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Mark L. Movsesian

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SOVEREIGNTY, COMPLIANCE, AND THE WORLD TRADE ORGANIZATION: LESSONS FROM THE HISTORY OF SUPREME COURT REVIEW

*Mark L. Movsesian**

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When you combine these dispute resolution procedures which are autocratic and antagonistic to our traditional systems of jurisprudence . . . you have autocracy with teeth laid over our democratic society and procedures in our country.

—Ralph Nader, 1994¹

The judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass.

—Thomas Jefferson, 1821²

* Professor of Law, Hofstra University. A.B. 1985, J.D. 1988, Harvard. I thank Robert Delahunty, Janet Dolgin, Jay Hickey, John McGinnis, Matty Movsesian, Richard Nagareda, Peter Spiro, Marshall Tracht, Vern Walker, and John Yoo for helpful comments on earlier drafts, and Connie Lenz of the Deane Law Library at Hofstra University for research assistance. Rachael Moore, Hofstra Law School Class of 2000, also provided research assistance. Support was provided by a grant from Hofstra University. An earlier version of this paper was delivered at the International Economic Law Forum at Brooklyn Law School.

1. *Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Comm. on Fin.*, 103d Cong. 86 (1994) (testimony of Ralph Nader) [hereinafter *Senate Finance Hearings*].

2. Letter from Thomas Jefferson to Archibald Thweat (Jan. 19, 1821), in 12 THE WORKS OF THOMAS JEFFERSON 196 (Paul Leicester Ford ed. 1905) [hereinafter *Jefferson Letter*].

INTRODUCTION

For people who study international trade law, these are exciting times. The law that governs trade in goods and services across national borders—what John Jackson once referred to as “the ‘boilerroom’ of international relations”³—has become a subject of intense scholarly and popular interest.⁴ The reasons are not hard to perceive. The volume of world trade has increased steadily since the end of the Second World War, and has grown at an impressive rate throughout the 1990s.⁵ The last few years, moreover, have seen the inauguration of a comprehensive new regime to govern world trade, the 134-member World Trade Organization, or WTO.⁶ Quite simply, there is more international trade, and more international trade law, than there used to be.⁷

3. John H. Jackson, *International Economic Law: Reflections on the “Boilerroom” of International Relations*, 10 AM. U. J. INT’L L. & POL’Y 595 (1995).

4. See, e.g., THE WTO AND INTERNATIONAL TRADE REGULATION (Philip Ruttley et al. eds. 1998); Symposium, *Institutions for International Economic Integration*, 17 NW. J. INT’L L. & BUS. 351 (1996–97); Symposium on *Current Issues in the World Trade Organization*, 17 U. PA. J. INT’L ECON. L. 69 (1996); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT’L ECON. L. 555, 555 (1996) (noting emergence of new field of international economic law); see also Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT’L ECON. L. 33 (1996) (describing new perspectives on international economic law); *Trade Winds*, ECONOMIST, Nov. 8, 1997, at 85 (noting that “the movement of goods and services across national boundaries has become the subject of intense public attention all over the world”) [hereinafter *Trade Winds*].

5. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 6 (3d ed. 1995) (noting “significant increases in volume of world trade” during the postwar period); *World Trade Growth Slower in 1998 After Unusually Strong Growth in 1997*, Chart 1 (WTO Press Release of April 16, 1999) <<http://www.wto.org/wto/intltrad/internat.htm>> (chart showing growth in volume of world merchandise exports in years 1990–98) [hereinafter *WTO Press Release*]. World trade in merchandise now exceeds five trillion dollars annually, *id.* at 1, roughly sixteen times its volume in 1950, *Trade Winds*, *supra* note 4, and its rate of increase has substantially outpassed growth in world output over the past decade. WTO Press Release, *supra*, at 2.

6. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994) [hereinafter *WTO Agreement*]. The WTO was established in the final act of the Uruguay Round of trade negotiations, begun in Punta del Este, Uruguay in September 1986. “The multilateral agreements reached” in the Uruguay Round “span over 400 pages, and the negotiated tariff schedules and other market access commitments another 20,000 or so.” David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT’L L. 11, 11 (1995). “Already, more than ninety percent of the world’s trade in goods is conducted in the shadow of the trade agreements” that make up the WTO’s “organic documents.” Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT’L L. 379, 381 (1996). For more on the Uruguay Round, see *infra* note 65 and accompanying text. On the WTO’s membership, see *The Organization: Members* (last updated July 27, 1999) <<http://www.wto.org/wto/about/organs6.htm>> [hereinafter *Members*].

7. Today’s “new global economy” may be the resumption of a trend that began at the end of the last century and was interrupted by the First World War. See Louis W. Pauly, *Capital Mobility, State Autonomy and Political Legitimacy*, 48 J. INT’L AFF. 369, 371 (1995)

One of the WTO's more remarkable and controversial innovations is its mechanism for resolving trade disputes among member states.⁸ Traditionally, states have resolved such disputes in "pragmatic" fashion, through negotiation and compromise informed by the relative power of the parties involved.⁹ But no longer:¹⁰ the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) provides that disputes between member states are to be resolved in

(noting that "[c]onditions approximating what is now commonly, if hyperbolically, referred to as 'global finance' existed before 1914 between the most advanced economies and their dependencies").

8. The literature on dispute settlement in the WTO is voluminous. For some examples, see DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION (James Cameron & Karen Campbell eds., 1998) [hereinafter DISPUTE RESOLUTION]; INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed., 1997) [hereinafter INTERNATIONAL TRADE LAW]; JOHN H. JACKSON, THE WORLD TRADING SYSTEM 107-37 (2d ed. 1997); Alan Stone Sweet, *The New GATT: Dispute Resolution and Judicialization of the Trade Regime*, in LAW ABOVE NATIONS 118 (Mary L. Volcansek ed. 1997) [hereinafter LAW ABOVE NATIONS]; Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM J. INT'L L. 193 (1996); Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 373-92 (1995); Miquel Montaña i Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103 (1993); Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 793-808 (1996-1997); Reitz, *supra* note 4; G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995); Symposium, *WTO Dispute Settlement System*, 1 J. INT'L ECON. L. 175 (1998); see also Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 851 n.2 (1996) (collecting sources). For an important early discussion, see Phillip R. Trimble, *International Trade and the "Rule of Law,"* 83 MICH. L. REV. 1016, 1025-32 (1985) (book review).

9. See JACKSON, *supra* note 8, at 109-11 (contrasting "power-oriented" and "rule-oriented" approaches); Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*, in INTERNATIONAL TRADE LAW, *supra* note 8, at 5, 30 (contrasting "diplomatic" and "legal" approaches to settling international trade disputes); Shell, *supra* note 8, at 833-34 (contrasting "pragmatism" and "legalism" in international trade law); cf. OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 76 (1985) ("The development of an understanding between the parties—of a mutually acceptable solution—[was] the main objective of the [former] dispute settlement procedure.").

10. See Shell, *supra* note 8, at 833 (WTO's "new international dispute resolution system marks a dramatic departure from past international trade practice"); see also Robert A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23 YALE J. INT'L L. 79, 82 (1998) (trade dispute settlement procedures "have evolved, particularly in recent years, into a highly legalistic system"); Sweet, *supra* note 8, at 118 (WTO procedures have evolved "from state-to-state bargaining to supranational adjudication"); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389, 396 (1995) (Uruguay Round's reforms "on dispute resolution must be judged as a decisive, though imperfect, step in the direction of a more legalistic, adjudicatory process").

adversary proceedings before impartial panels of experts.¹¹ Under the DSU, panels have authority to decide whether members' laws violate international trade norms; panel decisions are essentially binding,¹² though there is a right of appeal to a newly-established Appellate Body within the WTO.¹³ If an offending party in a dispute fails to implement a final decision, the complaining party may seek compensation from it.¹⁴ If the parties cannot agree on the appropriate level of compensation, the complaining party may retaliate by suspending trade concessions it has made to the offending party.¹⁵

The WTO's turn to "trade legalism" has sparked a heated debate.¹⁶ Some commentators favor the new approach, praising its predictability,

11. Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 6, 8, 33 I.L.M. 1226 [hereinafter DSU]. There is a requirement that the members attempt to settle their dispute by consultation before reaching the panel stage. *Id.* art. 4, 33 I.L.M. 1228-29; JACKSON ET AL., *supra* note 5, at 341. On the adversarial nature of the dispute-settlement mechanism, see Montañà i Mora, *supra* note 8, at 161.

12. A panel report is adopted unless there develops a consensus against its adoption in the WTO. *See* DSU art. 16(4), 33 I.L.M. 1235; JACKSON ET AL., *supra* note 5, at 343. For more on the significance of this "reverse consensus" requirement, see *infra* text accompanying notes 74-79.

13. DSU, art. 17, 33 I.L.M. 1236. The Appellate Body's report is binding unless there develops a consensus against its adoption in the WTO. *Id.* art. 17 (14), 33 I.L.M. 1237.

14. JACKSON ET AL., *supra* note 5, at 343-44; Dillon, *supra* note 8, at 386-87.

15. *See* Dillon, *supra* note 8, at 387. For a more complete description of the WTO's dispute-settlement mechanism, see *infra* text accompanying notes 66-91.

The North American Free Trade Agreement (NAFTA) contains a similar adjudicative mechanism for resolving some disputes, though its approach is less adversarial and omits appellate review. *See* North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. 20, 32 I.L.M. 693; *see also* Gabrielle Marceau, *The Dispute Settlement Rules of the North American Free Trade Agreement: A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization*, in INTERNATIONAL TRADE LAW, *supra* note 8, at 487, 541-42; Samuel C. Straight, Note, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 220, 231 (1995); *cf.* Nobuo Kiriya, *Institutional Evolution in Economic Integration: A Contribution to Comparative Institutional Analysis for International Economic Organization*, 19 U. PA. J. INT'L ECON. L. 53, 68-69 (1998) (arguing that NAFTA's process is more open to political interference and less legalistic than WTO's). *See generally* David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks For the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025, 1083-91 (1999) (comparing dispute settlement under NAFTA and WTO). For other interesting discussions of dispute settlement under NAFTA, *see* David S. Huntington, *Settling Disputes under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407 (1993); David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163 (1997).

16. *See* William R. Sprance, *The World Trade Organization and United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1226-27 (1998); *see also* Shell, *supra* note 8, at 833 (noting "running debate" between trade "legalists" and "pragmatists" on the question of dispute resolution).

uniformity, and fairness.¹⁷ The DSU, they argue, will promote compliance with international trade norms by rendering dispute settlement more effective.¹⁸ Others contend that the new approach will lead to a loss of national sovereignty and democratic self-government.¹⁹ The WTO's critics point to a consolidation of power in the hands of unaccountable trade panelists, a consolidation made particularly dangerous by the secretive nature of the panel process and the seemingly inexorable expansion of trade law into non-trade areas.²⁰ On one thing, both

17. See, e.g., JACKSON, *supra* note 8, at 111; Montañà i Mora, *supra* note 8, at 178; Young, *supra* note 10, at 390–91.

18. See, e.g., Montañà i Mora, *supra* note 8, at 179–80; Young, *supra* note 10, at 390–91, 409; Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2291 (1997); Shell, *supra* note 8, at 900.

19. See, e.g., *Senate Finance Hearings*, *supra* note 1, at 240–41 (statement of Ralph Nader); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1944–45, 1948 (1997) (book review); Trimble, *supra* note 8, at 1025–29; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on the Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1267 n.156 (1995); see also Jeffrey Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 236–37 (1998) (discussing democratic critiques of WTO). Even some trade legalists have raised concerns. Nichols, for example, believes that the “new rigidity” of the WTO's dispute-resolution system is “largely beneficial,” but fears that its disregard of societal values may diminish public support for the organization. Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 300 (1996); Philip M. Nichols, *Trade Without Values*, 90 NW. U.L. REV. 658, 659–61 (1996) [hereinafter Nichols, *Trade Without Values*]. Shell also supports trade legalism, but believes that broader public participation would enhance the legitimacy of the WTO's dispute-settlement process. Shell, *supra* note 8, at 837–39, 907–11; G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 359–70 (1996); cf. Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 589 (1998) (arguing that broader public participation in dispute settlement would increase the democratic legitimacy of international trade organizations).

20. See Atik, *supra* note 19, at 236–37; Trimble, *supra* note 8, at 1029 (“In my view the value of representative government outweighs the value of free trade.”). On the secretive nature of trade adjudication, see *Senate Finance Hearings*, *supra* note 1, at 247 (statement of Ralph Nader); Kenneth W. Abbott, “Economic” Issues and Political Participation: *The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 1005 n.168 (1996); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 333–34 (1996); Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699, 713–14, 722 (1994). On the expansion of trade law into non-trade areas, see Jeffrey L. Dunoff, “Trade and”: *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759, 762–68 (1996–97); Green, *supra* note 10, at 132; Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 INT'L L. & POL. 711, 715–19 (1996); Nichols, *Trade Without Values*, *supra* note 19, at 672–90; Aubry D. Smith, Note,

sides agree: supporters and opponents alike believe that WTO rulings will have a profound impact on the policies of member states.

To students of American constitutional history, the debate over the WTO has a familiar ring. We take it for granted today that the United States Supreme Court has authority to review the judgments of state courts on questions of federal law.²¹ In the first half of the nineteenth century, though, the Court's assertion of appellate jurisdiction over state courts caused great controversy.²² Antebellum Americans debated the merits of Supreme Court review in a manner remarkably similar to the way in which today's Americans debate the merits of the WTO. The Court's supporters—people like Joseph Story, John Marshall, and Daniel Webster—asserted that its review of state court judgments promoted uniformity, predictability, and compliance with federal norms.²³ Its opponents—people like Spencer Roane, Robert Hayne, and John C. Calhoun—contended that Supreme Court review posed dangers for state sovereignty and representative democracy.²⁴ To its opponents, in Jefferson's words, the Court seemed an "instrument which, working like gravity" would obliterate the states and "press us at last into one consolidated mass."²⁵

This article explores the nineteenth-century conflict over Supreme Court review and discusses its implications for today's debate on the WTO.²⁶ Congress granted the Court appellate jurisdiction over state

Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal To Increase Public Participation, 94 MICH. L. REV. 1267, 1271–73 (1996).

21. See 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4006 (2d ed. 1996). The present statutory authorization is at 28 U.S.C. § 1257 (1994).

22. The classic work on the controversy remains Charles Warren's two-part history of the Court. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926). Other good sources include LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932); CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789–1835 (1944); DWIGHT WILEY JESSUP, REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 1809–1835 (1987); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 390–413 (1998); Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790–1860) and the European Community (1958–94)*, 11 STUD. AM. POL. DEV. 149 (1997); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act* (pts. 1 & 2), 47 AM. L. REV. 1, 47 AM. L. REV. 161 (1913).

23. See *infra* text accompanying notes 169–177 (discussing arguments of Story), 190–93 (discussing arguments of Marshall), 230–33 (discussing arguments of Webster).

24. See *infra* text accompanying notes 196–202 (discussing arguments of Roane), 234–37 (discussing arguments of Hayne), 249–54 (discussing arguments of Calhoun).

