THE EVOLVING ARCHITECTURE OF NORTH AMERICAN INTEGRATION

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Given its potential significance for democracy, sovereignty, government, governance, and justice in each of Canada, the United States, and Mexico, North American integration qua *integration has thus far received surprisingly little attention from legal scholars and social scientists. While an expanding body of research explores the dynamics of continental integration in other contexts (especially Europe) and/or examines the meaning of globalization, regionalism, and multilateral internationalism in a general sense, the specific constitution of an integrated North American space remains largely undertheorized. This Article aims to advance the literature in this area by examining legal discourse as an example of the integrative processes by which North America is constructed as a region. Specifically, it examines a series of proceedings arising from a challenge by the United Parcel Service of America Inc. ("UPS") to Canadian policies and practices in the non-monopoly courier market under the North American Free Trade Agreement ("NAFTA"). While explicitly invoking the terms and conditions of NAFTA, UPS's claims call into question the ground upon which NAFTA may be said to operate: namely, an ideational, juridical, and physical space called 'North America.' The author argues that these proceedings recognize and form part of something we might call* integration discourse*, installing or (re)inscribing integration as part of a conceptual or ontological framework that plots particular notions of nationalism, regionalism, and globalization in relation to one another; naturalizes a nascent body of* integration law *that connects and defines national, regional, and global identities; and au-*

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thorizes specific actors, positions, and foundational concepts that serve, in part, to constitute North America as a distinct—and distinctly integrated—region.

"We must not imagine that the world turns towards us a legible face which we would have only to decipher . . . ."[1]

INTRODUCTION

This Article examines legal discourse emerging from a relatively recent dispute[2] arising under the North American Free Trade Agreement ("NAFTA"),[3] as one example of the integrative processes by which 'North America' is constructed as a 'region.' It starts from the view that the integration[4] or production of a North American space, as something distinct from both the nations that comprise it and the larger regions within which it operates, is socially constructed through legal, economic, and political processes. In this view, "social reality does not fall from heaven,"[5] but is constructed and reproduced by the practices of constitutive and constituted actors. So—to the questions what is North America? what is North American integration?—there may be as many answers as there are combinations of academic disciplines and theoretical frameworks. But for constructivists,[6] "[t]here are no 'natural regions,' and

1. Thomas Diez, *Speaking 'Europe': The Politics of Integration Discourse*, 6 J. EUR. PUB. POL. 598, 603 (1999) (quoting Michel Foucault, *The Order of Discourse*, *in* LANGUAGE AND POLITICS 127 (Michael J. Shapiro ed., 1984)).

2. The proceedings are identified *infra* notes 16–23 and accompanying text.

3. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

4. While I expand on the meaning of North American integration *infra* Part II, let me say two things here. First, when I say 'integration,' I mean it in its ordinary sense—the 'act of combining into an integral whole' or 'into a community.' Second, the relationships among Canada, the United States, and Mexico are sufficiently dialectical that an integrated North America is emerging in a form that cannot be accurately described as merely additive or multi-lateral.

5. Thomas Risse, *Social Constructivism and European Integration*, *in* EUROPEAN INTEGRATION THEORY 160 (Antje Wiener & Thomas Diez eds., 2004).

6. In the European literature (including legal scholarship), *social constructivism* and *constructivism* are used almost interchangeably. This may be because European scholars understand the word 'social' in this context not to be a *limiting* qualifier of 'constructivism' but, rather, a term that signals the overwhelmingly *social character* of economic, cultural, legal, and political dimensions of constructivism. However, American readers (steeped in different sorts of intellectual traditions and thematics) may be predisposed to read the word 'social' here as indicative of a conceptual or empirical *distance* from economic, political, and/or legal dynamics. Or, they may find the phrase 'social constructivism' confusingly similar to 'social constructionism' (a term of art which predominates in anthropological

definitions of 'region' and indicators of 'regionness' vary according to the particular problem or question under investigation."[7] Thus, "it is how political actors perceive and interpret the idea of a region and notions of 'regionness' that is critical: all regions are socially constructed and hence politically contested."[8]

With very few exceptions—Claudia Fabbri's thoughtful examination of the South American common market being one of them[9]—the use of constructivism as a theoretical framework for examining regional integration has been limited to the case of Europe. But there is emerging interest in this approach for the study of North America and North American integration.[10] As a theoretical framework, its explanatory and normative promise is this: by foregrounding symbolic and identity-inscribed values, it helps account for a variety of behaviors that might otherwise be viewed as unlikely, irrational,[11] or contra-

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and sociological literature and which bears slightly different, discipline-specific meanings therein). Consequently, I have decided to use the term 'constructivism' (for the most part) in order to reduce the likelihood of these particular misreadings arising. In doing so, I intend to signify a capacious definition of constructivism, which includes legal, economic, cultural, and institutional dimensions—each of which I understand to be social in nature. I elaborate further on the meaning of constructivism *infra* Part II.

7. Andrew Hurrell, *Regionalism in Theoretical Perspective*, *in* REGIONALISM IN WORLD POLITICS: REGIONAL ORGANIZATION AND INTERNATIONAL ORDER 38 (Louise Fawcett & Andrew Hurrell eds., 1995), *quoted in* Laura MacDonald, *Canada and the Politics of Integration*, *in* THE POLITICAL ECONOMY OF HEMISPHERIC INTEGRATION: RESPONDING TO GLOBALIZATION IN THE AMERICAS 219, 224 (Diego Sánchez-Ancochea & Kenneth C. Shadlen eds., 2008). On the importance of relational theory in the construction of social structures and institutions, see generally Anthony Giddens, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1986).

8. Hurrell, *supra* note 7, at 38–39.

9. Claudia M. Fabbri, *The Constructivist Promise and Regional Integration: An Answer to 'Old' and 'New' Puzzles. The South American Case* (University of Warwick, Dep't of Politics and Int'l Studies, CSGR Working Paper No. 182/5, 2005), *available at* http://www2.warwick.ac.uk/fac/soc/csgr/research/workingpapers/2005/wp18205.pdf. Other exceptions are noted by Francesco Duina and Laura MacDonald. *See* FRANCESCO DUINA, THE SOCIAL CONSTRUCTION OF FREE TRADE: THE EUROPEAN UNION, NAFTA, AND MERCOSUR 3–4 (2006) (arguing that ideologies of general application manifest themselves differently in different locations, depending on the norms, ideologies, and institutions of that area); MacDonald, *supra* note 7, at 224–30 (arguing that social constructivism helps explain Canada's enthusiasm for the proposed Free Trade Agreement of Americas, notwithstanding the fact that it would appear to run counter to its material interests).

10. Laura MacDonald, *supra* note 7; Stephanie Golob, *infra* note 11; and Francesco Diuna, *supra* note 9, exemplify this interest.

11. Stephanie R. Golob, *North American Beyond NAFTA? Sovereignty, Identity, and Security in Canada-U.S. Relations*, CANADIAN-AM. PUB. POL'Y (Canadian-American Center at the Univ. of Maine, Occasional Paper No. 52, 2002).

dictory, but together form something we might identify as process(es) of North American integration. At the same time, constructivism highlights the contingency of boundaries between sub-national, national, transnational, international and supranational environments, emphasizing the epistemological tension in how experiences in all these environments—including, and maybe especially, at their intersections—produce 'knowledge' about the 'region.' Just as importantly, it focuses attention on the 'local'—as both constitutive of, and constituted by, intersecting identities—in a framework that attempts to explain and theorize transnational, regional, and global processes. Finally, constructivism emphasizes the role of discourse in social construction. As Thomas Risse and Claudia Fabrri persuasively argue, "it is through discursive practices[12] that agents make sense of the world, construct and select certain interpretations while excluding others, and attribute meaning to their activities."[13]

Of course, a robust constructivist account of North America *qua* North America is beyond the scope of any one article. My ambition is more modest. Using constructivism as my point of departure and theoretical frame, I am here interested in the role of integration discourse in the construction of 'North America' and, even more narrowly, in the role of *legal discourse* in the integrative process or sets of processes. Building on the insights of discourse theorists and linguistic philosophers, I aim to draw attention to the independent role of legal discourse in the social construction of regional integration by focusing on one example: legal proceedings arising out of a challenge brought by the United Parcel Service of America, Inc. ("UPS")[14] against the Government of Canada under the North American Free Trade Agreement.

This Article proceeds as follows. I begin in Part I by elaborating on the meaning and relevance of constructivism and discourse analysis for specific questions about regionalism and integration in North America. This elaboration permits for a more directed inquiry into the potential for understanding the

12. I elaborate on the meaning of discourse *infra* Part II(B).

13. Fabbri, *supra* note 9, at 7 (internal footnote added); Risse, *supra* note 5, at 161.

14. According to its website, UPS—founded in 1907 as a messenger company—has grown into a $49.7 billion operation and is now the world's largest package delivery system. UPS: About UPS, Company History, http://www.ups.com/content/us/en/about/index.html?WT.svl=Footer (last visited Mar. 12, 2009).

UPS Proceedings[15] as both reflective and constitutive of integration. In Part II, I briefly sketch the history—or 'story'—of North American integration. As part of that sketch, I begin to develop definitions of integration and nationalism, the latter being obviously implicated in contests about the former. In Part III, I describe the proceedings that together make up the focus of my inquiry (together the "UPS Proceedings"). So that I can refer to them in Parts I and II, I will simply say here that they are:

- the UPS proceedings initiated against the Government of Canada under NAFTA,[16] alleging that Canada discriminated against UPS in contravention of its NAFTA obligations (the "NAFTA Proceeding");

- the UPS proceedings initiated by its Canadian lobbyist against the Government of Canada under *Canada's Access to Information Act*[17] ("Access to Information Act"),[18] seeking disclosure of certain documents allegedly relevant to UPS's claims in the NAFTA Proceeding (the "Federal Court of Canada Proceeding");

- the proceedings initiated by the Council of Canadians (the "Council"),[19] Canada's largest citizens' organization, and the Canadian Union of Postal Workers ("CUPW"),[20] to be added as parties or, in the alternative, to be permitted to file briefs as *amici*, in the NAFTA Proceedings[21] (the "Intervention Proceeding"); and

15. Set out *infra* notes 16–23 and accompanying text.

16. United Parcel Serv. of Am., Inc. v. Canada, ICSID (W. Bank), Award on the Merits in an Arbitration under Chapter 11 of the North American Free Trade Agreement, (issued May 24, 2007 and provided to the parties on June 11, 2007), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MeritsAward24May2007.pdf [hereinafter UPS Arbitral Award].

17. Access to Information Act, R.S.C., ch. A 1 (1985) (Can.).

18. Dussault v. Can. Customs and Revenue Agency, [2003] F.C. 973 (Can. Fed. Ct.), *available at* http://decisions.fct-cf.gc.ca/en/2003/2003fc973/2003fc973.html.

19. For a description of the organization, its mandate, and its campaigns, see The Council of Canadians, About Us, http://www.canadians.org/about/index.html (last visited Mar. 12, 2009).

20. For more information about CUPW, including its mandate and membership, see CUPW, About CUPW, http://www.cupw.ca/index.cfm/ci_id/6858/la_id/1.htm (last visited Mar. 12, 2009).

21. United Parcel Serv. of Am., Inc. v. Canada, ICSID (W. Bank), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae in an Arbitration under Chapter 11 of the North American Free Trade Agreement, (Oct. 17, 2001), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/IntVent_oct.pdf [hereinafter UPS Intervention Decision].

- the related actions initiated by the Council and CUPW in Ontario under the *Canadian Charter of Rights and Freedoms*,[22] challenging the constitutionality of the investor-state provisions of NAFTA[23] (the "Constitutional Challenge").

Then in Part IV, I argue that the UPS Proceedings present a unique opportunity for examining the ways in which legal discourses are constitutive of North American integration. Specifically, I argue that these proceedings recognize and form part of something we might call both *integration discourse* and *integration law*, installing or (re)inscribing integration as part of a conceptual or ontological framework that plots particular notions of nationalism, regionalism, and globalization in relation to one another, and naturalizes specific legal relationships between national, regional, and global identities. Given the potential significance of integration for nationalism and regionalism, it will be unsurprising to learn that contests in this juridical space invoke justificatory and legitimation narratives that seek to delimit who may participate in this discourse and what counts as a legitimate position within it.

I. SOCIAL CONSTRUCTIVISM AND DISCOURSE ANALYSIS: THE THEORETICAL FRAMEWORK

A. Constructivism

Thomas Risse argues that, "it is probably most useful to describe constructivism as based on a social ontology which insists that human agents do not exist independently from their social environment and its collectively shared system of meanings ('culture' in a broad sense)."[24] Applied to North America, constructivism instructs us to examine transnational regional integration as a set of interactive social processes and linked

22. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 (U.K.), *available at* http://laws.justice.gc.ca/en/charter/CHART_E.pdf [hereinafter Canadian Charter].

23. Council of Canadians v. Canada (Attorney General), [2005] O.J. 3422 (O.S.C.J. July 8, 2005), *aff'd* [2006] O.J. 4751 (Ont. C.A. Nov. 30, 2006). Application for leave to appeal to the Supreme Court of Canada were dismissed on July 26, 2007. *See* Supreme Court of Canada, SCC Case Information, Docket 31842, http://www.scc-csc.gc.ca/information/cms-sgd/dock-regi-eng.asp?31842 (last visited Mar. 23, 2009).

24. Risse, *supra* note 5, at 160.

practices, [25] through which its constituent parts—individuals, organizations, nations—are reproduced and transformed. In this sense, it is a (re)bordering[26] project. In contrast to the ways in which mainstream rationalist integration theories[27] ignore or minimize interactive processes of socialization and identity formation, social constructivism emphasizes the ideational[28] dimensions of regional integration. Regions (including the legal frameworks that support them) acquire symbolic and material meaning[29] in relationship with social actors who, in turn, acquire and redefine their own interests and their own identities by participating in these collective meanings.[30] The crucial point is co-constitution. Constructivists insist on the mutually co-constitutive relationship between actors and the social environments in which they are embedded.[31] Consequently, regionalism or regional integration is simultaneously an elaboration of self and the social construction of "non-regional others."[32]

At this juncture, one might ask the question—so what? In other words, why concern one's self—as a legal academic—with the arguably philosophical and sociological questions about

25. Foucault's understanding of the state as "a practice . . . a way of governing, a way of doing things, and a way too of relating to government," informs and frames my understanding of "integration" as a set of practices, as well as my view that government—and in particular "self-government"—is firmly implicated in the integrative process. MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–78, at 108–09, 277 (Michel Senellart et al. eds., Graham Burchell trans., 1st Am. ed. 2007); *see also* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977 (Colin Gordon ed. & trans., 1980).

26. I do not mean borders here in the positivist or Westphalian sense, but instead in the manner used by constructivist theorists such as Thomas Christiansen, Thomas Diez, Francesco Duina, and Antje Wiener. *See, e.g.*, DUINA, *supra* note 9; *see also* THE REBORDERING OF NORTH AMERICA: INTEGRATION AND EXCLUSION IN A NEW SECURITY CONTEXT (Peter Andreas & Thomas J. Biersteker eds., 2003).

27. *See* discussion *infra* notes 38–45 and accompanying text.

28. Constructivist scholars emphasize the centrality of ideas, norms, institutions, and identities to the formation of regional communities. MacDonald, *supra* note 7, at 224; *see also* Thomas Diez & Antje Wiener, *Introducing the Mosaic of Integration Theory*, *in* EUROPEAN INTEGRATION THEORY, *supra* note 5, at 2–3.

29. By symbolic, I mean mental representations of a physical space. By material, I mean the tangible connections that constitute the space, including markets, channels of cultural exchange, transnational social spaces, organizations, and the like.

