A Perilous Imbalance

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A Perilous Imbalance

The Globalization of Canadian Law and Governance

Stephen Clarkson and Stepan Wood

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IN MEMORIAM

The Law Commission of Canada, 1997-2006
The Law Reform Commission of Canada, 1971-1992

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Introduction

Consider these scenarios:

- An American company restructures its Canadian operations, relocating an assembly plant to Mexico and many management functions to its US headquarters.
- A Canadian mining company is implicated in environmental and human rights abuses in an African country.
- Cheap international travel and instant global communications allow growing numbers of Canadians to forge new identities and social bonds that challenge traditional notions of national citizenship.
- Respiratory disease in China spreads rapidly via airline passengers, straining public health systems and devastating Toronto's lucrative tourism economy for months.
- Victims of torture find their way to Canada and eventually launch lawsuits in Canadian courts against the foreign government officials who allegedly tortured them.
- Canadian labour and human rights groups collaborate with civil society organizations around the world to eliminate sweatshops and promote fair trade.
- Canadian corporations entrust resolution of their disputes to international arbitrators whose decisions are giving rise to an autonomous, stateless "law merchant."
- The amorphous threat of global terrorism prompts the Canadian government to restrict certain civil liberties and tighten controls on immigration and refugees.

All of these seemingly disparate developments are both manifestations of and responses to a bewildering array of phenomena collectively referred to

as globalization. Two decades after this term entered the public vocabulary, globalization remains one of the most controversial and challenging phenomena facing Canada and the world. Efforts to manage both it and its myriad effects are as controversial as globalization itself and often constitute aspects of globalization in their own right. Novel forms of governance are proliferating outside the conventional bounds of national government and domestic law in many areas, even while state power is being reasserted in others. Complex systems of multi-actor, multi-level governance are emerging in which states and their official law, though still occupying prominent roles, are being dislodged from their once unassailable pre-eminence.

This book examines the challenge of governing globalization in the context of Canada, a substantial but not dominant middle power that is strong enough to have some impact on the world beyond its borders, a world that increasingly influences what goes on within them. It canvasses historical patterns and contemporary developments to examine the role of law in a reciprocal dynamic: in the impact of global forces on Canada and in the conduct of Canadians as actors on the global stage.

Governing beyond Borders

Our consciousness of globalization as a putatively new phenomenon forces us to question not just the borders one sees on maps but a whole range of other familiar boundaries, whether they be political, social, cultural, or economic. It also makes us interrogate conceptual and institutional borders such as those associated with the state, law, public policy, sovereignty, and personal identity. These borders condition or impede the movement of people, goods, services, and ideas. They define the limits of political authority, of community, even of the self. Globalization is not simply a matter of erasing these borders. It may also shift or redefine them. In other cases, it may bring them into sharper relief or draw new borders where none existed before.

The nation-state is our prime example. Throughout most of the twentieth century, it was recognized as the primary, even the exclusive, institution for governing national societies. Its territorial borders were seen as co-extensive with those of society, so that the two formed an organic unity. The state was understood as having a monopoly over law, policy making, and the legitimate use of coercive force, a proposition captured in the notion of sovereignty. It was also seen by many as possessing a unique capacity and responsibility to promote collective prosperity, health, and welfare by intervening directly in markets and society, a vision embodied in the Keynesian welfare state after

the Second World War. Numerous developments have combined to loosen the state's apparent monopoly and undermine the geopolitical and conceptual borders on which it depended. In an era of instantaneous worldwide communication, porous societies, apparently seamless global production networks, and liberalized international trade, many Canadians feel they are living in a borderless world.

National borders seem to be disappearing in some respects as states cede some functions to multilateral structures such as the United Nations (UN) or the World Trade Organization (WTO). Other governmental responsibilities are being assumed by an array of informal, flexible, private global institutions including markets, transnational corporations (TNCs), and civil society organizations (CSOs). Whether they feel victimized by global economic forces they cannot control, enjoy the cosmopolitan pleasures of international tourism, pursue professional occupations that span national borders, or identify with tsunami victims half a world away, many Canadians experience the territorial borders of the Canadian state as decreasingly relevant and governance as an increasingly transnational phenomenon.

In other respects, the borders of the nation-state appear not to be disappearing but shifting. For certain actors, effective economic and political boundaries are moving to the continental level due to such treaties as the *North American Free Trade Agreement* (NAFTA). Something similar can be discerned in post–11 September 2001 efforts to turn North America into a continental fortress via the Security and Prosperity Partnership and in efforts to create a Fortress Europe on the other side of the Atlantic. In both cases, the goal is to stop terrorists and unwanted immigrants before they enter the continental community by relocating defence perimeters and immigration controls from the national to the continental level. In other domains, effective boundaries are shifting downward as central governments devolve their responsibilities, and provincial and local governments assert their authority. Some scholars believe that subsidiarity (the principle that governance authority should rest at the level best able to address the policy problem) is "in the process of replacing the unhelpful concept of 'sovereignty' as the core idea that serves to demarcate the respective spheres of the national and international" (Kumm 2004, 920-21). Some governmental functions are still exercised within the same geographic formations but are moving "sideways" from the state to market or civil society actors. Changing combinations of CSOs, business groups, and provincial/state governments interact with their national capitals to work out transborder arrangements – to clean up the

Great Lakes, for instance. Whether formal or informal, these new kinds of politics become confusingly messy.

But that is not all. In some cases, globalization seems to reinforce existing borders or throw up new ones, as federal and provincial governments battle over jurisdictional boundaries, or Ottawa tightens immigration barriers in reaction to newly perceived threats from terrorism or disease. New psychic borders are being erected when, for instance, minority groups seek to protect their customs, values, or identity, when the earth's billion or so slum dwellers are effectively kept out of the global economy, or when the millions who lack access to telephones or the Internet are excluded from the new virtual communities made possible by the information-technology revolution.

In short, drawing a sharp line between the domestic and the international neither reflects contemporary realities nor addresses the needs of Canadian and global societies. A coherent analysis of globalization must look beyond received conceptual and institutional boundaries to consider the realities of how globalization and governance are experienced.

Globalization

In common parlance, "globalization" refers to the increasing breadth, intensity, and speed of worldwide interconnectedness in all aspects of social life and its consequences for human conduct. In the constricted space and contracted time of the "global village," decisions made or actions occurring in one place have direct and rapid impacts on the health, prosperity, and prospects of individuals, communities, or ecosystems halfway around the world. The term "globalization" is already something of a cliché, "the big idea which encompasses everything from global financial markets to the Internet but which delivers little substantive insight into the contemporary human condition" (Held et al. 1999, 1). Yet clichés are meaningful, because they "often capture elements of the lived experience of an epoch. In this respect, globalization reflects a widespread perception that the world is rapidly being moulded into a shared social space by economic and technological forces and that developments in one region of the world can have profound consequences for the life chances of individuals or communities on the other side of the globe" *(ibid.)*.

Five further characteristics demonstrate the richness and complexity of the phenomenon: it is pervasive, heterogeneous, dynamic, interactive, and contested.

Globalization is *pervasive,* affecting government, business, civil society, and individuals and permeating all domains of human life. It includes

- the *globalization of consciousness:* a growing collective consciousness of humanity, the planet earth, and its ecosystems as a single community with a shared fate
- *political globalization:* the rise of transnational political regimes in which corporations, civil society organizations, and governments establish new norms for global trade, environment, and human rights
- *economic globalization:* the global spread of free trade rules and ideology, a spectacular increase in transnational investment, and a dramatic expansion of world trade in goods and services
- *societal globalization:* massive movements of peoples, transnational networks of activists, and a huge proliferation of personal interaction in cyberspace
- *technological globalization:* the instantaneous worldwide communications networks now provided by information technology, employed particularly in the industrialized world
- *legal globalization:* harmonization of national laws, proliferation of international law, the increasing use of model contracts and international arbitration by commercial actors, the incorporation of foreign and international law in domestic courts, and the worldwide transmission of American legal norms by US-based law firms as they serve the needs of large transnational corporations
- *medical globalization:* societies' increasing vulnerability to epidemics such as HIV/AIDS, SARS (severe acute respiratory syndrome), or influenza, whose devastation respects no borders
- *cultural globalization:* the increasing global domination of American (and to a lesser extent European) entertainment industries and cultural products
- *ecological globalization:* the emergence and rapid intensification of environmental change, from ozone depletion to climate change to biodiversity loss
- *criminal globalization:* the growth of networks of sex trade, drug trafficking, and terrorism, as well as the rise of white-collar corporate crime employing sophisticated tools and having transnational effects
- *military globalization:* the rise of "humanitarian intervention," the war on terror, the Iraq invasion and resulting civil strife, a burgeoning global

arms trade, and the presence of Canadian troops in Afghanistan, Haiti, and other states that have been torn apart by conflict, crime, or corruption

- *psychological globalization:* the spectre invoked by ideologues that the dire threat of irreversible competitive pressures forces politicians to make drastic cuts to government programs and requires businesses to cut jobs and reduce wages.

Irreducibly *heterogeneous,* globalization takes many different forms, involves a multiplicity of actors pursuing disparate goals, and has a wide range of contradictory effects – adverse and beneficial, creative and destructive, intended and unanticipated. It involves both integration (in continent-wide trade blocs, globally integrated production and distribution networks, transnational social movements, and universal human rights norms) and fragmentation (in separatist movements, the weakening of established social bonds, the disintegration of established states, and the increasing gulfs between rich and poor or between advanced and marginalized sectors), processes which demonstrate the intensification of transnational interactions at every geographic scale. It involves both universalization, whereby local ideas and practices are projected globally, and domestication, whereby universalized ideas and practices are received, adapted, or resisted in particular locales (for example, the adoption of Shari'a law in Ontario's Muslim communities). The benefits and costs of globalization are not evenly distributed. Some people and places bear the brunt of its negative impacts, whereas others enjoy the bulk of its gains.

Inherently *dynamic,* globalization is characterized by rapid, intense change in almost all domains of human affairs. Seemingly beyond the control of any single actor or class of actors, it appears to have a life of its own, reinforcing certain relations of power and privileging certain models of social, political, and economic organization while destabilizing, marginalizing, or eradicating others. As a result, any approach to managing globalization must be adaptive to change and ready to challenge entrenched or emerging patterns of injustice.

Globalization is also *interactive* and results in the spread of intergovernmental agreements, organizations, and regimes. One of the most significant developments of the post–Second World War period has been the proliferation of international law and organizations, which has occurred multilaterally, regionally, and bilaterally. Although some might argue that internationalization should be distinguished from globalization because it reinforces rather

than challenges the state-based character of the existing world system, we believe its impact is more ambiguous, in some ways reinforcing the dominant position of states, in other ways undermining it. Besides, we want to appraise the complete picture that Canada faces in the world. Defining globalization only in terms of phenomena that undermine the existing state-based system would prejudge a question we prefer to leave open by including in our remit aspects of internationalization that have acquired new significance or surfaced in recent decades.

Finally, globalization's meaning, effects, and desirability are fundamentally *contested* – in Canadian society as elsewhere. Any analysis of globalization and any attempt to manage its processes and effects must be sensitive to the deep conflicts that are generated by efforts to facilitate, constrain, or even simply to understand its various manifestations.

In sum, "globalization" refers to a pervasive, heterogeneous, dynamic, interactive, and contested intensification of interconnectedness in all aspects of human affairs, at all geographic scales.

Lessons from History

The intensification of transnational interconnections and the reconfiguration of the borders within which we live are nothing new for Canadians. Throughout Canada's history, political and other borders have continually been erected, dismantled, and reconstructed, shifting on a continuum from porous to solid and back. From the beginning, the fit between state and society has been imperfect, with First Nations, Québécois, Hutterites, polygamous Mormon sects, and numerous ethnic minorities asserting varying degrees of autonomy vis-à-vis a dominant anglophone society.

As Neilson (2004, 5) writes, "The present stage of globalization may be in our face, so to speak, but its antecedents in law and practice have been with us for centuries." Those antecedents, in legal terms, include Roman law, canon law, the law merchant, and the law of nations. In economic and political terms, Western colonialism and the rise of a capitalist world economy were early manifestations of globalization. Born of colonial expansion, Canada from its first days was dependent for its economic well-being on its insertion into a nascent global marketplace. To understand what, if anything, is new in contemporary globalization, Canadians can draw two linked lessons from their history: Canada's destiny was shaped from the beginning by external forces, and Canada's experience of global processes has always been mediated through its relationship with an imperial or hegemonic power.

External Forces

Since Samuel de Champlain first sailed up the Gulf of St. Lawrence, the Canadian state has been constructed, then largely constrained by external influences, from the market forces driving the original cod fishery and fur trade to recent massive waves of immigration. Ever since the arrival of the Europeans, Canada's indigenous and settler populations have been affected by distant forces and actions. It was the Europeans' search for increased supplies of less perishable protein that pushed their fishermen until they discovered the Grand Banks' teeming schools of cod. The subsequent demand for furs in France and England, along with the two great powers' search for a route to the Orient, motivated their establishing permanent settlements in New France and the Maritimes. These colonial outposts of expanding European empires established the embryonic structures that were to evolve into the Canadian federation.