25. Jefferson Letter, *supra* note 2, at 196.

26. Cf. Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 861 (1999) (suggesting analogy between WTO and Marshall Court).

courts in one of its earliest pieces of legislation, the Judiciary Act of 1789.²⁷ The first serious challenge to that jurisdiction occurred about a quarter-century later, however, in connection with the Court's famous opinion in *Martin v. Hunter's Lessee*.²⁸ The conflict continued episodically for the next four decades, with several states refusing to acknowledge the Court's jurisdiction in particular cases,²⁹ and ended only with the Civil War, which resolved this and other questions of American federalism by force.³⁰

The American experience suggests that today's debate overestimates the likely impact the WTO will have on member states. As we shall see, a number of factors favored the success of Supreme Court review. The Court asserted jurisdiction over states in conformity with an express statutory grant.³¹ It asserted jurisdiction under a Constitution that established it as part of a new national government, one with significant regulatory authority.³² The Court asserted jurisdiction over states, finally, in the context of a relatively homogeneous society. While there were regional differences, Americans in the early nineteenth century shared much in the way of a common political and legal culture.³³

Notwithstanding all these factors, the Court found it impossible, over a period spanning more than forty years, to establish its authority over recalcitrant states. While states accepted the Court's judgments most of the time, they did not hesitate to defy it where they believed that vital interests were at stake.³⁴ And the WTO stands in a much weaker position than the Court did in the early nineteenth century. No legislation grants the WTO jurisdiction over national courts.³⁵ As we shall see, the DSU does not require members to conform to WTO rulings; whatever the WTO decides, national courts remain free to apply national

27. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 85–87; see HAINES, *supra* note 22, at 120. For more on the Judiciary Act of 1789, see *infra* text accompanying notes 149–152.

28. 14 U.S. (1 Wheat.) 304 (1816). For more on the history of Supreme Court review before *Martin*, see *infra* note 152 and accompanying text.

29. See Warren (pt.1), *supra* note 22, at 3–4; see also 1 BOUDIN, *supra* note 22, at 464–66, 476–83; Friedman, *supra* note 22, at 382, 394–97; Goldstein, *supra* note 22, at 151, 153, 159–66. The states included California, Georgia, Kentucky, Ohio, Virginia, and Wisconsin. Warren (pt.1), *supra* note 22, at 4.

30. See Goldstein, *supra* note 22, at 155, 166; see also *infra* text accompanying notes 293–297. As the Georgia Supreme Court observed in 1890, “[a]fter [a] State has yielded to the federal army, it can well afford to yield to the federal judiciary.” *Wrought Iron Range Co. v. Johnson*, 11 S.E. 233, 235 (Ga. 1890).

31. See *infra* text accompanying notes 300–301.

32. See *infra* text accompanying notes 302–305.

33. See *infra* text accompanying notes 306–310.

34. See Goldstein, *supra* note 22, at 152, 155–56, 166.

35. Indeed, United States law denies effect to WTO rulings that are “inconsistent with any law of the United States.” Uruguay Round Agreements Act, 19 U.S.C. § 3512(a)(1). For further discussion, see *infra* note 91 and accompanying text.

law.³⁶ Unlike the Court, the WTO does not act as part of a new government. The instrument that establishes the WTO is not a constitution, but a trade treaty with a specific provision for withdrawal.³⁷ WTO members, finally, share little in the way of a common culture or history.³⁸

If the antebellum Court could not keep states of the union in line despite the many factors working in its favor, it seems unlikely that the WTO, which has none of the advantages the Court enjoyed, will be able to dominate its member states. To be sure, WTO members may have incentives to implement rulings in many cases.³⁹ Just as states did, members may decide that compliance is the best policy, much of the time. But the nineteenth-century conflict suggests that WTO members will not hesitate to defy adverse rulings where they believe that vital national interests are at stake. In those circumstances, as Hudec has recently observed, the WTO "will have to learn to cope with legal failure."⁴⁰

Part I of this article describes the DSU and examines the arguments of supporters and critics.⁴¹ Part II explores the nineteenth-century controversy over Supreme Court review. It focuses on three important episodes: the conflict with Virginia in connection with *Martin and Cohens v. Virginia*;⁴² the conflict with Georgia in connection with the Cherokee cases⁴³—a conflict that served as backdrop for some extraordinary congressional debates on the Court's jurisdiction;⁴⁴ and the conflict with Wisconsin in connection with *Abelman v. Booth*.⁴⁵ Part III discusses the implications of the nineteenth-century controversy for today's debate.⁴⁶

36. See *infra* text accompanying notes 315–317.

37. See *infra* text accompanying notes 318–322.

38. See *infra* text accompanying notes 323–325.

39. See *infra* text accompanying notes 117–121, 329.

40. Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 14 (1999).

41. See *infra* text accompanying notes 66–142.

42. 19 U.S. (6 Wheat.) 82, 264 (1821). See *infra* text accompanying notes 153–208.

43. See e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See *infra* text accompanying notes 210–225, 244–245.

44. See *infra* text accompanying notes 226–238 (discussing Webster-Hayne debate), 239–242, 246–247 (discussing report of House Judiciary Committee recommending repeal of Court's appellate jurisdiction over state courts).

45. 62 U.S. (21 How.) 506 (1859). See *infra* text accompanying notes 262–291.

46. See *infra* text accompanying notes 298–330.

I. DISPUTE SETTLEMENT IN THE WTO

A. *The DSU*

To understand the WTO's dispute-settlement procedures, and to appreciate why they represent an important change for international trade law, one must recall some history.⁴⁷ The WTO, established in the Final Act of the Uruguay Round of trade negotiations in 1994,⁴⁸ oversees the operation of several international trade treaties, the most prominent of which is the General Agreement on Tariffs and Trade (GATT), a multilateral agreement that has been in effect, in one form or another, since 1947.⁴⁹ GATT establishes a set of rules to govern trade among "contracting parties," rules that constrain the parties from adopting measures—like tariffs, quotas, and internal taxes—that burden imports and distort the flow of goods across national borders.⁵⁰ Disputes are inevitable, and article 23 of GATT provides that a party may seek redress where it believes that its benefits under GATT are being "nullified or impaired" as the result of another party's failure to carry out its GATT obligations.⁵¹ If the parties cannot settle their differences by consultation,

47. See JACKSON, *supra* note 8, at 31; see also Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461, 490–92 (1998) (arguing that historical analysis is of "critical importance" in understanding dispute settlement within the WTO).

48. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1144 (1994). The Uruguay Round was the eighth and most recent in a series of multilateral trade negotiations that have taken place under the auspices of the General Agreement on Tariffs and Trade. JACKSON ET AL., *supra* note 5, at 314. Although the Final Act was signed in April 1994, the WTO did not actually come into existence until the following year. *Id.* at 293; WORLD TRADE ORG., THE MULTILATERAL TRADING SYSTEM 12 (1998). For more on the Uruguay Round, see Leebron, *supra* note 6. For more on prior rounds, see JACKSON, *supra* note 8, at 73–78.

49. See Shell, *supra* note 8, at 832 & n.8; JACKSON, *supra* note 8, at 31; JACKSON ET AL., *supra* note 5, at 289–90. GATT has an interesting history. The treaty was originally conceived as part of a larger project that included the establishment of an "International Trade Organization," or ITO. Indeed, the contracting parties approved GATT in 1947 only "provisionally," in anticipation that the ITO charter would be completed the following year. JACKSON, *supra* note 8, at 39–40. The ITO charter was completed in 1948, but it failed to win approval in the United States Senate; GATT became, "by default, the central organization for coordinating national policies on international trade." JACKSON ET AL., *supra* note 5, at 295; see also Nichols, *supra* note 6, at 390. In 1994, a revised version of GATT, "GATT 1994," was appended as an annex to the new WTO charter. WTO Agreement, Annex 1A, 33 I.L.M. 1154. "GATT 1994" incorporates the original "GATT 1947," as amended, *id.*; in acceding to the WTO charter, a country automatically becomes bound to "GATT 1994" as well. JACKSON ET AL., *supra* note 5, at 292; see also Nichols, *supra* note 6, at 391–92. Thus, after almost a half-century of "provisional" application, GATT finally has definitive status. JACKSON, *supra* note 8, at 48.

50. JACKSON ET AL., *supra* note 5, at 290.

51. GATT art. 23(1). A party may also seek redress where it believes that its benefits are being nullified or impaired by conduct of another party that is not itself a GATT

article 23 provides, the dispute may be referred to the GATT membership, which shall investigate and make recommendations or rulings "as appropriate."⁵² If the matter is "serious enough to justify such action," the membership may authorize the complaining party to suspend concessions it has made under GATT to the offending party.⁵³

These fairly sketchy provisions formed the basis for what became established practice with regard to dispute settlement under GATT.⁵⁴ If consultations failed to resolve a dispute, the complaining party would file a written complaint against the offending party with the GATT membership.⁵⁵ On the basis of that complaint, GATT's Director General would appoint a panel to investigate the matter.⁵⁶ A GATT panel usually comprised three to five members chosen from national delegations; panel members were to act in an impartial manner, free from national allegiance.⁵⁷ After hearing argument and reviewing written submissions, the panel would deliberate for "an unspecified period of time" and issue a report recommending action by the GATT membership.⁵⁸ A panel's report had effect only if adopted by the membership—and the membership acted by consensus.⁵⁹ As a result, any party, including the party that had lost the decision, could block adoption by opposing the panel's report.⁶⁰

In actuality, losing parties only rarely decided to block panel reports.⁶¹ The fact that they could do so, however, led to serious delays in

violation. *Id.* Such "non-violation" cases are rare. JACKSON ET AL., *supra* note 5, at 362; *see also id.* at 349, 357–64 (discussing non-violation cases). For more on non-violation cases, *see, for example,* Thomas Cottier & Krista Nadakavukaren Schefer, *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future*, in INTERNATIONAL TRADE LAW, *supra* note 8, at 145; Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311 (1998).

52. GATT art. 23(2).

53. *Id.*

54. *See* Nichols, *supra* note 6, at 392–97; Schleyer, *supra* note 18, at 2282. For an account of the evolution of the GATT dispute-settlement procedures, *see* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW (1993).

55. *See* Nichols, *supra* note 6, at 395.

56. *Id.*

57. *Id.* There was apparently a preference for three-member panels, which were thought easier to manage. Pierre Pescatore, *The GATT Dispute Settlement Mechanism—Its Present Situation and Its Prospects*, J. INT'L ARB., March 1993, at 27, 29.

58. Nichols, *supra* note 6, at 396; Schleyer, *supra* note 18, at 2283.

59. Nichols, *supra* note 6, at 396–97; *see also* Pescatore, *supra* note 57, at 35.

60. Nichols, *supra* note 6, at 397; Schleyer, *supra* note 18, at 2283.

61. Nichols, *supra* note 6, at 397, 399; Norio Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, J. WORLD TRADE, August 1995, at 5, 29. As Shell explains, "relational pressures within the world trading community and the flexible nature of GATT compliance processes led to mutually acceptable solutions to trade problems in most cases." Shell, *supra* note 8, at 842 n.56. Hudec's

the dispute-settlement process.⁶² Critics complained, moreover, about frequent defects in panel decisions⁶³ and a general failure on the part of the membership to enforce sanctions against offending parties.⁶⁴ Accordingly, when trade negotiators established a new organization to oversee the operation of GATT in the Uruguay Round—the WTO—they also made a number of significant reforms in the dispute-settlement process.⁶⁵ Specifically, they adopted a new “legalistic” method for resolving disputes among member states.

Disputes are now governed by the DSU, which supplements the provisions of article 23.⁶⁶ Some aspects are familiar. Just as before, a complaining party must consult with the offending party before seeking appointment of a panel.⁶⁷ There is now a time limit, though: if consultations fail to resolve a dispute within sixty days, the complaining party has a right to the establishment of a panel to hear its case.⁶⁸ Just as

famous study put the “overall success rate” of the GATT dispute-settlement process at 88 percent. Hudec, *supra* note 54, at 353.

62. William J. Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT’L L.J.* 51, 85, 90 (1987); JACKSON ET AL., *supra* note 5, at 343; *see also* Komuro, *supra* note 61, at 29 (noting that “[s]everal” panel reports were “shelved . . . because of an objection by the disputing parties under the consensus rule”); Freidl Weiss, *WTO Dispute Settlement and the Economic Order of WTO Member States*, in *CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION* 77, 83 (Pitou van Dijck and Gerrit Faber eds., 1996) (arguing that consensus requirement, which allowed parties to block adoption of panel reports, “caused considerable delay”).

63. *See* Davey, *supra* note 62, at 88–89.

64. *See id.* at 85–88; Komuro, *supra* note 61, at 33. Indeed, in the entire history of GATT, the membership authorized retaliation only once, in response to a complaint the Netherlands had brought against the United States in 1953. JACKSON, *supra* note 8, at 116 & n.36; Schleyer, *supra* note 18, at 2284. The Netherlands decided not to act on the authorization. JACKSON, *supra* note 8, at 116.

65. *See* Shell, *supra* note 8, at 845–48. Shell explains that reform was the “unexpected” result of a convergence of four interests at the close of the Uruguay Round, *id.* at 845: (1) the general desire on the part of GATT members to curtail trade unilateralism, *id.* at 845; (2) an impulse for reform “within the elite community of GATT professional participants,” *id.* at 846; (3) a change in position on the part of European members, who had traditionally opposed an adjudicative approach, *id.* at 847; and (4) the decision by developing countries to support an adjudicative approach, *id.* at 848. For another interesting description of the circumstances leading to reform, see Hudec, *supra* note 40, at 12–14.

66. Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Annex 2, WTO Agreement, 33 I.L.M. 1226. The DSU provides a “unified dispute-settlement system for all parts of the GATT/WTO system.” JACKSON, *supra* note 8, at 125; *see also* Leebron, *supra* note 6, at 16 (discussing “integrated dispute settlement” under DSU). Earlier practice contemplated different procedures for different types of disputes. *Id.*; *see also* Shell, *supra* note 8, at 848 (discussing potential for “forum-shopping” under former rules).

67. *See* JACKSON ET AL., *supra* note 5, at 340–41; *see also supra* text accompanying note 52 (discussing consultation requirement under GATT article 23). Provisions with respect to consultations are set forth in article four of the DSU. DSU art. 4, 33 I.L.M. 1228–29.

68. DSU art. 4(7), 33 I.L.M. 1229, art. 6(1), 33 I.L.M. 1230. The membership may decide by consensus not to establish a panel, *id.* art. 6(1), 33 I.L.M. 1230, though this would

before, a panel comprises three or five members who serve in their individual capacities;⁶⁹ just as before, panel deliberations are confidential and opinions anonymous.⁷⁰ Time limits now ensure, however, that a panel's report will issue on schedule, normally six to eight months after the panel's appointment.⁷¹ Once a panel report issues, it circulates to the WTO membership—constituted, for these purposes, as the Dispute Settlement Body (DSB)—for adoption.⁷²

At this point, the DSU departs dramatically from past practice. Unlike the old system, which provided for adoption of a panel report by consensus,⁷³ the DSU provides that a panel report will be adopted unless the DSB decides by consensus *not* to adopt it.⁷⁴ Assuming that a winning party will not block a decision in its favor, this “reverse consensus” requirement assures automatic adoption of a panel report.⁷⁵ Automatic, at least, in the absence of an appeal: the DSU establishes a new seven-member Appellate Body to review panel decisions.⁷⁶ The Appellate Body, whose members must be “unaffiliated with any government,”⁷⁷ has authority to decide “issues of law” and “legal interpretation[]” raised by a panel report.⁷⁸ Like a panel report, an appellate report is subject to a reverse consensus rule: an appellate report is adopted unless the DSB decides by consensus not to adopt it.⁷⁹

require the consent of the party that requested the panel in the first place. See JACKSON ET AL., *supra* note 5, at 341–42 (explaining how this amounts “effectively” to a right to a panel).