30. Fabbri, *supra* note 9, at 6 (citing Alexander Wendt, *Constructing International Politics*, 20 INT'L SECURITY 71, 73 (1995)).

31. *See* Risse, *supra* note 5, at 160–61.

32. Ben Rosamond, *Discourses of Globalization and the Social Construction of European Identities*, 6 J. EUR. PUB. POL. 652, 659 (1999).

how regions come to be, how they interact with other organizations and institutions (including governments), and their legal significance for human interaction more broadly? We thus come to a central premise upon which my Article proceeds. Because of the profound effects of state institutions on the kinds of people we are and the lives we lead, the basic structure of society must be "the primary subject of justice."[33] Of course, justice is something with which we—legal academics—regularly concern ourselves. In the North American case, transnational regionalism implicates the basic structure of our society, including primary aspects of statehood and fundamental systems of governance, as well as many of the stated constitutional values of each of the NAFTA member-states, including democracy, sovereignty,[34] social welfare, and social justice.[35] In short, the stakes are high. Because constructivism focuses our attention on both material and symbolic dimensions of integration, as well as on the co-constitutive, interpretive, and dialectical features of regionalism, it permits for a robust and more complete account of North American integration, including its impact on statehood in Canada, the United States and Mexico. Similarly, emphasizing the constitutive effects of regional rules and norms enables us to study how "integration shapes social identities and interests of actors."[36] So, to put it less abstractly, constructivism presents the potential for meaningful study of how integration—including integration law—shapes both regional and national identities, as well as the symbolic and material interests of both regional and national stakeholders. As Risse convincingly argues, this reveals constructivism's political and analytical relevance.[37]

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33. JOHN RAWLS, A THEORY OF JUSTICE 7 (Harvard Univ. Press, 1971) (1921).

34. Sovereignty is as much a contested concept in this discussion as any other, but it is beyond the scope of this Article. For now, I simply mean to capture the simplest and most common understanding of sovereignty as having ultimate authority within national borders and the presumptive right to participate with other nations in the international order. For a contemporary survey of the many meanings of, and challenges to, the evolving concept of sovereignty, see SOVEREIGNTY IN TRANSITION: ESSAYS IN EUROPEAN LAW (Neil Walker ed., Hart Publishing 2006) (2003).

35. For example, a particular conception of 'the region' may establish the frameworks within which social, cultural, and legal norms are harmonized. *See* Laura Spitz, *At The Intersection of North American Free Trade and Same-Sex Marriage*, 9 UCLA J. INT'L L. & FOREIGN AFF. 163 (2004).

36. Risse, *supra* note 5, at 165. Risse identifies and develops these contributions of constructivism to studies of Europe in his essay; they seem equally relevant in the North American context. *See id.*

37. *Id.* at 164–65.

This is not to say that a constructivist account will tell the whole story; instead it may play the role of complement[38] to more mainstream integration theories, such as rationalism,[39] liberal institutionalism,[40] intergovernmentalism,[41] realism[42]

38. *Id*. at 161.

39. Rationalism emphasizes the role of reasoning in understanding the world and *obtaining* knowledge. While there are many strains, they all more or less operate from the premise that there are pre-existing truths in and about the world, truths about which knowledge can be discovered and understood through logic and reasoning, "without appeal to any empirical premises." J.O. URMSON & JONATHAN RÉE, THE CONCISE ENCYCLOPEDIA OF WESTERN PHILOSOPHY & PHILOSOPHERS 272 (Routledge 1991) (1960). Rationalism is especially prevalent within economic approaches to law. "From the economic perspective, human action is essentially rational, and the rationality of an action is a function of its costs and benefits to the agent." ANDREW ALTMAN, ARGUING ABOUT LAW 171 (2d ed. 2001).

40. Liberal institutionalism emphasizes the role of transnational institutions in responding to global problems created by modernization. As with other rationalist theories, it views states as rational utility maximizers, "locked into what game theorists call a Prisoner's Dilemma game." EDWARD A. KOLODZIEJ, SECURITY AND INTERNATIONAL RELATIONS 151 (2005). But "[a]t the same time [institutionalists] share constructivists' view that state preferences are configured in a process of socialization." Dirk Pulkowski, *Testing Compliance Theories: Towards U.S. Obedience of International Law in the* Avena *Case*, 19 LEIDEN J. INT'L L. 511, 519 (2006). Therefore, "state conduct [may] be analysed against the backdrop of an 'increasingly dense matrix of transnational interactions involving (components of) other states, inter-governmental institutions, corporations, and a whole range of cross-border groups and networks that are slowly evolving into a transnational civil society.' " *Id.* (quoting B. Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L LAW 345, 357 (1998)). "Theorists in this school have made a concerted effort to develop a conceptual framework for international relations theory that 'subsumes' realist thinking." KOLODZIEJ, *supra*, at 150; *see also* ROBERT KEOHANE, AFTER HEGEMONY, COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Robert Keohane, *'Governance' in a Partly Globalized World*, 95 AM. POL. SCI. REV. 1 (2001). See my discussion of 'realism' *infra*, note 42.

41. As with other terms on this list, intergovernmentalism is a relatively complex concept, and takes different forms (including, for example, pragmatic intergovernmentalism, liberal intergovernmentalism, and neo-realism). *See* Thomas Christiansen & Knud Erik Jørgensen, *The Amsterdam Process: A Structurationist Perspective on EU Treaty Reform*, EUROPEAN INTEGRATION ONLINE PAPERS (EIoP), Vol. 3, No. 1 (Jan. 15, 1999) at 7, *available at* http://eiop.or.at/eiop/pdf/1999-001.pdf. Nevertheless, some general observations can be made for my purposes. First, intergovernmentalist theories emphasize cooperation rather than integration. In this view, global regions are made up of individual nations that negotiate in their self (that is, national) interests. In that sense, it is a rationalist theory; it assumes previously constituted national identities; and it is actor or agent centered. *Id.* at 5. Second, it stands in contrast to 'supranationalist' or 'transgovernmental' integration theories. Jarle Tronal, Martin Marcussen & Frode Veggeland, *International Executives: Transformative Bureaucracies or Westphalian Orders?*, EUROPEAN INTEGRATION ONLINE PAPERS (EIoP), Vol. 8, No. 4 (2004) at 2, *available at* http:// eiop.or.at/eiop/pdf/2004-004.pdf. In some sense, this may be a matter of emphasis, but it plays out quite clearly in the context of

and instrumentalism.[43] This set of rationalist approaches to international relations may be well suited to substantive empirical research and relatively capable of describing the evolutionary markers of regional institutions.[44] We do not need constructivism, for example, to notice that NAFTA is a multilateral agreement between Canada, the United States and Mexico; that NAFTA represents a formalization of legal rules regulating certain kinds of relationships within North America; nor that the incidence of bilateral and multilateral trade and investment agreements has increased significantly in all regions of the world. But from within these theories, there is a tendency to think of North American integration as a recent phenomenon, connected (and limited) to the North American Free Trade Agreement. On this view, integration is a rationalist project within which various actors "seeking optimal solutions when confronted by sub-optimal conditions"[45] make "choices" from among a pre-existing set of menu-items—perhaps slowed by the tightening of U.S. borders since 9-11 but firmly grounded in the logic of a 'natural' geography.

Constructivism permits for a fuller account. Through a constructivist lens, we may observe several things. First, forces pushing in the direction of continental integration pre-

Europe where a debate rages about whether the European Union is intergovernmental or supranational.

42. Realism has gone through several incarnations, been reformulated, and split into several schools over the course of the last century. Still, in the context of international relations theory, these strains are united in at least two ways. First, they emphasize an independent reality—one that can be tested, observed, counted, and so on. In that sense, they are rationalist. URMSON & RÉE, *supra* note 39, at 273. Second, "[i]n its purest form, realists of different stripes identify the state as the key actor in international relations, whether as a solution to the anarchy of a state of nature (Hobbes) or as the dominant force in the relations of people and nations (Clausewitz and Thucydides)." KOLODZIEJ, *supra* note 40, at 128.

43. Instrumentalism is the idea that concepts, laws, policies, and theories can be used as tools (or instruments) (or means) towards a particular end. In this view, concepts, laws, policies, and theories are thus measured not by whether they are true or false or realistic or good or bad, but by how effective they are in achieving ends, or explaining or predicting phenomena. Donald Davidson, *Practical Reason and the Structure of Actions*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY *available at* http://plato.stanford.edu/entries/practical-reason-action/ (last updated Mar. 30, 2009). Essentially rationalist in frame, it can be distinguished from constructivism in this way: instrumentalists believe that 'means' can be used without fundamentally changing the agents who use them; constructivists believe that means and agents are co-constitutive.

44. Risse, *supra* note 5, at 165.

45. Rosamond, *supra* note 32, at 659.

date contemporary multilateral agreements by decades[46] and shape and constrain the social construction of interests and imperatives[47] within these agreements. These, in turn, serve to simultaneously challenge and support deepening integration. Such forces continue apace in sometimes unpredictable ways[48] and cannot be readily explained by geography *per se*. Thus, by emphasizing that "the interests of actors cannot be treated as exogenously given or inferred from a given material structure . . . [constructivism demonstrates that] . . . political culture, discourse, and the 'social construction' of interests and preferences matter."[49]

As stated above, it is beyond the scope of this Article to identify and examine the panoply of processes in play in the making and remaking of North America—processes that might be some combination of cultural, political, economic, or legal, and might occur at, or among some combination of, subnational, national, transnational, or supranational levels.[50] I

46. See, for example, the Reciprocity Treaty, U.S.-Can., June 5, 1854, 10 Stat. 1089; the Reciprocal Border Crossing Treaty, U.S.-Mex., Sept. 21, 1882, 22 Stat. 939; the various treaties and agreements making up the Organization of American States (Organization of American States Charter, Apr. 30, 1948, 119 U.N.T.S. 3) in which Mexico's and the United States' memberships were ratified in the 1950s, and to which Canada became a party in 1990; the North American Air Defense Command, U.S.-Can, May 12, 1958, 9 U.S.T. 538; the Agreement Concerning Automotive Products, U.S.-Can., Mar. 9, 1965, 17 U.S.T. 1372 (entered into force provisionally January 16, 1965); the Understanding Regarding Subsidies and Countervailing Duties, U.S.-Mex., Apr. 23, 1985, Temp. State Dep't No. 86-149, Hein's No. KAV 1395; and the Understanding Concerning a Framework of Principles and Procedures for Consultations Regarding Trade and Investment Relations, U.S.-Mex., Nov. 6, 1987, T.I.A.S. No. 12,395. *See also* NORRIS C. CLEMENT ET AL., NORTH AMERICAN ECONOMIC INTEGRATION: THEORY AND PRACTICE 13 (2000). Indeed, the U.S.-Canada and U.S.-Mexico borders were already the two busiest land borders in the world prior to the adoption of NAFTA. Peter Andreas, *A Tale of Two Borders: The U.S.-Canada and U.S.-Mexico Lines After 9-11*, *in* THE REBORDERING OF NORTH AMERICA, *supra* note 26, at 1.

47. *See generally* Colin Hay & Ben Rosamond, *Globalisation, European Integration and the Discursive Construction of Economic Imperatives*, 9 J. EUR. PUB. POL'Y. 147 (2002) (arguing that economic imperatives are socially constructed).

48. This does not mean 9-11 had no effect on the trajectory of North American integration, only that to call it a 'slowing' of the process is at least inadequate, and probably inaccurate. 'Recalibration' probably does the best job of capturing the response of integrative processes to the political and legal changes flowing from 9-11. For a fuller account of integration in post 9-11 North America, see generally THE REBORDERING OF NORTH AMERICA, *supra* note 26. *See also* Golob, *supra* note 11; REQUIEM OR REVIVAL? THE PROMISE OF NORTH AMERICAN INTEGRATION (Isabel Studer & Carol Wise eds., 2007); THE POLITICAL ECONOMY OF HEMISPHERIC INTEGRATION, *supra* note 7.

49. Risse, *supra* note 5, at 161.

50. I do not mean to suggest that the lines between these categories are clear, but only to suggest that there are many dimensions and many processes—some

focus here on a single process: legal discourse. And within that broader category, I focus on a single set of proceedings: the UPS Proceedings. This focus is appropriate, however, as an emphasis on communication and discursive practices is paradigmatic of constructivism. Because the primary aim of this Article is to examine the role of legal discourse in the process of integration *from a constructivist frame*, I elaborate in the next section on the significance of words, language, and communicative utterances to a constructivist inquiry.

B. Discourse

For the purposes of my Article I adopt Michel Foucault's definition of discourse:

> We shall call discourse a group of statements in so far as they belong to the same discursive formation. . . . [I]t is made up of a limited number of statements for which a group of conditions of existence can be defined. Discourse is in this sense not an ideal, timeless form . . . [I]t is, from beginning to end, historical—a fragment of history . . . posing . . . its own limits, its divisions, its transformations, the specific modes of its temporality.[51]

Foucault's definition is particularly helpful in the context of law and society because it is not only attentive to history and temporality, but also concerned with power: "discursive practices establish power relationships in the sense that they make us 'understand certain problems in certain ways, and pose questions accordingly.' "[52] Moreover, discourse plays an impor-

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pushing in contradictory directions—that together make up 'integration' in North America.

51. MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 117 (A.M. Sheridan Smith trans., Routledge 1989) (1972).

52. Risse, *supra* note 5, at 164 (quoting Thomas Diez, *Europe as a Discursive Battleground: Discourse Analysis and European Integration Studies*, 36 COOPERATION & CONFLICT 5, (2001)); *see also* Henrik Larsen, *British Discourses on Europe: Sovereignty of Parliament, Instrumentality and the Non-Mythical Europe*, *in* REFLECTIVE APPROACHES TO EUROPEAN GOVERNANCE 111 (Knud Erik Jørgensen ed., 1997) ("For Foucault, language is linked to power in society and discourse is central in constituting identities and social beliefs."). Professor Stephen Clarkson offers a fascinating course in the Political Science department at the University of Toronto, called "How Canada and Mexico Construct and/or Constrain U.S. Power" (POL 397Y1), *summary available at* http://www.chass.utoronto.ca/~clarkson/courses/397%20SYLLABUS%2010%20viii%2007.pdf (last visited Mar. 30, 2009). In that class, students apply these Foucauldian insights to

tant role in legitimating specific systems of power and power relationships (and consequently, systems of domination and exploitation).

The constructivist emphasis on discourse rests on the premise that speaking entails both locutionary[53] and illocutionary[54] acts.[55] That is, language is always and simultaneously reflective and constitutive. Conversely, beliefs and identities are "social, meaningful, and embedded in language."[56] To date, the role of language has been largely under-theorized—some have suggested neglected[57]—in the process of regional integration. Nevertheless, there is a rich and growing literature developing discourse theory in a wide range of contexts, including, but not limited to, European integration.[58]

In the context of North American integration, discourse operates to authorize certain subjects to speak about—including to deny—integration, at the same time that it defines and delimits geopolitical and institutional identities. Therefore, if we want to understand behavior in this context, we might usefully examine what actors are saying about how they relate to their environment (and their role within it), and how their environment shapes, constrains and enables their identi-

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the question of the roles played by Canada and Mexico in constituting (but also constraining) American power.

53. A 'locution' or 'locutionary act' is an utterance regarded in terms of its intrinsic meaning or reference, as distinct from its function or purpose in context.

54. An 'illocution' or 'illocutionary act' is an action performed by saying or writing something.

55. *See* JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS 3, 6, 20, 94 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975); JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 19–22 (1969); John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1352 (2008); Muneer Ahmad, *Interpreting Communities: Lawyering Across Language Difference,* 54 UCLA L. REV. 999, 1034 (2007).