From prehistoric migrations across the Bering land bridge, to the influx of European settlers and the displacement of the indigenous populations, to contemporary diasporas from around the globe, Canadian history is a story of ceaseless human movement. Modern Canada is a nation of immigrants, many of whom preserved strong ties to their home cultures, languages, and communities even as they cobbled together a pan-Canadian identity. Intolerance, prejudice, and discrimination in many forms were central to this history. They were directed toward people of Aboriginal, Métis, Irish, French, Chinese, Japanese, Southern European, Eastern European, Jewish, African, and other heritages. They were embodied in discriminatory immigration policies that could at best be described as a "calculated kindness" (Folson 2004). They were also aimed at women and religious minorities. Outside the largest cities, which received the bulk of our immigrants, the population remains predominantly French in Quebec and Anglo-Saxon in the rest of Canada. Notwithstanding these facts, Canadian society has become remarkably diverse in the past six decades as it has built a deserved reputation for multiculturalism, tolerance, and respect for civil rights. Canadian society, especially its urban population, is a microcosm of global cultural diversity and home to numerous diasporas. In short, the history of Canadian demography is itself a parable of globalization.

Similar stories could be told in the realms of economy, technology, and politics. The Canadian economy has long been export oriented, responding to the demand for renewable resources and raw materials in European, American, and, increasingly, Asian markets. It has long been dependent on imports

of manufactured and finished goods. As a result, it is chronically sensitive to fluctuations in international commodity prices and changes in the economic fortunes of its major trading partners. "The need and the efforts to deal with the problems posed by its insertion into the global economy are nothing new for the Canadian state," observes McBride (2001, 35): "Indeed, there is a sense in which the political history of Canada consists of little else."

In terms of scientific developments, Canadian economic and social history was driven by the same transformations that wrote the technological story of globalization: from sail to steam, from carriage to railroad, from telegraph to telephone to television, from the car to the computer, from electricity to e-mail.

On the Periphery of Empire

The second lesson from Canada's history is that its experience of globalization has always been mediated through its relationship with a single dominant power, first as an outpost of the French, then the British Empire, and, more recently, as an extension of American hegemony. Canadian politics have always been heavily oriented toward an imperial metropolis – once Paris, later Whitehall, now Washington – the chronic dependence on which has generally been counterbalanced by efforts to establish some degree of autonomy. Under French control, even as they strengthened their connections with Paris, New France's voyageurs claimed their mastery over the continent, extending their relationship with Native peoples. From the days of these first European settlers, Canada has related to its global context as a receiver, relying on investment and know-how coming from a more powerful and advanced economy, and then depending on that economy's market for selling the resulting raw materials or manufactures.

Canadians have at times felt themselves the hapless pawns of imperial conflicts going on elsewhere. By the end of the eighteenth century, the struggle among the European empires for global dominance left the territory to the north of the new United States of America in the hands of the British, whose need for timber and wheat caused their staple-producing North American colonies to burgeon. Some residents of these colonies did not fare so well in these imperial geopolitics. First Nations were steadily marginalized, despite the 1763 *Royal Proclamation,* which pledged to protect their lands and interests. The Acadians were brutally deported to Louisiana, whereas the Canadiens of New France became second-class citizens within British North America, provoking nationalist tensions that continue to define Canadian

politics today. Under British rule, colonial politicians worked to consolidate an autonomous state structure, even as they tried to ensure that London maintained its troops along their impossibly long American border.

Dependence is not a one-way street. The imperial powers needed Canada's supplies of furs and fish, timber and wheat, oil and uranium for their own wealth, health, and security. Although this interdependence may always have been mutual, it has also been asymmetrical, with the weaker periphery depending more on its powerful imperial centre than the centre depended on its periphery. Furthermore, the colonial periphery was inherently vulnerable to interruptions in the supply of technology and capital from the metropolis and to fluctuations in its demand for the colonies' staples. In the nineteenth century, this vulnerability generated a desire for autonomy from Great Britain, but fear of being swallowed up by the expansionist United States tempered this impulse. Canadian politicians' efforts to extract themselves from British control evolved gradually over almost one hundred years from the 1860s until the mid-twentieth century.

After the First World War, Canada's locus of economic dependence shifted steadily from the declining British Empire to the rising colossus to the south, as American investors elbowed aside their English rivals to become the dominion's main source of capital. In this process, the United States also displaced the United Kingdom as Canada's major foreign market and its principal supplier of technology. Former US secretary of state Henry Kissinger (1999, 3) famously quipped that globalization was just a euphemism for Americanization. The prime economic indicators of globalization – development of communication technologies, the spread of TNCs, the emergence of a global capital market, the negotiation of new economic rules for global capitalism – were indeed the product of the US political economy. For Canada more than any other country, globalization has been experienced as Americanization. Since it felt the social, cultural, and economic effects of post–Second World War US power more fully than any other country, discussion of Canada's experiences of globalization must start with American hegemony.

Hegemony, Imperium, and Autarchy

Before getting deeper into the Canada-US relationship, we need to clarify our use of the term "hegemony," which describes a situation in which a dominant actor achieves its goals by generating a willing consensus with subordinate actors about how their shared system should operate (Clarkson 2008a,

17). Such a consensus may transcend social classes and include a wide range of interests (Gill 1995, 400). Subordinate actors submit consensually to the will of the dominant actor. Hegemony can be located in the middle of a continuum passing from imperium at one end to autarchy at the other. "Imperium" describes a situation in which a single dominant actor employs coercion to impose its will upon others – typically via threats of physical force or the infliction of severe economic penalties (Clarkson 2008a, 17). Such compulsion can be exercised either through law or in spite of it (Koskenniemi 2007, 13). At the other extreme, "autarchy" describes a condition in which an actor is disconnected from and unconstrained by the wills of other actors. Until the NAFTA era, Mexico's approach to economic development after its revolution was largely autarchic. The United States continues to assert autarchy in certain economic sectors.

These three categories are ideal types. In practice, the relationship between them is complex and dynamic. A particular project such as NAFTA may be experienced as hegemonic by Canadian and Mexican elites and by some workers in export-oriented industries but as imperial by those who strenuously oppose it (such as labour, environmental, and nationalist movements). Hegemony may expand and deepen over time as a dominant actor, such as the United States, extends a consensual approach to more and more areas of foreign relations, and as broader segments of subordinate societies come to believe there is no alternative. This was the trend in several North American policy arenas as the project of continental integration unfolded during the 1980s and 1990s. By the same token, if a dominant actor shifts from consensual to coercive tactics for exerting its will, we may see a move from hegemony to imperium. This is exactly what happened in North America after 11 September 2001, when the United States retreated from its previous practice of consensual governance to a more traditional variety of unilateral strong-arm tactics, using the threat of restricted access to US markets to press Canada and Mexico into enacting tougher border controls that would buttress American homeland security. This return to imperial relations with its continental periphery was accompanied by a reassertion of autarchy, as the United States unilaterally closed its borders and brought cross-border trade to a temporary standstill. The same autarchic reflex was seen again in 2003 when Washington closed its borders to Canadian cattle imports in response to a "mad cow" disease scare. Following most such autarchic episodes, the United States eventually reopened its borders and re-established hegemony, but on new and tougher terms.

Neo-Conservatism

In this book, we devote substantial space to what we call the neo-conservative project of economic globalization. In the literature on globalization, there is some confusion about the terms "neo-liberalism" and "neo-conservatism," which are often used to denote the same phenomenon. Because the word "liberal" has various meanings, we use "neo-conservative" to indicate the economic orthodoxy that became dominant in the aftermath of the Keynesian policy paradigm's rejection by the political, economic, and media elites of the capitalist world following the election of Margaret Thatcher in 1979 and Ronald Reagan in 1980. Their perspective is also referred to as the "Washington Consensus," which describes the formula for prosperity offered by the World Bank Group and the International Monetary Fund (IMF) to their client states: freeing their markets by deregulating the domestic economy, privatizing state-owned firms, shrinking the public sector, reducing the social wage, and liberalizing the rules for international trade and investment.

Many writers use "neo-liberalism" in this sense, evoking nineteenth-century economic liberals who championed a reduced role for autocratic governments in order to liberate the economy's burgeoning capitalist forces. This usage can be confusing for those who associate "liberal" with generous, socially progressive policy and "conservative" with tough-love free-market policies. This is not to suggest that neo-conservatism is either monolithic or unchanging. It is neither. Although it has a certain amount of global coherence, it is marked by regional and national variations as well as disagreement on various points among its principal proponents. Reconsideration or abandonment of some elements of the Washington Consensus, along with the aggressive military unilateralism and unabashed Christian fundamentalism of the George W. Bush administration, make contemporary neo-conservatism qualitatively different from that of two decades ago. As we shall see, neo-conservatism has proved flexible and resilient, and still supplies the dominant ideational impetus to the economic dimension of globalization.

Sleeping with the Elephant

It was during the Cold War standoff between the socialist and capitalist blocs from the late 1940s to the late 1980s that the US asserted its predominance as the world's most dynamic economy, ideological leader, and military power. Its decisive role in setting up, financing, and staffing the Bretton Woods institutions that restructured the capitalist order after the Second World War (the IMF, the World Bank, and, later, the *General Agreement on Tariffs and Trade*

[GATT]) and its partners' acceptance of this international system made it the unquestioned hegemon of the capitalist world. Although American hegemony may have declined in certain respects during the late twentieth century thanks to the rise of the European and Asian economies (Keohane 1984), it was revived by the collapse of Eastern European communism, which left the United States the sole global military superpower. More subtly, American actors, institutions, products, and ideas remained hegemonic economically, politically, and culturally as well (Gill 1993). Whatever might be said for the rest of the world, American influence remains the central feature of Canada's experience of globalization. Cohen (1974, 4) summarizes the situation nicely:

> No one could have foreseen in 1776 or 1783 that the new, independent English-speaking United States would grow so rapidly as to overshadow quickly the imperial remnant to the north and create by these geopolitical facts the permanent crisis in Canadian life; namely, its development beside an immense neighbour who would outstrip Canada in everything, perhaps, but the determination to achieve an integrity of its own. It is no surprise, therefore, that the long-term Canadian international experience par excellence, and the concomitant political-legal preoccupation, should have been the form and substance for managing Canadian relations with the United States; and this remains true to the present day.

Well before the word "globalization" was invented, Canada's autonomy was already limited by the fact that substantial parts of its economy, including the most modern sectors such as the petroleum, chemical, automotive, electrical machinery, and computer industries, were owned by American companies and thus controlled from south of the border, where the best management jobs and most important research and development facilities were located. With much of the country's gross national product flowing to the US through intra-firm transfers, the federal and provincial governments' capacity to regulate the domestic economy has been limited.

This branch-plant economy's pervasive dependence on the United States did not prevent considerable autonomous political evolution. Notably, in the first decades following the Second World War, Canada, along with its fellow nation-states in the industrialized world, developed a sophisticated

management capacity and social infrastructure. This Keynesian welfare state had three main tasks. First, it fine-tuned the macro-economy's overall stable growth by adjusting interest rates and setting taxation levels. Second, it implemented micro-economic policies for specific economic sectors aimed to increase exports, reduce imports, and expand domestic production for the home market. Third, this import-substitution strategy was complemented by programs designed to provide a basic social wage (through pensions, unemployment insurance, and workers' compensation) along with public health care and education for all citizens. As the federal and provincial governments learned to manage these three tasks, the Canadian state achieved considerable legitimacy as the manager of a marketplace and society that were largely coterminous with its political boundaries.

Ever since Canada emerged from the blood-soaked battlefields of the Second World War as a significant actor in international affairs, its foreign policy has been cosmopolitan and internationalist. During the Cold War period, it built a reputation for itself as an honest broker in great power politics, exercising an influence seemingly beyond its material capabilities. A staunch supporter of multilateralism and international law, it played a key role in the negotiation of universal human rights instruments and was a vocal proponent of decolonization and Third World development. An eager participant in multilateral forums, it joined every international club for which it was eligible, from the Commonwealth to la Francophonie. Its avid multilateralism helped offset its asymmetrical relationship with its overwhelmingly stronger neighbour by generating multilateral political spaces in which Ottawa could manoeuvre outside Washington's bilateral influence.

In response to a nationalist surge critical of the country's deepening integration in and dependence on a bellicose America fighting an imperial war in Vietnam, the Trudeau government sought in the 1970s and early 1980s to reduce Canadian dependence on the US economy and vulnerability to US policy by forging a more independent foreign policy and a more nationally focused domestic economy. Trudeau established Petro-Canada, tried to buy back or limit foreign (read: American) investment in crucial sectors, launched the controversial National Energy Program, and espoused a foreign policy that was at times openly critical of US international stances. To think that Canada could be an autonomous state pursuing its own priorities domestically and internationally would be naive. For the four decades following 1945, Canada's tenuous, ambiguous sovereignty was primarily tied to its

deep dependence on the giant next door. With globalization, Canada's relations of interdependence have become more complicated.

What's New?

Canada's contemporary experience of globalization differs from that of its past mainly because of economic and technological transformations in global capitalism made possible by a breakdown of the post–Second World War bargain among industrialized states (Cox 1996b; McBride 2001, 16). This bargain, which Ruggie (1982, 209) calls the compromise of "embedded liberalism," had enabled the emergence of the modern welfare state: "The task of postwar institutional reconstruction ... was to ... devise a framework which would safeguard and even aid the quest for domestic stability, without, at the same time, triggering the mutually destructive external consequences that had plagued the interwar period. This was the essence of the embedded liberalism compromise: unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism."