69. DSU art. 8(5), 33 I.L.M. 1231, art. 8(9), 33 I.L.M. 1232. The Secretariat nominates panel members, and the parties “shall not oppose nominations except for compelling reasons.” *Id.* art. 8(6), 33 I.L.M. 1231; see also JACKSON ET AL., *supra* note 5, at 342 (describing selection process).

70. DSU art. 14, 33 I.L.M. 1235; JACKSON ET AL., *supra* note 5, at 342. The secrecy surrounding panel proceedings has been controversial. See *infra* text accompanying notes 132–137.

71. JACKSON ET AL., *supra* note 5, at 342. The parties have a chance to comment on an interim version of a panel report before it becomes final. DSU art. 15, 33 I.L.M. 1235.

72. On the identity of the WTO membership and the DSB, see WTO Agreement art. 4(2)–(3), 33 I.L.M. 1145; Shell, *supra* note 8, at 849 n.95. On the circulation of reports to the DSB, see DSU art. 16, 33 I.L.M. 1235.

73. See *supra* text accompanying notes 59–60.

74. DSU art. 16(4), 33 I.L.M. 1235; Shell, *supra* note 8, at 849.

75. See JACKSON, *supra* note 8, at 125; Green, *supra* note 10, at 84–85; Shell, *supra* note 8, at 849.

76. DSU art. 17, 33 I.L.M. 1236. Members are appointed by the DSB for four-year terms; each member may be reappointed once. *Id.* art 17(2), 33 I.L.M. 1236.

77. *Id.* art. 17(3), 33 I.L.M. 1236.

78. *Id.* art. 17(6), 33 I.L.M. 1236 (“An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel”); Shell, *supra* note 8, at 850.

79. DSU art. 17(14), 33 I.L.M. 1237; JACKSON, *supra* note 8, at 125; Green, *supra* note 10, at 85. The DSU contemplates that the length of time from appointment of a panel to

Once the DSB adopts a final report, there remains the matter of implementation. If a panel believes that a party has violated a provision of GATT, its report will usually recommend that the party cease the violation, for example, "by withdrawing the offending measure."⁸⁰ The DSU provides that the offending party must comply with such a ruling within a reasonable time, normally not to exceed fifteen months;⁸¹ if the complaining party questions the adequacy of the offending party's response, it may return to the original panel for a second ruling.⁸² Ultimately, if the offending party fails to comply with a ruling, it must enter into negotiations with the complaining party "with a view to developing mutually acceptable compensation."⁸³ If these negotiations fail, the complaining party may request authority to retaliate by suspending its own GATT obligations to the offending party.⁸⁴ Authority is conferred automatically—unless the DSB decides by consensus to reject the request.⁸⁵

The DSU contemplates that members will implement adverse rulings.⁸⁶ Whether members *must* do so is a controversial question, however.⁸⁷ The DSU does not expressly require members to conform to

adoption of an appellate report will not exceed twelve months in the usual case. See DSU art. 20, 33 I.L.M. 1237–38.

80. JACKSON ET AL., *supra* note 5, at 343.

81. DSU art. 21, 33 I.L.M. 1238; JACKSON ET AL., *supra* note 5, at 344. "The reasonable period of time may be set by the member concerned if approved by the DSB, by agreement of the contending parties, or, absent agreement, by arbitration." *Id.*

82. See DSU art. 21(5), 33 I.L.M. 1238; see also Green, *supra* note 10, at 85; Shell, *supra* note 8, at 851. "The panel shall circulate its report within 90 days after the date of referral of the matter to it." DSU art. 21(5), 33 I.L.M. 1238.

83. *Id.* art. 22(2), 33 I.L.M. 1239.

84. *Id.* The complaining party may request such authority "[i]f no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time" set for compliance with the final report. *Id.*

85. *Id.* art. 22(6); JACKSON ET AL., *supra* note 5, at 344.

86. See DSU art. 21(1), 33 I.L.M. 1238 ("Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."); DSU art. 22(1), 33 I.L.M. 1239 ("Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time."); John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62–63 (1997). The WTO Agreement provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements," WTO Agreement art. 16(4), 33 I.L.M. 1152, but leaves open the question what those obligations are. Jackson, *supra*, at 62 n.9.

87. Jackson argues that members have an obligation to implement adverse rulings. Jackson, *supra* note 86, at 61, 63–64; see also John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 180 (1997). Others contend that no such obligation exists. See Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM.

WTO rulings,⁸⁸ and so far members have been unwilling to grant them direct effect in national courts.⁸⁹ As a result, in the absence of domestic implementing legislation, national courts may continue to apply national laws, whatever the WTO holds with regard to their GATT-legality.⁹⁰ For purposes of the United States, this is made clear by section 102 of the Uruguay Round Agreements Act, which expressly denies effect to any GATT provision, or the application of any GATT provision, that is inconsistent with United States law.⁹¹

J. INT'L L. 416, 416-17 (1996); Timothy M. Reif & Marjorie Florestal, *Revenge of the Push-Me, Pull-You: The Implementation Process Under the WTO Dispute Settlement Understanding*, 32 INT'L LAW. 755, 763 (1998). For more on the controversy over members' obligation to implement rulings, see Bhala, *supra* note 26, at 861-62 & n.42; Comments, *Performance of the System IV: Implementation*, 32 INT'L LAW. 789 (1998).

88. See Jackson, *supra* note 86, at 62; see also Debra Herz, Note, *Effects of International Arbitral Tribunals in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 217, 247 (1995-96) (noting that the DSU "does not mandate enforcement of its . . . decisions in national courts"). Apparently, "[t]he relationship between national and international dispute resolution bodies was not a prominent issue in the Uruguay Round debates," Meinhard Hilf, *The Role of National Courts in International Trade Relations*, 18 MICH. J. INT'L L. 321, 323 (1997), though some of the negotiators mistakenly believed that they had settled the question. See Jackson, *supra* note 86, at 62.

89. See Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW. J. INT'L L. & BUS. 556, 559 (1996-97); Hilf, *supra* note 88, at 336, 337; Shell, *supra* note 8, at 865 n.170; C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 298 n.410 (1997). In the United States, the Uruguay Round Agreements Act makes clear that adverse rulings lack effect in domestic courts. See *infra* note 91 and accompanying text. In the European Union, the EC Council and Commission have both denied that the Uruguay Round agreements have direct effect; the European Court of Justice has not yet ruled on the question, though it did hold recently that provisions of the old GATT lacked such effect. See Peter L.H. Van den Bossche, *The European Community and the Uruguay Round Agreements*, in IMPLEMENTING THE URUGUAY ROUND 23, 92-95 (John H. Jackson & Alan O. Sykes eds., 1997) [hereinafter IMPLEMENTING THE URUGUAY ROUND]; Thomas Oppermann & Jose Christian Cascante, *Dispute Settlement in the EC: Lessons for the GATT/WTO Dispute Settlement System?*, in INTERNATIONAL TRADE LAW, *supra* note 8, at 469, 482-84. On the situation in Japan, see Yuji Iwasawa, *Constitutional Problems Involved in Implementing the Uruguay Round in Japan*, in IMPLEMENTING THE URUGUAY ROUND, *supra*, at 137, 162 ("It is doubtful . . . that Japanese courts would use panel reports as delineating binding standards for the interpretation of the WTO Agreement, and invalidate trade restrictions imposed by Japanese laws.").

90. See Atik, *supra* note 19, at 232.

91. In part, section 102 provides:

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

19 U.S.C. § 3512(a)(1). Section 102 also prohibits challenges to government conduct on the ground that the conduct violates WTO obligations. 19 U.S.C. § 3512(c)(1)(B). For more on the absence of direct effect under United States law, see JACKSON ET AL., *supra* note 5, at 306; David W. Leebron, *Implementation of the Uruguay Round Results in the United States*, in IMPLEMENTING THE URUGUAY ROUND, *supra* note 89, at 175, 218, 222.

The DSU has been in effect for roughly five years now, and many have hailed it as a great success.⁹² In some respects, the praise seems justified. Members have demonstrated confidence in the new system by submitting cases at a greatly increased rate.⁹³ While many of these have settled,⁹⁴ the DSB has adopted several panel and appellate reports.⁹⁵ In two significant cases, moreover, the DSB has authorized retaliation for members' failure to comply with adverse rulings.⁹⁶ In April 1999, as a result of the failure of the EC to implement a ruling on its banana-import regime, the DSB authorized the United States to suspend concessions to the EC in the amount of \$191 million.⁹⁷ A few months later, the DSB authorized the United States to suspend concessions to the EC in the amount of \$117 million in response to Europe's failure to implement a ruling on hormone-treated meat.⁹⁸ The DSB had ruled that Europe's

92. See, e.g., Bhala, *supra* note 26, at 856–59 (describing “cheerleading” by the DSU’s advocates); Debra P. Steger & Susan M. Hainsworth, *New Directions in International Trade Law: WTO Dispute Settlement*, in *DISPUTE RESOLUTION*, *supra* note 8, at 28, 57. (“At this stage of the WTO’s existence, the dispute settlement system is a major success story.”); William J. Davey, *Issues of WTO Dispute Settlement*, 91 AM. SOC’Y INT’L L. PROC. 279, 281 (1997) (“[T]he WTO dispute settlement system seems well on its way to success. . . .”); Warren Lavorel, *The World Trade Organization: Looking Ahead*, 91 AM. SOC’Y INT’L L. PROC. 20, 23 (1997) (noting delegations’ satisfaction with new dispute-settlement procedures).

93. See Lavorel, *supra* note 92, at 23; Steger & Hainsworth, *supra* note 92, at 33. At this writing, some 138 distinct matters have been brought before the WTO. *Overview of the State-of-Play of WTO Disputes* 1 (last modified Sept. 1, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>> [hereinafter *Overview*]. The United States has been by far the most frequent complainant, but smaller and developing nations are increasingly active. See Hudec, *supra* note 40, at 22; Lavorel, *supra* note 92, at 23; Steger & Hainsworth, *supra* note 92, at 34.

94. “[M]ore cases are being settled . . . prior to the release of a panel report than ever before.” Lavorel, *supra* note 92, at 23; see also Steger & Hainsworth, *supra* note 92, at 33; cf. Hudec, *supra* note 40, at 26–27 (noting that smaller number of disputes have gone to panels and led to panel reports than was the case under the old GATT system). The adjudicative nature of the new dispute-settlement process has contributed to this development. See John H. Jackson, Introduction and Overview, *Symposium on the First Three Years of the WTO Dispute Settlement System*, 32 INT’L LAW. 613, 614 (1998); Steger & Hainsworth, *supra* note 92, at 33–34.

95. See *Overview*, *supra* note 93, at 5–7, 26–32 (describing adopted reports).

96. See *id.* at 3 (discussing European Communities—Regime for the Importation, Sale and Distribution of Bananas (WT/DS27) and European Communities—Measures Affecting Meat and Meat Products (Hormones) (WT/DS26 and WT/DS48)). The membership had authorized retaliation only once during the entire history of the old GATT regime. See *supra* note 64.

97. See *Overview*, *supra* note 93, at 3; see also European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU (WT/DS27/ARB) (Apr. 9, 1999) (arbitrators’ report on level of suspension). For some background on the banana-import dispute, see James M. Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT’L L. REV. 957, 970–74 (1999); Reif & Florestal, *supra* note 87, at 776–81.

98. See *Overview*, *supra* note 93, at 3.

ban on such meat violated provisions of an agreement on sanitary and phytosanitary measures.⁹⁹

But there is reason for caution as well. As yet, relatively few disputes have reached the implementation stage.¹⁰⁰ In those that have, members have shown a willingness to resist adverse rulings where they believe the stakes are sufficiently high.¹⁰¹ In the banana-import dispute, for example, authorization to retaliate came only after continued European stalling and a threat of unilateral action on the part of the United States.¹⁰² At this writing, it remains unclear whether the EC will revise its import rules.¹⁰³ In the hormones dispute, the EC has indicated that the adverse WTO ruling—and the attendant sanctions—will not persuade it to remove its ban on hormone-treated meat.¹⁰⁴

The WTO may yet find ways to defuse such crises. Over time, as Hudec has suggested, the organization may be able to “fashion[] . . . accommodations that produce . . . result[s] that can be said to be consistent with long-term respect for GATT/WTO law.”¹⁰⁵ As the banana-imports and hormones cases make clear, however, dispute settlement in the WTO has begun to trench on sensitive domestic policy concerns.¹⁰⁶ As we shall see in part III, members may feel little need to comply with

99. See *id.* at 29. For background on the hormones dispute, see Dale E. McNeil, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89 (1998); Reif & Florestal, *supra* note 87, at 781–84; Vern R. Walker, *Keeping the WTO from Becoming the "World Trans-Science Organization": Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute*, 31 CORNELL INT'L L.J. 251 (1998).

100. See Whitney Debevoise, *Access to Documents and Panel and Appellate Body Sessions: Practice and Suggestions For Greater Transparency*, 32 INT'L LAW. 817, 829 (1998) (“To date, few disputes have entered the implementation phase, so it is too early to assess whether the system encourages compliance with panel rulings and how well it handles cases in which Members refuse to comply.”).

101. See Reif & Florestal, *supra* note 87, at 756.

102. See *id.* at 776–81; Cooper, *supra* note 97, at 972–74; see also Helene Cooper, *U.S. Starts Its Threatened Banana Fight With Europe*, WALL ST. J., March 4, 1999, at A2; David E. Sanger, *Miffed at Europe, U.S. Raises Tariffs For Luxury Goods*, N.Y. TIMES, Mar. 4, 1999, at A1.

103. See Michael Smith, *Bananas: EU Warns of Delay in Reforming Banana Import Regime*, FIN. TIMES, Sept. 9, 1999.

104. See Helene Cooper, *U.S. Imposes 100% Tariffs on Slew of Gourmet Imports in War Over Beef*, WALL ST. J., July 20, 1999; see also Elizabeth Olson, *U.S. and EU Trade Shots in Beef War*, INT'L HERALD TRIB., June 4, 1999, at 13.

105. Hudec, *supra* note 40, at 15.

106. See *At Daggers Drawn*, ECONOMIST, May 8, 1999, at 17; see also *Roundtable Summary and Looking to the Future*, 32 INT'L LAW. 943, 945 (1998).

adverse rulings that affect what they perceive to be vital national interests.¹⁰⁷

B. *The Debate on the DSU*

The DSU has occasioned a heated debate.¹⁰⁸ Supporters and opponents agree that its adoption has profound implications for WTO members. They disagree, though, on whether those implications are benign or malignant. Supporters argue that the DSU will promote rationality and fairness in the dispute-settlement process, thereby promoting members' compliance with international trade norms.¹⁰⁹ Opponents, by contrast, contend that the DSU threatens to undermine national sovereignty and democratic control over trade policy.¹¹⁰

Take first the arguments of the DSU's supporters. Supporters contend that the DSU's legalistic approach will ensure uniformity and predictability in the application of international trade rules.¹¹¹ As a result, nations will find it easier to forecast the consequences of trade measures¹¹²—a great improvement over the old GATT system, which failed to provide much guidance for national decisionmakers.¹¹³ In addition, supporters contend, the DSU will promote fairness, particularly

107. See *infra* text accompanying notes 315–328; see also Hudec, *supra* note 40, at 14–15 (predicting that there will be cases in which members refuse to comply with WTO rulings).