56. Larsen, *supra* note 52, at 109.

57. Diez, *supra* note 1, at 1.

58. *See, e.g.*, Diez, *supra* note 1; Risse, *supra* note 5; Larsen, *supra* note 52; Rosamond, *supra* note 32; Harald Müller, *Internationale Beziehungen als kommunikatives Handeln. Zür Kritik der utilitaristischen Handlungstheorien*, 1 ZEITSCHRIFT FUR INTERNATIONALE BEZIEHUNGEN 15 (1994); KEOHANE, *supra* note 40; Keohane, *supra* note 40; Christian Joerges, *'Deliberative Supranationalism'—Two Defenses*, 8 EUR. LAW J. 133 (2002); Christian Joerges, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, 2 EUR. LAW J. 105 (1996); Jürgen Neyer & Dieter Wolf, *Horizontal Enforcement in the EU: The BSE Case and the Case of State Aid Control*, *in* LINKING EU AND NATIONAL GOVERNANCE 201 (Beate Kohler-Koch ed., 2003); Jeffrey T. Checkel, *Constructing European Institutions*, *in* THE RULES OF INTEGRATION: INSTITUTIONALIST APPROACHES TO THE STUDY OF EUROPE 19 (Gerald Schneider & Mark Aspinwall eds., 2001).

ties. Thus, I am interested in what the UPS Proceedings might tell us about the perceptions of actors implicated in those proceedings and the relationship between their accounts of the world and the discourses in which they are embedded. These perceptions and relationships are of particular interest because the "way in which the context of action is perceived and understood is vital to the conclusions that actors draw about their strategic location, their interests and who they are."[59] In other words, discourse is not merely a reflection of the degree of accuracy and completeness of the information legal actors possess; it is also a reflection of their normative orientation towards their environment and potential future scenarios.[60] In this view, 'real' or 'objective' interests—of, for example, multinational corporations, national governments, non-governmental organizations or individual citizens—do not exist "independent from the discursive context in which"[61] they emerge.[62] Finally, and perhaps most importantly, given the ways in which discursive practices construct and limit meaning, discourse analysis focuses our attention on the ways in which actors attempt to establish fixed meanings as objective truths in order to privilege certain interpretations and exclude others. Legal discourse, in particular, operates to naturalize its form and content as rational and reasonable, at least to those trained in

59. Rosamond, *supra* note 32, at 659.

60. Hay & Rosamond, *supra* note 47, at 151.

61. MacDonald, *supra* note 7, at 224.

62. It should be noted, however, that while I am interested in the independent effect of discourse as "producing" integration, my perspective is also grounded in institutionalism. That is, I recognize an independent effect of legal discourse, but I also operate from the premise that discourse is itself the product of structural and organizational dynamics. *See generally* Yvonne Zylan, *Passions We Like . . . And Those We Don't: Anti-Gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body*, 15 MICH. J. GENDER & L. (forthcoming 2009) (describing discourse as emerging from " 'preexisting policy environments,' including temporally prior discursive streams, organizational practices, and institutional mandates"). I explore the institutionalist features of North American integration elsewhere. *See* Laura Spitz, The Institutionalization of North America (Apr. 15, 2009) (unpublished manuscript, on file with author); *see also* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills eds., 1946); RICHARD SWEDBERG, MAX WEBER AND THE IDEA OF ECONOMIC SOCIOLOGY (1998); TALCOTT PARSONS ON INSTITUTIONS AND SOCIAL EVOLUTION (Leon H. Mayhew ed., 1982).

that discourse.[63] Thus, the questions to which I turn later in this Article may be reduced to the following:[64]

- Who is allowed to (legitimately) speak about North American integration in the discursive arena?
- What counts as a sensible position?
- Which constructions of meaning have become so dominant that they are being taken for granted?
- What can the UPS Proceedings—as one example of legal discourse—tell us about the trajectory of regional integration more generally, if anything?

Before proceeding to Part II, however, I want to acknowledge briefly the limits of using *legal* discourse as the focus of inquiry.

C. The Limitations of Legal Discourse

The choice of legal discourse—over political or economic discourses, for example—is not without consequences. First, law as a specific set of institutions engages in a variety of rendering and disciplining processes that tend to sacrifice social, economic, and political complexity in favor of the production of discrete, singular, and disconnected 'questions.' Specifically, legal practice and procedure constrain the form and substance of argument, drastically limit what counts as relevant evidence bearing upon contested inquiries, and naturalize legal judgments in such a way as to produce the appearance of a deeper and broader analysis and resolution of a given conflict.[65]

Additionally—and perhaps most importantly—legal discourse, especially within the contours of the investor-state provisions of NAFTA, is a discourse of privilege. Focusing on legal discourse means ignoring the voices of many individuals living

63. Martin Shapiro, *Institutionalizing Administrative Space*, *in* THE INSTITUTIONALIZATION OF EUROPE 94, 99 (Alec Stone Sweet, Wayne Sandholtz & Neil Fligstein eds., 2001).

64. The first three questions come from Thomas Risse's summary of the questions being asked about European discourse by, for example, Ben Rosamond, Thomas Diez, and Henrik Larsen. *See* Risse, *supra* note 5, at 165.

65. YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY, AND DISCOURSES OF DESIRE, 37–41 (2009) (unpublished book manuscript, on file with author).

in Canada, the United States, and Mexico. Worse, it is a discourse that purports to deal with gender/class/race-neutral rules of general application *as gender/class/race-neutral rules of general application*. This has the effect of obscuring, discounting, or minimizing the ways in which NAFTA decisions constitute social categories of consequence for already disadvantaged groups within each of the NAFTA member-states. Focus on this discourse necessarily runs the risk of replicating the very systems it aims to unpack.

I acknowledge these limits. Yet, it is precisely for all these reasons that legal discourse requires study. The "naturalizing quality of law's intervention . . . makes it [a] powerful (and [ ] problematic) . . . source of social construction."[66] Legal discourse authorizes particular notions of regionalism that are limited and constructed but which, by virtue of their grounding in legal institutions, "enjoy[ ] the status of unreconstructed social fact."[67] Hence, its justificatory narratives require examination and interrogation. With examination and interrogation comes understanding, and with understanding comes the potential to intervene in systems of power.

II. INTEGRATION: REGIONALISM, NATIONALISM AND THE MAKING OF NORTH AMERICA

A. North American Integration

In order to examine the UPS Proceedings for what they might tell us about the meaning of North American integration, it is necessary to provide some background for the context within which the legal discourse arises. In this Part II, I begin by very briefly surveying the existing literature on what might be called 'North American integration,' even when it does not identify itself as such. In conducting this survey, I wish to emphasize that the literature itself forms a set of discursive practices. In other words, even when it promises to merely provide a descriptive account of already-existing social environments, the literature both constitutes and reflects regional integration. From there, I explicitly engage with discourses of integration in constructivist terms. I seek not to establish a definition so much as to make connected observations towards the goal of

66. *Id.* at 40.
67. *Id.*

building an argument for broadening the integration discussion.[68]

1. Integration Discourses: Surveying Existing Literature

Given the potential significance for democracy, sovereignty, government, and justice in each of the NAFTA member-states, surprisingly little attention—at least in a relative sense—has been paid to integration *qua* integration[69] in North America.[70] There are some important and exciting exceptions. Lawyers, judges, lawmakers, and legal scholars are talking with increasing frequency across the Canada-U.S. and U.S.-Mexico borders about the meaning of globalizing trends in North America for courts, for domestic legislators, for legal practice, and for legal education.[71] Former Canadian Supreme Court Justice, Madame Justice L'Heureux-Dubé, for example, wrote in 1998 about the potential for what she called the "cross-pollination" of domestic legal systems.[72] She argued that there had been an appreciable shift in how the U.S. Supreme Court used decisions from other jurisdictions. Whereas historically the Court had been more or less, depending on its make-up, receptive to hearing about cases from other jurisdictions,

68. I accept that I, too, am engaging in the very discourse I aim to examine; therefore, I try not to make claims about meaning beyond what is arguably necessary for examination of the discursive practices in Part IV. In each case, I acknowledge that it is a judgment call.

69. As opposed, for example, to integration as *imperialism*. In this account, the asymmetries between the United States and Canada, and between the United States and Mexico, are not so much constituted of and by integration, but instead presented as demonstrative of integration's impossibility. See, for example, the arguments of the Council of Canadians, available online at http://www.canadians.org/trade/index.html (last visited April 12, 2009).

70. There are huge bodies of literature devoted to integration, regionalism, globalization, multi-lateral inter-governmentalism, and so on; this is only to say that a relatively small portion is devoted to these discussions in and for *North America*. That is, they are developed as theories of general application, usually, but not always, in Europe. Again, these sources are extremely important and useful, but fuller engagement with their application to North America is required.

71. There are now at least five programs from which students can graduate simultaneously with both American and Canadian law degrees. They include the joint J.D./ LL.B. programs at the University of Colorado/University of Alberta; Detroit Mercy/University of Windsor; American University/University of Ottawa; Michigan State University/University of Ottawa; New York University/Osgoode Hall University.

72. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998).

its jurisprudence was now engaged in what she described as an interactive—and what Robert Ahdeih might call dialectical[73]—dialogue with the jurisprudence of other courts.[74] Equally important has been the recent work of constitutional comparativists, such as Mark Tushnet, Vicki Jackson, and David Schneiderman;[75] immigration reform scholars, such as Kevin Johnson and Bernard Trujillo;[76] environmental law scholars, such as Tseming Yang and Sanford Gaines;[77] labor law scholars, such as Katherine Stone;[78] and international trade scholars, such as

73. *See* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U L. REV. 2029 (2004); Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007); Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons From Coordination*, 73 MO. L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272967.

74. For a very recent discussion about transnational judicial dialogue, see Maira Rosaria Ferrarese, *When National Actors Become Transnational: Transjudicial Dialogue Between Democracy and Constitutionalism*, 9 GLOBAL JURIST 2 (2009).

75. *See, e.g.*, COMPARATIVE CONSTITUTIONAL FEDERALISM (Mark Tushnet ed., 1990); VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999); David Schneiderman, *Exchanging Constitutions: Constitutional Bricolage in Canada*, 40 OSGOODE HALL L.J. 401 (2002) [herinafter Schneiderman, *Exchanging Constitutions*]; David Schneiderman, *Comparative Constitutional Law in an Age of Globalization*, *in* COMPARATIVE CONSTITUTIONAL LAW: DEFINING THE FIELD 237 (Mark Tushnet & Vicki C. Jackson eds., 2002) [hereinafter Schneiderman, *Comparative Constitutional Law*].

76. *See, e.g.*, KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (NYU Press, 2007); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369 (2007).

77. *See, e.g.*, Sanford E. Gaines, *NAFTA As A Symbol on the Border*, 51 UCLA L. REV. 143 (2003); Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizens Submission Process: A Case Study of* Metales v. Derivados, 76 U. COLO. L. REV 443 (2005); *see also* PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996); Ignacia S. Moreno, James W. Rubin, Russell F. Smith III & Tseming Yang, *Free Trade and the Environment: The NAFTA, The NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L.J. 405 (1999).

78. *See, e.g.*, Katherine Stone, *A New Labor Law for A New World of Work: The Case for a Comparative-Transnational Approach*, 28 COMP. LAB. L. & POL'Y J. 565–81 (2007); Katherine Stone, *Rethinking Labour Law: Employment Protections for Boundaryless Workers*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW 155 (Guy Davidov & Brian Languille eds., 2006); *see also* Raymond Robertson, *Has NAFTA Increased Labor Market Integration Between the United States and Mexico?*, 19 WORLD BANK ECON. REV. 425 (2005); Risa L. Lieberwitz, *Linking Trade and Labor Standards: Prioritizing the Right of Association*, 39 CORNELL INT'L L.J. 641 (2006).

Todd Weiler, Guillermo Alvarez, and Jack Coe.[79] This is by no means a complete list in any category, nor a complete list of categories, but it is representative of the legal scholarship engaged in, and elaborating on, both intended and unintended consequences of deepening connections between Canada, the United States, and Mexico.[80] The difficulty with much of this scholarship, however, is that it largely presumes fully constituted rational actors[81] engaged with integration as a multilateral and intergovernmental project. Moreover, it proceeds on one of two assumptions: connections between Canada, the United States, and Mexico do not rise to the level of 'integration'; and/or, there is a fixed meaning for integration, upon which we all agree. Perhaps unsurprising, then, this scholarship rarely acknowledges its constitutive role in the process itself.

79. Within the broader category of international trade scholars, there is a robust literature specifically examining the investor-state arbitration provisions of NAFTA. See, for example, the collection of papers in NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, PRESENT PRACTICES, FUTURE PROSPECTS (Todd Weiler ed., 2004); Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2002); Jack J. Coe, Jr., *The State of Investor-State Arbitration—Some Reflections on Professor Brower's Plea for Sensible Principles*, 20 AM. U. INT'L L. REV. 929 (2005); Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381 (2003); Clyde Pearce & Jack J. Coe, Jr., *Arbitration Under NAFTA Chapter Eleven: Some Pragmatic Reflections Upon the First Case Filed Against Mexico*, 23 HASTINGS INT'L & COMP. L. REV. 311 (2000); David Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States–Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679 (2004). But while I would argue that this literature is both reflective and constitutive of North American integration, it does not explicitly engage with integration in those terms.

80. My own work theorizes the fact and potential for North American integration on the continuing relevance of the nation-state; the delivery of social services and protection of constitutional guarantees in Canada, the United States, and Mexico; and the shifting relationship between governance and government in North America. *See, e.g.*, Spitz, *supra* note 35; Laura Spitz, *The Gift of Enron: An Opportunity to Talk About Capitalism, Equality, Globalization and the Promise of a North American Charter of Fundamental Rights*, 66 OHIO ST. L.J. 315 (2005); Laura Spitz, *Theorizing the More Responsive State*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY (Martha Fineman ed., forthcoming 2009).

81. David Schneiderman is an exception. *See* Schneiderman, *Exchanging Constitutions*, *supra* note 75; Schneiderman, *Comparative Constitutional Law*, *supra* note 75; Schneiderman, *infra* note 107.

Scholarship outside the discipline of law—in economics, political science, and sociology, for example[82]—has the potential to move the discussion meaningfully out of or beyond the liberal/rationalist frames that predominate within legal scholarship. At the same time, however, much of this work has been firmly located within structuralist discourses, focused primarily—although not exclusively—on NAFTA as a trade and investment regime. This is not to say that it presumes NAFTA to be the whole story;[83] indeed, much of this work is focused on the relationship between NAFTA, the proposed Free Trade Area of the Americas ("FTAA")[84] and the Southern Common Market (Mercosur).[85] It is, rather, to point out that NAFTA is foregrounded as the arbiter of 'genuine' integration in North America. In other words, NAFTA is described in this work as having fallen short of, or exceeded, its 'promise.'[86] Again—notwithstanding its polysemic qualities—integration is rarely defined. Instead, as with the legal scholarship on the subject, this literature assumes a common understanding or meaning.