The identity between states' political boundaries and their economic space started to break down in the 1970s for a number of reasons, both internal and external. Domestically, the success of the Keynesian welfare state generated a crisis as an ever-enriched social wage and escalating labour demands for higher pay put inflationary pressures on governments, which were unwilling to tax their citizens enough to finance their generous programs. Internationally, the world economy was shaken first by the collapse of the Bretton Woods system of international currency controls in 1971 when President Richard Nixon disconnected the US dollar from gold and then by the next decade's oil shocks, when the Organization of Petroleum Exporting Countries (OPEC) doubled, redoubled, and doubled again the price of oil on the world market. Computer technology and the intermediation of financial institutions made capital markets increasingly integrated across borders, helping TNCs to escape from government regulation and so weakening national governments' control over their economies.

These problems proved to be more than the old formula of Keynesian welfarism could resolve. With stagflation – simultaneously high inflation and unemployment, a combination Keynesian theory had believed impossible – economists and business advocates made the case for a radical policy shift that would restrain the state in order to liberate and reinvigorate the market.

The election of Prime Minister Margaret Thatcher in 1979 and President Ronald Reagan in 1980 made neo-conservatism the dominant policy paradigm in the capitalist world. As Canada lost more control over its markets and found it was competing with other countries to lure foreign investors, it came under pressure to cut back the social wage and restrict such regulations as those designed to achieve environmental sustainability.

Finding it increasingly difficult to resolve problems on their own, governments started cooperating more extensively with their neighbours. With the European Community in the lead, regional groupings of states emerged as common markets or free trade areas, permitting their corporations to cut their costs (via lowered tariffs) and achieve greater competitive efficiency (via economies of scale). The economic trade-off was straightforward: in return for their increased access to other markets, domestic firms received less protection from foreign competition. The social trade-off was less obvious. Reduced protectionism spelled job losses in beleaguered industrial sectors. Since investment tended to follow trade, enlarged access to foreign markets meant more jobs created abroad than at home by successful TNCs. The result: further downward pressure on the social wage without compensating salary increases.

By the late 1970s, Canadian business had abandoned its historical support for the import-substitution industrialization that had kept the home market largely to itself. With tariff protection falling as a result of the continual negotiating rounds at the GATT, the business community was losing control of what was in any case a relatively small home market. Unable to survive by producing for the domestic market, Canadian entrepreneurs decided their best hope lay in selling to and investing in the huge market next door. At the same time, American business was lobbying for Washington to break down other countries' economic development programs that fostered domestic corporations by discriminating in their favour. Claiming they faced unfair discrimination abroad, American TNCs promoted an ambitious agenda centred on the ability to operate freely in all economies. Giant firms in the entertainment, biotechnology, and computer sectors wanted their intellectual property rights protected around the world. Corporations in the energy, courier, education, and health sectors argued that other countries' public-sector provision of these services amounted to unfair protectionism and should be deregulated and privatized to allow them to compete there.

Incorporating these demands in a sophisticated dual strategy, the US government pressed its global counterparts for major changes in the rules

governing the GATT. Finding multilateral resistance to this vision from major industrialized players such as the European Community and Japan as well as from rising Third World powers such as Brazil and India, Washington also pursued a bilateral approach, twisting the arms of its more compliant trade partners to make concessions that could be used as precedents in the ongoing multilateral negotiations. It enjoyed its first major success with the 1987 *Canada-US Free Trade Agreement* (CUFTA). The year 1994 saw the implementation of the *North American Free Trade Agreement* (NAFTA), which expanded the bilateral deal to Mexico and provided corporate investors with unprecedented rights and powers to overturn regulations issued by the governments of the three member states. That same year saw the conclusion of the GATT's Uruguay Round, which launched the World Trade Organization, effectively universalizing American-inspired norms of international trade liberalization.

Opinions differ regarding the beneficial or harmful impact of these free trade arrangements, but all agree that they have fundamentally changed the balance between states and transnational capital. Throughout this period, "an international economy made up of discrete and strongly regulated national economies trading with and investing in each other slowly became eclipsed by a world economy 'in which production and finance were being organized in cross-border networks that could very largely escape national and international regulatory powers'" (Ó Tuathail, Herod, and Roberts 1998, 2-3, quoting Cox 1996b, 22).

Although these politico-economic changes are of fundamental importance, what is new about globalization is not limited to the economic sphere and associated modifications of the administrative state. The collapse of the Soviet bloc, the end of bipolar geopolitics, and the emergence of the United States as the only superpower have had profound effects, including newfound instability and uncertainty in the former Third World, a massive ideological boost to agendas for the global spread of capitalism and liberal democracy, and the transformation of global military conflict from a relatively stable nuclear stalemate to unstable, largely localized, yet persistent warfare. We are witnessing a global "rights revolution" in which new and old states are emerging from the yoke of totalitarianism and embracing greater democracy, human rights, and personal freedoms (Schneiderman 2004). We have also seen the rise of Islamist extremism, Christian fundamentalism, and other nominally religious transnational movements. The experience of catastrophic environmental change in the last thirty years, from ozone depletion to climate warming, shows for the first time that human activity can impair

ecological functioning at a planetary scale and intensifies the urgency for cooperative action to forestall disaster. The Internet and other information technologies make possible an unprecedented density and velocity of personal connections across borders, instantaneous communication concerning events around the world, and new forms of social solidarity and personal identity, at least for those with access to them. The list goes on. Suffice it to say that, though the roots of globalization are old, some of its manifestations and implications are substantially new in the contemporary period.

Although debate continues whether the current characteristics of globalization differ in degree or in kind from the interdependencies that existed in the past, it is increasingly clear that contemporary developments fundamentally challenge our received understandings of how we govern and are governed, whether in Canada or abroad.

Bringing the States Back In[1]

Many Canadians perceive no connection between their country's role on the global stage and its relationship with the United States. In terms of Canada-US relations, they understand Canada as a generally loyal geopolitical ally and economic extension of the global superpower, its room for manoeuvre perennially constrained by the need not to antagonize the behemoth for fear of being crushed underfoot. But in relation to the rest of the world, they see Canada as an independent force, punching above its weight as it brokers solutions to international conflicts, advances world peace, and pursues its own national interest. This compartmentalized outlook needs to be corrected by understanding how Canada's position on the global stage is inseparable from its relationship with American hegemony.

Many proponents of a robust, independent Canadian foreign policy become so caught up in their visions of Canada as a potential force for good in the world that they underestimate the extent to which Canada's connection with the United States restricts its possibilities for action abroad (Byers 2007; Welsh 2004). The highly asymmetrical Canada-US relationship is a constitutive condition of Canada's role in world affairs. Middle powers such as Canada understandably favour multilateralism because working in international organizations with many partners can enhance their room for manoeuvre and can compensate for the limitation they feel in their unequal dealings with a dominant neighbour. Yet this same asymmetry makes multilateralism problematic since it can induce Canada to take actions such as committing

troops to an unwinnable war in Afghanistan just to ingratiate itself with Washington. A belief in an independent foreign policy may lead many to ignore their federal and provincial governments' considerable dependence on actions taken in government offices and corporate headquarters south of the forty-ninth parallel.

Nevertheless, Canada is neither as helpless in its bilateral relationship nor as autonomous in its international endeavours as many may assume. Indeed, its bilateral relationship sets the main parameters for its international possibilities, which in turn help orient its relations with Washington. After 1945, Canada experienced the dilemmas of interdependence mainly through its complex political, economic, social, and cultural relationships with the United States; however, the forces of globalization now expose it to different dynamics, which open prospects for new types of engagement.

Canadians as Agents and Objects of Globalization

Canadians as individuals and the Canadian state as a set of institutions are both agents and objects of globalized governance. Given their history, it is not surprising that Canadians tend to feel they are *objects* of globalization, either as winners or losers. The happy winners find themselves the beneficiaries of global forces, enjoying an increasingly multicultural Canadian society, the World Wide Web, cheap international telephone calls, an amplified variety of consumer goods and cultural products from all over the world, better job opportunities in some sectors, affordable international travel, almost instant worldwide e-communication, rapid transmission of ideas across borders, and growing understanding of the "outside" world. Others see themselves as victims of globalization, pointing to more job insecurity, the Canadian economy's vulnerability to external shocks, worsening social tensions, a loss of national identity, the homogenization of cultural and consumer products, growing disparities between rich and poor, deteriorating environmental quality, and a spread of transnational criminal activity, disease, and terrorism. They feel their destiny controlled by decisions made outside the country by actors and institutions that are neither transparent nor accountable. Whether lucky victors or unhappy sufferers, citizens feel themselves to be passive objects of external forces.

But this is only part of the picture, because Canada and Canadians are also *agents,* shaping globalization by acting on the world stage. Consider the following:

- The Canadian government early became adept at parlaying its sheltered position in the global hierarchy of power into unusual, if limited, influence in global politics, punching above its weight diplomatically, earning a reputation as an honest broker, and championing multilateralism and international peace. From Lester Pearson to Maurice Strong to Louise Arbour, individual Canadians have been leading figures in the development and implementation of international law and policy in a wide range of fields, such as peacekeeping, environmental protection, human rights, and global criminal law.
- Federal and provincial governments have been active champions, not just passive objects, of many of the changes associated with neo-conservative globalization, from government downsizing and privatization to negotiating trade agreements that deliberately reduced their own powers.
- Many Canadian businesses operate abroad, bringing jobs, technology, and industrial best practices to host communities, while others bring social dislocation, human rights abuses, and environmental devastation. Some industry self-regulatory initiatives developed in Canada have spread globally, such as the chemical industry's Responsible Care program.
- CSOs are also global players. Greenpeace began as a small group of environmental activists in Vancouver. Canadian CSOs were instrumental in securing the adoption of a global treaty to ban anti-personnel land mines. Canadian Native peoples are influential advocates of indigenous rights and self-government in Australia, Chiapas, and the circumpolar region.
- As tourists, Canadians influence other societies and economies through their choice of destinations, activities, accommodations, meals, and souvenirs. A Canadian tourist who engages in child-sex tourism has very different impacts on the world, and different implications for legal governance, than one who travels to ski, hike, or visit art museums. At home, the choices Canadians make as consumers and investors affect health, prosperity, ecosystems, and life prospects half a world away, sometimes supporting unsustainable systems of production, sometimes pressuring firms to be more socially and environmentally responsible.
- Canada is often itself a model for the world. Its health care system; social programs; *Charter of Rights and Freedoms;* laws and policies regarding multiculturalism, indigenous rights, women's equality, and sexual diversity; the relatively successful coexistence of Quebec in the Canadian federation; and most recently Ottawa's banking regulations are held up

for emulation around the world (Welsh 2004, 190) – or occasionally for derision by those who mock "Canuckistan" as a socialist perversion (Trickey 2002).

In sum, when thinking about globalization, we must simultaneously consider its impact on Canada and Canadians' impact on it, because these inward and outward dynamics are dialectically inseparable sides of the same coin. Canadians experience their engagement with the world as a double movement. Not only do they feel the effect of external forces on them, they also have impacts on the world outside Canada's borders. They are concerned about the fate of communities in other countries and want to know what they, as Canadians, can do as cosmopolitan citizens of the world to ameliorate that fate.

Canada's relationship with the United States is similarly dual. Canadian governments promoted US hegemony when they subscribed to the entrenchment of neo-conservative economic norms in NAFTA and the WTO but also when they negotiated bilateral trade and investment agreements with other countries (discussed in Chapter 3). Sometimes Canada resists the United States. As we explain in Chapter 4, Ottawa backed the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* as a reaction against the WTO *Sports Illustrated* ruling, through which the United States threatened the Canadian magazine industry. Canada's championing of the International Criminal Court (ICC) despite sustained American opposition provided another example of principled resistance.

Rethinking Our Concepts

For all these reasons, globalization requires us to rethink four of the key terms of contemporary political order: governance, law, sovereignty, and legitimacy.

Governance

Globalization prompts us to interrogate the meaning of governance. How are societies governed under conditions of globalization? How and by whom is authority to govern distributed and exercised? We can no longer accept the conventional assumption that formally elected governments wield the ultimate authority in Canadian society. Other institutions and actors, from NAFTA to transnational corporations, coexist in a complex tapestry of power relations that may substantially constrain governments' autonomy to direct Canadian society according to their own priorities.

For most of the last two centuries, "governing" was viewed as an activity undertaken by "the government" – that is, the formal apparatus of the state: legislatures, executive bodies, bureaucracies, courts, and the coercive agencies of the police and the Armed Forces. Many believe that this way of looking at governance is now obsolete because the conventional institutions of the nation-state are ill-suited to deal with problems that transcend borders or those for which other actors such as business associations are better equipped to address. From private corporations to international organizations, from local social movements to transnational networks of scientists, countless institutions play important, even decisive, roles in contemporary governance.

Many analysts employ the term "governance" to describe the confusing situation created by the emergence of multiple decision-making centres. Formerly restricted to a few specialized areas, the term has recently spread to almost all domains of human endeavour. People now talk about the governance of health care and education, prisons and pension funds, non-governmental organizations (NGOs), and even families – and, in our case, the global governance of world affairs through the UN, the WTO, or other international regimes. Indeed, it is now almost impossible to speak about how to conduct human affairs without mentioning governance, although little agreement exists regarding what the word means.