108. See *supra* text accompanying notes 16–20. For further discussion of the debate, see, for example, William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 *FORDHAM INT'L L.J.* 427, 428–29 (1995); Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 365–66 & nn. 209, 212 (1997); Zane O. Gresham & Thomas A. Bloomfield, *Rhetoric or Reality: The Impact of the Uruguay Round Agreement on Federal and State Environmental Laws*, 35 *SANTA CLARA L. REV.* 1143, 1162–64 (1995); Jackson, *supra* note 87, at 158 n.3, 162, 175–83; Straight, *supra* note 15, at 217–18, 233–34, 243–47, 250–53.

109. See *infra* text accompanying notes 111–121.

110. See *infra* text accompanying notes 122–137.

111. See, e.g., Croley & Jackson, *supra* note 8, at 193; Jackson, *supra* note 87, at 177–78; Nichols, *Trade Without Values*, *supra* note 19, at 719; Kim Rubenstein & Jenny Schultz, *Bringing Law and Order to International Trade: Administrative Law Principles and the GATT/WTO*, 11 *ST. JOHN'S J. LEG. COMM.* 271, 305 (1996); Montañà i Mora, *supra* note 8, at 178; Young, *supra* note 10, at 390. The DSU itself makes reference to these benefits. See DSU art. 3(2), 33 I.L.M. 1227 (“The dispute settlement system . . . is a central element in providing security and predictability to the multilateral trading system.”).

112. Predictability will also help firms plan and execute international transactions. See Jackson, *supra* note 87, at 177–78; Nichols, *Trade Without Values*, *supra* note 19, at 659, 719; Schleyer, *supra* note 18, at 2291; see also Horacio A. Grigera Naon, *Sovereignty and Regionalism*, 27 *LAW & POL'Y INT'L BUS.* 1073, 1081–82 (1996).

113. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 394, 395 (1995); Weiss, *supra* note 62, at 83.

with regard to complaints by smaller and developing countries.¹¹⁴ As we have seen, the old GATT system favored the more powerful party in a dispute, which could stall the process, without serious fear of reprisal from the weaker party, until it got its way.¹¹⁵ The DSU, by contrast, tends to level the playing field. Whatever the relative power of the parties, they can now expect a decision on the merits, and an authorization to enforce that decision, within a determinable time.¹¹⁶

For these reasons, supporters contend, the DSU will encourage members' compliance with international trade norms.¹¹⁷ Regular panel reports will provide guidance for members that wish to conform to GATT requirements; automatic adoption and enforcement of panel reports will discourage members from trying to evade them.¹¹⁸ If panels do their work fairly and efficiently, and build confidence in their decisions, members will feel less need to resort to extralegal "self-help" measures in resolving trade disputes.¹¹⁹ Some supporters have argued, finally, that the DSU will promote compliance by blunting pressures for protection at home.¹²⁰ On this theory, governments will use adverse WTO rulings as "cover" for the repeal of trade-distorting measures that remain popular with important domestic constituencies.¹²¹

These arguments fail to persuade the DSU's opponents. In their view, the DSU represents a grave threat to national sovereignty and democratic self-government. Opponents point to the potential for "bad

114. Jackson, *supra* note 87, at 161; Young, *supra* note 10, at 390. Indeed, developing countries have been increasingly active under the DSU. *See supra* note 93.

115. *See supra* note 62 and accompanying text; *cf.* Schleyer, *supra* note 18, at 2291 (noting that pragmatic approach "produce[d] . . . outcomes based on the power balance of the disputants at that point in history").

116. In this way, Jackson argues, smaller nations might find that membership in the WTO actually enhances "sovereignty." Jackson, *supra* note 87, at 161; *see also* Schleyer, *supra* note 18, at 2292 (noting that an adjudicative method creates less temptation for a powerful nation to "'flex [its] muscles'" (alteration in original). During the debate on the WTO, Clinton Administration officials made this claim with regard to the United States. *See, e.g., The World Trade Organization: Hearing Before the House Comm. on Ways and Means*, 103d Cong. 8, 13, 17 (1994) (statement of Michael Kantor, United States Trade Representative) [hereinafter *Ways and Means Hearing*].

117. *See* Schleyer, *supra* note 18, at 2291; Young, *supra* note 10, at 390-91.

118. *See* Schleyer, *supra* note 18, at 2291.

119. *See* Montañà i Mora, *supra* note 8, at 134-35, 179; *See also* Naon, *supra* note 112, at 1082; Young, *supra* note 10, at 390-91, 409. Indeed, a desire to curb American unilateralism was a major factor in convincing negotiators to adopt the DSU in the Uruguay Round. *See supra* note 65.

120. *See* Montañà i Mora, *supra* note 8, at 135; Young, *supra* note 10, at 391.

121. *See* Naon, *supra* note 112, at 1081; Shell, *supra* note 8, at 900 & n.328. "Officials may even be able to obtain some positive political payoff by expressing sympathy with the request for protection and criticizing the rules." Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501, 522 (1985).

results” in significant cases.¹²² As the scope of trade law expands into areas like environmental protection and national security, WTO panels may well act to invalidate members’ laws in “circumstances that . . . pose great danger to essential national objectives.”¹²³ Members will have no choice but to comply with adverse rulings, opponents argue.¹²⁴ As a result, the WTO will have achieved sovereign control over vital questions of domestic policy.¹²⁵

Moreover, opponents argue, allowing WTO panels to invalidate domestic legislation poses grave dangers for representative democracy.¹²⁶ To be sure, Americans are accustomed to the idea that unelected judges can invalidate popularly-enacted legislation.¹²⁷ But those are American judges applying American law. They do not answer directly to the people, but they receive their commissions from the people’s representatives and apply a constitution that commands the continuing consent of the governed.¹²⁸ Trade panelists, by contrast—those “faceless, unelected, unaccountable bureaucrats in Geneva”¹²⁹—lack even the attenuated claim to popular authority that federal judges enjoy.¹³⁰ Their appointment, and the law they apply, are both much further removed from citizens’ control. As a result, opponents contend, WTO rulings

122. See Jackson, *supra* note 87, at 175 (discussing objections).

123. *Id.*; see also *supra* note 20 (discussing expansion of trade law into other areas). For an interesting discussion of the interplay between GATT and national security concerns, see John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT’L & COMP. L. REV. 747, 758–62 (1997).

124. See Sprance, *supra* note 16, at 1232–35 (discussing objections).

125. See JAMES GOLDSMITH, *THE TRAP* 38 (1995). Some legalists have argued that in certain circumstances a panel should refrain from invalidating a national law that burdens free trade in pursuit of some important “societal value.” Nichols, *Trade Without Values*, *supra* note 19, at 660–61. See also Atik, *supra* note 19, at 230, 261–62 (distinguishing among “democracy” critiques of international trade regimes).

126. See, e.g., *Senate Finance Hearings*, *supra* note 1, at 240–41 (prepared statement of Ralph Nader); Trimble, *supra* note 8, at 1018, 1029–30; Trimble, *supra* note 19, at 1944–46, 1948; see also Atik, *supra* note 19, at 236–37 (discussing democracy objections). In Trimble’s memorable phrase, “[t]o reach David Ricardo’s Promised Land, we apparently must do more than restrain misguided diplomacy; we must curtail representative government as well.” Trimble, *supra* note 8, at 1018.

127. The countermajoritarian aspects of American judicial review have drawn a great deal of attention. I leave the details of those “bone numbingly familiar debates” for others. Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1447 (1997). For the classic discussion, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). For an interesting recent treatment, see Friedman, *supra* note 22.

128. See Trimble, *supra* note 8, at 1027; see also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 612–14 (1993) (discussing appointment process).

129. Bello, *supra* note 87, at 416.

130. See Trimble, *supra* note 8, at 1027.

raise legitimacy concerns more serious than those that surround domestic judicial review.¹³¹

Opponents also point to the secretive nature of WTO proceedings.¹³² Under the DSU, panel and appellate-body deliberations remain confidential; their reports, anonymous.¹³³ Disclosure requirements seek to ensure the independence of panelists, but information about the background of potential panelists is limited, even for members.¹³⁴ Restrictions like these, holdovers from the days of trade pragmatism,¹³⁵ only serve to increase opponents' suspicions about the democratic legitimacy of the new regime.¹³⁶ And there is little sign of change. While both the United States and the European Union have suggested reforms to make the panel process more transparent, the WTO has yet to act on them.¹³⁷

The DSU's supporters dismiss these concerns. All treaties diminish sovereignty to some extent, they observe; for a country to accept some international-law restraint in pursuit of important national interests is neither new nor objectionable.¹³⁸ In any event, they argue, opponents greatly exaggerate the threats to sovereignty and democratic government.¹³⁹ As we have seen, WTO rulings lack effect in national courts.

131. See, e.g., *Ways and Means Hearing*, *supra* note 116, at 106–08 (statement of Bruce Fein).

132. See, e.g., *Senate Finance Hearings*, *supra* note 1, at 241, 247–48, 249 (statement of Ralph Nader); Charnovitz, *supra* note 20, at 333–34; Housman, *supra* note 20, at 713–14, 722; Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 646–47 (1994).

133. DSU art. 14, 33 I.L.M. 1235, art. 17(10), (11), 33 I.L.M. 1236. Parties can disclose their own positions to the public, but must treat as confidential information that opposing parties submit to panels. DSU art. 18(2), 33 I.L.M. 1237. In addition, “[a] party to a dispute shall . . . upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.” *Id.*

134. See Debevoise, *supra* note 100, at 821.

135. See Nichols, *supra* note 6, at 396 & n.99 (discussing secrecy of process under GATT 1947); Rubenstein & Schultz, *supra* note 111, at 271 (same).

136. In Senator Moynihan's words, “if you want to lose an argument in this country say we have turned over our rights to a secret tribunal in a place where they eat frogs and speak languages we do not understand.” *Senate Finance Hearings*, *supra* note 1, at 129 (remarks of the chairman). The secrecy of the dispute-settlement process was a major issue in the United States debate on accession to the WTO. See, e.g., Jackson, *supra* note 87, at 177 (describing opposition to WTO).

137. Cf. Frances Williams, *WTO: Call For Dispute Reform*, FIN. TIMES, Oct. 21, 1998 (describing the European Union's suggested reforms).

138. See *Regional Trade Organizations: Strengthening Or Weakening Global Trade?*, 88 PROC. AM. SOC. INT'L L. 309, 322 (1994) (remarks of Frederick M. Abbott); Jackson, *supra* note 87, at 159; Sprance, *supra* note 16, at 1231. Some have accused the WTO's critics of deploying sovereignty arguments in an attempt to disguise their real motivation: self-interested protectionism. See Bello, *supra* note 87, at 418.

139. See, e.g., Bello, *supra* note 87, at 417–18; Gresham & Bloomfield, *supra* note 108, at 1163–64; Jackson, *supra* note 87, at 179–80.

Members that fail to comply with rulings may face retaliation from aggrieved parties, but their courts can continue to apply domestic law, whatever the WTO decides.¹⁴⁰ And the WTO Agreement allows members to withdraw from the organization, for any reason, on six-months notice.¹⁴¹ While members would likely exercise this option only in the most drastic circumstances, supporters contend that their capacity to do so provides a check against panel overreaching.¹⁴²

II. THE CONFLICT OVER SUPREME COURT REVIEW

The debate on the WTO is not the first Americans have had on the merits of centralized adjudication. In the first half of the nineteenth century, the Supreme Court's assertion of authority to review the judgments of state courts on questions of federal law sparked a controversy remarkably similar to today's. Like today's proponents of the WTO, the Court's supporters emphasized the need for uniformity, predictability, and compliance with legal requirements. Like today's critics of the WTO, the Court's opponents argued that its exercise of jurisdiction over state courts threatened to undermine local sovereignty and democratic self-government. The controversy continued for four decades, ending only with the outbreak of civil war.

This part explores the nineteenth-century conflict over Supreme Court review. There were several episodes,¹⁴³ but this part focuses on three of the more important: the conflict with Virginia in connection with the cases of *Martin v. Hunter's Lessee*¹⁴⁴ and *Cohens v.*

140. See *supra* text accompanying notes 89–91.

141. WTO Agreement art. 15; see also *Senate Finance Hearings*, *supra* note 1, at 118–19 (testimony of John H. Jackson).

142. See *Senate Finance Hearings*, *supra* note 1, at 118–19; see also *id.* at 197 (prepared statement of John H. Jackson); Sprance, *supra* note 16, at 1233, 1246, 1264. But cf. Antonio Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 *YALE J. INT'L L.* 302, 326 (1998) (noting “practical impossibility of withdrawal from the WTO, given the importance of the expectations of trade benefits it confers on each member”).

143. Warren writes that

[b]etween 1789 and 1860 the courts of seven States denied the constitutional right of the United States Supreme Court to decide cases on writs of error to State courts—Virginia, Ohio, Georgia, Kentucky, South Carolina, California, and Wisconsin. The Legislatures of all these States (except California), and also of Pennsylvania and Maryland, formally adopted resolutions or statutes against this power of the Supreme Court.

Warren (pt.1), *supra* note 22, at 3–4. In addition, at least five bills eliminating the Court's jurisdiction over states were introduced in Congress during this period, one of which received the support of the House Judiciary Committee. See *id.* at 4; see *infra* text accompanying notes 239–242.

144. 14 U.S. (1 Wheat.) 304 (1816). See *infra* text accompanying notes 153–178.

Virginia,¹⁴⁵ the conflict with Georgia in connection with the Cherokee cases,¹⁴⁶ and the conflict with Wisconsin in connection with the case of *Abelman v. Booth*.¹⁴⁷ Taken together, these episodes serve to highlight the main arguments on either side of the debate. In addition, they serve to demonstrate the Court's continuing failure to prevent state courts from going their own way in cases that affected important local interests.¹⁴⁸

A. *The Conflict With Virginia, 1814–22*

Congress authorized Supreme Court review of state court judgments in one of its first pieces of legislation, section twenty-five of the Judiciary Act of 1789.¹⁴⁹ Section twenty-five provided for Supreme Court review in cases where state courts had rejected claims under federal law: where state courts had denied the validity of a federal statute, for example, or had upheld the validity of a state statute against a federal constitutional challenge.¹⁵⁰ In light of the controversy that developed, it is interesting to note that Congress enacted section twenty-five with

145. 19 U.S. (6 Wheat.) 264 (1821). *See infra* text accompanying notes 179–208.

146. *E.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 557 (1832). *See infra* text accompanying notes 210–225, 244–245.

147. 62 U.S. (21 How.) 506 (1859). *See infra* text accompanying notes 262–291.

148. *See* Warren (pt. 1), *supra* note 22, at 4

149. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (1789); *see* HAINES, *supra* note 22, at 120.