Existing scholarship engaged with North American integration is both exciting and important. Yet, it is inadequately

82. See, for example, the work of Diana Alarcón (Inter-American Institute for Social Development), Peter Andreas (University of Toronto), Thomas J. Biersteker (Brown University), Stephen Clarkson (University of Toronto), Norris C. Clement (San Diego State University), Benjamin Cohen (University of California, Santa Barbara), Theodore H. Cohn (Simon Fraser University), Charles Doran (John Hopkins University), Christina Gabriel (Carleton University), James Gerber (San Diego State University), Kelly Hugger (Colorado College), William Kerr (University of Colorado), Sergio Gómez Lora (Mexican Ministry of Trade and Industry), Laura MacDonald (Carleton University), Gordon Mace (Université Laval), Antonio Ortiz Mena (Centro de Investigación y Docencia Económicas), Isidro Morales (Universidad de las Américas), Enrique Dussel Peters (Universidad Nacional Autónoma de México), Isabel Studer (Mexican Ministry of Foreign Affairs), Gustavo del astillo Vera (Coegio de la Grontera Norte), Carol Wise (University of Southern California), Tamara Woroby (Towson University), and Eduardo Zepeda (University of California, Riverside).

83. See, for example, the collection of essays in NORTH AMERICA WITHOUT BORDERS (Stephen J. Randall ed., 1992), all of which predate NAFTA. *See also* GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN ECONOMIC INTEGRATION: 25 YEARS BACKWARD AND FORWARD (Industry Canada Research Publications Program: 2000).

84. Free Trade Area of the Americas, Third Draft FTAA Agreement (Nov. 21, 2003), *available at* http://www.ftaa-alca.org/FTAADraft03/Index_e.asp.

85. Treaty Establishing a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay (Treaty of Asuncion), Mar. 26, 1991, 30 I.L.M. 1041, *available at* http://www.sice.oas.org/Mercosur/instmt_e.asp (along with other Mercosur agreements).

86. See, for example, the full collection of essays in REQUIEM OR REVIVAL?, *supra* note 48.

specified and, consequently, limited in crucial respects. As already described in the preceding Subsections, constructivist inquiries may go some distance in alleviating these limitations and filling gaps in the literature. Consequently, it may assist in developing fuller understandings and theories of North American integration that, in turn, afford practitioners and scholars additional insight into integration's impact on statehood and national identities, as well as the constitutive effects of national identity discourses on the meaning of 'North America.' This Article aims to shift legal scholarship in the direction of constructivism. I begin by attempting in the section that follows to more clearly set out what I mean by 'integration.'

2. Reframing Integration Discourse: Elaboration and Interrogation

First, while 'integration' is a contested term, it must mean—at a minimum—the process of combining or integrating previously separate or differently divided groups into a new or larger whole. In the context of North America, it is marked by simultaneous: (a) deregulation at the domestic[87] or national level; and (b) increasing formalization, coordination, and institutionalization at the transnational and international levels. Of course, even this relatively simple definition puts further concepts on the table—such as what we might mean by the 'process of combining'[88] or 'whole.'[89] But the definition of regionalism helps here. Regionalism is also a contested term, but in its simplest articulation, it is defined as "consciousness of and loyalty to a distinct region,"[90] and the "development of a political or social system based on one or more such areas."[91]

87. It will be interesting to watch as the Obama administration and the Democratic Congress move to re-regulate areas of our lives that have been substantially de-regulated in the last twenty years. The extent to which this re-regulation pushes in the direction of, or away from, regional integration is an open question.

88. For example, this might be as simple as coordination or as complicated as constitutional pluralism.

89. For example, does this require the development of criteria against which we might measure its achievement? How do we know if we are moving towards a new 'whole'?

90. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003), *available at* http://www.merriam-webster.com/dictionary/regionalism. *See generally* REGIONALISM AND GOVERNANCE IN THE AMERICAS: CONTINENTAL DRIFT (Louise Fawcett & Mónica Serrano eds., 2005).

91. REGIONALISM AND GOVERNANCE IN THE AMERICAS, *supra* note 90.

Thus, regional integration might usefully be described as the dynamic development of political, economic, legal, and cultural (that is, social) systems and identities, *at the regional level*, pushing in the direction of new community loyalties that disrupt historical systems of political, economic, legal, and cultural organization.

Second, integration is a process or set of practices, and not a discrete outcome, simultaneously dynamic and evolving, constantly changing and adapting. It will not always look the same,[92] nor proceed at the same pace. It is not linear, nor path dependent (in the sense that it can be said to be on a particular 'track'). And it certainly need not look like other integrations—chiefly, Europe—in order to be integration. While the European Union ("EU") is a useful experiment for inquiry and comparison,[93] I am mindful of Stephen Clarkson's caution against understanding North America as "a variant—perhaps less developed, perhaps less structured—of Europe's more mature, more sophisticated system of transnational governance"[94] for the reason that we simply do not understand enough about North America yet to set the EU as the "conceptual *template* through which we construct our understanding of continental governance in North America."[95]

Third, while the process of North American integration does not begin or end with NAFTA, there is little doubt that NAFTA's implementation signaled a break from the "quiet diplomacy"[96] of the pre-CUSFTA,[97] pre-NAFTA North America. Just within the last two decades, there has been a rapid prolif-

92. For example, it makes some sense to describe North America as two bilateral integrations—Canada/United States and United States/Mexico. This is arguably shifting in the direction of a trilateral integration, but the fact of the shift does not make previous processes any less 'integrative.'

93. *See* NICHOLAS V. GIANAVIS, THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE EUROPEAN UNION (1998); Isabel Studer, *Obstacles to Integration: NAFTA's Institutional Weakness*, *in* REQUIEM OR REVIVAL?, *supra* note 48, at 53 (identifying differences between North America and Europe).

94. Professor Stephen Clarkson, Address at the Centre on North American Politics and Society, Carleton University, Mixed Blessing: Is the European Union More Help or Hindrance in Studying Continental Governance in North America? 2 (Feb. 8, 2002), *available at* http://www.chass.utoronto.ca/~clarkson/publications/index.html (follow the twenty-first hyperlink in the list).

95. *Id.* at 3.

96. Stephen Clarkson, *Continentalism: The Conceptual Challenge for Canadian Social Science*, *in* THE JOHN PORTER MEMORIAL LECTURES: 1984–1987, at 23–43 (1988).

97. Free-Trade Agreement, U.S.-Can., Dec. 22, 1987–Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CUSFTA].

eration and formalization of continent-wide rules[98] aimed at dismantling national institutions and harmonizing regulatory regimes in order to reduce (primarily economic) barriers between Canada, the United States, and Mexico. Many of these rules can be found in bilateral and multilateral agreements to which Canada, the United States, and Mexico are signatories, as well as agreements between national and sub-national institutions and organizations in each of the three countries. Most obvious are NAFTA—including the NAFTA side agreements[99]—and the treaties establishing the World Trade Organization,[100] but others include: the North American Security and Prosperity Partnership,[101] the Security and Prosperity Partnership Regulatory Cooperation Framework,[102] the North American Forum,[103] various tax coordination treaties,[104] and

98. CLEMENT ET AL., *supra* note 46, at 5.

99. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 8–14, 1993, 32 I.L.M. 1499; North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Nov. 1993, Sept. 8–14, 1993, 32 I.L.M. 1480; Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, U.S.-Mex., Nov. 16–18, 1993, 32 I.L.M. 1545.

100. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1143 [hereinafter collectively referred to as the WTO Agreements]; *see also* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 33 I.L.M. 1153 [hereinafter GATT].

101. The Security and Prosperity Partnership ("SPP") was established in March 2005 between the governments of Canada, Mexico, and the United States. It is described at http://www.spp.gov/ (U.S. government website) and http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/eng/h_00000.html (Canadian government website).

102. The SPP Regulatory Cooperation Framework is a key element of the SPP's Prosperity Agenda, aimed, as its title suggests, at harmonizing the regulatory framework(s) of Canada, the United States, and Mexico. *See* Canada/United States/Mexico SPP Regulatory Cooperation Framework, http://www.spp.gov/pdf/spp_reg_coop_final.pdf (last visited Mar. 12, 2009).

103. For years, the North American Forum ("NAF") met relatively secretly. Recently, the NAF established a public website and a more formal public presentation. The home page of the website describes its make-up and purpose as follows:

> The North American Forum (NAF) is Co-Chaired by former US Secretary of State George P. Shultz, former Mexican Secretary of Finance Pedro Aspe and former Alberta Premier Peter Lougheed. Its purpose is to advance a shared vision of a resilient North America—able to avoid shocks when possible and to withstand and rebound from shocks when necessary. The Forum's method is to convene leaders from the public, private and citizen sectors to identify those steps that can be taken to advance security, prosperity and quality of life on the continent. The NAF will explore actions that governments and private actors can take.

the Council of Great Lake Governors.[105] The resulting harmonization or institutionalization[106] of multi-jurisdictional and inter-systemic North American spaces presents both empirical and theoretical challenges for scholarly inquiry.[107]

Fourth, and relatedly, North American integration is not limited to the economy and therefore comprises more than so-called 'economic integration.' My understanding of continental integration thus departs from that of those who suggest that economic integration may not only be posited as a discrete category, severable from legal, social, and political integration(s), but also as fundamentally asocial.[108] Critical legal feminists (and others) have ably challenged claims that the economy operates outside and apart from culture or politics or

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> Invited participants are selected based on their commitment to these goals and their ability to effect positive change.

And from further down the first page of their website, under the heading "History": "The North American Forum is a community of Canadian, Mexican and American *thought leaders*, whose purpose is to advance a shared vision of North America . . . ." North American Forum, www.northamericanforum.org (last visited Mar. 12, 2009) (emphasis added).

104. A list of the significant treaties may be found in ARTHUR COCKFIELD, NAFTA TAX LAW AND POLICY (2005).

105. According to its website:

> The Council has one simple mission: To encourage and facilitate environmentally responsible economic growth through a cooperative effort between the public and private sectors among the eight Great Lakes States and with Ontario and Québec. Through the Council, Governors work collectively to ensure that the entire Great Lakes region is both economically sound and environmentally conscious in addressing today's problems and tomorrow's challenges.

Council of Great Lakes Governors, http://www.cglg.org/ (last visited Mar. 12, 2009).

106. Stephen Clarkson, *The View From the Attic*, *in* THE REBORDERING OF NORTH AMERICA, *supra* note 26, at 83.

107. I sidestep the question, here, of whether these might be more akin to legislative, administrative, constitutional (or some other kind of) rules. For an argument that NAFTA may be 'constitutional,' see David Schneiderman, *NAFTA's Taking Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 514 (1996) (internal footnotes omitted):

> I have argued elsewhere that NAFTA, though an international trade agreement, exhibits characteristics typical of constitutions. Three parallels to constitutionalism are evident: (1) NAFTA is a form of 'pre-commitment strategy' whereby present generations disable future generations from pursuing certain legislative goals – subjects are removed effectively from the legislative agenda; (2) it is not easily amended because its effects are not easily reversed; and (3) it is binding politically and, in some cases, juridically.

108. *Cf., e.g.*, CLEMENT ET AL., *supra* note 46 (proceeding on the assumption that it makes sense to talk about economic integration as something distinct from other kinds of integration(s)).

law. Indeed, there is a rich and persuasive literature that demonstrates the economy (like law) is itself social, cultural, and political.[109]

Moreover, even if it were possible to separate economic integration from other integrations, I am not persuaded that the forces organized around increasing (economic) integration actually *intend* to 'limit' integration to the economy.[110] For example, although the American government's public rhetoric has been and continues to be that NAFTA, the Security and Prosperity Partnership ("SPP"),[111] and the SPP Regulatory Cooperation Framework do not comprise an *integrationist* project (or part of an integrationist project),[112] its own admissions and priorities undermine this rhetoric. Launched in March 2005, for example, the SPP describes itself as "an ongoing dialogue that

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109. *Cf., e.g.*, Lauren Edelman, *The Centrality of the Economy to Law and Society Scholarship*, 38 LAW & SOC'Y REV. 181 (2004).

110. As another example, see the statement of former Mexican President Vicente Fox:

> So, too, is my dream of a [sic] creating a great Union of the Americas to rival the European Union and the economic tigers of Asia, harnessing the power of the world's largest economy to lift people out of the shadowy borders of poverty and into the bright light of promise. This is my American dream. An America of bridges, not walls. An America where gates of love once again welcome those caught in the barbed wire of hate. An American of open hearts and open arms, where today, we find too many closed minds.

VICENTE FOX & ROB ALLYN, REVOLUTION OF HOPE, at xvii (2007).

111. See, for example, "SPP Myths vs. Facts" on the U.S. Federal Government's SPP website, http://www.spp.gov/myths_vs_facts.asp (last visited April 9, 2009), and in particular:

> Myth: The SPP is a movement to merge the United States, Mexico, and Canada into a North American Union and establish a common currency.
>
> Fact: The cooperative efforts under the SPP, which can be found in detail at www.spp.gov, seek to make the United States, Canada and Mexico open to legitimate trade and closed to terrorism and crime. It does not change our courts or legislative processes and respects the sovereignty of the United States, Mexico, and Canada. The SPP in no way, shape or form considers the creation of a European Union-like structure or a common currency. The SPP does not attempt to modify our sovereignty or currency or change the American system of government designed by our Founding Fathers.
>
> . . . .
>
> Myth: The SPP infringes on the sovereignty of the United States.
>
> Fact: The SPP respects and leaves the unique cultural and legal framework of each of the three countries intact. Nothing in the SPP undermines the U.S. Constitution. In no way does the SPP infringe upon the sovereignty of the United States.

112. *Id.*

seeks to address common challenges, strengthen security and enhance the quality of life for the citizens of Canada, the United States, and Mexico"[113] "through greater cooperation and information sharing."[114] It is a "trilateral effort"[115] "premised on our security and our economic prosperity being mutually reinforcing."[116] And it "recognizes that [Canada, the United States, and Mexico] are bound by a shared belief in freedom, economic opportunity, and strong democratic institutions."[117] On the U.S. government's SPP website, the SPP is explicitly described as going beyond the economy:

> The SPP builds upon, but *is separate from*, our long-standing trade and economic relationships [with Canada and Mexico]. It energizes other aspects of our cooperative relations, such as the protection of our environment, our food supply, and our public health.[118]

Similarly, the SPP Regulatory Cooperation Framework, a key implementation element of the SPP agenda,[119] is aimed at harmonizing the regulatory frameworks of Canada, the United States, and Mexico in areas beyond trade: "By increasing regulatory cooperation, the federal governments of the United States, Canada and Mexico (the Partners) aim to lower costs for North American businesses, producers, governments and consumers; maximize trade in goods and services across our borders; *and protect health, safety, and the environment*."[120]

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113. *See* Security and Prosperity Partnership of North America, http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/eng/h_00000.html (last visited Apr. 9, 2009) (Canadian government website).

114. *See* Security and Prosperity Partnership of North America, http://www.spp.gov/ (last visited April 9, 2009) (U.S. government website).

115. *Id.*

116. *Id.*; *see also* Security and Prosperity Partnership of North America, http://www.spp-psp.gc.ca/eic/site/spp-psp.nsf/eng/h_00000.html (last visited Apr. 9, 2009) (Canadian government website).

117. *See* Security and Prosperity Partnership of North America, http://www.spp.gov/ (last visited Apr. 9, 2009) (U.S. government website).

118. *See id*. (emphasis added).

119. *See* Canada/United States/Mexico SPP Regulatory Cooperation Framework, http://www.spp.gov/pdf/spp_reg_coop_final.pdf (last visited Mar. 12, 2009).

120. *Id*. (emphasis added). According to the Council of Canadians, Canada's largest citizens' organization, "[t]here are over 300 initiatives in the SPP aimed at harmonizing North American policies on food, drugs, security, immigration, manufacturing, the environment and public health." The Council of Canadians, Integrate This!, Challenging the Security and Prosperity Partnership of North America, http://www.canadians.org/integratethis/ (last visited Apr. 9, 2009).