This does not mean that national governments have become irrelevant. Whether acting through the international organizations and regimes to be discussed in Part 1 of this book or through the reconfigured instrumentalities of the nation-state described in Chapter 6, governments remain at the centre of efforts both to promote and respond to globalization. Yet, as we argue in relation to the economic supraconstitution in Chapter 3 and to governance "beyond the state" in Chapter 7, it is also important to recognize that a wide range of non-governmental actors and institutions is involved in governance, from TNCs to non-profit aid organizations.

Despite the proliferation of forms of governance beyond the state, many decision makers, stakeholders, and journalists continue to connect governance with the government, defined in terms of the nation-state, territorial sovereignty, and formal law, thus perpetuating the old sharp distinction between the domestic and international spheres. Rejecting this approach as outmoded, and cognizant of the myriad ways in which people are actually affected by public and private regulations, we adopt a broader definition of governance in order to examine state and non-state governance arrangements alongside one another.

All governance arrangements are not created equal. Some have more muscle than others and some more legitimacy. In the past, the term "government" was understood to designate those institutions that had ultimate constitutional authority in any given territory with a monopoly over law making and the legitimate use of force. Government actions and pronouncements were seen as having a binding authority that those emanating from other actors and institutions could not claim. If this picture was ever accurate, globalization has made it obsolete. Today, certain non-governmental actors and institutions may, and in some cases clearly do, have more effective and binding authority than some governments. Giant transnational corporations, international organizations (such as the IMF), credit-rating agencies, and the rules of the world trading system have greater clout than many domestic authorities. Because they exert effective authority over their own affairs, it would even be consistent to apply the term "government" to these institutions and to acknowledge that they stand alongside (or are even superior to) some national governments in terms of their power and authority. Regardless of terminology, it is important when exploring the numerous forms of governance in a globalized world to consider the relative muscularity of different governing authorities and institutions.

This brings us to a further question about the relationship between globalization and governance: can globalization itself be governed? In practice, attempts to manage globalization are made in a piecemeal, incoherent, sometimes conflicting manner by a range of forces including the needs and demands of global capital, the geopolitical priorities of the major states, the set of quasi-constitutional rules and institutions underpinning the world economic system, and, to a much lesser extent, the actions of transnational civil society. Some critics refer to this heterogeneous organizational hodgepodge as global "dysgovernance" (Latham 1999). Our question for Canadians is less whether globalization can be managed as how it can be managed in ways that respect and enhance equity, justice, human development, ecological sustainability, and democratic legitimacy. Even after much heated debate everywhere in the world, the answer is not yet clear (Falk 1999; Bhagwati 2004). But it is certainly worthwhile, indeed imperative, for us to strive to achieve a satisfactory answer.

Law

Because governance extends well beyond government, globalization also invites us to challenge the conventional conception of law as a formal

product of the state and to consider a range of unofficial and transnational normative orders as elements of a broader, pluralistic set of legal systems that govern our lives in various ways and to varying degrees. Legal pluralism, at its simplest, refers to "a situation in which two or more legal systems coexist in the same social field" (Merry 1988, 871). Such is the case in Quebec, for instance, where the common and civil law systems coexist. Canadian law interacts increasingly with international law, Aboriginal law, and a range of unofficial or informal legal orders such as cyber-law, corporate codes of ethics, fair trade labelling schemes, workers' rights certification programs, the *lex mercatoria* (a body of private rules designed to facilitate transnational business dealings), Torah, and Shari'a.

Legal pluralism is more than just a description of coexisting or overlapping legal orders. It is a normative project to embrace and foster the diversity of normative orders, to enable their coexistence, and to reject the dominant tradition of "legal centrism" in which official state law remains at the apex of a hierarchical pyramid of normative authority (Sinha 1995; Tie 1999). Legal pluralism implies focusing on the "living law" (the real patterns of regularized conduct in society) rather than law "on the books." It also implies a conception of law that is not restricted to official statutes, administrative rules, and court decisions but is defined in terms of all the ways people actually experience authority and rule in their own lives. Of course, the formal legal system features prominently in these experiences for most people, but other normative orders work alongside or in place of this official law.

Why should we use the term "law" to describe these unofficial rule systems? Without rehearsing long-standing debates about the definition of law, we offer the simple reason that the term carries with it certain expectations of transparency, democratic accountability, fairness, and justice that facilitate an inquiry into the legitimacy of governance in a globalized environment. These aspirations are often unrealized in practice, but as Szablowski (2007, 288) says, "to leave law tied to the state when the state's myths of authority and competence are so visibly eroded is to abandon one of our most powerful metaphors – one which combines a concern for accountability, legitimacy, and justice":

> The modern concept of state law may be said by many measures to have failed to live up to expectations, but it has left us with at least one vital legacy, that of its aspirations. Disillusionment with the emancipatory capacities of the state may be widespread, [but]

> the aspirations of effective and democratic governance have if anything increased their resonance around the globe. The task of reimagining what law should mean in a globalizing world should be guided by these aspirations. (Szablowski 2004, 20)

Taking a broader view of law also prompts us to be realistic about the potential that official law-making institutions could play in bringing about legal and social change. Although they are central to conventional accounts of law, legislatures and courts play only small roles in the day-to-day operation of law as it is lived in this broader pluralist conception, which understands "law" to be made and applied in a multitude of arenas, from union halls to corporate boardrooms, commercial arbitral tribunals, religious councils, community organizations, and Internet chat rooms. To appreciate how all these varieties of law operate in lived experience requires us to "turn away from the canonical texts and the privileged sites of legal reason, and turn towards the minor, the mundane, the grey, meticulous, and detailed work of regulatory apparatuses, of the control of streets, of the government of transport, of the law of health and hygiene, of the operation of quasi-legal mechanisms for the regulation of relations between men and women, parents and children ... of all the places where ... laws, rules, and standards shape our ways of going on, and all the little judges of conduct exercise their petty powers of adjudication and enforcement" (Rose and Valverde 1998, 546).

Similarly, we should recognize that projects to reform state law play limited roles in social change. In the pluralist understanding of law advanced here, "law reform" occurs in the imperceptible evolution of normative structures through daily social interaction, in marketplace arrangements invented by imaginative business people and civil society groups, in innovative grassroots political action, and in other social institutions and practices. If official law reform is to have any substantial influence on legal and social change, it must be acutely sensitive to these social practices.

Sovereignty

Globalization also challenges received conceptions of sovereignty, which, along with the complicated sets of social practices that constitute it, has lain at the heart of conventional understandings of law's international context. It has been at the foundation of the modern world order since the peace of Westphalia in 1648. Sovereignty denoted complete, exclusive, and independent authority over a defined territory and its permanent human population,

along with security from intervention in its internal affairs by other sovereigns. So understood, sovereignty implied the absence of any higher authority capable of binding a sovereign against its will. Hence, all international obligations, whether arising by customary law or treaty, were dependent, in theory, upon the consent of the affected sovereign, freely given on the basis of formal equality.

Inherent in the image of the modern nation-state is

> the idea not only that political systems have to be hierarchically organized but also that this system should have a final arbiter of law – a sovereign – over which no other authorities can decide. This historical image of the European nation state has, however, been transformed from an empirical fact that shaped life in Europe from the Thirty Years War onwards to an ontological claim on which modern theorizing is based ... The result is that we have a tremendously hard time conceiving of political systems where territory, identity, and power are separated, functionally and/or spatially. (Wind 2003, 124)

New forms of governance challenge the traditional conception of sovereignty upon which the nation-state, its legal order, and the whole structure of international law are based. They throw the continuing meaning and relevance of sovereignty into question, seemingly weakening the sovereign authority of many states, casting doubt over the adequacy of a purely territorial model of sovereignty, increasing the kind and numbers of entities claiming some form of sovereignty, and inviting us to reconsider what sovereignty entails in the contemporary world. Toward the end of the twentieth century, this conception of sovereignty as a nation-state's territorially bounded and exclusive authority over a specific geographic space came under increasing pressure from many sources at once, including market globalization, transnational interdependence, neo-conservative political and economic ideology, global ecological changes, the retreat of the welfare state, and the collapse of communism. As a result, sovereignty is no longer what we once thought it was.

For some observers, sovereignty is dead, overwhelmed – for better or worse – by the advance of a now worldwide capitalism, global environmental crises, universal human rights, armed humanitarian intervention, and newly intrusive international treaties. For others, sovereignty still exists but

has been fundamentally transformed so that, far from denoting a state's freedom to act as it chooses, it signifies the state's capacity to participate in the international regulatory regimes that make up international life and increasingly constrains unilateral action. In Abram and Antonia Chayes' (1995, 26-27) famous formulation, "for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life."

This brings into focus the old dispute over whether international agreements detract from state sovereignty. On the one hand, we can view signing international treaties or joining international organizations as limiting Canadian sovereignty because they effectively restrict the autonomy of national, provincial, or local governments to regulate as they see fit the business firms or other actors within their own territorial boundaries. Such restrictions are found, to varying degrees, in many policy fields, from foreign investment (for instance, in NAFTA) to biodiversity protection. Something like one-third of the laws adopted by the federal Parliament derive from the domestic implementation of international agreements. For these reasons, many observers view international treaties and organizations as limitations on Canadian sovereignty.

By negotiating international agreements and joining international organizations, Canada can also be seen as exercising its sovereignty and extending its capacity to act beyond its borders. In this view, treaty making is how Canada exercises its sovereign will on the international level. Ottawa enters only those arrangements it deems in the national interest, and treaties contain provisions that allow it to exercise its sovereign prerogative to register exceptions to or withdraw from those arrangements that do not meet its needs. Granted, many international treaties restrict Canada's freedom of action, but, like a contract between private individuals, such limitations are (in theory) assumed freely and voluntarily. This is so even when Canada "binds itself to the mast" of an intrusive international regime (see, for example, Wood 2002-03). In this view, if international arrangements curtail the regulatory autonomy of Canadian governments to a greater extent than initially anticipated, this is more a failure of informed consent than an invasion of Canadian sovereignty.

Still others believe that contemporary developments challenge our conceptions of sovereignty on an even more fundamental level, requiring recognition that sovereignty lies with people (or peoples), not states. This is

manifested in, for example, the emerging recognition of a right to democratic governance and the assertion of sovereignty by national minorities around the globe. Many of these claims are asserted over territories that are not coterminous with existing sovereign states or are based on factors other than territory. The result is that, more and more, we may be living in a world of multiple, overlapping, and even deterritorialized sovereignties.

Sovereignty nonetheless remains a powerful rhetorical device in struggles for governance authority. In Canada, the Québécois and First Nations assert the sovereign right to govern themselves and participate in the international domain. In many developing countries, state sovereignty is widely seen as an indispensable defence against "Northern" impositions. In powerful countries such as the United States, sovereignty is routinely invoked to justify everything from high import duties to rejection of the International Criminal Court's jurisdiction or non-compliance with an unfavourable ruling by a NAFTA dispute settlement panel.

The concept of sovereignty is bound together with the ability of a political collectivity (usually a nation-state) to determine and achieve its own goals. The ability of Canadian governments to set their own goals and achieve them, both domestically and internationally, is shaped by Canada's relationship with the United States and the world beyond. We find it useful to distinguish between two aspects of this ability. We use "autonomy" to refer to a state's authority to do what it wants within its own territory. It may be limited by the influence of powerful external actors such as states, international organizations, or transnational corporations. It may be constrained by supranational norms and institutions. It may be restricted internally by powerful domestic actors or by constitutional constraints such as federalism and a bill of rights. Major states, such as the United States or China, have more success in retaining their autonomy because they are relatively uninhibited by the threat of retribution for violating their international obligations. Less powerful states, such as many developing countries, often find they have little or no autonomy in domestic affairs, although they may enhance it by making common cause with like-minded states. Canada, as a mid-size advanced industrialized country, finds its autonomy constrained mainly by its relationship with its huge southern neighbour.

We use "capacity" to refer to a state's ability to achieve its objectives outside its own territory. By entering into international agreements, a state and its constituents may lose autonomy domestically but gain capacity to achieve their goals beyond their borders. Canadians' enthusiasm for multilateralism

and for "rules-based" continental and global free trade regimes reflects their desire to enhance their country's capacity in international affairs. Sometimes capacity is gained at the expense of autonomy, because, during negotiations, a state may give up some of its powers in order to win concessions that increase its capacity in the other states' economies. But capacity and autonomy do not necessarily vary inversely with each other. Sometimes, after a country emerges victorious from a conflict, the two may be enhanced simultaneously. In the aftermath of a severe currency crisis when it becomes a ward of the international community, a state may find both its internal autonomy and external capacity shrinking at the same time.

"Sovereignty," in short, remains a central term of political and legal discourse, even as its meaning is increasingly problematized by globalization.