150. In full, section 25 provided:

[A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and a decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or the laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the Constitution, of a treaty, or a statute of, or commission held under the United States, and the decision is against the title, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be reexamined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

1 Stat. at 85–87; *see* Wallace Mendelson, *The Judiciary Act of 1789: The Formal Origin of Federal Judicial Review*, 76 JUDICATURE 133, 134–35 (1992) (discussing section 25). “The basic pattern of review established in 1789 has been altered only by expanding it to include all federal questions properly presented to state courts, and by gradually shifting all proceedings to discretionary review by certiorari rather than the formally obligatory appeal jurisdiction.” 16B WRIGHT ET AL., *supra* note 21, § 4006, at 121. The present statutory authorization is at 28 U.S.C. § 1257 (1994).

relatively little discussion,¹⁵¹ and that the Court applied it without apparent incident for roughly a quarter-century.¹⁵²

The calm ended with *Martin v. Hunter's Lessee*.¹⁵³ *Martin* involved a complicated land dispute with important implications for the Virginia gentry.¹⁵⁴ Denny Martin, a British subject, claimed land in northern Virginia by virtue of inheritance from his uncle, Lord Fairfax. Virginia law prohibited aliens from inheriting land, however, and the state had confiscated the Fairfax estate and sold it in parcels to various persons, including David Hunter. When Hunter brought an ejectment action against Martin in the Virginia courts, Martin argued that treaties between the United States and Britain confirmed his title to the land. After a protracted litigation, the state's highest court, the Virginia Court of Appeals, decided for Hunter, holding that his claim to the land prevailed under Virginia law.¹⁵⁵

Martin appealed to the United States Supreme Court. As the case involved the construction of federal treaties, the Court issued a writ of error under section twenty-five requiring the Virginia Court of Appeals to certify the record for examination.¹⁵⁶ The court of appeals complied, and the Supreme Court proceeded to reverse the judgment and remand the case with instructions that the Virginia court enter a new judgment for Martin.¹⁵⁷ At this point, the court of appeals took notice. It determined that

151. See HAINES, *supra* note 22, at 22, 120, 500; see also Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1557 (1990).

152. See HAINES, *supra* note 22, at 344 & n.41; Warren (pt.1), *supra* note 22, at 6. Between 1790 and 1815, the Supreme Court heard 17 appeals from state courts, John P. Franck, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 16 (1948), but these episodes passed by "apparently . . . without incident." 16B WRIGHT ET AL., *supra* note 21, § 4006, at 125.

153. 14 U.S. (1 Wheat.) 304 (1816). The following account of the *Martin* litigation derives from 1 BOUDIN, *supra* note 22, at 281–82; G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35*, at 165–66 (abr. ed. 1991); JESSUP, *supra* note 22, at 161–62; and Warren (pt. 1), *supra* note 22, at 6–8.

154. Indeed, Chief Justice Marshall recused himself in *Martin* "because of his financial interests in the land in dispute." WHITE, *supra* note 153, at 167; see also JESSUP, *supra* note 22, at 170 n.54 (discussing Marshall's interest in the case). Marshall may have participated secretly in the case. See *infra* note 167.

155. *Hunter v. Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810), *rev'd* 11 U.S. (7 Cranch) 603 (1813).

156. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 603–04 (1813); *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 5 (1814) (opinion of Cabell, J.), *rev'd* 14 U.S. (1 Wheat.) 304 (1816); see also WHITE, *supra* note 153, at 166; Warren (pt. 1), *supra* note 22, at 8.

157. See *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 628. The Court's mandate is set forth in the Virginia court's opinion on remand. See *Hunter*, 18 Va. (4 Munf.) at 1–3; see also *id.* at 7 (opinion of Cabell, J.) (discussing mandate). Historians dispute whether a majority of the Court's members actually joined the Court's opinion. Compare 1 WARREN, *supra* note 22, at 446 with WHITE, *supra* note 153, at 166 n.45.

it had “improvidently” complied with the writ of error and requested counsel’s views on the question whether it should comply with the Court’s mandate reversing its judgment.¹⁵⁸

After an unusually long argument,¹⁵⁹ the court decided not to comply.¹⁶⁰ The judges did not object to judicial review itself,¹⁶¹ nor to the idea that federal law preempted inconsistent state law. They objected to the claim of federal judicial supremacy: in their view, the United States Supreme Court lacked authority to make its judgments binding on state courts.¹⁶² “What [the federal] constitution is,” Judge Cabell wrote in the lead opinion, “what [federal] laws and treaties are, must, in cases coming before the State Courts, be decided by the State Judges, according to their own judgments, and upon their own responsibility.”¹⁶³ Any other view “would, sooner or later, terminate in an entire consolidation of the states into one complete national sovereignty.”¹⁶⁴ Judge Cabell also rejected the argument that Supreme Court review was necessary to promote “uniformity of decision.”¹⁶⁵ By encouraging consolidation in the federal government, he wrote, Supreme Court review “would produce evils greater than those of the occasional collisions which it would be designed to remedy.”¹⁶⁶

Martin appealed once more to the United States Supreme Court. This time, the court of appeals refused to respond to the Court’s writ of error, and the Court considered the case on a “makeshift record” provided by the attorneys.¹⁶⁷ Once again, it reversed the court of appeals’ judgment.¹⁶⁸ Writing for the Court, Justice Joseph Story maintained that review of state judgments did not impermissibly diminish state sover-

158. *Hunter*, 18 Va. (4 Munf.) at 1, 3.

159. *Id.* at 3.

160. *Id.* at 58.

161. For an interesting analysis of antebellum Americans’ failure to focus on the anti-democratic aspects of judicial review, see Friedman, *supra* note 22, at 343, 382, 409–10.

162. For discussions of this aspect of the Virginia court’s opinion, see 1 BOUDIN, *supra* note 22, at 284–85, 286; HAINES, *supra* note 22, at 342–43, 345–46.

163. *Hunter*, 18 Va. (4 Munf.) at 11 (opinion of Cabell, J.); *see also id.* at 24 (opinion of Brooke, J.).

164. *Id.* at 9 (opinion of Cabell, J.); *see also id.* at 45 (opinion of Roane, J.).

165. *Id.* at 15 (opinion of Cabell, J.); *see also id.* at 45 (opinion of Roane, J.).

166. *Id.* at 9 (opinion of Cabell, J.); *see also* HAINES, *supra* note 22, at 345. Judge Spencer Roane argued that section 25 failed to promote uniformity. He noted that section 25 authorized Supreme Court review only where state courts had decided *against* federal claims. As a result, he observed, section 25 created the “novel spectacle . . . of a court being of the last resort or otherwise, as its decision may happen to have been for one or other of the parties.” *Hunter*, 18 Va. (4 Munf.) at 45 (opinion of Roane, J.).

167. WHITE, *supra* note 153, at 169. For an interesting discussion of the procedural irregularities in *Martin*, including a claim that Chief Justice Marshall secretly participated in the case, *see id.* at 167–73.

168. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 362 (1816).

eignty.¹⁶⁹ The Constitution had created a new government, he observed, "in many respects, national, and in all, supreme."¹⁷⁰ As a component of that government, Article III had established a Supreme Court with appellate jurisdiction of cases arising under federal law.¹⁷¹ "From the very nature of things," Story reasoned, that jurisdiction must extend to cases in state as well as federal courts.¹⁷² To hold otherwise would be to "interpose a limitation" on federal power "where the people [had] not been disposed to create one."¹⁷³

In addition, Story argued, Supreme Court review promoted uniformity, rationality, and compliance with federal norms.¹⁷⁴ Without Supreme Court review, different states might reach different conclusions on questions of federal law. "If there were no revising authority to control these jarring and discordant judgments," he wrote, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two."¹⁷⁵ The "public mischiefs that would attend such a state of things would be truly deplorable."¹⁷⁶ The Framers had understood, moreover, that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct . . . the regular administration of justice."¹⁷⁷ Supreme Court review could serve to neutralize any anti-federal bias.

The *Martin* Court avoided a second confrontation with the court of appeals, issuing its mandate directly to the Virginia district court, and for a while the controversy seemed to abate.¹⁷⁸ But the matter was far from settled. Five years later, the issue rose again in another case from the Virginia courts, *Cohens v. Virginia*.¹⁷⁹ Philip and Mendes Cohen had

169. *Id.* at 342–43. Story later repeated his arguments in his treatise on the Constitution. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 819, at 582–83, §§ 907–911, at 646–49 (photo. reprint 1987) (1833).

170. *Martin*, 14 U.S. (1 Wheat.) at 328.

171. *Id.* (discussing U.S. CONST. art. III); *id.* at 337–39.

172. *Id.* at 345.

173. *Id.* at 351. Story noted that the Court's appellate jurisdiction over state courts "was, previous to [the Constitution's] adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions," and that state courts had complied with the Court's mandates "in a great variety of cases." *Id.*; see also *supra* note 152 (discussing early history of Supreme Court review).

174. See *Martin*, 14 U.S. at 347–48.

175. *Id.* at 348.

176. *Id.*

177. *Id.* at 347.

178. See JESSUP, *supra* note 22, at 163; Warren (pt. 1), *supra* note 22, at 12.

179. 19 U.S. (6 Wheat.) 264 (1821). For good descriptions of the *Cohens* litigation, see HAINES, *supra* note 22, at 427–28; JESSUP, *supra* note 22, at 204; WHITE, *supra* note 153, at 504–05.

sold lottery tickets in Virginia as part of an effort to raise funds for the District of Columbia. Although federal law authorized their actions, Virginia law made it a crime to sell lottery tickets within the state, and the Cohens were convicted in a state prosecution.¹⁸⁰ The Cohens appealed their convictions to the United States Supreme Court,¹⁸¹ arguing that jurisdiction existed under section twenty-five of the Judiciary Act, as the Virginia court had decided in favor of the constitutionality of the state anti-lottery statute.¹⁸²

The Court agreed to hear the case, and Virginia erupted. A "barrage" of articles condemning the Court appeared in the Richmond press, some suggesting that the Court's decision to take *Cohens* was part of a "consolidationist campaign" to eliminate state sovereignty.¹⁸³ The legislature passed resolutions declaring that the Court had no right to examine the judgments of state courts and instructing state's counsel to limit their argument before the Court to the question of jurisdiction.¹⁸⁴ Counsel followed instructions, arguing *Cohens* almost as though *Martin* did not exist.¹⁸⁵ "If it shall be established," Alexander Smythe told the Justices, "that this Court has appellate jurisdiction over the State Courts . . . a complete consolidation of the States . . . is produced."¹⁸⁶ For his part, Philip Barbour informed the Court "that he wished to be distinctly understood, as not yielding his assent to the doctrine of *Hunter v. Martin*."¹⁸⁷ On that matter, he advised the Justices, he "decidedly concurred with the Court of Appeals of Virginia."¹⁸⁸

In a unanimous opinion, the Court rejected this second challenge to its appellate jurisdiction.¹⁸⁹ Opposition to Supreme Court review, Chief Justice Marshall explained, derived from the assumption that the states were independent sovereigns.¹⁹⁰ But they were not: the Constitution had established a regime in which the states were, for some purposes, sub-

180. See HAINES, *supra* note 22, at 428; JESSUP, *supra* note 22, at 204.

181. The Cohens appealed from a decision of an inferior state court, there being "no higher State tribunal which could take cognizance of the case." *Cohens*, 19 U.S. (6 Wheat.) at 376 n.31; see also WHITE, *supra* note 153, at 506.

182. See WHITE, *supra* note 153, at 505.

183. *Id.* at 506, 510.

184. *Id.* at 505; 1 WARREN, *supra* note 22, at 547-48. For the text of these resolutions, see Journal of the Virginia House of Delegates 46 (1820); STATE DOCUMENTS ON FEDERAL RELATIONS 103 (Herman V. Ames ed.) (photo. reprint 1970) (1900) [hereinafter STATE DOCUMENTS].

185. See WHITE, *supra* note 153, at 504; see also 1 BOUDIN, *supra* note 22, at 303.

186. *Cohens*, 19 U.S. (6 Wheat.) at 320 (emphasis added).

187. *Id.* at 310 n.4.

188. *Id.*

189. *Id.* at 430. The Court also rejected the claim that it had no jurisdiction in the case because a state was a defendant. See *id.* at 378, 412.

190. See *id.* at 413.

ordinate to the federal government.¹⁹¹ As a result, there was nothing “unreasonable” in giving the Court “a supervising power” over state court judgments on questions of federal law.¹⁹² Indeed, Marshall wrote, “the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States,” suggested the need for a “single tribunal [with] the power of deciding, in the last resort, all cases in which they are involved.”¹⁹³

On the merits, the Court affirmed the Cohens’ convictions, thereby precluding further action in the Virginia courts.¹⁹⁴ But reaction in the state was swift and hostile. In his message to the opening session of the legislature, Governor Randolph dwelled on Virginia’s “‘humiliation and mortification’” at the hands of the court.¹⁹⁵ Judge Spencer Roane of the court of appeals, meanwhile, wrote a series of newspaper articles attacking the decision under the name “Algernon Sidney.”¹⁹⁶ Roane repeated many of the arguments he and his colleagues had made five years earlier in *Hunter*.¹⁹⁷ State courts had an obligation to apply federal law, he conceded, but they had no obligation to comply with the rulings of federal courts.¹⁹⁸ By claiming a right to reverse the judgments of state courts, the Court threatened to upset the constitutional balance and establish a consolidated government in which states would cease to exist.¹⁹⁹

Roane scoffed at the idea that Supreme Court review was necessary to promote uniformity. State courts had an interest in preserving the Constitution, he contended; they would not casually force “collisions”

191. *See id.* at 414

192. *See id.* at 421.

193. *Id.* at 416. Like Story, Marshall noted that advocates had described the Court’s appellate jurisdiction at the time of the Constitution’s adoption, *see id.* at 418–20, and that the Court’s jurisdiction had been “assented to, with a single exception, by the Courts of every State . . . whose judgments have been revised.” *Id.* at 420.

194. *See id.* at 447–48. On Marshall’s possible strategy in affirming on the merits in *Cohens*, *see* 1 BOUDIN, *supra* note 22, at 306; JESSUP, *supra* note 22, at 205.

195. JESSUP, *supra* note 22, at 209.

196. *Id.* at 205. This was not the first time Roane had attacked Chief Justice Marshall in print. Two years earlier, Roane had written a series of articles attacking Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), under the name “Hampden.” For those articles, and Marshall’s pseudonymous replies, *see* JOHN MARSHALL’S DEFENSE OF *McCulloch v. Maryland* (Gerald Gunther ed., 1969).

197. *See supra* text accompanying notes 159–166.

198. *See* Letter from Algernon Sidney to the Richmond Enquirer (June 1, 1821), *reprinted in* 2 BRANCH HISTORICAL PAPERS OF RANDOLPH-MACON COLLEGE 109, 115 (William E. Dodd ed., 1905) [hereinafter BRANCH HISTORICAL PAPERS].

199. *See* Letter from Algernon Sidney to the Richmond Enquirer (June 8, 1821), *reprinted in* 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 153, 174; *see also* Letter from Algernon Sidney to the Richmond Enquirer (May 25, 1821), *reprinted in* 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 78, 80.

with the federal courts.²⁰⁰ To be sure, occasional clashes might create inconvenience for the national government.²⁰¹ But occasional inconvenience was hardly a reason to sacrifice the independence of state courts. "It is as well," Roane argued, "that the course of the general government should be arrested for a season, as that the rights of the states should be forever swept away."²⁰²

Roane attempted to organize opposition to the Court, and for a while vigorous debate on *Cohens* appeared in newspapers around the country.²⁰³ Alarmed, Marshall thought he detected a conspiracy to overthrow the Constitution.²⁰⁴ "The attack upon the Judiciary is in fact an attack upon the Union," he wrote Story; he warned supporters to be "'on the alert'" for an attempt to repeal the Court's appellate jurisdiction.²⁰⁵ But the controversy fizzled out. The Court's disposition of *Cohens* made further resistance within Virginia superfluous, and outsiders quickly lost interest in the state's "humiliation" at the hands of the Justices.²⁰⁶ Roane died soon thereafter, disappointed at the failure of his

200. See Letter from Algernon Sidney to the Richmond Enquirer (June 5, 1821), reprinted in 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 132, 137.