Fifth, North American integration, like globalization, is a product of, and made possible by, the convergence of several connected developments or transformations that are usefully understood as comprising a rupture, or critical break, from certain structures and concepts endemic to modernity. The first is tremendous changes in science and technology. The second is the massive global restructuring of capital. Together, these are "the motor and matrix"[121] of integration. The third is the global "turn toward neo-liberalism as a hegemonic ideology and practice."[122] This has permitted (so far) "the market and its logic . . . to triumph over public goods," making "the state . . . subservient to economic imperatives and logic."[123] And finally, the rhetorical conflation of democracy and capitalism has worked to both constitute and constrain integration.[124] All of these developments have worked to push in the direction of accelerating or deepening integration.

Finally, integration's contemporary evolution has been shaped by intracontinental forces we might loosely describe as nationalisms (particularly as sites of resistance to global hegemony and global capitalism) and regionalisms (particularly as extensions of the logic of global capitalism), as well as the extra- and trans-continental forces commonly described as 'globalization.'[125] It is complicated by the fact that nationalism, regionalism, and globalization often push in contradictory and conflicting directions.[126] It is further complicated by the fact that each of these—nationalism, regionalism, and globalization—display progressive and emancipatory, as well as oppressive, regressive, and negative, features.[127] Because the ways in

121. *See* Douglas Kellner, *Theorizing Globalization* 3, *available at* http://www.gseis.ucla.edu/faculty/kellner/essays/theorizingglobalization.pdf.

122. *Id.* at 5.

123. *Id.*

124. *See id.* at 6 ("Globalization also is constituted by a complex interconnection between capitalism and democracy, which involves positive and negative features, that both empowers and disempowers individuals and groups, undermining and yet creating potential for fresh types of democracy.").

125. *Cf.* Richard Kahn & Douglas Kellner, *Resisting Globalization*, *in* THE BLACKWELL COMPANION TO GLOBALIZATION 662 (George Ritzer ed., 2007); Kellner, *supra* note 121.

126. Kahn & Kellner, *supra* note 125.

127. Richard Kahn and Douglas Kellner provide a wonderful account of the breadth and depth of views advocating and criticizing 'globalization' for these reasons:

> The current forms and scope of worldwide resistance to globalization policies and processes is one of the most important political developments of the last decade. However, to speak singularly of 'resistance' is

which nationalism and regionalism intersect with integration are fundamentally co-constitutive, I conclude this Part II by briefly elaborating on the meaning of 'nationalism.'

B. Nationalism: Identities in the Making of Integration

Nationalism is a complicated and contested term, a full discussion of which is beyond the scope of this Article. I wish here to make only three points about nationalism and its connection to integration. First, as a historical phenomenon, nationalism is a relative newcomer.[128] This relatively simple point serves to remind us that national resistance to integration *for the reason* that integration upsets or threatens national identity is incomplete as far as reasons go. It is not enough to say we should continue to do it this way—and reject anything that challenges our ability to do it this way—because we *presently* do it this way. When confronted with this discourse, we ought to insist on (and interrogate) the substantive reasons behind the claim. In other words, resistance to integration for the reason that it challenges the Westphalian system requires elaboration. This elaboration will, in turn, give us important information about priorities and values in the various contests implicated at the intersection of nationalism, regionalism, and globalization.

Second, national identity is a product of social relationships, reflecting and constituting the identities of social actors within its political borders. At the same time—and in both similar and different ways—it produces, shapes, and constrains those same actors' relationships to the region(s) within which the nation-state finds itself. This explains why individuals might feel, for example, a sense of belonging in North America but remain ambivalent about—if not hostile to—something called North American 'integration.'[129] Regardless of how per-

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> itself something of a misnomer. For just as globalization must ultimately be recognized as comprising a multiplicity of forces and trajectories, including both negative and positive dimensions, so too must the resistance to globalization be understood as pertaining to highly complex, contradictory and sometimes ambiguous varieties of struggles that range from the radically progressive to the reactionary and conservative.

Id. at 662.

128. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 37–49 (1983).

129. *See* Risse, *supra* note 5, at 166–71 (examining these tensions in European integration).

suasively the historical and social contingency of nationalism can be demonstrated, its prevalence and import cannot be underestimated in the production of identity formation at the North American level.

Finally, a constructivist approach to the definition of 'nation' (and its formative cousin, 'nationalism') helps make sense of the possibilities presented by integration for remaking polities along differently drawn lines. Take, for example, Benedict Anderson's persuasive definition of the nation: "it is an imagined political community—and imagined as both inherently limited and sovereign."[130] "It is *imagined*," Anderson tells us, "because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."[131] It "is imagined as *limited* because even the largest of them, encompassing perhaps a billion living human beings, has finite, if elastic, boundaries, beyond which lie other nations."[132] None imagines itself to be 'coterminous' with humankind. "It is imagined as *sovereign* because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm."[133] And "[f]inally, it is imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship."[134] National impulses to resist integration, when considered through the lens of Anderson's definition, depend for their coherence on the constancy of those elements. Those elements, on the other hand, are inherently contingent. Clearly, when viewed as a social construct, the nation's 'natural' place in the scheme of things is revealed to be anything but. This Article does not intend to take these observations any further, but suggests that they are important aspects to keep in mind in thinking about transnational integration in the context of North America.

130. ANDERSON, *supra* note 128, at 15.
131. *Id.*
132. *Id.* at 16.
133. *Id.*
134. *Id.*

III. THE UPS PROCEEDINGS

Thus far I have provided a brief overview of both the theory and scholarly treatment of North American integration. I argue that this scholarship brackets important questions about the co-constitutive features of integration discourse, identity formation, and the practice of integration more generally. This reflects its rationalist and instrumentalist premises. In order to more fully account for the multidirectional and interactive forces in play in the making of North America, I propose applying a constructivist approach to questions about the fact, scope, and meaning of regional integration in North America. To restate the questions posed in Part II, this Article aims to move the constructivist account of North American integration forward by posing a narrow set of inquiries[135] about the UPS Proceedings *qua* legal discourse, namely:

- Who is allowed to (legitimately) speak about North American integration in the discursive arena?
- What counts as a sensible position?
- Which constructions of meaning have become so dominant that they are being taken for granted?
- What can the UPS Proceedings—as one example of legal discourse—tell us about the trajectory of regional integration more generally, if anything?

While these questions are simply put, the proceedings about which they inquire are factually complex. Thus, I begin here by outlining the essential facts, arguments, and procedural steps comprising the UPS Proceedings. Then, in Part IV, I examine the specific discourses deployed within the Proceedings in greater detail, in order to illustrate: the contested nature of claims about integration; the constitutive role of legal discourse in the production of symbolic and material conditions[136] in North America; and the privileging of legal discourse (and within that broader category, particular kinds of legal discourse) over other forms of discourse (and the legitimating effects of same).

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135. *See* Risse, *supra* note 5, at 165 (developing these inquiries in the European context).

136. *See* Diez, *supra* note 1, at 603.

A. The UPS Proceedings: A General Overview

In *United Parcel Service of America Inc. v. Government of Canada*, UPS alleged that the government of Canada had breached its obligations under NAFTA.[137] Very briefly, UPS argued that Canada subsidized the Canada Post Corporation ("Canada Post") and Purolator Courier Ltd. ("Purolator") (a subsidiary of Canada Post) in the non-monopoly courier market, and that these subsidies had the effect of discriminating against UPS on the basis of its nationality (American).[138] When it failed during the discovery stage of the NAFTA Proceeding to require Canada to reveal particular aspects of its contractual relationship with Canada Post, UPS initiated—through the office of its Canadian lobbyist, Dyane Dussault—the Federal Court of Canada Proceeding.[139]

Following UPS's initial complaint, the Canadian Union of Postal Workers ("CUPW") and the Council of Canadians (the "Council")[140] sought standing as parties or, in the alternative, *amici curiae*, before the NAFTA tribunal.[141] As employees of Canada Post and members of the Canadian public, their position was essentially: they had a direct interest in the subject of the proceeding and might be adversely affected by the award; they had "an interest in the broader public policy implications of th[e] dispute"; and they had "unique and distinct perspective[s] and expertise . . . that would be of assistance to th[e] Tribunal."[142] While their application for party standing was dismissed, they were permitted—together with the Chamber of Commerce of the United States of America—to file submissions as *amici*.[143]

At the same time, CUPW and the Council initiated a constitutional challenge to NAFTA in Ontario (Canada) arguing that the investor state provisions of NAFTA (relied on by UPS

137. UPS Arbitral Award, *supra* note 16, ¶ 1.

138. *Id.* ¶¶ 11–17.

139. Dussault v. Can. Customs and Revenue Agency, [2003] F.C. 973 (Can. Fed. Ct.), *available at* http://decisions.fct-cf.gc.ca/en/2003/2003fc973/2003fc973.html.

140. "[T]he Council of Canadians is Canada's largest citizens' organization." The Council of Canadians, About Us, http://www.canadians.org/about/index.html (last visited Mar. 12, 2009). For a description of the organization, its mandate, and its campaigns, see The Council of Canadians, http://www.canadians.org/ (last visited Mar. 12, 2009).

141. UPS Intervention Decision, *supra* note 21, ¶ 1.

142. *Id.* ¶ 3.

143. UPS Arbitral Award, *supra* note 16, ¶ 1.

in the NAFTA proceeding) violated various provisions of the Canadian Constitution, including section 96 of the Constitution Act, 1867, and sections 7 and 15 of the Canadian Charter of Rights and Freedoms.[144] These provisions (1) reserve to Canadian courts the inherent jurisdiction to make certain kinds of decisions, which CUPW and the Council argued had been improperly delegated to NAFTA tribunals; and (2) protect Canadians' rights to life, liberty, security, and equality, which CUPW and the Council argued were threatened by permitting NAFTA tribunals to make decisions about social policy. The UPS arbitration tribunal (the "Tribunal") issued its Decision on the Merits (the "UPS Arbitral Award") in June 2007. A few weeks later, the Supreme Court of Canada refused to grant leave to appeal in the Ontario proceedings.[145]

Two comments before delving into the separate proceedings that are at issue in this analysis: first, the positions urged by all parties to this multi-jurisdictional dispute reveal collective engagement with an integrative process, and their submissions should be read cumulatively, in their entirety, and as part of a whole. That does not mean that their positions cannot be discussed separately—which I do below—only that they must ultimately be understood as constituent parts of a larger process. Second, in the Subsections that follow in this Part, I simply describe the proceedings and leave my analysis to Part IV.

B. UPS v. Canada*: Decision on the Merits*

The hearing on the merits was held in Washington, D.C., from December 12 to December 17, 2005.[146] Witnesses were examined and oral submissions were made. Canada, the United States, Mexico, and UPS were all invited by the Tribunal to file post-hearing briefs, although none did.[147] The Tri-

144. Council of Canadians v. Canada (Attorney General), [2005] O.J. 3422 (O.S.C.J. July 8, 2005), *aff'd* [2006] O.J. 4751 (Ont. C.A. Nov. 30, 2006) (discussing the Canadian Charter, *supra* note 22).

145. UPS Arbitral Award, *supra* note 16. The UPS Arbitral Award was released to the parties on June 11, 2007. Applications for leave to appeal to the Supreme Court of Canada were dismissed on July 26, 2007. *See* Supreme Court of Canada, SCC Case Information, Docket 31842, http://www.scc-csc.gc.ca/information/cms-sgd/dock-regi-eng.asp?31842 (last visited Mar. 23, 2009).

146. UPS Arbitral Award, *supra* note 16, ¶¶ 1–5.

147. *Id.*

bunal's Decision on the Merits was made on May 24, 2007, and released to the parties on June 11, 2007.[148]

UPS's claims against Canada were made under Chapters 11 and 15 of NAFTA. In particular, UPS alleged that Canada had breached the following provisions:

- Article 1102, which requires Canada to treat UPS at least as well as it treats national investors;
- Article 1103, which requires Canada to treat UPS at least as well as it treats investors from countries with "most favored nation status";[149]
- Article 1104, which requires Canada to provide UPS with the better of national treatment or most favored nation treatment;
- Article 1105, which requires Canada to accord UPS treatment in accordance with international law; and
- Articles 1502 and 1503, which require Canada to ensure that its agents do not act in a manner inconsistent with Canada's NAFTA obligations.[150]

Without going into all the complexities of the complaints, UPS's basic factual allegations can be fairly summarized in three points. First, Canada Post provides both monopoly mail services and non-monopoly courier services. In addition, it owns Purolator Courier, the largest courier company in Canada. Both Purolator (a National investor) and the non-monopoly services arm of Canada Post have access to Canada Post's entire infrastructure. UPS (an American investor) does not. This has the effect of discriminating against and disadvantaging UPS in the non-monopoly courier market.[151]

Second, the infrastructure of the legal and accounting relationships between Canada Post and the Canada Customs and Revenue Agency ("Canada Customs") gives Canada Post an unfair advantage in the non-monopoly market. In effect, Canada

148. *Id.* ¶¶ 1–5.

149. For an explanation of the meaning and effect of "most favored nation" status, see World Trade Organization, Understanding the WTO: Basics, Principles of the Trading System, http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 13, 2009).

150. UPS Arbitral Award, *supra* note 16, ¶ 13.

151. *Id.* ¶¶ 13, 63, 65.

Customs procures certain kinds of services from Canada Post (and vice versa). In addition, Canada Customs makes payments to Canada Post; doesn't require Canada Post to pay fines and other penalties; and doesn't charge Canada Post for certain kinds of services that it charges UPS.[152] As with the relationship between Canada Post and Purolator, UPS argued, the relationship between Canada Post and Canada Customs disadvantages UPS in the non-monopoly courier market.

Finally, Canada runs a Publications Assistance Program ("PAP"), through which it provides postal distribution subsidies to eligible Canadian publishers on the condition that they use Canada Post. Canada's cultural and social policy with respect to publications is designed to connect Canadians to one another and to sustain and develop the Canadian publishing industry. UPS argued that it was as able to assist in these goals as Canada Post. The requirement that publishers use Canada Post is not connected to the underlying aim of PAP—protecting Canada's cultural industries—and therefore discriminates against UPS.[153] From these three points, a common theme emerges: UPS argued that Canada—through its various agencies, programs and subsidiaries—subsidized Canada Post to UPS's disadvantage. This is something it is free to do in the monopoly postal service market, but not in the non-monopoly courier market.

UPS's claims were dismissed by a majority of the Tribunal.[154] Reduced to their essence, the Tribunal's reasons were as follows. First, Purolator is not a party to NAFTA, nor a 'state enterprise' under NAFTA, nor has it been delegated governmental authority by Canada, and therefore it is beyond UPS's reach under NAFTA. Second, postal systems are internationally regulated (by treaty) and are therefore different from other kinds of commercial activity. Canada has fully complied with those treaty obligations. For a complicated set of reasons relating to treaty compliance, Canada need not treat Canada Post and UPS the same and, therefore, Canada Post and UPS are not in 'like circumstances.' Accordingly, UPS has no right to the same treatment by Canada of Canada Post.[155]

152. *Id.* ¶¶ 13, 80.

153. *Id.* ¶¶ 13, 146, 157.

154. But see the Separate Statement of Dean Ronald A. Cass, in dissent, attached to the UPS Arbitral Award, *supra* note 16.