Legitimacy

Globalization also complicates the age-old problem of legitimacy – the popular approbation that comes when decisions affecting people are made by appropriate authorities, in acceptable ways, with acceptable results. Systems for legitimation have not kept pace with recent changes in the locus and operation of political authority (Bernstein 2004). Conflicts between the proponents and opponents of economic globalization are, at bottom, struggles over the legitimation of international political authority:

> Mainstream economists now routinely express their puzzlement at the rise and rapid expansion of "anti-globalization" protest movements around the world. If the protestors would only learn some basic economics and a little Riccardian trade theory, we often hear, they would realize that the costs of international interdependence and even deepening integration are overwhelmed by the benefits. It is, however, becoming very hard to believe that simple ignorance is driving a spreading reaction to global change. Mass demonstrations sweeping through relatively prosperous cities like Seattle, Washington, DC, Quebec City, and Genoa in the early years of the twenty-first century reflected broad agenda-defining coalitions among a variety of not necessarily convergent interests. But they also suggested something deeper. Certainly protestors commonly claimed that corporate power and vested interests were usurping public space and dictating the agenda for public policy, that elected governments actually charged with

> making policy were becoming powerless, and that an ideology of free market individualism was eroding social cohesion around the world. At the systemic level, their concerns seemed to centre on what we might call the constitution of international political authority. Who makes the rules at the systemic level? Whose interests are most effectively served? Who pays the price? (Pauly 2002, 76)

Globalization first prompts us to rethink the question of legitimacy by casting doubt on the tendency to identify legitimate governance authority exclusively with the state. Until recently, legitimate political authority was understood, in the liberal democracies at least, to rest primarily with the governmental institutions of the nation-state. Their legitimacy was based on their representation of and ultimate accountability to citizens, as well as the existence and more or less consistent observation of constraints on their authority in the form of constitutionally mandated divisions of powers, civil rights, judicial review, the rule of law, and the like. The legitimacy of international governance rested, in turn, on state sovereignty: international laws derived their legitimacy primarily from the consent of sovereign states, freely given when treaties were signed on the basis of sovereign equality. Although these traditional sources of legitimacy were already under strain domestically and internationally (Habermas 1975; Chayes and Chayes 1995), globalization has sometimes stretched them beyond the breaking point.

The problem of legitimacy is found wherever humans govern or are governed. Every would-be state or non-state authority is compelled to justify itself in some way: "to govern, one could say, is to be condemned to seek an authority for one's authority" (Rose 1999, 27; see also Weber 1968, 3:953). Legitimacy is "another name for the willingness and capacity of individuals to submit to the necessities" of collective authority; as such, it lies ultimately with, and must be conferred by, those over whom it is exercised (Ruggie 1998, 61, quoting Barnard 1938).

This paradox leads to a second problem. If authority is ultimately conferred by those over whom it is exercised, its legitimacy is not just a question for normative analysis and prescription: it is also a sociological issue. Legitimacy – the esteem in which an institutional order is held by stakeholders – is the contingent outcome of social interactions among "rule makers" and "rule takers." Legitimation – processes that generate legitimacy – is one of the central strategies used by both state and non-state rule makers to establish

and maintain their authority, whereas opponents may engage in efforts at delegitimation to undermine the same authority.

Legitimation involves deliberate strategic efforts by rule makers to establish the appropriateness and authoritativeness of their status and decisions as rule makers (that is, legitimacy), which is achieved when the relevant communities accept the rule maker as "appropriately engaged in the task at hand" (Bernstein 2004, 4). This does not mean that rule takers necessarily agree with the rule maker or its rules, only that they perceive them to be binding and authoritative (Weber 1947). Diverse audiences may have differing perceptions of legitimacy. These perceptions may vary over time, space, and subject matter. Depending on the context, a rule maker's legitimacy may be grounded in any number of sources, including appeals to truth, justice, fairness, neutrality, objectivity, expertise, ethnic identity, tradition, consent, the will of the people, and the dictates of God. Legitimacy may depend on characterizing the rule maker's authority as public or private, technical or political, religious or secular, and so on.

Legitimation simultaneously disguises and puts limits upon the exercise of power. It may mask unequal power relations by shrouding them in the guise of authority, such as when a repressive government uses the label "constitution" to cloak its acts of domination in the inauthentic robes and mystifying aura of legitimate authority (Walker 2003, 32). Yet, in order to be successful in the long run, legitimation processes must have some demonstrated effectiveness at curbing that power (Szablowski 2007, 19, citing Thompson 1975, 265). It is thus no coincidence that all legitimation strategies share one characteristic: "they seek to justify the exercise of power by claiming to set certain constraints upon its exercise" (Szablowski 2007, 18). Governments, for example, might claim to respect the autonomy of a "private" sphere or to respect due process and the rule of law. Technical experts might claim to stay away from "political" questions (Wood 2003a, 2005). For legitimation to function, rule takers must believe that these constraints are, for the most part, actually observed (Szablowski 2007, 19).

Rule takers who are well organized, attentive to rule-making activities, capable of posing a threat to rule makers' authority, and who command substantial material resources typically receive special attention from rule makers and are likely to have their legitimacy expectations taken seriously. The opposite is true of disorganized categories of rule takers who are less vigilant, more easily demobilized, and less able to threaten rule makers' authority (*ibid.*,

20). Hence well-organized and well-funded business lobbies typically receive more attention from governments and international organizations than do less disciplined, poorly funded anti-poverty or environmental activists. This discrepancy has particular significance for transnational relations, in which some sets of rule takers are fragmented and dispersed, whereas others are highly organized and easily able to mobilize resources across borders.

The legitimacy or illegitimacy of a given actor, institution, norm, or decision is the contingent outcome of interacting legitimation and delegitimation efforts in a particular social field. The result is that, though we can take a principled approach to the question of legitimacy, we must remember that "legitimacy in global governance is not conducive to formulaic lists of requirements ... [but is] highly contextual, based on historical understandings of legitimacy and the shared norms of the particular community granting authority" (Bernstein 2004, 18). When considering established and new forms of governance in an era of globalization, we should ask not just "Are they legitimate?" as if legitimacy were an objective reality, but "*How* are they legitimated or delegitimated?" Having understood that legitimacy is socially constructed, it is important to be clear about the normative criteria we are using to evaluate the competing authority claims made on behalf of different forms of governance under conditions of globalization.

Legitimacy as Emancipatory Potential

From a normative point of view, legitimacy ought to be judged ultimately by the extent to which the governance arrangement in question advances or hinders the goal of emancipation – freedom from the legal, social, and political restraints that keep people in positions of subjugation and oppression. This is a noble concept. One of the central goals of Western political philosophy since the Enlightenment has been to free people everywhere from oppression, injustice, violence, social exclusion, ignorance, poverty, disease, and premature death. The project of emancipation remains vital to progressive political practice and, even if they do not use the word, central to the aspirations of most Canadians. The goal of emancipation is not mere survival but the flourishing and enfranchisement of individuals, communities, and, increasingly, the ecosystems on which life depends.

Furthermore, as Santos (2002, 2) explains, emancipation requires breaking the bond between experience and expectations. Guaranteeing the stability of expectations for transnational corporations is a key ingredient of neo-conservatism's global agenda. The most obvious example is the insistence

by the World Bank Group, transnational corporations, and developed states that the security of property and contract rights and the stability of reasonable investment-backed expectations are crucial for good governance and economic development. In advanced industrialized countries, people demand stability of their hard-won achievements of good health care, shelter, decent jobs, prosperity, cheap and plentiful food, and security against arbitrary violence. These demands have, understandably, intensified in the current economic downturn as the realization of these expectations has been jeopardized for millions of (formerly) well-off people.

Billions of people do not share in or benefit from this stability of high expectations. The price of achieving or preserving stability for some is increased instability and misery for others. For this impoverished majority, low expectations follow predictably from grim experience, as they have for generations. Maintaining these low expectations is one of the main goals of those who benefit most from current forms of globalization.

Emancipation requires breaking and re-establishing the link between experience and expectations by confronting and delegitimizing the norms, institutions, and practices that perpetuate the production of oppression and the maintenance of hopelessness. Admittedly, this is risky for those struggling to break free of oppression and threatening to those clinging to received advantages. But it is also promising, especially for those with the least to lose and the most to gain from it. Emancipation does not necessarily mean fighting to destabilize existing legal systems. In some cases, it may involve using them – for instance, by invoking the citizen complaint mechanisms of the NAFTA environmental or labour side agreements to campaign for more effective enforcement of existing laws. In others, it may mean struggling for deeper social transformation (Santos 2002, 470).

Who, then, are we talking about when we speak of those needing emancipation? We mean those people who are effectively excluded from the social contract. On a global scale, this means the "majority world" – the majority of the human population living in chronic and pervasive poverty, disease, violence, drought, or pollution. In advanced liberal democracies such as Canada, it means the inhabitants of "internal Third Worlds" such as Aboriginal peoples, the rural poor, and the homeless.

From a normative perspective, legitimacy can thus be reconceptualized in terms of emancipatory potential – the capacity of a given governance actor, institution, norm, or decision to advance social inclusion, human rights, human welfare, individual and collective self-realization, and ecological

sustainability. Legitimacy is usually analyzed in terms of the processes by which decisions are made ("process legitimacy") or the outcomes of such decisions ("outcome legitimacy"). Emancipatory potential is a function of both.

Process Legitimacy

A decision may be legitimate if it was made by a decision maker who is perceived as legitimate, through processes that are recognized by the relevant audience to be appropriate in the circumstances (Franck 1990; Chayes and Chayes 1995, 127; Szablowski 2007). Put in other words, process legitimacy is a function of both the status of the decision maker and the role of those affected by the decision.

Whether a decision was made by a proper authority raises several subsidiary issues, including the distribution of competences between authorities of different kinds and across different topics (for example, ecclesiastical matters should be decided by religious officials, purely local questions should be decided by town councils), whether the issue in question falls within the scope of the rule maker's authority (is this bishop's ruling really about an ecclesiastical matter?), what limitations exist on the rule maker's authority, whether they have been observed, and whether the authority has followed the internal rules and procedures that prescribe its own behaviour (Szablowski 2007, 20-21).

Process legitimacy typically raises such questions of accountability as "Is the rule maker's authority open to challenge and by whom?" or "Can the rule makers be held to account democratically for their actions, and how?" Process legitimacy also invokes such questions of technical expertise as "Is the issue in question properly characterized as a 'technical' matter over which specialized experts should have authority?" or "How should technical matters be distinguished from 'political' ones?" and "How should expert authorities be held accountable (is peer review adequate)?" Related questions of subsidiarity and centralization ask, "Should authority be centralized, or should it be located as close as possible to the affected people and places?"[2] Finally, process legitimacy entails questions about "private" and "public" domains, because in many places, including Canada, perceptions of legitimacy depend partly on whether the matter in question is understood as falling within a private or public sphere. Within the former, the individuals and groups are widely considered to have the freedom to govern their own affairs as they see fit within the limits established by law and civic responsibilities, and public

authorities have a duty to protect and foster the autonomy of this private sphere (*ibid.*, 21). This leads to the difficult question of what is private and what is not, a question to which there is no a priori answer and the resolution of which varies from one audience to another.

The second question is whether all those subject to or affected by a decision have a say in decision making. Most perceptions of legitimacy are based on the assumption that there should be congruence between the decision-making authority and those targeted or affected by its decisions (Conzelmann and Wolf 2008). Those affected by rules should have an effective voice in the development of the rules by which they are bound. In this view, legitimacy requires the public's participation in and access to transparent decision-making processes on matters that affect it (Bernstein 2004, 7). Many difficult questions arise here, such as who is included in the relevant "public" – neo-Nazis in Germany? Mafiosi in Sicily? – along with what form their participation should take, how transparency should be ensured, and to what extent non-state or "expert" authorities should be subject to the same requirements.

Legitimacy expectations may differ depending on whether the relevant community comes together voluntarily to address a specific issue or is a "community of fate" bound together by shared destinies (Held et al. 1999, 29-30). Legitimacy in the case of spontaneous groupings may depend only on officials explaining and defending their decisions to those directly concerned. In communities of fate, legitimacy may require broader democratic participation and deliberation. Unfortunately, it is often difficult to distinguish between voluntary, issue-driven institutions and general-purpose jurisdictions (Bernstein 2004, 9). Complex questions also crop up in relation to self-regulation, especially the self-regulation of business, with some observers emphasizing the advantages of self-determination and others warning against the dangers of allowing the foxes to guard the henhouse or permitting an actor to be the judge in its own cause. In many cases of global governance, process legitimacy issues are acute because those affected by norms that were created under conditions of diplomatic or business secrecy and implemented by unknown officials or executives in far-off cities have no sense of control over or access to these procedures or decision makers.

Outcome Legitimacy

Outcome legitimacy is a function less of means than of ends. Conventional analyses of legitimacy tend to identify three potential sources of outcome legitimacy. Perceptions of legitimacy may be based on *outcome favourability*

when the outcome of the decision favours the observer's interests, on *substantive fairness* when the outcome is just according to the observer's values, or on *effectiveness* when the rule or decision in question achieves its stated goals (Szablowski 2007, 16-17; Chayes and Chayes 1995, 127; Peters 2003, 86). Outcome favourability is typically discounted as a measure of legitimacy when dealing with large heterogeneous audiences (such as one finds in many national, transnational, and international settings), since outcomes are likely to favour particular interests over others. In such circumstances, basing legitimacy on outcome favourability would be to take sides in a contestable value judgment. Similarly, substantive fairness or justice is typically discounted as a measure of outcome legitimacy on the grounds that conceptions of what is substantively fair or just are subjective and bound to differ (Franck 1990). According to this logic, legitimacy can only then be determined in terms of process, since evaluating outcomes is necessarily too fraught with subjectivity to be reliable (Szablowski 2007).