201. See Letter from Algernon Sidney to the Richmond Enquirer (June 5, 1821), reprinted in 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 132, 133; Letter from Algernon Sidney to the Richmond Enquirer (June 1, 1821), reprinted in 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 109, 119.

202. Letter from Algernon Sidney to the Richmond Enquirer (June 1, 1821), reprinted in 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 109, 119; see also Letter from Algernon Sidney to the Richmond Enquirer (May 29, 1821), reprinted in 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 91, 105.

203. See JESSUP, *supra* note 22, at 206–11; 1 WARREN, *supra* note 22, at 554–60; WHITE, *supra* note 153, at 521–23. Roane's arguments were echoed by his fellow Virginia Republican, the prolix John Taylor, who in the early 1820s wrote a series of prominent books criticizing federal consolidation in general and Supreme Court review in particular. See JOHN TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 22–24, 127–69 (photo. reprint ed. 1971) (1823); see also JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 129–46 (photo. reprint 1970) (1820). On Taylor's place in American politics, see Loren Baritz, *Introduction* to JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES ix, x–xi (Loren Baritz ed., 1969); F. Thornton Miller, *Foreword* to JOHN TAYLOR, TYRANNY UNMASKED ix, xxi (F. Thornton Miller ed., 1992).

204. See JESSUP, *supra* note 22, at 208–09; 1 WARREN, *supra* note 22, at 560–63. Marshall particularly resented Roane's criticism, which was at times personally insulting. See, e.g., Letter from Algernon Sidney to the Richmond Enquirer (May 25, 1821), reprinted in 2 BRANCH HISTORICAL PAPERS, *supra* note 198, at 78, 82–83 (characterizing Marshall's opinion in *Cohens* as "monstrous" and reflective of "that love of power . . . which infects and corrupts . . . even the high and ermined judges"). Roane and Marshall had clashed in the press before. See *supra* note 196.

205. See 1 WARREN, *supra* note 22, at 562–63 (quoting Marshall-Story correspondence).

206. When a member of Virginia's congressional delegation introduced a bill to repeal section twenty-five, it received no support. JESSUP, *supra* note 22, at 210. The bill was tabled

campaign against the Court.²⁰⁷ The conflict over Supreme Court review had ended—temporarily.²⁰⁸

B. Georgia and the Crisis of 1830–32

One can readily see how the arguments made in connection with *Martin* and *Cohens*—Story and Marshall's claims about uniformity and compliance with federal norms, Roane's objections about sovereignty and local control—anticipate today's controversy with regard to the WTO.²⁰⁹ They also set the stage for further debate on Supreme Court review. For if the Court's supporters believed that the conflict with Virginia had secured their position, they were soon disappointed. The Court's next crisis occurred at the start of the following decade, when the idea of Supreme Court review came under serious attack in the state of Georgia and in Congress as well.²¹⁰

The conflict with Georgia stemmed from the state's attempt to exercise authority over the Cherokee Nation, an Indian tribe located on lands within Georgia's borders. Federal treaties guaranteed the Cherokees' sovereignty over these lands, and the Cherokees had proclaimed themselves an independent state.²¹¹ Nonetheless, in 1828, Georgia adopted a number of measures to establish its jurisdiction over tribal lands.²¹² It officially annexed the Cherokee territory and nullified all Cherokee laws; it also enacted a statute requiring white people living in Cherokee territory to obtain residency licenses and swear allegiance to Georgia law.²¹³ Georgia's actions received the support of the newly-elected

at the request of its sponsor. See CONG. DEB. 1681–82 (April 1822) (remarks of Rep. Stevenson).

207. See JESSUP, *supra* note 22, at 206, 211, 237. Roane was particularly disappointed in Thomas Jefferson, who, having encouraged Roane to "broaden the geographical base of the attack on the Court," avoided public involvement in the controversy. *Id.* at 207.

208. See WHITE, *supra* note 153, at 523–24.

209. See *supra* text accompanying notes 108–142 (discussing debate on dispute settlement by the WTO).

210. See JESSUP, *supra* note 22, at 355 (conflict with Georgia "brought the Court to a low point in judicial efficacy on constitutional questions"); Warren (pt.2), *supra* note 22, at 161 ("In 1831 there occurred the most determined and the most dangerous attack on the Supreme Court and its jurisdiction under the 25th Section.").

Opposition to Supreme Court review also emerged periodically during the 1820s. Kentucky, for example, refused to comply for eight years with a Court decision invalidating certain real property laws, and the Ohio legislature overwhelmingly passed a resolution against Supreme Court review in response to a ruling that struck down state tax legislation. See HAINES, *supra* note 22, at 463–80; JESSUP, *supra* note 22, at 213–44. There were also occasional calls in Congress to eliminate the Court's appellate jurisdiction over state courts. See *id.* at 427 (listing efforts).

211. See HAINES, *supra* note 22, at 596–97; JESSUP, *supra* note 22, at 359–60.

212. See JESSUP, *supra* note 22, at 360–61.

213. See *id.*

President Andrew Jackson, who, despite treaty obligations, recommended removal of the Indians to a region west of the Mississippi River.²¹⁴

Georgia's policy toward the Cherokees first came before the Court in 1830 in the case of Corn Tassel, a Cherokee who had been convicted of murder and sentenced to death under Georgia law.²¹⁵ The murder had occurred on tribal territory, and Tassel appealed his conviction to the Supreme Court, arguing that prosecution under Georgia law violated federal treaty obligations.²¹⁶ The Court scheduled the case for argument in January 1831 and, in December 1830, served an order on Governor George Gilmer requiring Georgia's appearance to defend the conviction.²¹⁷ Gilmer informed the Georgia legislature that he would disregard the order, and the legislature responded by passing resolutions condemning the Court's "interference" and forbidding state officers from complying with any "mandate . . . purporting to proceed from . . . the Supreme Court of the United States, for the purpose of arresting the execution of any of the criminal laws of this State."²¹⁸ Georgia executed Tassel two days later, on December 24, 1830.²¹⁹

The following year, the Court faced a challenge to the Georgia statute requiring white people to obtain licenses to live in Cherokee territory. Georgia prosecuted two missionaries who had defied the law and sentenced them to four years at hard labor.²²⁰ The missionaries appealed their convictions to the Supreme Court, arguing that the license requirement violated the federal constitution.²²¹ Once more, the Court issued an order requiring Georgia to appear before it; once more, the governor, with the approval of the Georgia legislature, refused to comply.²²² In *Worcester v. Georgia*, decided early in 1832, the Court held the licensing statute unconstitutional, reversed the missionaries' conviction.

214. *Id.*

215. See 1 WARREN, *supra* note 22, at 733; see also JESSUP, *supra* note 22, at 363–64. Tassel's name sometimes appears as "George Tassels." See 1 WARREN, *supra* note 22, at 733 n.1.

216. See HAINES, *supra* note 22, at 598; Warren (pt. 2), *supra* note 22, at 167.

217. JESSUP, *supra* note 22, at 363; Warren (pt.2), *supra* note 22, at 167.

218. Resolutions of the Legislature Relative to the Case of George Tassels, December 22, 1830, reprinted in STATE DOCUMENTS, *supra* note 184, at 127; see also Friedman, *supra* note 22, at 396; Warren (pt. 2), *supra* note 22, at 167–68.

219. Warren (pt.2), *supra* note 22, at 168; see also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12–13 (1831) (describing Tassel case). The Georgia legislature had directed that Tassel's execution be expedited. THURMAN WILKINS, CHEROKEE TRAGEDY 216 (2d ed. 1986). Four years later, Georgia executed another prisoner notwithstanding a writ of error from the Court. Warren (pt. 2), *supra* note 22, at 174; see also HAINES, *supra* note 22, at 603.

220. JESSUP, *supra* note 22, at 367.

221. *Id.*

222. *Id.* at 367–68; Warren (pt. 2), *supra* note 22, at 169.

tions, and ordered their release.²²³ The Georgia courts simply ignored the mandate.²²⁴ As Charles Warren describes it, “[t]he two prisoners remained in prison; and everything went on exactly as if the Supreme Court had rendered no decision.”²²⁵

Supreme Court review had been coming under serious attack in Congress as well. In the Senate, the Court’s jurisdiction over state courts was a central question in a famous debate between Daniel Webster of Massachusetts and Robert Hayne of South Carolina.²²⁶ The Webster-Hayne debate, largely forgotten today, transfixed the nation in 1830; visitors packed the Senate gallery to hear the two men, and supporters distributed more than 100,000 copies of Webster’s speech throughout the country.²²⁷ The debate began when, in comments on federal land policy, Hayne warned of the dangers of consolidating too much power in the national government.²²⁸ In a two-part reply, Webster moved beyond land policy to defend the need for federal supremacy generally.²²⁹

223. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562–63 (1832); see also Warren (pt. 2), *supra* note 22, at 169.

224. See Friedman, *supra* note 22, at 395.

225. Warren (pt. 2), *supra* note 22, at 171. It is in connection with *Worcester v. Georgia* that Andrew Jackson allegedly made the famous remark, “Well, John Marshall has made his decision, now let him enforce it.” See 1 WARREN, *supra* note 22, at 759 & n.1. Jackson may not have said that, specifically, see *id.*, but he had little sympathy either with the Chief Justice or the Cherokees, and he certainly did say “other things in the same spirit.” PETERSON, *supra* note 226, at 214; see also JESSUP, *supra* note 22, at 370–71.

226. See 1 WARREN, *supra* note 22, at 721. For good descriptions of the debate, a major event in antebellum history, see DAVID HERBERT DONALD, *LIBERTY AND UNION* 31–33 (1978); MERRILL D. PETERSON, *THE GREAT TRIUMVERATE* 170–83 (1987).

227. See PETERSON, *supra* note 226, at 175, 179; see also 1 THOMAS A. BAILEY, *THE AMERICAN PAGEANT* 259–60 (3d ed. 1966). “No speech in the English language, perhaps no speech in modern times, had ever been as widely diffused and widely read” as Webster’s Second Reply to Hayne. PETERSON, *supra* note 226, at 179–80. Its famous conclusion, an emotional tribute to “Liberty and Union, now and forever, one and inseparable,” became a standard part of the school curriculum, memorized by “tens of thousands of impressionable schoolboys,” BAILEY, *supra*, at 260, and “declaimed from a thousand platforms over the next three decades.” DONALD, *supra* note 226, at 32. Lincoln referred to the speech while writing his First Inaugural Address, and it was said that “[e]very Union cannon was shotted with the Reply to Hayne.” PETERSON, *supra* note 226, at 496.

228. DONALD, *supra* note 226, at 32. Hayne also annoyed Webster by making some disparaging comments about New England’s behavior during the War of 1812. *Id.*

229. *Id.* Webster claimed to have been drawn unprepared into the “discussion of so grave and important a subject,” CONG. DEB. 79 (Jan. 27, 1830), but there is some indication that he had been waiting for an opportunity to join the issue. HAINES, *supra* note 22, at 557–58.

For Webster, Supreme Court review played an essential role in securing federal supremacy.²³⁰ The Constitution made clear that federal law took precedence over state law. But questions of interpretation were sure to arise—indeed, they had arisen already—and if states could decide for themselves what federal law required, “the General Government would be good for nothing.”²³¹ Like Story and Marshall, Webster stressed the need for uniformity in American law. Could anything be “more preposterous,” he asked, “than to make a government for the whole Union, and yet leave its powers subject, not to one interpretation, but to thirteen, or twenty-four?”²³² Such a regime would not be a government at all, Webster proclaimed, but “a collection of topics, for everlasting controversy; heads of debate for a disputatious people.”²³³

In response, Hayne drew the same distinction between legal and judicial supremacy that the Virginia court had drawn in the *Martin* litigation.²³⁴ The Constitution made federal law supreme, Hayne conceded, but it did not give the Court power “to bind the States by its decisions.”²³⁵ If the Constitution had done so, the states would never have ratified it: it was unthinkable that the states would “under any circumstances, have consented to leave to a court to be created by the Federal Government, the power to decide . . . on the extent” of federal authority.²³⁶ Nor did Hayne agree that Supreme Court review was necessary in the interests of uniformity. In the event of a serious conflict between a state and the Court on a question of federal power, the matter could be referred to the states as a body, who could settle the matter by amending the Constitution on a three-fourths vote.²³⁷

The Senate debate on Supreme Court review ended inconclusively a few months later, after several senators had joined in on either side.²³⁸ The topic came up again the following year, this time in the House of Representatives. Over a vigorous dissent, and instigated by what it

230. See CONG. DEB. 78 (Jan. 27, 1830). Without Supreme Court review, Webster believed, the United States Government “would, in all probability, have been now among things which are past.” *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. See *supra* text accompanying notes 159–166.

235. CONG. DEB. 87 (Jan. 27, 1830).

236. *Id.* at 88.

237. *Id.* at 89.

238. See PETERSON, *supra* note 226, at 179; see also BAILEY, *supra* note 227, at 260; 1 WARREN, *supra* note 22, at 721–24. For speeches supporting Supreme Court review, see, for example, CONG. DEB. 149, 152–53 (Feb. 9, 1830) (Barton); *id.* at 161 (Feb. 19, 1830) (Holmes); *id.* at 229 (March 4, 1830) (Clayton); *id.* at 266–67 (March 15, 1830) (Livingston). For speeches opposing Supreme Court review, see *id.* at 112 (Feb. 2, 1830) (Benton); *id.* at 137–44 (Feb. 8, 1830) (Rowan).

called "an accumulation of grievances" against the Court, the House Judiciary Committee issued a report in January 1831 recommending repeal of section twenty-five of the Judiciary Act.²³⁹ Fifteen years after the Court had attempted to resolve the matter in *Martin*, the House committee took the position that Supreme Court review was unconstitutional.²⁴⁰ Section twenty-five, its report stated, had improperly conferred on the Court "a supervisory and controlling power over . . . sovereign states."²⁴¹ Moreover, and despite the claims of its supporters, Supreme Court review had done little to promote uniformity and cohesion in American law. Indeed, the committee alleged, the Court's assertion of authority over state courts "had given rise to painful collisions in the State and Federal authorities, calculated to disturb the harmony of our system."²⁴²

Just as it had during the conflict with Virginia a decade earlier, the Court's outlook seemed bleak. "'You may depend,'" Story wrote a correspondent in January 1831, "'that our wisest friends look with great gloom to the future.'"²⁴³ Once more, though, the controversy subsided. Like Virginia, Georgia discovered that its troubles with the Court failed to arouse much sympathy outside the state.²⁴⁴ Georgia's imprisonment of the missionaries eventually became a political embarrassment for the Jackson Administration in Washington, and Administration allies persuaded Georgia's governor to pardon the two in 1832.²⁴⁵ In the House,

239. JESSUP, *supra* note 22, at 346; HAINES, *supra* note 22, at 593; Friedman, *supra* note 22, at 392. The dissenting members issued a counter-report arguing that Supreme Court review was "essential to the preservation of the General Government." Counter Report on the Judiciary, CONG. DEB. app. at lxxxii, lxxxii (1831). Charles Warren believed that the counter-report, drafted by future President James Buchanan, "must be regarded as one of the great and signal documents in the history of American constitutional law." 1 WARREN, *supra* note 22, at 739. Readers must judge for themselves.