155. UPS Arbitral Award, *supra* note 16, ¶¶ 118–19 ("118. The evidence is compelling. Canada, like the US and the UK, has adopted customs procedures which are fully compliant with the Universal Postal Convention and the Kyoto

Additionally, many of the arrangements between Canada Customs and Canada Post fall within the procurement exception to NAFTA Article 1108.[156] Finally, the Publications Assistance Program falls within the cultural industries exception to NAFTA.[157]

C. Dussault v. Canada (Customs and Revenue Agency) *and Canada Post Corporation*

As stated above, UPS challenged Canada Customs' arrangements with Canada Post, and in particular the *Postal Imports Agreement* ("PIA"), as according more favorable treatment to Canada Post than UPS. Canada's defense to this claim was that the PIA fell within the procurement exception to national treatment. NAFTA Article 1108(7)(a) provides that Articles 1102, 1103 and 1107 do not apply to "procurement by a Party or a state enterprise."[158] Canada refused during the course of the NAFTA Proceeding to disclose certain provisions of the PIA to UPS.[159]

In response, UPS, through the offices of Dyane Dussault, applied under the Access to Information Act[160] for (*inter alia*):

> "A copy of the memorandum of understanding between Revenue Canada and the Canadian Post Office (CPO) regarding the roles and responsibilities and financial arrangements pertaining [to] the Customs operations related to release of international mail and parcels handled by the CPO and involving the presence of Customs Officers in des-

Convention. Customs administrations throughout the world accord different treatment to postal traffic than to express consignment operators for the simple reason that circumstances are not like. 119. In summary, the evidence before our Tribunal is overwhelming. We conclude that UPS and Canada Post are not in like circumstances in respect of the customs treatment of goods imported as mail and goods imported by courier.").

156. That is, an intra-government procurement contract under which Canada Post performs services for Canada Customs for a fee. *Id.* ¶ 135.

157. There is no cultural industries exception between Mexico and the United States, only between Canada and the United States. *See* NAFTA, *supra* note 3.

158. NAFTA, *supra* note 3, Art. 1108.

159. Dussault v. Can. Customs and Revenue Agency, [2003] F.C. 973 (Can. Fed. Ct.), *available at* http://decisions.fct-cf.gc.ca/en/2003/2003fc973/2003fc973.html.

160. Access to Information Act, R.S.C., ch. A-1 (1985) (Can.).

> ignated international postal centers [sic] operated by the CPO."[161]

In response, Canada Customs determined that the PIA came within the purview of the request, but that the third party rights of Canada Post were implicated. Accordingly, at the request of Canada Post, Canada Customs redacted certain portions of the PIA on the basis that the information could be used by competitors of Canada Post to bid against it for the provision of certain services. Ms. Dussault then applied to the Federal Court of Canada for review of the decision of Canada Customs refusing to disclose to UPS certain information contained in the PIA. The question to be determined by that court—on a correctness standard—was whether Canada Customs was justified in refusing to disclose the information on the basis that its disclosure would prejudice the competitive position of Canada Post.[162] Agreeing with Canada Customs and Canada Post, the Federal Court denied Ms. Dussault's application and awarded attorneys' fees to Canada:

> [t]he evidence [ ] establishes, on a balance of probabilities, that disclosure of the information could reasonably be expected to prejudice the competitive position of [Canada Post]. It follows that [Canada Customs] has met the onus upon it to establish, by cogent evidence, a reasonable expectation of probable harm.[163]

D. UPS v. Canada*: Decision on the Petitions for Intervention and Participation*

Very shortly after UPS filed its claim against Canada in the NAFTA Proceeding, CUPW and the Council (together, the "Petitioners") petitioned the Tribunal for:

- standing as parties;

- in the alternative, the right to intervene as *amicus curiae* on terms consistent with the principles of fairness, equality, and fundamental justice;

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161. *Dussault*, [2003] F.C. 973, ¶ 2 (quoting Dyane Dussault's information request).
162. *Id.* ¶ 1.
163. *Id.* ¶ 29.

- disclosure of all materials submitted to the Tribunal;
- the right to make submissions regarding the place of arbitration;
- the right to make submissions concerning the jurisdiction of the Tribunal and arbitrability of the matters raised by UPS; and
- an opportunity to amend their petition as further details become known to them.[164]

In addition to the Petitioners and UPS, all three NAFTA member-states—Canada, the United States, and Mexico—made submissions.[165]

In support of their request, Petitioners made five principle arguments. First, they argued that they had a direct interest in the subject matter of the UPS claims and could be adversely affected by any Tribunal Award. Therefore, "it would be contrary to both national and international principles of fairness, equality and fundamental justice to deny them the opportunity to defend their interests in [the] proceedings."[166] Second, Petitioners argued that they had a direct interest in the public policy implications of UPS's claims, including implications for the public service sector in Canada, and it could not be said that the dispute was "essentially private in character, but rather [was] likely to have far reaching impacts on a broad diversity of non party interests."[167] Accordingly, it would be "unfair and inconsistent with the principles of equality, fairness and fundamental justice" to exclude them from the proceedings.[168] Third, they argued that they had an interest in ensuring that any decision by the Tribunal would be subject to the oversight of Canadian courts, since Tribunal decisions might implicate Canadian constitutional law.[169] Fourth, Petitioners argued that the lack of transparency of NAFTA proceedings meant they could not reasonably participate without party status.[170] Finally, Petitioners claimed that they had special expertise and

164. UPS Intervention Decision, *supra* note 21, ¶ 1.
165. *See id.* ¶ 2.
166. *Id.* ¶ 3(i).
167. *Id.* ¶ 3(ii).
168. *Id.* ¶ 3(i).
169. *See id.* ¶ 3(iii).
170. *See id.* ¶ 3(iv).

unique perspectives that would not be otherwise represented before the Tribunal and that would be of assistance to the Tribunal.[171]

In response, UPS argued that the conferral of party-status would give the Petitioners greater rights than the non-disputing parties (the United States and Mexico) and the sub-national governments of NAFTA member-states. Moreover, arbitrations are conducted on the basis of consent of the parties to them; since UPS did not consent to the Petitioners' participation, Petitioners could not participate. Finally, the Tribunal was not authorized under NAFTA to grant the Petitioners' request to be added as parties.[172] Canada, Mexico, and the United States made similar arguments.[173]

On the question of whether the Petitioners could participate as *amici*, UPS argued that the issue was premature.[174] Canada and the United States both argued that the Tribunal had the authority to accept written submissions from third parties in certain limited circumstances and on limited terms.[175] Mexico submitted that NAFTA does not authorize the Tribunal to accept unsolicited submissions.[176] This discussion—about who gets to participate in the discourse, and on whose terms, and for what purposes—is the primary focus of my discussion in Part IV, so I elaborate on these arguments below. In order to minimize repetition, I simply note here that on October 17, 2001, the Tribunal held that:

> it ha[d] power to accept written *amicus* briefs from the Petitioners. It [would] consider receiving them at the merits stage of the arbitration following consultation with the parties, exercising its discretion in the way indicated in this decision and in accordance with relevant international judicial practice. In all other respects the Petitions [were] rejected.[177]

171. *See id.* ¶ 3(v).
172. *Id.* ¶¶ 5, 29, 30.
173. *Id.* ¶¶ 5, 9, 10, 28, 33.
174. *Id.* ¶ 49.
175. *Id.* ¶¶ 51–55.
176. *Id.* ¶¶ 56–57.
177. *Id.* ¶ 73.

E. Council of Canadians v. Canada (Attorney General)

As I stated in my introduction to Part III, commensurate with their application to intervene before the UPS Tribunal, CUPW and the Council, together with the Canadian Charter Committee on Poverty Issues, ("the Applicants") brought an application in Ontario challenging the investor-state provisions of NAFTA Chapter 11.[178] Among other things, the Applicants alleged that Chapter 11 violated Section 96 of the 1867 Constitution Act,[179] as well as Sections 7[180] and 15[181] of the Canadian Charter,[182] and Section 2(e)[183] of the Bill of Rights.[184] Of particular concern to the Applicants was this: under NAFTA, any measure (broadly defined) or expropriation (again, broadly defined) by Canada may be the subject of a claim for damages brought by *private* investors (who are not parties to NAFTA) and judged by arbitral panels (as opposed to Canadian courts), provided the measure also violates NAFTA (for example, by having the effect of discriminating against that investor).

While not articulated in precisely this way, the essence of Applicants' claims was that: (1) NAFTA tribunals, at the initiation of private investors from other countries, may judge measures taken by the Government of Canada to be in violation of

178. Council of Canadians v. Canada (Attorney General), [2005] O.J. 3422 (O.S.C.J. July 8, 2005), *aff'd* [2006] O.J. 4751 (Ont. C.A. Nov. 30, 2006).

179. Constitution Act, 1867, § 96, 30 & 31 Vict. Ch. 3 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985).

180. Canadian Charter, *supra* note 22, § 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.").

181. *Id.* § 15(1) ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethic origin, colour, religion, sex, age or mental or physical disability."); *see also id.* § 15(2) ("Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.").

182. *Id.* §§ 1–34.

183. Canadian Bill of Rights, § 2(e), 8–9 Eliz. II c. 44 (Can.), *as reprinted in* R.S.C. (Appendix 1985) ("Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.").

184. *Id.* §§ 1–5.

NAFTA, the effect of which is to require Canadian taxpayers to compensate the investor, and worse, to have a chilling effect on future government action, even where that action may be in the best interests of Canadians; (2) this has the effect of constraining government in the lawful exercise of its constitutional powers; (3) a constitution is the elaboration of a nation's legal sovereignty; therefore (4) in operating to constrain Canada's actions, NAFTA operates to diminish, or erode, Canadian sovereignty.[185]

The Petitioners claims were dismissed by the trial judge on July 8, 2005.[186] The Ontario Court of Appeal released its decision dismissing the Applicants' appeal on November 30, 2006.[187] And the Supreme Court of Canada denied the Applicants' application for leave to appeal to that court on July 26, 2007,[188] less than two months after the Tribunal released its Decision on the Merits in the NAFTA arbitration.

IV. LEGAL DISCOURSE AND THE CONSTRUCTION OF NORTH AMERICA

To this point, I have outlined the theories on which my arguments rest, and the UPS Proceedings on which my inquiry focuses. In this Part IV, I seek to apply the theory to the UPS Proceedings *qua* a set of discursive practices or dialogues, embedded within larger cultural debates about North America integration. Again, I am primarily interested in the contested nature of claims about integration, the constitutive role of legal discourse in the production of symbolic and material conditions,[189] and the privileging and legitimation of legal discourse (and within that broader category, particular kinds of legal discourse) in this context.

185. *See* Council of Canadians v. Canada (Attorney General), [2005] O.J. 3422 (O.S.C.J. July 8, 2005), *aff'd* [2006] O.J. 4751 (Ont. C.A. Nov. 30, 2006).

186. *Id.* ¶ 41.

187. Council of Canadians v. Canada (Attorney General), [2006] O.J. 4751 (Ont. C.A. Nov. 30, 2006).

188. *See* Council of Canadians v. Canada (Attorney General), [2007] 3 S.C.R. viii (Can.) (leave to appeal refused).

189. *See* Diez, *supra* note 1, at 603.

A. The Right To Participate: Permission To Speak in the Discursive Arena

Of all constructivist inquiries that might be made into the discursive construction of meaning and identity, the question of who gets to participate may be the most important. If "discursive practices establish power relationships in the sense that they make us 'understand certain problems in certain ways, and pose questions accordingly,' "[190] then the most powerful discursive act will be deciding who gets to decide how problems are identified, presented, and answered. The UPS Proceedings take up, for the first time, a potentially radical broadening of the discursive participants in how law functions to shape, constrain, enable, et cetera, North American integration. While a previous tribunal admitted *amici*,[191] no prior tribunal heard from an affected employees' union representing approximately 54,000 members[192] and a broad based citizens' organization (ably represented by counsel), at the same time as a domestic proceeding on substantially the same facts made its way to a national supreme court.

The demands of CUPW and the Council of Canadians (the "Petitioners" or "Applicants")[193] to be added as parties and make submissions rested, in part, on their view that "this dispute [was] not essentially private in character, but rather [was] likely to have far reaching impacts on a broad diversity of non party interests"[194] (including theirs, as employees of Canada Post and as Canadian citizens). Among other concerns, and of particular interest here, was the Petitioners' view that "the expansive interpretation of NAFTA urged by [UPS] would dramatically expand the scope for foreign investor claims and put

190. Risse, *supra* note 5, at 164 (quoting Diez, *supra* note 52); *see also* Larsen, *supra* note 52, at 111 ("For Foucault, language is linked to power in society and discourse is central in constituting identities and social beliefs.").

191. Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," 23 (Jan. 15, 2001) (Rowley, Christopher, Veeder, Arbs.), *available at* http://www.iisd.org/pdf/methanex_tribunal_first_amicus_decision.pdf.

192. Canadian Union of Postal Workers, About CUPW, Membership, http://www.cupw.ca/index.cfm/ci_id/1288/la_id/1.htm (last visited Apr. 10, 2009).

193. CUPW and the Council were referred to as the Applicants before the Ontario courts and the Petitioners before the NAFTA Tribunal. *See generally* Council of Canadians v. Canada (Attorney General), [2005] O.J. 3422 (O.S.C.J. July 8, 2005), *aff'd* [2006] O.J. 4751 (Ont. C.A. Nov. 30, 2006); UPS Intervention Decision, *supra* note 21.

194. UPS Intervention Decision, *supra* note 21, ¶ 3(ii).

at risk a broad diversity of [Canadian] government measures that should not be vulnerable to such claims."[195] For the Petitioners, UPS's claims challenged Canada's 'sovereign' right to make certain kinds of choices within Canadian borders. From a constructivist view, UPS's claims challenged Canada's identity and, just as significantly, Petitioners' identities as Canadians. At the same time, UPS's claims worked a constructive function. In other words, this was as much about identity production as materiality.

The position of each of the parties to the Intervention Proceeding is instructive for thinking about how differently constituted social actors understand their roles *and the legitimate roles of others* in the contested space. To be clear, the contested space was not simply the arbitral proceeding. Rather, the arguments presented by various parties to the Intervention Proceeding suggest that the contested space was as much North America as it was the NAFTA Proceeding.

Petitioners' arguments in the Intervention Proceeding essentially reduced to arguments about who may legitimately speak to issues raised by challenges to Canada's sovereignty. In essence, Petitioners claimed that Canada—as a parliamentary sovereign—could not be made to act unconstitutionally at UPS's behest. To the extent that Canada's sovereignty was implicated, Petitioners argued that: (1) the arbitration should be held in Canada to ensure judicial oversight by Canadian courts[196] "in accordance with Canadian constitutional principles and the rule of law";[197] and (2) Petitioners should be permitted to participate in order to ensure that the proceedings were transparent.[198] Put another way, the consequences for Canadian sovereignty argued in favor of broad public participation with strong judicial oversight by Canadian courts, as well as for substantially broadening who should be included in the discursive exchange. There are at least two observations that might be made about Petitioners' arguments.

First, in so far as sovereignty goes, this arbitration was arguably no different than any other in which an investor claimed Canada had violated its NAFTA obligations. Pre-

195. *Id.* ¶ 14.

196. Under NAFTA, tribunal decisions may be reviewed only by the courts located in the jurisdiction of the arbitration. United Mexican States v. Metaclad Corp., [2001] 89 B.C.L.R.3d 359, ¶¶ 39–49 (Can.).

197. UPS Intervention Decision, *supra* note 21, ¶ 3(iii).

198. *Id.*

sumably, every decision Canada has made or will make in the future—including the decision to enter into NAFTA, the choice to agree in advance to constrain future choices, and the decision (if such a decision is made) to act contrary to its NAFTA obligations—is an act of 'sovereignty.'[199] But—to use the words of Paul Kahn—sovereignty is being asked to bear more weight than it can sustain here.[200] Consider the Council of Canadians' statement that, "[i]f industrial standards just kept getting better down south, matching them might not be so bad."[201] Viewed next to this statement, Petitioners' sovereignty claims (in both the Intervention Proceeding and the Constitutional Challenge) would seem to be more about identity and democracy than sovereignty. It was not so much that a NAFTA tribunal might make a decision that upset traditional conceptions of national sovereignty, but that Canada's choice to enter into NAFTA without constitutional safeguards ought to require that Canadian citizens be let into the conversation about the meaning of integration law for Canadians and Canadian expressions of identity.