Nevertheless, we believe it is meaningless to discuss the legitimacy of governance beyond borders without referring to its outcomes. The content and effects of rules are just as important as where or how they are made. We argue in this book that the dominant rules governing globalization systematically (though not uniformly) favour concentrated economic interests in the global North at the expense of human welfare and global ecological sustainability. The reason for the intensity of the worldwide backlash against the rules governing economic globalization, from the Seattle WTO ministerial meeting in 1999 to the London G20 meeting in 2009, is that the outcomes they produce are viewed by many millions of people – both the relatively well-off residents of advanced liberal democracies who are experiencing unaccustomed insecurity and downward mobility, and the global majority whose long-standing immiseration endures or deepens – as disproportionately benefiting global capital at the expense of ordinary people. Despite the irreducible heterogeneity of interests and values that characterizes politics, this public condemnation of outcomes should not be ignored in assessing the legitimacy of global governance, which cannot be judged exclusively or even primarily in terms of "right process." Although competing conceptions of the just and the good will always exist, an outcome-oriented account of legitimacy allows us to acknowledge that what the winners in struggles over norm-creation see as good and just has major impacts on the health, happiness, and security of the losers.

Outcome legitimacy is, moreover, likely to acquire increasing salience as we move away from governance by democratically elected governments, since few other institutions can boast the universality of representation claimed by modern liberal-democratic states. Breadth of representation is one of the keys to process legitimacy. By contrast, whatever legitimacy most CSOs can claim is bound to rest less on the nature of their membership structures, funding sources, and decision-making processes than on their capacity to advocate substantive positions "that are recognizably in the 'global public interest,' rather than the narrow self interest" of a privileged few, and this is so even if a truly cosmopolitan set of global values remains elusive (Buchanan and Long 2002, 62).

One final caveat about outcome legitimacy: some analysts maintain that legitimacy is as much a product of the effectiveness of rules at achieving their stated goals as it is of rule-making processes (Peters 2003, 86). The relationship between legitimacy and effectiveness is complicated. Many rules and institutions are effective in achieving their goals without being legitimate (Nazi concentration camps are one example). Conversely, many may be perceived as legitimate without being particularly effective. And of course some, such as the detention facility at Guantanamo Bay, Cuba, and the 2003 Iraq invasion, are neither legitimate nor effective in achieving their stated goals. As a result, effectiveness and ineffectiveness are not reliable gauges of legitimacy, although in the long run we can expect that effective authority will need to cloak itself in legitimacy in order to remain effective, and legitimate authority will need to demonstrate some effectiveness in order to remain legitimate.

To summarize, legitimacy is normatively related to emancipatory potential. Emancipatory potential is, in turn, a function of both process and outcomes. It is an index of the extent to which the norms, actors, or institutions in question challenge the hegemonic forms of governance that perpetuate illegitimate processes and outcomes.

Legitimacy and Legality

The relationship between legitimacy and legality has long exercised analysts because legality does not guarantee legitimacy (Bernstein 2004, 11). A rule or decision may have the force of law (legality) yet lack legitimacy. Conversely, many rules and decisions recognized as legitimate in social relations lack the status of formal law. Formal law must earn its legitimacy just like

any other form of authority. In some ways, it enjoys a legitimation advantage due to its close historical and ideological association with ideals of justice and fairness. In other ways, it is at a disadvantage because of its historical and continuing role as a mask for injustice and domination. Throughout history, the powerful have employed law as an instrument of repression. Beyond this, many business people view formal law as a burden on entrepreneurial innovation, and many civil society actors are disillusioned with law as a tool for social change. In short, the legitimacy of formal law should not be assumed but should be evaluated according to the same criteria as other forms of authority.

As a result, the relationship between legitimacy and the rule of law – a fundamental constitutional principle in Western liberal democracies – must be reconsidered. As typically understood in Canada, it has three elements: the equality of all before the law, the existence of a system of positive law (which embodies and preserves the more general principle of normative order), and the need for all government action to be grounded in law rather than arbitrariness (Hughes 2004). The rule of law tends to enhance the legitimacy of laws by providing a principle of constraint on arbitrary or unfairly discriminatory government action. If the rule of law is observed in practice, the process legitimacy of formal law and state action is likely to be enhanced. On the other hand, the rule of law does not itself guarantee legitimacy. From a legitimacy perspective, appeals to the rule of law will always beg the question of which law, and whose interests it serves. Efforts to promote the rule of law in a transnational setting – from trade and investment treaties to World Bank "good governance" projects, civil-society-led anti-corruption campaigns, and official development aid programs – preach a particular conception of law and the role of government in social change. Some of them advance a neoconservative agenda of economic globalization, property rights protection, free markets, and limited government that may be at odds with Canada's constitutional tradition and with the ultimate goal of social justice (*ibid.;* Schneiderman 2004).

Government, law, sovereignty, and legitimacy are not the only conceptual categories to have been exploded in a globalizing world. A whole range of received understandings about politics and law has been thrown into question. The conventional dichotomy between the domestic and international realms has disintegrated with the emergence of increasingly muscular international laws and organizations. Conceptions of the self based on citizenship and territory are giving way to new forms of identity as information

technology and human migration break down old barriers. The previously sharp distinction between national security and human development is collapsing into the emerging concept of human security. The distinction between war-fighting and peacekeeping died with the Cold War. The already shaky dichotomy between commercial dealings and public regulation has been further eroded by the growth of investor-state arbitration under NAFTA Chapter 11 and bilateral investment treaties. The list could go on. Although many of these categories were contested long before globalization entered the lexicon, contemporary global transformations have intensified this contestation and exposed the inadequacies of conventional understandings of these terms.

Plan of the Book

Canadians debate whether globalization and the attendant transformations in law and governance are beneficial or harmful. Some see these developments in a positive light, welcoming freer trade, stronger international laws and institutions, harmonization of different countries' laws, innovative changes to the structure and operation of the welfare state, a burgeoning global civil society, a growing commitment by global business to sustainability and social responsibility, and the spread of Canadian constitutional values and jurisprudence to other nations. Others take a more negative view, pointing to the expanding power of unaccountable and opaque international bodies, the retreat of Canadian governments from their responsibility to protect public welfare, the increasing supremacy and continuing social and financial abuses of transnational corporations, and the questionable motives and accountability of some NGOs.

These disagreements are bound to persist because the manifestations of globalization are so diverse they are inherently controversial. But persisting controversy does not mean that taking sides on the pros and cons of globalization is inappropriate. Indeed, normative engagement with new (and old) forms of governance in a globalized world is as imperative for citizens nowadays as is their need to engage with their own domestic politics. Rather than attempting a comprehensive analysis of all forms of governance in a globalized environment, the following chapters examine selected developments in four spheres: the international system, the nation-state, the market, and civil society. Like imperium, hegemony, and autarchy, these categories are ideal types that correspond imperfectly to lived reality and overlap in complex ways. Nonetheless, these familiar categories of political and legal analysis are useful heuristic tools to help us make sense of globalization.

The international system is the subject of Part 1, in which we examine the proliferation of international law and organizations, one of the most striking aspects of the contemporary world. We investigate these developments from a constitutional perspective, arguing that certain aspects of this burgeoning international normative architecture have acquired constitutional status, effectively constraining the exercise of public authority in Canada. In Chapter 2, we explain this *supraconstitutional* perspective as a framework for analyzing international law and organizations. Chapter 3 expands on Canada's emerging economic supraconstitution in the form of international trade and investment rules and institutions. Chapter 4 then explores international social and environmental governance, while Chapter 5 takes the measure of the global supraconstitution by contrasting its economic, social, and environmental dimensions.

Whereas interaction between the domestic and international spheres is a central theme of Part 1, in Part 2 we turn our attention from the interstate system to the nation-state and the realms of non-state actors and institutions. In Chapter 6, we investigate the globalization of the Canadian state, both in terms of the localization of global ideologies and legal forms in Canada, and the role of Canada and Canadians in the exportation and globalization of law and governance. In Chapter 7, we focus on the role of market actors – especially business elites and transnational capital – in globalized law and governance. We also discuss civil society, in the form of public-interest NGOs and social movements. Developments in these arenas do not occur in isolation from each other. Indeed, interaction between and hybridization of these different spheres are defining characteristics of governance in a globalizing world. In the final chapter, we evaluate the implications of our analysis for Canadians. Throughout the book, we assess what globalization means for law and governance in a middle power that exists in the shadow of a global hegemon, and how such a country and its nationals can influence law and governance beyond their borders.

Our central thesis is that the globalization of law and governance is characterized by severe, ever-perilous imbalances between economic and social priorities, between the needs of capital and of people, between elites and the general public, between hegemonic expansion and democratic self-determination, between Canada and the United States, and between the global North and South. We maintain that these imbalances are the manifestations of a continuing neo-conservative project to remake the world to suit transnational business. We believe that if globalization is to realize its potential

as a progressive and legitimate process, these imbalances must be redressed. We close by arguing that the seeds of a solution lie in the embrace of a pluralist conception of law and governance, which asserts a space for emancipatory governance projects outside the hegemonic instrumentalities of the state, the interstate system, and the market. Though acknowledging the continuing centrality of those hegemonic forms, we conclude that the need to work within and through them should be infused by the quest for just and sustainable governance, not solely for Canadians but for all humankind.

PART 1

Canada's Emerging Supraconstitution

2
The Supraconstitution: A Framework for Analysis

If you ask many interested citizens what globalization means to them, one of the first things they will point to is the massive proliferation of international organizations, agreements, and regimes within a single human lifetime – the United Nations, the World Bank, the World Trade Organization, the European Union (EU), et cetera – and the increasing impact of these international actors and arrangements on their daily lives. Since the end of the Second World War, nation-states have been embedding themselves in complex webs of international agreements, organizations, and regimes, whose number, scope, and competencies seem to have expanded almost without end. As we have already seen, we have reached a point where participation in networks of multilateral regimes – not the unhindered capacity for unilateral action – is the defining feature of sovereignty in the contemporary world (Chayes and Chayes 1995).

This aspect of globalization is found at all geographic scales, from bilateral to regional to global. Canadians – whether politicians or diplomats, scholars or commentators – have been among the most enthusiastic architects and supporters of this phenomenon of *internationalization*, especially in its multilateral forms. In turn, internationalization has had substantial impacts on Canada's society, economic structures, and state institutions. It is highly uneven over time and space, and across domains of human activity. This unevenness – this perilous imbalance – is primarily what concerns us in Part 1. International regimes are more robust in some places, regarding some domains of activity, and for some actors, than others. Their burdens and benefits are distributed highly inequitably. They are in perennial flux, moving in inconsistent directions toward contested destinations.

One of the most important if least understood dimensions of internationalization is the emergence of what we call a global *supraconstitution*. What

began as the creation of interstate institutions and agreements governed by general principles of public international law has in some respects morphed into a process of constitutionalization: the appearance of supranational political formations governed by their own brand of constitutional law (Weiler 1999). Simultaneously international and domestic, the supraconstitution refers to a constitutional order arising at the international level, which at the same time transforms the domestic legal order by embedding an "external" constitution into its domestic one (Chantal Thomas 2000; Clarkson 2004).

Because the supraconstitution acts upon and is partially embedded in domestic constitutional orders, it is experienced differently in different nation-states. Canada's supraconstitution is not the same as Mexico's, let alone those of the United States or China. The processes, structures, and effects of the supraconstitution also diverge greatly by subject area, reflecting the wide variety of bilateral, regional, multilateral, and global interstate structures, and the bewildering proliferation of transnational legal arrangements "beyond the state" (Teubner 1997). Although this diversity might lead to a sense of "irreducible heterogeneity," the emerging global supraconstitution has a number of unifying features and implements a specific political agenda (Schneiderman 2000a, 83).

The supraconstitution is found neither in the *Charter of the United Nations* and the post–Second World War project of achieving world peace through world law, nor in world federalists' tired dreams of a world super-state. Rather, it springs from the rules and institutional forms of what Stephen Gill (1995, 412-13) calls the "new constitutionalism": a continuing program to restructure state and international political forms to promote market efficiency and discipline, enable free capital movement, confer privileged rights on transnational corporations, insulate key domains of the economy from state interference, and constrain democratic decision-making processes. The new constitutionalism is rooted in an interlocking network of agreements and rule-making structures intended to promote and protect transnational corporate investment and insulate it from majoritarian politics (Schneiderman 2008, 2). Its normative architecture is animated by a neo-conservative ideology and propelled by the world's most powerful state elites and corporations. The thrust of this supraconstitutional program is the international entrenchment of economic rights for transnational capital within domestic constitutional orders – often at the expense of human rights, cultural integrity, social justice, human security, environmental protection, and national political autonomy.

This venture to re-constitutionalize the world has had the sharpest impact on countries and actors – mainly in the global periphery and semi-periphery – which have had to make the most changes to conform to its norms. Since the new constitutionalism represents the continental and global projection of mainly US constitutional norms by mainly US economic and political elites, the United States has been affected the least, whereas Mexico's constitutional and legal order has been substantially transformed, and the effect on Canada's has been intermediate in comparison to these two. But Canadians are not simply passive recipients. Canadian political and business elites were and are active agents of the new constitutionalism, both at home and abroad. Having taken an active part in constructing the constitutional architecture of North American free trade and investment, Canadian state and corporate elites became champions of this same disciplinary neo-conservatism in the World Trade Organization, and they continue to re-export it by negotiating further trade and investment agreements with other countries.

This quiet transformation is proceeding without being legitimated by many affected national publics, who remain unaware of its significance. It is occurring without a corresponding supranational constitutionalization of social, environmental, cultural, or labour rights. It has significant negative consequences for social justice, human security, ecological integrity, and national autonomy. The supraconstitution, in short, is highly asymmetrical and raises important questions about legitimacy.