240. Committee Report upon the Judiciary, CONG. DEB. app. at lxxvii, lxxvii (1831).

241. *Id.* at lxxviii.

242. *Id.* at lxxix.

243. Warren (pt.2), *supra* note 22, at 163 (quoting letter from Story to George Ticknor, Jan. 22, 1831).

244. In March 1831, at the height of the conflict, the Massachusetts legislature passed a series of resolutions condemning Georgia's conduct and defending the jurisdiction of the federal courts. JESSUP, *supra* note 22, at 366. The legislatures of Pennsylvania, New Jersey, and Connecticut followed suit, *see* STATE DOCUMENTS, *supra* note 184, at 130-31, Connecticut's explaining that "[t]he courts of the several states partake too readily of local jealousies and excitements, to be entrusted with the final determinations of questions involving the validity or construction of the federal laws." Report and Resolutions of Connecticut, May Session 1831, *reprinted in id.* at 131-32.

245. JESSUP, *supra* note 22, at 370; *see also* 1 WARREN, *supra* note 22, at 776; Warren (pt. 2), *supra* note 22, at 173. The missionaries' imprisonment became a political liability for the Jackson Administration during the Nullification Crisis of 1832. The crisis began when South Carolina passed an ordinance declaring certain federal tariff legislation unconstitutional and forbidding its enforcement within the state. Ordinance of Nullification of South

meanwhile, the bill to repeal section twenty-five lost in a lopsided vote.²⁴⁶ Its proponents complained that parliamentary maneuvers had prevented the bill's full consideration, but to no avail.²⁴⁷ The debate on Supreme Court review had ended—again, temporarily.

C. *The Conflict With Wisconsin, 1854–59*

For the next twenty years, the Court's jurisdiction over state courts drew little public attention.²⁴⁸ The controversy continued to bubble beneath the surface, though. In his *Discourse on the Constitution and Government of the United States*, written between 1845 and 1849, John C. Calhoun gave the subject extended treatment.²⁴⁹ Like Roane and Hayne before him—and like today's opponents of the WTO—Calhoun perceived grave dangers for local autonomy.²⁵⁰ In granting the Court jurisdiction over state courts, he wrote, Congress had impermissibly stripped the states of their sovereignty and reduced them to an inferior

Carolina, Nov. 24, 1832, reprinted in STATE DOCUMENTS, *supra* note 184, at 169. Jackson threatened to use force to uphold federal law in South Carolina, but the crisis ended when Congress passed a new compromise tariff in 1833. See DONALD, *supra* note 226, at 12–14; PETERSON, *supra* note 226, at 212–34. Jackson's failure to threaten force to uphold federal law in Georgia was an embarrassing inconsistency during the Nullification Crisis, and Administration allies in Georgia convinced Governor Lumpkin to moot the question by pardoning the missionaries. JESSUP, *supra* note 22, at 370.

Interestingly, the South Carolina nullification ordinance expressly prohibited appeals to the Supreme Court. Ordinance of Nullification of South Carolina, reprinted in STATE DOCUMENTS, *supra*, at 171. For a discussion of the role of Supreme Court review in the Nullification Crisis, see JESSUP, *supra* note 22, at 374–87.

246. The vote, on a motion to reject, was 138 to 51. CONG. DEB. 542 (Jan. 29, 1831); see also JESSUP, *supra* note 22, at 347. The bill drew strong support from Virginia, Georgia, South Carolina and Kentucky—states that had challenged the Court's jurisdiction in the past—but virtually no support from New England and the Middle Atlantic states. JESSUP, *supra* note 22, at 347, 397 n.111.

247. CONG. DEB. 660 (Feb. 9, 1831) (remarks of Rep. Daniel). Proponents did get a chance to air their views in a subsequent debate on printing extra copies of the Judiciary Committee's report. For samples of the debate, which sometimes became quite heated, see *id.* at 620–22 (Feb. 7, 1831), 658–70 (Feb. 9, 1831), 730–40 (Feb. 17, 1831), 790 (Feb. 25, 1831).

248. Goldstein argues that the lack of resistance in the 1840s “can be explained by the fact that, after the mid-1830s, as a result of electoral politics and judicial appointments, the Supreme Court was dominated by pro-states-rights [J]ustices.” Goldstein, *supra* note 22, at 159.

249. *A Discourse on the Constitution and Government of the United States*, in 1 WORKS OF JOHN C. CALHOUN 108, 263–65, 317–46, 383–84 (Richard G. Cralle ed., photo. reprint 1968) (1851) [hereinafter *Discourse*]. On the timing of the work, see PETERSON, *supra* note 226, at 409; *Discourse*, *supra*, at vii.

250. For Roane's views, see *supra* text accompanying notes 196–202; for Hayne's views, see *supra* text accompanying notes 234–237. For the arguments of the WTO's opponents, see *supra* text accompanying notes 122–137.

status.²⁵¹ He dismissed arguments about the need for uniformity.²⁵² The point of section twenty-five was not uniformity, Calhoun wrote, but the consolidation of power in the federal government.²⁵³ Its repeal would be “[t]he first and indispensable step” in restoring the states to “their true position” in the constitutional framework.²⁵⁴

The *Discourse* appeared posthumously in 1851.²⁵⁵ Shortly thereafter, opposition to Supreme Court review resumed in earnest, this time in the West and North.²⁵⁶ In 1854, the California Supreme Court ruled that parties could not appeal its judgments to the United States Supreme Court.²⁵⁷ It had considered both the Court’s opinion in *Martin v. Hunter’s Lessee*²⁵⁸ and Calhoun’s argument in the *Discourse*, the California court explained, and come to the conclusion that Calhoun was correct.²⁵⁹ In Ohio, meanwhile, the state supreme court delayed for three years, from 1853 to 1856, before entering the Court’s mandate in a tax case.²⁶⁰ When it did so, it drew a bitter dissent from the state’s chief justice, who complained that Supreme Court review “wholly prostrates the . . . sovereignty of the people within the state.”²⁶¹

The most serious conflict, though, occurred with the Wisconsin Supreme Court in *Abelman v. Booth*.²⁶² The case, which attracted national attention, began in 1854, when the federal marshal in Wisconsin arrested a local abolitionist, Sherman Booth, on the charge of aiding the

251. See *Discourse*, *supra* note 249, at 318–19, 338–39. Calhoun thought it “probable” that the First Congress had enacted section 25 “without a clear conception of the principle on which it rested, or the extent to which it might be carried.” *Id.* at 342.

252. *Id.* at 325–30.

253. See *id.* at 328–30. Just as Roane had, see *supra* note 166, Calhoun stressed the fact that section 25 authorized Supreme Court review only in cases where state courts had ruled *against* federal claims. If “uniformity of decision” were one of its “objects,” he observed, section 25 “was very illy calculated to accomplish it.” *Id.* at 326.

254. *Id.* at 383–84.

255. *Id.* at viii.

256. See 1 BOUDIN, *supra* note 22, at 466.

257. *Johnson v. Gordon*, 4 Cal. 368, 374 (1854).

258. 14 U.S. (1 Wheat.) 304 (1816).

259. *Johnson*, 4 Cal. at 369, 370; see also 1 BOUDIN, *supra* note 22, at 476–78; Warren (pt. 2), *supra* note 22, at 176. Warren believed that California’s hostility to Supreme Court review was “probably due to the peculiar isolated situation of litigation in that State, at that period, when there was absence of railroad communication, and little contact with the rest of the Union.” 2 WARREN, *supra* note 22, at 257. The California Supreme Court reversed *Johnson* four years later, over a vigorous dissent by its chief justice. *Ferris v. Coover*, 11 Cal. 175 (1858); 2 WARREN, *supra* note 22, at 257–58 & n.2.

260. See *Piqua Bank v. Knoop*, 3 Ohio St. 342 (1856); see also 2 WARREN, *supra* note 22, at 256; Warren (pt. 2), *supra* note 22, at 178–81. The Supreme Court had issued the mandate in connection with *State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1853).

261. *Piqua Branch*, 3 Ohio St. at 346 (Bartley, C.J., dissenting); see also 2 WARREN, *supra* note 22, at 256.

262. 62 U.S. (21 How.) 506 (1859).

escape of a runaway slave in violation of the federal Fugitive Slave Law.²⁶³ There were no federal prisons in Wisconsin, so the marshal placed Booth in a state jail to await trial.²⁶⁴ The Wisconsin Supreme Court ordered Booth's release on a writ of habeas corpus, holding that the Fugitive Slave Law was unconstitutional.²⁶⁵ The marshal appealed this ruling to the United States Supreme Court and, in the meanwhile, arrested Booth a second time.²⁶⁶ After a three-day trial, a federal district court convicted Booth of violating the Fugitive Slave Law and committed him to state prison.²⁶⁷ Undeterred, the Wisconsin Supreme Court again ordered his release.²⁶⁸

At this point, the United States Attorney General intervened. The Attorney General appealed the Wisconsin court's second decision to the United States Supreme Court, which issued a writ of error requiring the Wisconsin court to certify the record for examination.²⁶⁹ Although the Wisconsin court had complied with the writ of error in the marshal's appeal, not yet argued,²⁷⁰ it ignored the second writ and instructed its clerk to make no note of it in the official records.²⁷¹ In Washington, the Court hesitated, hoping that the Wisconsin court would reconsider.²⁷² The Court ultimately decided to hear the case, together with the marshal's appeal, on the basis of a record that the United States Attorney had managed to obtain through other means.²⁷³

The Court heard argument in January 1859 and issued its decision two months later.²⁷⁴ More than forty years after *Martin v. Hunter's Les-*

263. See 1 BOUDIN, *supra* note 22, at 479–80, 507. For an excellent account of the Booth litigation, see CARL B. SWISHER, *THE TANEY PERIOD, 1836–64*, at 653–75 (vol. 5 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (Paul A. Freund ed.) (1974)).

264. See SWISHER, *supra* note 263, at 660.

265. See *id.* at 657.

266. See *Abelman*, 62 U.S. (21 How.) at 509; see also SWISHER, *supra* note 263, at 658.

267. See SWISHER, *supra* note 263, at 658–59.

268. See *In re Booth* and Rycraft, 3 Wis. 144 (1855); see also *Abelman*, 62 U.S. (21 How.) at 511; SWISHER, *supra* note 263, at 660.

269. *Abelman*, 62 U.S. (21 How.) at 511–12; see also Warren (pt. 2), *supra* note 22, at 182.

270. *Abelman*, 62 U.S. (21 How.) at 509; see also SWISHER, *supra* note 263, at 660.

271. See *Abelman*, 62 U.S. (21 How.) at 512, 514; see also SWISHER, *supra* note 263, at 661.

272. *Id.* at 661.

273. *Id.* at 660–61. The United States Attorney had secured the record from the Wisconsin court "without disclosing his purpose." *Id.*

274. Swisher suggests that the Court delayed so long in hearing the case because of criticism it had received for its decision two years earlier in the *Dred Scott* case, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). See SWISHER, *supra* note 263, at 662.

see,²⁷⁵ the Court found it necessary to explain once more that it had authority to review state court judgments on questions of federal law.²⁷⁶ Chief Justice Roger Taney's opinion for a unanimous Court stressed the need for uniformity and compliance with legal requirements—themes repeated by the WTO's supporters today.²⁷⁷ Without Supreme Court review, Taney argued, state judges would give federal law a variety of different interpretations, "and the Government of the United States would soon become one thing in one State and another thing in another."²⁷⁸ The ultimate outcome would be war:

[A]s the final appellate power in [federal] questions is given to this court, controversies as to the respective powers of the United States and the States, instead of being determined by military and physical force, are . . . settled with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided . . . internal tranquility could not have been preserved; and if such controversies were left to the arbitrament of physical force, our Government[s], State and National, would soon cease to be Governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.²⁷⁹

The Court held the Fugitive Slave Law constitutional and reversed the judgments of the Wisconsin court in each of the consolidated cases.²⁸⁰

Reaction to *Abelman* followed a predictable pattern. The Wisconsin court refused to enter the Supreme Court's mandates,²⁸¹ and the state legislature passed a set of resolutions condemning the Court's exercise of jurisdiction as "an arbitrary act of power, unauthorized by the Constitution."²⁸² In Congress, where there had been calls for repeal of

275. 14 U.S. (1 Wheat.) 304 (1816). For a discussion of *Martin*, see *supra* text accompanying notes 153–178.

276. *Abelman*, 62 U.S. (21 How.) at 514–25. The Court asserted that *Abelman* represented the first occasion in which a state supreme court had claimed supremacy with regard to a federal question, *id.* at 514—an assertion which, in light of all that had gone before, was not "wholly accurate." Warren (pt. 2), *supra* note 22, at 183.

277. *Abelman*, 62 U.S. (21 How.) at 514–25. For the arguments of the WTO's supporters, see *supra* text accompanying notes 111–121, 138–142.

278. *Abelman*, 62 U.S. (21 How.) at 518.

279. *Id.* at 520–21; see also *id.* at 519–20, 525.

280. *Id.* at 525–26. The Court also ruled that the Wisconsin court had no authority to inquire into the proceedings of a federal court "by habeas corpus or by any other process." *Id.* at 525–26 (emphasis omitted).

281. See 1 BOUDIN, *supra* note 22, at 481; SWISHER, *supra* note 263, at 670; 2 WARREN, *supra* note 22, at 342–43.

282. Wisconsin Resolutions, March 19, 1859, in STATE DOCUMENTS, *supra* note 184, at 303–05; see also SWISHER, *supra* note 263, at 668; 2 WARREN, *supra* note 22, at 340–41.

section twenty-five even while *Abelman* was under consideration, members from Northern and Western states denounced the Court in strong terms.²⁸³ Senator Doolittle of Wisconsin, for example, ridiculed the “‘Federal doctrine of judicial supremacy’” that had appeared so prominently in Taney’s opinion.²⁸⁴ Doolittle even went so far as to praise the courts of Virginia and Georgia for having disregarded the Court’s mandates in the past, as did Senator Hale of New Hampshire.²⁸⁵

Once again, though, the crisis passed. The Wisconsin resolutions, like the Virginia resolutions that had followed *Cohens v. Virginia*,²⁸⁶ failed to spark a national campaign.²⁸⁷ *Abelman* may have alerted Northerners to the dangers of Supreme Court review, but it had caused Southerners to reconsider their opposition.²⁸⁸ In a speech on the Senate floor, Robert Toombs of Georgia denounced Wisconsin’s “‘infidelity’” to the Constitution and criticized its assertion of supremacy over the federal courts.²⁸⁹ In Wisconsin, federal authorities rearrested Booth, this time placing him in a federal customs house for safekeeping.²⁹⁰ After a drawn-out saga, which included at least one rescue and recapture, Booth received a pardon from President James Buchanan on the day before Abraham Lincoln’s inauguration in 1861.²⁹¹

III. SOVEREIGNTY, COMPLIANCE, AND THE WTO: LESSONS FROM AMERICAN HISTORY

Abelman represents the last serious challenge by a state court to the idea of Supreme Court review.²⁹² The Civil War, which broke out two years later, put an end to questions about the Court’s authority to review

283. See 2 WARREN, *supra* note 22, at 333–36, 345–48; see also CONG. GLOBE 35th Cong., 1st Sess. 1703 (1858) (remarks of Sen. Pugh); *id.* app. at 72–76 (1859) (remarks of Rep. Bliss).