Second, while Petitioners' arguments for broad public participation and judicial oversight are persuasive, it does not follow that the Canadian courts would be best situated to provide the oversight suggested by Petitioners. Rather, the issue of the scope of Chapter 11 and of the challenges of reconciling national interests (including, but not only, national sovereignty) and non-state investor interests are necessarily transnational in character and scope. These factors argue in the direction of expanding adjudicative and policy functions of transnational, multilateral, and supranational institutions aimed at making the Chapter 11 process open, fair, responsive, public, and representative. It would be no easy task—particularly given the

199. One of the common sovereignty debate scripts goes something like this: when a parliamentary government agrees to something which has the effect of limiting the range of actions of future parliaments, it is an act of sovereignty but, at the same time, it diminishes in some sense the future parliament's sovereignty. So we are left with a conflict between the present expression of sovereignty and some future expression of sovereignty. *See generally* SOVEREIGNTY IN TRANSITION, *supra* note 34. It is precisely this point—the disabling of future parliaments—that leads David Schneiderman to argue that NAFTA demonstrates the features of a constitutional order. Schneiderman, *supra* note 107, at 514.

200. Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 259 (2004).

201. Council of Canadians, *The Jelly Bean Summit*, CANADIAN PERSP. (Autumn 2007), *available at* http://www.canadians.org/publications/CP/2007/autumn/summit.html.

relative power of the United States—to design adjudicative review mechanisms to guard against power asymmetries within and between the member-states, to consider wider implications for member-state identities, and to ensure NAFTA's consistent application in accordance with standardized rules, agreed principles, and previous NAFTA decisions. But in short, Petitioners had the matter half-right: they were correct that the proceedings implicated important public interests that extended beyond those of the parties to the dispute. However, they failed to appreciate that *North American* institutions might be better situated than domestic courts to meet the needs of an enlarged process.[202]

UPS, as an investor with relatively narrow economic interests, understandably had different views about who might legitimately participate in this space. Adding parties—or even permitting *amici* participation—was potentially disruptive to the process. Permitting the Petitioners to present evidence and make arguments would prolong the arbitration and increase its cost. Finally, it was clear Petitioners wanted party status in order to mount additional defenses, beyond Canada's position, to UPS's claims. In other words, their addition would not only expand the scope of the proceedings, but increase the number of parties against whom UPS was 'fighting.' But these 'rational' reasons arguably belie a deeper meaning. UPS—as a socially constituted actor—had strong views about the meaning of the discourse and, consequently, who might legitimately challenge its position. Consider its arguments: "It is [ ] the *essence* of arbitration that the [T]ribunal ha[d] only the authority conferred on it by the agreement under which it [was] established."[203] The arbitration had to be "conducted on the basis of the consent of the disputing parties," and UPS "[made] it clear that it [did] not consent to the participation of the Petitioners."[204] Thus, in UPS's view, NAFTA—as a set of discursive

202. Stephen Clarkson persuasively argues for the development of a judicial system to interpret and apply NAFTA's texts. Affidavit of Stephen Clarkson (May 26, 2003) ¶ 41, Ontario Superior Court of Justice File No. 01-CV-208141, Council of Canadians v. Canada (Attorney General), [2005] O.J. 3422 (O.S.C.J. July 8, 2005), *available at* http://www.canadians.org/trade/documents/clarkson_ affidavit1.pdf. His argument rests on his view that NAFTA is constitutional, or at least supra-constitutional. *Id.* ¶ 22. Thus, to "interpret the ambiguities inherent in the norms, limits and rights [of the constitution] and to resolve eventual disputes[,] a judicial system is required." *Id.* ¶ 23(e).

203. UPS Intervention Decision, *supra* note 21, ¶ 36 (emphasis added).

204. *Id.* ¶ 29.

practices—was not intended to be broad and inclusive and, therefore, should not be broad and inclusive. It was not in the interests of UPS to open the discussion to the very social actors most interested in shifting or limiting its power, either in this proceeding or in the future.

The substantive positions of Canada and the United States were not remarkably different from those of UPS. But Canada's were sufficiently different in emphasis as to warrant further examination. According to the Tribunal,

> Canada [began] its submission by stating its support for greater openness in NAFTA Chapter 11 proceedings and its appreciation of the contribution that transparency brings to building public confidence in the investor-state dispute settlement process.[205]

Although it is not clear whether the United States cast its argument in those terms, it "join[ed] Canada in the view that the Tribunal is authorised to accept written submissions from third parties as *amici curiae*."[206] Even a cursory familiarity with NAFTA law suggests that Canada's position is potentially contrary to its material interests, at least in the NAFTA context. For one thing, even though it was Petitioners' aim to support Canada's position before the Tribunal in this case, it was also clear that Petitioners disagreed with Canada in the constitutional challenge, and any decision to expand the number of participants before the UPS Tribunal might lead to similar expansions in disputes between a Canadian investor and the United States or Mexico in future cases. In other words, Canada's support for opening the process will most certainly have the effect of making it more difficult for Canadian investors in other Chapter 11 proceedings. So, what explains its stance? In other words, why would Canada take a position against its material interests in other fora? It seems relatively clear that the answer is symbolic. There was something about this particular set of discursive practices that engaged Canadian identity—Canada's view of what it represents in the world vis-à-vis other nations but also vis-à-vis its own citizens—and Canada's position reflected this. To put it less abstractly, Can-

205. *Id.* ¶ 51.
206. *Id.* ¶¶ 55, 9.

ada's view of who should be included in the conversation was tied to its identity.[207]

If there was any doubt about the co-constitutive relationship between identity and participation, one need only look to Mexico's submissions. Like UPS, Mexico relied on arguments grounded in the principles of contract law: in "the absence of express language" in the contract/treaty, the Tribunal could not authorize certain kinds of actions—in this case, participation—that the NAFTA member-states did not themselves authorize.[208] But the substance of that position was informed by Mexican law. Whereas UPS, Canada, and the United States agreed that the treaty did not permit for Petitioners to be added as parties, they all agreed that it permitted their participation as *amici*.[209] Mexico disagreed for two reasons. First, "the grant of an apparently minor procedural right could create a substantive legal issue in dispute,"[210] and arbitrations are not thought of as the sorts of proceedings where non-parties create legal issues in dispute. Second, the power of courts to receive *amicus* briefs is not recognized under Mexican law.[211] So, Mexico argued, "[c]oncepts or procedures alien to its legal tradition . . . [could] not be imported into NAFTA dispute settlement proceedings and set a precedent for cases where Mexico is the disputing party."[212] To this last argument, the Petitioners responded—and the Tribunal agreed—that Mexican law is "relevant only if [it] reflect[s] general principles of law, international custom or other source of international law which the Tribunal is obliged to consider under article 1131(1)."[213] "The matter is to be determined under international law, especially NAFTA incorporating the UNCITRAL rules."[214]

As with the Petitioners' claims to be added as parties, Mexico's claims sounded in sovereignty. And as with Petitioners' claims to be added as parties, the sovereignty argument was as much about symbolic identity as it was about material inter-

207. Laura MacDonald makes a similar argument about Canada's seemingly relentless support for a FTAA. In her view, this support cannot be explained with reference to Canada's material interests. Instead, it has as much—if not more—to do with identity (that is, symbolic interests). MacDonald, *supra* note 7, at 224, 230–34; *see also* Golob, *supra* note 11, at 8.

208. UPS Intervention Decision, *supra* note 21, ¶ 56.

209. *Id.* ¶¶ 5, 7, 9.

210. *Id.* ¶ 57.

211. *Id.* ¶ 56.

212. *Id.*

213. *Id.* ¶ 58.

214. *Id.* ¶ 65.

ests. In Mexico's view, the Tribunal could not impose on it rules to which Mexico did not agree and which it could not be expected to foresee. This reminds us Mexico is not 'similarly situated' to the United States and Canada in some important cultural, political, and economic respects. And, therefore, Mexico's identity might be differently engaged; significantly, it may experience integration as imperialism in ways that neither Canada nor the United States will or do.

The UPS Proceedings explicitly engage the question of who gets to participate in the discursive construction of North American space. Set alongside these proceedings, the Constitutional Challenge might be seen as an extension of this discussion. The Petitioners' arguments before the Ontario courts were, in some sense, arguments about the scope of participation in the transnational discourse. Their position reduced to this: their interests as Canadians were directly implicated in the NAFTA Proceeding. Depending on the outcome of the Intervention Proceeding, they may be excluded from that conversation which—because of the nature of the dispute—promised to be constitutive of their rights (identities) as Canadians *qua* Canadians and Canadians *qua* North Americans. Canada's participation in the NAFTA Proceeding exposed Canadians to external restraints on their rights (identities) as Canadians *qua* Canadians and Canadians *qua* North Americans. Therefore, if Petitioners were denied a voice in that process, Canada could not *and should not* be there either. In other words, the only two legitimate positions were: the conversation should be widened to include them, or it should be stopped altogether.

B. What Counts as a Sensible Position?

In thinking about the role of legal discourse in the process of integration, the question of not only *who* counts, but *what* counts arises. In other words, law's legitimating function extends not only to actors, but positions. If integration is, in fact, a set of processes or discursive practices, then what counts as a sensible position inevitably shapes and constrains the constitution of the integrated space and the contours of how social actors interact with, and within, that space.

Of course, an argument about who counts may, in fact, be an argument about what counts, and vice versa. In the context of the UPS Proceedings, some of the same observations that can be made about who should be allowed to participate in the

discursive arena might also be made about what counted as a sensible position. This is not particularly surprising. While this might not be true in every discursive contest, legal proceedings are set up such that decision-makers will only consider adding parties (that is, extending the conversation to additional actors) if their position is different from the original parties to the dispute, they are uniquely situated to bring that position to the decision-maker, *and* their position 'matters' or 'counts.' Accordingly, a decision-maker's decision whether to include them also signals whether their position counts.

However, who/what questions are not entirely coterminous, even in a legal proceeding concerning the intervention of third parties—a point illustrated by the UPS Proceedings. While the Tribunal rejected Petitioners' request to intervene as parties,[215] it nonetheless recognized as legitimate and material *certain* of petitioners' claimed interests giving them permission to file *amicus* briefs.[216] Thus, the Tribunal authorized a specific subset of claims and arguments, even as it failed to authorize the parties to intervene. The effect of the adjudication was to configure the discursive field in a particular way; it became narrower in terms of legitimate actors *qua* parties (that is, those who might be understood to be as important as other kinds of actors), yet slightly broader in terms of legitimating a public interest/position in the proceedings.[217]

C. Dominant Constructions of Meaning as Fixed Truths?

As important as the question of who may legitimately engage in the contested space and what positions count as 'sensible,' is the question to which I turn in this section: which constructions of meaning have become so dominant that they are being taken for granted in North America? When viewed as a set of discursive practices, the UPS Proceedings suggest at least three: the meaning of 'sovereignty', the meaning of 'international' (as distinct and distinguishable from 'domestic'), and the meaning of 'economic.'

First, the dominant construction of sovereignty as a *legal* concept firmly grounded in Westphalian notions of statehood prevails in North America. Consider, for example, the Constitutional Challenge. In considering the claims of the Appli-

215. *Id.* ¶ 43.
216. *Id.* ¶ 70.
217. *See id.*

cants, Madame Justice Pepall noted that the NAFTA Chapter 11 procedures lack transparency; the principle of *stare decisis* is inapplicable, and decisions lack predictability; domestic review of NAFTA decisions depending on the location of the arbitration means that the review mechanism is not consistent, nor consistently available; broad definitions of 'measure,' 'investment,' and 'expropriation' (the findings that give a NAFTA tribunal jurisdiction to review government action) are intrusive and *constrain* government action; and investors are given rights against member-states in situations where there is no privity of contract between states and investors.[218] In these circumstances, then, she held that NAFTA was constitutional,[219] but infringed Canadian sovereignty. These observations seem to reflect both a failure of politics in the articulation of law and also assumptions about the meaning of sovereignty.

Put another way, the Applicants' argument seems to have been that Canada's expression of legal sovereignty (competence to enter into the treaty) had suppressed Canada's political sovereignty (its capacity to generate political power through its relationship with 'the people'). But Madame Justice Pepall seemed not—by virtue of her conception of sovereignty—to see it in these terms. Of course, she did not express her decision this way, but this is the essence of the NAFTA tension: Canada can clearly (and Canadian courts say, constitutionally) use the law to explicate and express sovereignty (in this case, adding NAFTA tribunals to its jurisdictional menu). But this should lead us to ask whether it is using law (legal sovereignty) to suppress political sovereignty,[220] and, if so, what is to be done about it? At a minimum, answering this question requires serious intellectual inquiry and wide consultation into a fuller and more nuanced account of the meaning of sovereignty and consequently law's function in the processes of integration.

A second instance of constructed meaning passing for fixed truth in the UPS Proceedings, at least in the Constitutional Challenge, is the distinction between international and domestic law. According to Madame Justice Pepall, they "are distinct legal systems that operate in different spheres."[221] The Appli-

218. Council of Canadians v. Canada (Attorney General), [2005] O.J. 3422, ¶ 31 (O.S.C.J. July 8, 2005), *aff'd* [2006] O.J. 4751 (Ont. C.A. Nov. 30, 2006).

219. *See id.* ¶ 58 (describing Pepall's reasoning for finding NAFTA constitutional).

220. *See generally* SOVEREIGNTY IN TRANSITION, *supra* note 34.

221. *Council of Canadians*, [2005] O.J. 3422, ¶ 41.

cants' original arguments with respect to the *Charter* and the Bill of Rights centered on the proposition that a NAFTA tribunal could put Canada in the untenable position of having to choose between its constitutional obligations to Canadians and its treaty obligations to investors.[222] Choosing either over the other would cost Canada money damages. In addition, the Applicants worried that concern for avoiding this dilemma would have a chilling effect on the development of Canadian social policy.[223] But Madame Justice Pepall refused to rule on the question of the potential for a future infringement until the factual basis for such an infringement materialized.[224] The Applicants responded by agreeing that she need not rule on premature matters, but they instead pursued a declaration that Section B of Chapter 11 of NAFTA infringed sections 7 and 15 of the *Charter* for the reason that it precluded and failed to require NAFTA tribunals to consider, weigh, and apply fundamental *Charter* values in adjudicating claims under NAFTA.[225] In some ways, this argument is reminiscent of Mexico's argument on Petitioners' application to intervene—a sort of grappling with the question of how domestic law fits, informs, and shapes the evolution of NAFTA obligations, and vice versa. But the Court denied this request because, among other reasons, "the tribunals have no authority to change Canada's domestic law or practices. Their jurisdiction is limited to the international law issues before them . . . ."[226]

This theme—that Canada's domestic law is domestic law, while NAFTA law is international law, and never the two shall meet—runs through and informs her decision at every turn.[227] It is troubling for the reason that it is grounded in an outdated and unrealistic understanding of the relationships between domestic, transnational, international, and supranational law. In addition, it would seem to contradict or at least complicate her finding that NAFTA represents a constraint or infringement on Canadian sovereignty. Again, as with the other decisions in this series of proceedings, it reveals the simultaneous—and largely unnamed—acceptance of a particular meaning on the one hand and ambivalence and confusion about

222. *Id.* ¶ 60.
223. Affidavit of Stephen Clarkson, *supra* note 202, ¶¶ 35, 46–49.
224. *Council of Canadians*, [2005] O.J. 3422, ¶¶ 64–65.
225. *Id.* ¶ 63.
226. *Id.* ¶ 65.
227. *See, e.g.*, *id.* ¶ 41.

the tensions presented by integration on the other. This is markedly different than the European courts, which (for the most part) explicitly confront these tensions in an effort to navigate them.[228] Again, this is not surprising in the context of the European Union. Still, it is a useful counterpoint to the North American case.