The Move to Constitutions in International Law

To speak of international law and organizations in constitutional terms is nothing new. Scholars have long applied concepts and terminology drawn from constitutional law to the United Nations, the European Community, the international trade system, international human rights law, international organizations, and the international legal system generally (Verdross 1926; Lauterpacht 1950, 463; Ross 1950; Opsahl 1961; Jackson 1969, 1980; Stein 1981). This trend intensified after the end of the Cold War and was especially pronounced in relation to Europe, where – despite the failure to ratify the *Treaty to Establish a Constitution in Europe* – the scholarly debate has moved past *whether* Europe has a constitution to *what kind* of constitution it should be (Weiler 1999; Weiler and Wind 2003; Avbelj 2008). Constitutional analyses of – and prescriptions for – the World Trade Organization (De Búrca and Scott 2001; Cass 2005), international economic law (Joerges and Petersmann

2006), the UN Charter (Fassbender 1998), and international law as a whole are now commonplace (Joerges, Sand, and Teubner 2004; Orrego Vicuña 2004; Macdonald and Johnston 2005; de Wet 2006; von Bogdandy 2006; Dunoff and Trachtman 2009).

This upsurge of interest in the existence of constitutions beyond the national state is a reaction to a threefold transformation occurring over the last two decades in the way that international law is experienced in the core capitalist democracies. Led by the liberalization of trade and investment rules, international law has expanded to cover subjects that were traditionally addressed as domestic concerns, from money laundering to consumer and environmental protection. In the European Community, by 1990, it was possible to say that there was simply "no nucleus of sovereignty that the Member States can invoke, as such, against the Community" (Lenaerts 1990, 220). Kumm (2004, 913) claims that the same can be said of international law today. This "comprehensive blue-print for social life" has become "a multi-faceted body of law that permeates all fields of life, wherever governments act for promoting a public purpose" (von Bogdandy 2006, 226, quoting Tomuschat 1999, 63, 70). The result is that, during the last two decades, governments in the core capitalist countries have begun to feel pervasive pressure to align their domestic policy choices with international legal rules and obligations. They are finally experiencing the same loss of autarchy that international law has always meant for the weak and poor countries of the global periphery.

Second, the core countries find themselves increasingly subject to dictates to which they did not specifically consent (Kumm 2004, 914). The link between state consent and international obligations loosens as parties to international treaties delegate more law-making, interpretation, and enforcement powers to quasi-legislative bodies, adjudicative tribunals, and international standards development organizations such as the Codex Alimentarius Commission. These bodies determine the details of states' rights and duties without obtaining the affected states' consent to the specific decisions.[1]

Third, the increasing specificity and transparency of international obligations and the proliferation of compulsory third-party dispute resolution have robbed many states of a substantial degree of flexibility to interpret their international obligations as they see fit (*ibid.*, 914-15). Led by the European Court of Justice, which established the supremacy of European Community law and its direct effect in the domestic legal systems of member states, this constraint over states' self-determination is especially true in international

economic relations (Weiler 1999, 19-20). With the establishment of the International Criminal Court (ICC) and numerous ad hoc international criminal tribunals during the last decade, international criminal law limits some state systems – if not others. Its teeth are felt much more sharply by countries of the global periphery and semi-periphery than by the core capitalist countries, as illustrated by the United States' fierce refusal to submit its own nationals to ICC prosecution, and the refusal of the chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia to indict NATO leaders for alleged war crimes arising from their 1999 bombing campaign against Serbia (Cerone 2007).

Since the end of the Cold War, many countries have increasingly experienced international law as "a firmly structured normative web" that exerts "influence on national political and legal processes and often exerts pressure on nations not in compliance with its norms" (Kumm 2004, 912). To make sense of this development, international lawyers are turning to constitutional analysis, a move that has generated considerable controversy. Because the term "constitution" is strongly associated with the national state (see Hogg 2004, 1; Monahan 2002, 3), it is usually reserved for the fundamental arrangements by which governmental powers are allocated, organized, and limited in order to define the relationship between public authorities and citizens within a sovereign state. Since it is still widely assumed that only the state can supply the exclusive, systematic, and unified hierarchy of norms characteristic of a constitution, it is also thought that only within boundaries can one find the single constituent power (the "We the People") that a constitution presupposes and to which public authorities can be held accountable. Thus, to suggest the existence of a constitution at the international level strikes many not only as nonsensical but dangerous (Howse and Nicolaidis 2001). The danger is summarized by Walker (2003, 32, emphasis in original) as follows: "Constitutionalism is not just about the history of legitimate self-government, but also about the history of *illegitimate* domination – of cloaking illegitimate regimes and the illegitimate acts of sometimes legitimate regimes with the inauthentic robes and mystifying aura of legitimate authority."

Notwithstanding this concern, many commentators view international constitutionalism as a positive development, a manifestation of international law's civilizing mission (Koskenniemi 2001). The Cold War's collapse reinvigorated this project and inaugurated a burst of international institution building, driven by a renewed enthusiasm for international human rights,

the rule of law, and market liberalization. Many proponents of this project were inspired, implicitly or explicitly, by the liberal-democratic capitalist version of constitutionalism that had apparently emerged victorious from the ideological struggle with communism.

This euphoria came to an end with the United States' aggressive resort to unilateralism, exceptionalism, and armed force after 11 September 2001 when the mood among many international lawyers shifted from triumphalism to anxiety (Dunoff 2006, 649).[2] Constitutionalism became less a confident project of international integration and more a defence against the perceived threats to the international order posed by the Bush doctrine of pre-emptive self-defence, the Anglo-American invasion of Iraq, the torture of terror suspects by the US and allied governments, American hostility toward international law and organizations, and other aspects of the American-led global war on terror.

The upshot is that many international lawyers employ constitutional terminology loosely and in a bewildering variety of ways. Moreover, they often do so with little or no effort to clarify their analytical frameworks or acknowledge the normative presuppositions embedded in their analysis (Walker 2003, 39). An effort at clarification is therefore necessary.

Constitutional Concepts and Terminology

At a general level, "constitution" refers to the system of fundamental norms by which any organization – whether a professional association, corporation, or national state – is governed (Weiler 1999, viii). As the British foreign secretary quipped during the debate over the failed European constitutional treaty, in this sense, even golf clubs have constitutions (Kumm 2006).

In the term's narrower, political sense, we can distinguish three uses of "constitution." First, the word can refer in a *formal* sense to the written text or fundamental legal act that sets forth the essential norms by which a political community is governed (Snyder 2003, 56). The norms entrenched in a constitutional instrument have the highest rank in the legal system and are subject to more burdensome amendment procedures than other norms (Kumm 2006, 508). The US constitution and the *Canadian Charter of Rights and Freedoms* qualify as constitutional documents in this sense. The UN Charter and the European Union's basic treaties do too. Many social systems, however, have fundamental norms that are not entrenched in any document, including the United Kingdom's largely unwritten constitution. A formal or textual definition is therefore inadequate.

The term "constitution" can be used in a second, *functional* sense to refer to the ensemble of fundamental norms and practices that perform certain basic roles in the establishment and organization of a polity's legal order. Such functions may include creating public institutions and political subdivisions, distributing jurisdictions among them, generating objectives to guide the use of such powers, placing constraints on their exercise, protecting fundamental rights, and enabling judicial review of the exercise of public authority (Verdross 1926; Snyder 2003, 56; Kumm 2006, 508). In this view, a constitution typically establishes guiding *principles* by which the community's collective life is to be conducted, basic *rules* that govern members' behaviour, fundamental *rights* of community members vis-à-vis governing authorities, and specific *institutions* that perform legislative, executive, and adjudicative functions (Black 1979; Constitutional Law Group 2003, 3-4; von Bogdandy 2006, 230). As fundamental elements of the legal order, these principles, rules, rights, and institutions constrain ordinary political and legal decision making; are harder to change than other principles, rules, rights, and institutions; and are rooted in a particular system of core values (Wiener 2003; von Bogdandy 2006, 231).

Finally, the term "constitution" can be employed in a *normative* sense to denote the establishment of an independent authority that structures and legitimates a political process (Kumm 2006, 509). A community may have a constitution in the formal or functional sense without having a constitution in the stronger normative sense. What is necessary to establish a constitution in this strong sense depends on which normative constitutional theory – in other words, what variety of *constitutionalism* – one subscribes to.

"Constitutionalism" refers to a position advocating constitutionalization (Trachtman 2006, 630), the historical process by which constitutions are generated, consolidated, or expanded to domains that did not previously have constitutional features (see Cass 2001, 2005). At the international level, "constitutionalization" refers to the transformation of international organizations and regimes from interstate arrangements governed by general principles of international law into supranational political formations whose structure more closely resembles that of a multi-layered polity (Weiler 1999, 12). It also refers to the corresponding transformation of domestic constitutional orders to enable or accommodate the emergence of these new entities.

Numerous varieties of constitutionalism are at play in contemporary debates about international law, each informed by its own theory of legitimate

authority. Avbelj (2008), for example, counts seven different constitutionalisms in current legal discourse concerning the European Union alone. Rooted in Western liberal-democratic constitutional theory, most contemporary constitutionalisms tend to privilege the constraint of public power, the rule of law, the protection of fundamental rights and freedoms, and legitimation via democratic deliberation. Debates about whether a specific supranational entity has a constitution in the "strong" (normative) sense discussed above revolve around whether its fundamental norms, practices, and institutions, and the procedures by which they are established, conform to the observers' preferred version of constitutionalism. Such debates also consider what version of constitutionalism is appropriate at the supranational level.

With this conceptual ground-clearing in mind, we turn to the central term in our analysis of internationalization: the *supraconstitution*.

The Supraconstitution

The competence of many international institutions is expanding in sectors that were once the exclusive domain of states. Although typically established by intergovernmental agreement, an organization may take on a life of its own, with implications for its founders. While carrying out its responsibilities, an international body may introduce new rules that bind its members. When international tribunals make judgments to resolve a dispute between two states, their rulings often affect other states. When international standards-setting bodies make decisions about new issues, these can have substantial consequences for political and legal decision making in member states. For instance, decisions of the Codex Alimentarius Commission concerning the approval or labelling of genetically modified foods for human consumption will affect the fate of many countries' agricultural economies and the profitability of some of the world's largest corporations, which have invested billions to develop transgenic crops that are impervious to certain insects or plant diseases. Because of public concerns about the health implications of hormone-treated livestock and genetically modified fruits and vegetables, governments and agribusiness defend their positions at the Codex in the face of non-government organizations representing the often opposing interests of producer and consumer groups.

Neither the conventional concepts of international law and organizations nor the traditionally inward-looking perspective of constitutional law make sense of the new power arrangements in this globalizing multi-layered

world. Understood functionally as the ensemble of fundamental norms and institutional practices that define the establishment, organization, and division of power in a supranational legal order, the concept of a supraconstitution bridges this gap. When we speak of Canada's supraconstitution, we refer to those norms and institutions at the international level that can be said to form part of the assemblage of fundamental practices by which Canadian society is governed and from which domestic Canadian laws and policies are not allowed to derogate.

At the level of norms, the supraconstitution can be analyzed in terms of general *principles* guiding the allocation and exercise of power, basic *rules* governing community members' behaviour, and fundamental *rights* of community members. At the level of institutional practices, it can be analyzed in terms of the *institutions* that perform – to varying degrees – legislative, executive, administrative, adjudicative, and enforcement functions within a specific legal order. But these features alone do not a supraconstitution make. The supraconstitution has another defining characteristic: it constrains domestic governmental decision making and prevails over conflicting domestic laws. We call this quality *primacy*. The supraconstitution also has both domestic and international dimensions, one implication of which is that one state's supraconstitution is not the same as another's. Finally, constitutional analysis of international norms and institutions has an unavoidable normative dimension, which must be acknowledged. We develop each of these points in turn.

Principles, Rules, and Rights

Supraconstitutional norms take various forms, from abstract principles to concrete rules. *Principles* may range from the vague and the general (such as the aspiration for peace) to the specific (such as national treatment for goods or investments). *Rules* are typically more numerous, laying down explicit prescriptions for behaviour. They might, for example, prohibit exports of hazardous chemicals or the employment of children below a certain age. Since these rules are negotiated in a power-based system, they also reflect the interests of dominant powers at the centre of the world system. A great many of these international rules, especially in the economic domain, universalize domestic American norms. For example, the WTO's *Agreement on Trade-Related Aspects of Intellectual Property Rights* supports the interests of American, European, and Japanese "Big Pharma," entertainment, and information-technology industries even as it inhibits the development of those same

industries in the emerging economies of the global South. Alongside principles and rules, *rights* may be expressed along a continuum from the general (the right to development, education, or shelter) to the specific (the right to vote, the right to a fair trial, or the right of foreign investors to compensation if their property is expropriated).

Some of these supraconstitutional norms may reinforce existing national constitutional norms; others may undermine them. Not surprisingly, controversy is most likely to erupt when supraconstitutional norms come into conflict with domestic constitutional arrangements.

Institutions

Some international institutions are powerful, well-financed, and sophisticated, as in the case of the institutional structures created by the various treaties that built the European Union into its own constitutional order. Other international institutions are flimsy. Whether strong or weak, they can be analyzed in terms of five principal functions. Although these governmental functions overlap and may sometimes be performed by the same institutions or actors, they provide a useful starting point for analysis.