284. 2 WARREN, *supra* note 22, at 346–47.

285. See *id.* at 346.

286. 19 U.S. (6 Wheat.) 264 (1821). For a discussion of *Cohens*, see *supra* text accompanying notes 179–208.

287. For a discussion of the Virginia resolutions, see *supra* text accompanying note 184.

288. See 2 WARREN, *supra* note 22, at 348–49.

289. *Id.* at 348.

290. See SWISHER, *supra* note 263, at 671.

291. See *id.* at 671–72; A.J. Beitzinger, *Federal Law Enforcement and the Booth Cases*, 41 MARQ. L. REV. 7, 32 (1957).

292. See RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 507 (4th ed. 1996) (“The constitutional validity of the Court’s jurisdiction to review state court decisions has not been seriously challenged in the contemporary era.”).

the judgments of state courts.²⁹³ There have been grumblings about the Court's exercise of jurisdiction in particular cases,²⁹⁴ most notably the school desegregation cases in the 1950s,²⁹⁵ and resistance to particular decisions.²⁹⁶ On the whole, though, the Court's authority to review the judgments of state courts has become, since Appomattox, an accepted feature of American jurisprudence.²⁹⁷

The history of Supreme Court review has interesting implications for today's debate on the WTO. While there are significant differences between the two institutions—differences I discuss below—the Court and the WTO are alike in one essential respect.²⁹⁸ Both are centralized tribunals that purport to decide whether constituents' laws conform to external standards. And, just as the antebellum Court had to establish its authority to determine whether state laws conformed to federal norms, the WTO must establish its authority to determine whether national laws conform to international norms. Indeed, as we have seen, the arguments made in today's debate on the WTO greatly resemble those made earlier in the context of Supreme Court review.²⁹⁹

The nineteenth-century history suggests, however, that both sides in today's debate exaggerate the likely impact of the WTO on member nations. To see why, one must appreciate the factors that favored establishment of Supreme Court review in early nineteenth-century America. In its struggle to assert authority over state courts, the Court had several advantages. To begin, the Court asserted jurisdiction under an express statutory grant, contained in one of the first pieces of legislation that Congress adopted.³⁰⁰ As the Court's supporters repeatedly observed, Congress conferred this authority on the Court without recorded dissent,

293. See Steve J. Boom, *The European Union After the Maastricht Decision: Will Germany Be the "Virginia of Europe?"*, 43 AM. J. COMP. L. 177, 199 (1995); Goldstein, *supra* note 22, at 155, 166.

294. See Warren (pt. 2), *supra* note 22, at 185–89.

295. *Brown v. Board of Education*, 347 U.S. 483 (1954); see FALLON ET AL., *supra* note 292, at 507; Boom, *supra* note 293, at 200. For examples of resolutions criticizing Supreme Court review in light of the *Brown* decision, see 1 RACE REL. L. REP. 435, 435–47 (1956).

296. Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 100 (1998) (discussing "willingness of democratic institutions to resist Court rulings" on abortion, affirmative action, school prayer and other subjects).

297. See FALLON ET AL., *supra* note 292, at 507; see also 16B WRIGHT ET AL., *supra* note 21, § 4006, at 129; cf. Friedman, *supra* note 22, at 340–41 (discussing how disputes about the Court's supremacy subsided following the Civil War).

298. See *infra* text accompanying notes 315–326 (describing differences between the Court and WTO).

299. See, e.g. *supra* text accompanying notes 23–24, 209, 250, 277.

300. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85–87; see HAINES, *supra* note 22, at 120. For the text of § 25, see *supra* note 150.

and the Court exercised it without incident for roughly a quarter-century.³⁰¹

The Court asserted jurisdiction, moreover, under a constitution that established it as part of a new national government.³⁰² In that context, arguments about the need for uniformity carried great weight. The Constitution granted Congress significant legislative powers, including, among other things, the power to collect taxes, to regulate foreign and interstate commerce, to raise armies, and to declare war.³⁰³ If state courts could adopt independent interpretations of federal law, they could easily frustrate these powers.³⁰⁴ Allowing state courts to go their own way on federal questions could, in Webster's words, render "the General Government . . . good for nothing."³⁰⁵

Other circumstances also favored the establishment of Supreme Court review. American judges and lawyers shared a common legal culture that could have eased the integration of state and federal courts into a unitary system.³⁰⁶ Americans shared a common history, the defining event of which had been a successful rebellion against British rule, an epochal struggle still in living memory.³⁰⁷ While they were not so homogeneous as one might think,³⁰⁸ Americans in the early nine-

301. See *supra* note 152 (discussing early history of § 25).

302. The Constitution did not expressly grant the Court authority to review state judgments, but the implication was clear. Article III gave the Court appellate jurisdiction of "Cases . . . arising under" federal law, U.S. CONST. art. III, § 2, cl. 2, and, as Justice Story pointed out in *Martin*, one could best read this language as extending to cases in state as well as federal courts. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 327–52 (1816); see also *supra* text accompanying notes 168–178 (discussing *Martin*).

303. U.S. CONST. art. I, § 8. Though the Constitution granted Congress significant powers, the Framers clearly contemplated that the federal government would have far more limited authority than it has come to exercise in the twentieth century. See, e.g., John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 205–06 (1997).

304. See *supra* text accompanying notes 174–177 (discussing views of Story), 193 (discussing views of Marshall), 230–233 (discussing views of Webster), 278 (discussing views of Taney).

305. CONG. DEB. 78 (Jan. 27, 1830). For further discussion of Webster's views, see *supra* text accompanying notes 230–233.

306. For good sources on this culture, see THE LEGAL MIND IN AMERICA (Perry Miller ed., 1962); PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 99–265 (1965); WHITE, *supra* note 153, at 76–156. The culture derived largely from English norms and practice. Writing in 1833, Joseph Story confidently asserted that the English common law was America's "birthright and inheritance," the "foundation[]" for "[t]he whole structure of our present jurisprudence." STORY, *supra* note 169, § 79, at 65. This was a somewhat controversial claim when Story made it, see MILLER, *supra*, at 105, 115, 125, but his did come to be the accepted view. See Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1524 (1997).

307. See THE FEDERALIST NO. 2, at 38 (John Jay) (Clinton Rossiter ed., 1961) [hereinafter FEDERALIST NO. 2].

308. See DONALD, *supra* note 226, at 5–9.

teenth century were united, as Jay had observed in *The Federalist*, by many common "manners and customs": by and large, they spoke the same language, practiced much the same religion, and had similar political institutions.³⁰⁹ In short, early nineteenth-century Americans possessed a sense of common identity, a fact confirmed by the surge in nationalism that followed the War of 1812.³¹⁰

Notwithstanding all these factors, the Court found it impossible, over a period spanning more than forty years, to assert its authority over recalcitrant states. While states accepted the Court's judgments most of the time, they did not hesitate to ignore them where they believed that important state interests were at stake:³¹¹ real property and anti-lottery laws in Virginia,³¹² for example, or the administration of Indian lands in Georgia,³¹³ or abolitionism in Wisconsin.³¹⁴ And the WTO stands in a much weaker position than the Court did in the early nineteenth century. No legislation grants the WTO jurisdiction over national courts. As we have seen, WTO rulings lack effect in national courts.³¹⁵ Members that fail to comply with rulings may face retaliation from aggrieved parties, but their courts can continue to apply domestic law, whatever the WTO decides.³¹⁶ For domestic purposes, WTO rulings are little more than advisory opinions, quite different in nature from the binding judgments authorized by the Judiciary Act of 1789.³¹⁷

Unlike the Court, moreover, the WTO does not act as part of a government that has significant regulatory responsibilities. The document that establishes the WTO is not a constitution, but a trade treaty. It confers nothing like the range of prescriptive authority that article I grants

309. FEDERALIST NO. 2, *supra* note 307, at 38; *see also* JESSUP, *supra* note 22, at 26 (describing growing network of national economic institutions).

310. *See id.* at 20–33; BAILEY, *supra* note 227, at 222–42; *cf.* JESSUP, *supra* note 22, at 25–26 (arguing that surge in nationalism following War of 1812 was short-lived).

311. *See* Goldstein, *supra* note 22, at 155–56.

312. *See supra* text accompanying notes 153–208 (discussing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)).

313. *See supra* text accompanying notes 210–225, 244–245 (discussing Cherokee cases, particularly *Worcester v. Georgia*, 31 U.S. (6 Pet.) 557 (1832)).

314. *See supra* text accompanying notes 262–291 (discussing *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1859)).

315. *See supra* text accompanying notes 89–91. For purposes of the United States, this is made clear by section 102 of the Uruguay Round Agreements Act, which denies effect to any GATT provision, or the application of any GATT provision, that is inconsistent with United States law. *See supra* note 91 and accompanying text.

316. *See supra* text accompanying notes 86–90.

317. For more on the Judiciary Act of 1789, *see supra* text accompanying notes 149–52.

Congress.³¹⁸ While the WTO can act in a legislative capacity in some circumstances—for example, by adopting waivers, interpretations, or amendments³¹⁹—voting procedures are “extremely cumbersome,”³²⁰ involving various supermajority and unanimity requirements.³²¹ And “secession” is always an option. Under the WTO Agreement, members can withdraw from the organization, for any reason, on six months notice.³²²

Finally, WTO members share little in the way of culture or history.³²³ To be sure, they have some common goals. Membership in the WTO suggests a commitment to the principles of free trade, for example. But there exists nothing like the commonality of experience and identity that united early Americans.³²⁴ The 134 nations that make up the WTO—nations as diverse as Pakistan, Denmark, and the Dominican Republic—have widely different customs, values, economies, and regimes.³²⁵ As a consequence, members are likely to feel less attachment for the WTO than states did for the Court. Members are more likely to view WTO rulings as the pronouncements of a remote and alien institu-

318. See *supra* text accompanying note 303 (discussing U.S. CONST. art. I); cf. Reitz, *supra* note 4, at 599 (observing that WTO lacks significant legislative functions). But cf. Nichols, *supra* note 19, at 692 (suggesting broader scope for WTO’s legislative authority).

319. See WTO Agreement art. 9(2) (adoption of interpretations), art. 9(3) (adoption of waivers), art. 10 (adoption of amendments).

320. Shell, *supra* note 8, at 850.

321. The membership may adopt waivers and interpretations on a three-fourths vote. See WTO Agreement arts. 9(2), 9(3). Amendments are adopted on a two-thirds vote, provided they do not affect members’ rights and obligations. See *id.* art. 10(1). Amendments that affect members’ rights and obligations are adopted by a two-thirds vote, but apply only to those members who accept them, though three-fourths of the membership can decide that members that do not accept the amendments shall be free to withdraw from the organization. *Id.* art. 10(3). Certain amendments, including amendments to the DSU, must be unanimous. *Id.* arts. 10(2), 10(8). For further description of these and other voting requirements, see JACKSON ET AL., *supra* note 5, at 311–13.

322. See *supra* text accompanying note 141; see also Perez, *supra* note 142, at 326 (suggesting that right to secede undercuts notion that “WTO law should be understood as a supranational constitution”).

323. See Nichols, *Trade Without Values*, *supra* note 19, at 695–96. Recently, some commentators have asserted the existence of a global culture, based on Western, rights-oriented ideologies and promoted by advances in telecommunication. See Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1089 (1996) (discussing arguments); see also Lawrence M. Friedman, *Nationalism, Identity, and Law*, 28 IND. L. REV. 503, 507 (1995) (discussing consumer- and rights-consciousness as elements of an international mass culture). There is something to this, but one can easily overestimate the impact of the new “consumerism.” See Movsesian, *supra*, at 1093; see also Trimble, *supra* note 19, at 1953–54.

324. See *supra* text accompanying notes 306–310.

325. For the membership of the WTO, see *Members*, *supra* note 6.

tion, particularly given the manner in which panelists receive their appointments and the secretive nature of panel proceedings.³²⁶

Given its comparatively weak position, one would expect the WTO to be even less successful in obtaining members' compliance than the Court was in the early nineteenth century. In light of the American experience, it seems safe to predict that WTO members will defy adverse rulings whenever they believe that vital national interests are at stake. Indeed, even at this early date, when relatively few disputes have reached the implementation stage, one can detect signs of resistance.³²⁷ In both the banana-imports and hormones disputes, the EC has declined to change its laws in response to adverse rulings—despite rulings authorizing retaliation by the complaining parties.³²⁸

All this is not to say that members will never implement adverse rulings. Just as states did, members may decide that compliance is a sensible strategy, much of the time: complying with an adverse ruling may serve some long-term national interest, like encouraging cooperation from other members, or discouraging protectionist agitation at home.³²⁹ Circumstances may change, moreover, in ways that render the WTO more effective. If members decided to grant rulings direct effect in national courts, for example, that could significantly increase the organization's influence.³³⁰ As things now stand, though, the nineteenth-century history

326. On the appointment of panelists, and the secretive nature of panel proceedings, see *supra* text accompanying notes 132–137.

327. See *supra* text accompanying notes 100–104; see also Reif & Florestal, *supra* note 87, at 756.

328. See *supra* text accompanying notes 102–104 (discussing banana-imports and hormones disputes).

329. See Shell, *supra* note 8, at 835, 864–66 (discussing “Regime Management Model” for WTO); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2632–33 (1997) (book review) (discussing states' compliance with international norms generally); *supra* text accompanying notes 117–121 (discussing arguments that DSU will promote states' compliance with international trade norms).

330. Formal authority is not the only factor that can lead to a consolidation of power in a supranational body. Take the European Union, for example. Under the Treaty of Rome, the European Court of Justice has authority to issue “preliminary” interpretive rulings on questions of European law that national courts refer to it. Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 *AM. J. COMP. L.* 421, 423–45 (1996) (discussing article 177 of Treaty of Rome). As a formal matter, these rulings do not bind national courts. See *id.* at 436. As a practical matter, though, national courts routinely comply. See *id.* at 426; see also J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2420–21 (1991). As a result, ECJ judgments have “roughly the same effect as judgments issued by domestic courts in member states.” Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 292 (1997). Despite the lack of formal appellate authority, the ECJ has succeeded in making national courts part of “a unitary system of judicial review.” Weiler, *supra*, at 2420.

suggests that the WTO will have a less profound impact on its member states than the current debate implies.

CONCLUSION

The WTO's mechanism for resolving trade disputes has caused a great deal of controversy. In some ways, this is understandable. Particularly for Americans, the notion that a supranational body might conduct judicial proceedings and declare national laws "invalid" is a startling one. As this article has shown, though, one can easily exaggerate the effect WTO rulings are likely to have on member states. It took several decades and a civil war for the Court to establish its authority over states of the union. If the American experience with Supreme Court review is any guide, the WTO presently represents neither the threat to sovereignty its critics decry, nor the advance for international compliance its advocates anticipate.

There are reasons to doubt the usefulness of the ECJ as a model for the WTO, however. Unlike the WTO, the EU possesses significant legislative and administrative powers. "[T]here is important EU legislation in such fields as the environment, worker and consumer protection, gender equality, corporate law and securities regulation, and taxation." JACKSON ET AL., *supra* note 5, at 188. See generally RALPH H. FOLSOM ET AL., EUROPEAN UNION LAW AFTER MAASTRICHT (1996) (reviewing substantive EU law). Moreover, the commonality of the European experience provides a context for political integration that the WTO lacks. See Nichols, *Trade Without Values*, *supra* note 19, at 694; see also *supra* text accompanying notes 323–325 (discussing lack of commonality among WTO members).