Finally, the UPS Proceedings reveal wide acceptance of the view that NAFTA is primarily concerned with the *economic* interests of private parties, and that it makes sense to talk about economic integration as distinct from other kinds of integration. A central premise underlying this acceptance is that economic interests are asocial and apolitical, and, therefore, something that can be discovered, limited, enabled, but not socially co-constitutive in the ways suggested by a constructivist account.

D. What Can the UPS Proceedings Tell Us About the Trajectory of Regional Integration More Generally?

There is always a danger in generalizing from the specific case to the larger arena. Nevertheless, there are some interesting observations that might be made about the UPS Proceedings from a constructivist view. I limit myself to four.

First, integration discourse is a powerful component of regional construction even when its apparent content is made up of arguments to the contrary. This is its paradox. Legal (political/cultural/economic) arguments about how and why integration should be resisted or limited—arguments made by supposed opponents of integration, like the Petitioners—actually serve to construct (affirm/create/shape) the frames they seek to deny. In other words, by engaging with integration in the language of integration, they delimit the terrain upon which discursive and material action is undertaken. As a result, integration becomes the nexus of *intentional* decision-making and *unintentional* consequences. Anti-integration discourse is imbricated with the logic of integration itself.

228. One could look at the significant body of jurisprudence emerging from the European Court of Justice since the Treaty of Maastricht for evidence of this difference. *But see* the German Federal Constitutional Court's Decision Concerning the Maastricht Treaty, Bundesverfassungsgericht [German Federal Constitutional Court] Oct. 12, 1993, 89 Europaische Grundrechte Zeitschrift [BVERFGE] 55 (F.R.G), *translated in* 33 I.L.M. 388 (1994).

Second, the oppositional stance of the Petitioners is incoherent without a constructivist lens. The Petitioners simultaneously argue that Canada should not participate in NAFTA, that the Petitioners should be permitted to participate in NAFTA, that NAFTA should be interpreted to be something less than an integrative process, that integration is not in Canada's interests, and that integration might be in Canada's interests if the values of the other NAFTA member-states more closely accorded with Canada's.[229] Even in the context of litigation—where it is common to make arguments in the alternative—these positions are difficult to reconcile in a rationalist frame. However, if considered from a constructivist stance, it becomes clear that the Petitioners have it right: this is as much a contest about identity and identity production (and who gets to participate in that process) as about anything else. The Tribunal's legitimation of any one of these positions would have the effect of authorizing a particular notion—or in Anderson's words, imagination[230]—of national and/or supranational identity, and of the Petitioners' power to speak on such questions of identity (if in a highly constrained and limited way).

Third, in the UPS Intervention Decision, the Tribunal held that Chapter 11 proceedings were "not now, if they ever were, to be equated to . . . standard . . . international commercial arbitration between private parties."[231] Of course investor claims have never been entirely 'private' in the sense that they always involve at least one of the NAFTA member-states, but early discursive accounts of Chapter 11 disputes emphasized the private investor rather than the public state.[232] The Tribunal's approach in the Intervention Decision reflects or confirms a promising shift in *emphasis*. It signals the Tribunal's acceptance that a broad diversity of public non-party interests may be implicated by investor claims[233] and, therefore, it makes sense that NAFTA Tribunals might accept *amicus* submissions in certain circumstances. In addition, read as a whole, the In-

229. *See generally* MURRAY DOBBIN, THE COUNCIL OF CANADIANS, ZIP LOCKING NORTH AMERICA: CAN CANADA SURVIVE CONTINENTAL INTEGRATION? (2002), *available at* http://www.canadians.org/DI/issues/ZipLockingNA.html.

230. ANDERSON, *supra* note 128, at 6.

231. UPS Intervention Decision, *supra* note 21, ¶ 70.

232. *Cf., e.g.*, Andrea Bjorklund, *The Participation of Amici Curiae in NAFTA Chapter Eleven Cases* (Mar. 22, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/participate-e.pdf.

233. For a discussion about what these interests might comprise in Chapter 11 more generally, see *id.*

tervention Decision evinces a relatively sophisticated understanding of the 'lines' between public and private as well as between international and domestic. A reader might reasonably be left with the impression that the Tribunal understood perfectly well that those lines are socially constructed and imprecise. Finally, the Tribunal's language—that Chapter 11 proceedings were "not now, if they ever were"[234]—reflects its apparent acceptance of the idea that NAFTA law is capable of evolving.

The Tribunal's approach in its Decision on the Merits builds on its reasoning in the Intervention Decision. Consider two examples: the use of 'precedent' and Arbitrator Cass's attempt to fashion a test for future application. With respect to the first of these examples, it is important to remember that NAFTA arbitrations are held in-camera, there is no requirement that decisions be made public, and NAFTA decisions are not binding on future arbitral panels.[235] They need not even be considered persuasive. Accordingly, one does not think of NAFTA decisions as comprising a body of jurisprudence in the way we understand that term in the United States. This contributes to the construction of NAFTA disputes as distinct and isolated questions rather than comprising a larger interactive and cumulative integration discourse. Increasingly, however, we have witnessed a shift in tribunal and party approaches to these questions.[236] This shift is especially apparent in the

234. UPS Intervention Decision, *supra* note 21, ¶ 70.

235. NAFTA, *supra* note 3, Art. 1126(1) (hearings in camera unless parties agree otherwise) & Art. 1136(1) (tribunal awards have no binding force except between the disputing parties and in respect of the particular case).

236. Again, for a discussion of how and why this shift occurs in the context of investment treaty arbitrations more generally, see Bjorklund, *supra* note 232, at 265, 280. *See also* the Separate Opinion of Thomas Wälde, Int'l Thunderbird Gaming Corp. v. United Mexican States, Arbitral Award, ¶¶ 15–16 (NAFTA Arb. Trib. 2006) (internal footnotes omitted), *available at* http://www.iisd.org/pdf/2006/itn_award.pdf:

> 15. Finally, I wish to highlight the need to pay attention and respect to the consolidating jurisprudence coalescing out of pertinent decisions of other authoritative tribunals, in particularly [sic] the more recent decisions applying the NAFTA and international investment treaties which have a similar methodology, procedure and substantive content to NAFTA Chapter XI. While there is no formal rule of precedent in international law, such awards and their reasoning form part of an emerging international investment law jurisprudence. . . .
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> 16. While individual arbitral awards by themselves do not as yet constitute a binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected; if an authoritative jurisprudence evolves, it will ac-

NAFTA Proceeding. UPS, for example, cited *Feldman v. Mexico*[237] "as *authority* for [a] proposition" helpful to its case.[238] Canada argued that *Mondev International Ltd. v. United States of America*[239] stood "as *precedent*" for a position that supported its defense.[240] The Tribunal similarly examined and relied on past decisions for guidance.[241] But most significantly, I am drawn to the dissent's attempt to *construct a test* for future NAFTA cases. At paragraph 17 of Dean Ronald Cass's Separate Statement, he writes:

> The most natural reading of NAFTA Article 1102, however, gives substantial weight to a showing of competition between a complaining investor and an investor of the respondent Party in respect of the matters at issue in a NAFTA dispute under Article 1102. Article 1102 focuses on protection of investors and investments against discriminatory treatment. A showing that there is a competitive relationship and that two investors or investments are similar in that respect establishes a *prima facie* case of like circumstances. Once the investor has established the competitive relationship between two investors or investments, the burden shifts to the respondent Party to explain why two competing enterprises are not in like circumstances.[242]

Cass clearly intended to articulate a test for the application of Article 1102 that transcended the case before him to be applied in future decisions.

The use of past decisions in legal reasoning and the articulation of tests for future application are the hallmarks of emerging customary international law. Both the Tribunal and

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quire the character of customary international law and must be respected. . . .

237. Feldman v. United Mexican States, Case No. ARB/(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Int'l Ctr. for Settlement of Inv. Disputes Dec. 6, 2000), *available at* http://ita.law.uvic.ca/documents/feldman_mexico_jurisdiction-english.pdf.

238. UPS Arbitral Award, *supra* note 16, ¶ 27 (emphasis added).

239. Mondev Int'l Ltd. v. United States of America, Case No. ARB/(AF)/99/2, Award (Int'l Ctr. for Settlement of Inv. Disputes Oct.. 11, 2002), *available at* http://ita.law.uvic.ca/documents/Mondev-Final.pdf.

240. UPS Arbitral Award, *supra* note 16, ¶ 27 (emphasis added).

241. *See, e.g.*, *id.* ¶¶ 34–35 (citing *Pope & Talbot Inc. v. Government of Canada*, Award in Respect of Damages (Arb. Trib. May 31, 2002), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/damage_award.pdf).

242. *Id.* ¶ 17 (Dean Ronald A. Cass, Separate Statement in concurrence and dissent).

the parties to the dispute before it took a sort of evolutionary common law approach[243] to the issues raised in the NAFTA Arbitration, signaling a deepening or thickening of what we might call a body of *integration law*. As a result, one could imagine talking about a body of NAFTA law, the function of which would be to standardize approaches to interpretation and application of NAFTA treaty obligations. This ought not to be surprising. In adjudicating such disputes, tribunals are evincing the sort of nascent institutional practices and structures that Max Weber theorized as endemic to bureaucratic rationalization.[244] Accordingly, we might reasonably predict the increasingly autonomous development of such institutions, which would, in turn, begin to constitute a distinct, public North American space.

This evolutionary approach to what I call integration law serves to frame my fourth and final point in this Part. The dynamic processes of integration are made up of a series of practices, often contradictory, which together comprise a series of 'moments.' This is reassuring; it means we need not always be where we are (and ties into my earlier observation that nationalism is a relative newcomer in the evolution of social institutions). The point I want to make here is this: at this particular moment, continental integration is uniquely marked by both (a) a proliferation of information, fundamentally disaggregated, yet spawning an array of ideas for the possibilities of using same, and (b) a lack of any deliberate positive coordination

243. For a persuasive account of emerging '*jurisprudence constante*' in the context of investment treaty decisions, see Andrea Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265, 280 (Colin Picker, Isabella Bunn & Douglas Arner eds., 2007):

> The decisions of investment treaty arbitral tribunals are proving to be essential in establishing the modern international law of investment. Given the paucity of detail in the international investment treaties to which states have adhered, it is inevitable that the meaning and contours of the legal standards in those treaties will be defined and clarified in arbitral decisions. The actual compilation of a generally accepted set of standards will be an accretive process developed little by little as tribunals make decisions in individual cases, and as those decisions are tested by other tribunals, by publicists and international organisations, and by the states themselves. Gradually one may expect the institution of a *jurisprudence constante*, and the emergence of key decisions that are judged to be the influential starting points from which further analysis should flow.

244. For an elaboration of Weber's theory of bureaucracy and rationalization, see FROM MAX WEBER, *supra* note 62, at VIII.14.

(with the notable exception of the United Parcel Service of America, Inc., whose management and counsel seem to appreciate the intricacies of coordination in ways the NAFTA member-states have yet to grasp[245]). The *Dussault* decision provides a good example. Remember that in that proceeding, UPS sought disclosure of documentary evidence denied to it in the NAFTA Proceeding. In the Arbitration on the Merits, the Tribunal found that Canada did not have to treat UPS "like" it treats Canada Post, essentially for the reason that postal services are "special."[246] In the *Dussault* decision, the Court denied UPS's application for the reason that Canada Post is *not* special. Instead, said the Court, "[t]he uncontradicted evidence establishe[d] that there are a number of other companies in the customs brokerage business or the financial services business which would be capable of performing [the disputed] services."[247] Of course, this was as true in the Arbitration as in the Federal Court application, but it is the different emphasis on the place for competition in the analyses that interests me here. The effect of the UPS Arbitral Award was to say that Canada Post does not need to compete with UPS (at least not in the ways that UPS understands 'competition'), while the effect of the *Dussault* decision was to say that Canada Post does not need to provide information to UPS if that information might harm Canada Post's competitive position in the market.

Together, the *Dussault* and Tribunal decisions do more than demonstrate a relative lack of coordination in approaches to integration. They suggest that we—and by we, I mean North Americans—are not (yet?) comfortable with the evolving concepts and expressions of sovereignty presented by deepening integration. Instead, the decisions share a palpable resistance to having to tell Canada it can or cannot do something in the context of its public and social services. There may be good

245. If one needs convincing of this, notice that at the same time UPS made its complaint against Canada under NAFTA (and its application to the Federal Court of Canada for additional documents), it was involved in a similar challenge to the German postal service before the European Court of First Instance. That court's decision was delivered on July 1, 2008. Case T-266/02, Deutsche Post AG v. Comm'n of the Eur. Cmtys., 2008 E.C.R. 00000, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0266:EN:HTML.

246. UPS Arbitral Award, *supra* note 16, ¶ 119 ("We conclude that UPS and Canada Post are not in like circumstances in respect of the customs treatment of goods imported as mail and goods imported by courier.").

247. Dussault v. Can. Customs and Revenue Agency, [2003] F.C. 973, ¶ 28 (Can. Fed. Ct.), *available at* http://decisions.fct-cf.gc.ca/en/2003/2003fc973/2003fc973.html.

reasons for preserving (and extending) Canada's traditional approach to public and social services, but those reasons require articulation in the context of treaty obligations and multilateral agreements pushing in the direction of integration. Without that particular articulation, we cannot know if sovereignty is simply a proxy for some other sort of claim that may or may not be best served by regulation at the national level, or whether—if sovereignty is indeed implicated—it might be negotiated in ways that advance social justice priorities.

CONCLUSION

Given its potential significance for democracy, sovereignty, government, governance, and justice in Canada, the United States, and Mexico, North American integration *qua* integration has thus far received relatively little attention from legal scholars and social scientists. While an expanding body of research explores the dynamics of continental integration in other contexts (especially Europe) and/or examines the nature of globalization, regionalism, and multi-lateral internationalism in a general sense, the specific constitution of an integrated North American space remains undertheorized. Even while there are important exceptions—Laura MacDonald and Francesco Duina, for example—most studies of North American integration assume a rationalist and instrumentalist frame. I have argued that constructivist theory—and, specifically, constructivism's focus on the production of discourse as a set of practices that are simultaneously constitutive and reflective—may help point the way toward a theory that provides for a fuller account of 'North America' as both a material and symbolic geopolitical entity. Significantly, it allows us to study how integration shapes both regional and national identities as well as the symbolic and material interests of both regional and national stakeholders.

The multi-party, multilateral, and multi-pronged litigation arising from UPS's challenge to Canadian policies and practices in the non-monopoly courier market illustrates the benefits of such an approach. While explicitly invoking the terms and conditions of NAFTA, UPS's claims called into question the ground upon which NAFTA may be said to operate: namely, an ideational, juridical, and physical space called 'North America.' In advancing and contesting claims about a specific set of *economic* and *legal* practices, UPS and its adversaries identified

and authorized specific actors, positions, and foundational concepts that serve, in part, to constitute this space. Only by interrogating these proceedings as a set of constitutive discursive practices can we begin to see the shape and potential of North America as a distinct—and distinctly integrated—region.