Legislature

Many international institutions perform a *legislative* function, in which the assembled members or a subset of them deliberate and enact legally binding rules for the institution and its members. Taken in its totality, the body of world institutions has a spotty and uneven legislative capacity. Legislation is the least developed of all governmental functions at the international level. The UN General Assembly is a major global debating forum, but it has very limited capacity to enact binding norms. The European Parliament's legislative capability has grown but remains inferior to the European Commission's substantial legislative capacity, which manifests itself in hundreds of directives that compel member states to take a specified action. In contrast, the NAFTA Free Trade Commission has no autonomous rule-making ability and so is unable to adapt its many rules, which were negotiated in the early 1990s, to changing conditions. Between these extremes, the World Trade Organization has a forum for making new rules in the biennial meeting of its members' trade ministers. However, the requirement that decisions be reached by consensus makes it extremely difficult to arrive at any decision acceptable to some 150 states. As a result, new rules for the WTO are made following years-long negotiating "rounds" between the member governments.

Executive

Most international institutions have a body or bodies mandated to perform *executive* functions ranging from management of routine day-to-day operations to making momentous decisions such as the UN Security Council's determination whether to endorse a pre-emptive war against Iraq. On the whole, the executive function is weakly developed at the international level because nation-states have been reluctant to allow international institutions much autonomous decision-making authority. The WTO has no executive to speak of, whereas NAFTA's merely consists of periodic meetings of the three countries' trade ministers.

Administration

A more extensively developed function performed in typical international institutions is *administration*, because an administrative staff is needed to implement decisions and deliver the action for which the institution is mandated. The Organisation for Economic Co-operation and Development (OECD) and the UN have personnel in the thousands. Many others have very small secretariats, limited to organizing meetings and facilitating communication among their member states. Aggregating them all would reveal a considerable – but heterogeneous and disconnected – international civil service, many elements of which are supranational in the sense that these bureaucrats' careers are independent of their member governments' control. The WTO has an extremely lean administration: just five hundred people operate this globally crucial institution. NAFTA has no central administration at all. Each of its three signatory states merely maintains a small office to keep track of NAFTA-related paperwork, and each federal government assigns civil servants to staff a few working groups that deal with some of NAFTA's minor outstanding business.

Adjudication

Norms and rules are subject to diverse interpretations. No organization can operate for long without having to resolve conflicts generated by its own mandate and mechanisms. *Adjudication* is thus the fourth function that may be performed by international institutions. International dispute settlement mechanisms vary from the highly structured European Court of Justice, whose rulings have direct effect in each member state, to the deliberately ineffectual arbitration processes established in the *North American Agreement on Environmental Cooperation*. They range in formality and complexity from

informal consultations to one-off arbitrations (such as that for the Canada-US *Trail Smelter* dispute); specialized international tribunals (such as the WTO Appellate Body, the ICC, the Rwandan and Yugoslav criminal tribunals, and the International Tribunal for the Law of the Sea); private international commercial arbitral panels (such as those used for NAFTA Chapter 11 investor-state disputes); and the venerable International Court of Justice.

Enforcement

Finally, international institutions have very uneven *enforcement* capacities. NATO has the capacity to enforce its decisions through a command structure that can mobilize the armed forces of its members to fight a hostile regime or intervene militarily to keep the peace in a failed state. In fact, many NATO members ultimately find ways to minimize their contributions to military missions that are unpopular at home, as evidenced by the reluctance of most governments to undertake combat missions in the post-2001 occupation of Afghanistan. The European Commission's directives can be enforced through the rulings of the European Court of Justice. By contrast, the enforcement of international human rights, environmental agreements, and labour conventions is weak. Compliance with the WTO's dispute settlement rulings tends to be high, in part because its rules permit economic retaliation by a successful state against a defendant who does not comply with its judgment. WTO rulings are also effective largely because members perceive that conforming to an adverse judgment is in their own interest because they expect a counterpart to comply when they win a ruling against it.

To summarize, we can analyze the supraconstitution in terms of the existence of supranational principles, rules, and rights, and the performance of these five institutional functions. But the mere presence of these norms and institutions does not, on its own, create a supraconstitution. Supraconstitutional norms and institutions are also fundamental to the legal and political order. They effectively constrain political and legal decision making. This quality is captured in the concept of *primacy*.

Primacy

We use the prefix "supra" ("above") not just to indicate that the supraconstitution spans multiple nation-states but to denote the primacy of the supraconstitution within the domestic orders of participating nation-states. Supraconstitutional norms and decisions take precedence over domestic laws and constitutional provisions when the first conflict with the second. This

feature of the supraconstitution is one of the most difficult to define. In the European Union, where supraconstitutionalization is most advanced, primacy is expressed most often in the doctrine of *direct effect*, which means that Community legal norms become the law of each land (Weiler 1999, 19) by creating enforceable legal obligations not just among member states or between individuals and their governments, but among individuals themselves. These norms may be invoked by individuals before national courts, and national courts must provide adequate remedies for their violation just as if they had been enacted by national legislatures.

Direct effect on its own does not distinguish supraconstitutional from ordinary international law, however. In some nation-states, international treaties are automatically received into the domestic legal order. Some provisions of international treaties are recognized as self-executing (that is, directly effective) in the domestic legal order. Canadian law generally subscribes to the opposing view that international treaties are not incorporated automatically but must be "received" via implementing legislation in order to take effect within the domestic legal system. Hundreds of international treaties have been received into Canadian federal and provincial law in this manner. When we speak of supraconstitutional primacy, we are not talking about the reception of international treaties via domestic legislation. Primacy refers to international norms taking effect in the domestic legal system in the absence of domestic legislation or even in the face of conflicting domestic legislation, not by virtue of it. Canadian reception of customary international law, which consists of customs rooted in widespread state practice and recognized as binding by states in their relations with each other, comes closer to what we are talking about because, in theory, it is automatically received into Canadian law as part of the common law (Kindred 2006). When customary international law is received automatically as part of the common law, this is an example of direct effect. But direct effect is so rarely operationalized in general international law that it falls below whatever threshold is required for most observers to liken it to constitutional law (Weiler 1999, 25). More importantly, direct effect alone does not qualify a norm as supraconstitutional. Even in Europe, where direct effect is widespread and presumptive, it is the combination of direct effect and the doctrine of *supremacy* that makes Community law supraconstitutional (*ibid.*, 20).

The doctrine of supremacy in EU law holds that, within the Community's sphere of competence, any Community norm, from a treaty article right down to a "minuscule administrative regulation enacted by the Commission,

'trumps' conflicting national law whether enacted before or after the Community norm" (*ibid.*, 20-21).[3] Crucially, the Community's own judicial organ, the European Court of Justice, has the *"Kompetenz-Kompetenz"* – that is, the competence to determine the Community's sphere of competence and hence the matters on which Community law is supreme (*ibid.*, 21). International law also boasts supremacy over national law, in theory: in a dispute between states, national law is no defence to a violation of international law. But supremacy in international law is not the same thing as supremacy in constitutional law.

Even if the reception of customary international law into domestic Canadian law is an example of direct effect, it is not an example of primacy. A norm of customary international law that is received as part of the common law would not prevail over conflicting domestic legislation because legislation "trumps" common law. Moreover, whereas legislation is presumed to be consistent with Canada's international legal obligations, it prevails over international law in the event of a conflict (Van Ert 2002, 99-136; Kindred 2006, 19-21).

EU-style direct effect and supremacy represent the fullest expression of supraconstitutional primacy in the contemporary world and distinguish the European legal order from other supranational orders. Nevertheless, international norms and institutions may be supraconstitutional without reaching the European standard. Here we part company with those who insist that only Europe has a supraconstitution (Weiler 1999). But we do not go as far as Johnston (2005), Macdonald (2005), Fassbender (2005), or Tomuschat (1999), who see a supranational constitution in the supposed paramountcy of the UN Charter, the operation of certain basic principles of intersovereign relations, and the existence of an ethical core of international human rights norms. In our logic, international norms and institutions are supraconstitutional if they establish constraints on the authority of governments that are legally binding, practically effective, and difficult to amend. Outside the EU, the leading form of supraconstitutionality is the international trade and investment regime, which provides the main normative and institutional architecture of neo-conservative globalization.

The main purpose of international trade and investment disciplines is to prevail over domestic legal and constitutional arrangements by placing on government authority legally binding limits that are difficult to revise and are designed to bind states far into the future (Schneiderman 2008, 4-6).

These limits are enforced through robust international dispute settlement mechanisms, the outcomes of which are made effective domestically via enforcement proceedings in domestic courts (in the case of investor-state disputes under investment treaties) or via trade sanctions (in the case of WTO dispute settlement rulings). Like domestic constitutional provisions, they represent a form of precommitment strategy in which their proponents seek to constrain decision-making far into the future (*ibid.*, 3). Ratifying governments must change their laws and regulations in a context that makes them practically irreversible. Unlike normal alterations to statutes made by national or subnational legislatures, which can further amend or revoke their acts in response to changing circumstances, revisions to statutory enactments incorporating international trade norms are valid only if the external regime changes its rules by international agreement. A perfectly legitimate democratic government action could subject a state to severe sanctions or penalties if it were deemed by the relevant international dispute settlement body to violate the international agreement in question.

Any consideration of the emerging global constitutional order must preemptively recognize its fragmentary, disconnected, imbalanced, heterogeneous, and multi-faceted nature. As we have seen, international organizations and regimes range in their territorial scope from bilateral to regional to global and in their size from tiny to huge. Some are relatively autonomous; others are little more than agents of their member states. Some are of marginal significance, whereas others exercise substantial influence over world developments as well as national governments. They vary from relatively informal secretariats to bricks-and-mortar organizations with their own buildings, permanent civil service, insignia, and even flags. They include ad hoc arrangements for cooperation in specific functional areas (such as international fisheries management regimes) and general-purpose political structures complete with all the organs of government, such as the United Nations.

This order is "post-national" or "post-statal" in several senses (Walker 2003). It reconfigures and in important ways constrains or diminishes the nation-state. Non-state, substate, and transnational actors and structures play important roles in this new order and create their own constitutional orders "without the state" (Teubner 1997, 2004; Schepel 2005). Supranational entities do not reproduce the national state at the supranational level. Some may exhibit state-like features, but they are not states. Notwithstanding these realities, the state has not disappeared from this new constitutional order. It

remains central to it. The supraconstitution may run roughshod over the national sovereignty of many states, but it does not obliterate them: rather, it reconstitutionalizes them.

Inescapable Normative Dimensions

By calling certain rules and institutions supraconstitutional, we advance a descriptive claim. Our goal is to describe how, under contemporary conditions of globalization, public powers are established, organized, and constrained, and how fundamental rights are allocated and protected. At the same time, we recognize that any analysis of what constitutionalization means or even whether it exists is irreducibly normative, grounded in a particular vision of constitutionalism. To describe something as a constitution is always to make a normative claim.

For critics of supranational constitutional analysis, describing international arrangements as constitutional is dangerous because it has the unwarranted effect of legitimizing them. In their view, the very language of constitutionalism may confer legitimacy by presupposing democratic self-government, popular validation, the rule of law, and effective protection of individual human rights, the first two of which are completely absent and the latter two patently weak at the international level (Howse and Nicolaidis 2001; Cass 2005). Invoking constitutional discourse "may be a rhetorical strategy designed to invest international law with the power and authority that domestic constitutional structures and norms possess" (Dunoff 2006, 649). Critics also point to the danger that constitutional language will demobilize opposition to undesirable international arrangements by making them appear natural, inevitable, or immutable. To call international trade and investment rules supraconstitutional "might appear to establish economic globalization as an irreversible 'fact,' furnishing the convenient alibi to political and other global actors that there are no alternatives in sight" (Schneiderman 2008, 5). Constitutional discourse may have the intended or unintended effect of suppressing ambiguity and political contestation (Dunoff 2006).

Although these dangers are real, constitutional analysis does not necessarily reinforce the existing global status quo. Constitutionalism may challenge as well as support existing arrangements, having a long history as a "*critique* of rule, as a vocabulary of rights, accountability and transparency" (Koskenniemi 2005, 17, emphasis in original). Our account of the supraconstitution is presented in this critical evaluative mode. We employ constitutional

terminology precisely because of its normative power. By characterizing certain international norms and institutions as forming part of the basic ensemble of practices by which contemporary societies are governed alongside national constitutions, we hope to alert readers to the fundamental significance of these arrangements and the serious normative issues they raise. Our intent is to challenge the choices embedded in NAFTA, the WTO, and other aspects of the institutional and normative architecture of neo-conservative globalization, not to legitimize them. Constitutional concepts and terminology provide potent tools to accomplish this:

> The discourse of constitutionalism is a powerful one and can equally rouse citizens into action as it can immobilize them. It has the advantage of assessing the new terrain of economic globalization from a perspective different from that in which it was conceived and so can engage critically with the dominant discourses of [neo-conservatism] ... Constitutionalism, in this way, performs a double role: both as descriptor and as normative guide to the current scene. (Schneiderman 2008, 5)

Canada's Supraconstitution: Where to Begin?

Choosing the time period at which to begin an account of Canada's supraconstitution is somewhat arbitrary. Canada has experienced two supraconstitutional phases in its history (Clarkson 2008b). During the colonial era, it was explicitly embedded in an imperial constitutional order, which was dismantled over more than a century as democratic self-government and foreign policy autonomy were established gradually in the Canadian dominion. By the second half of the twentieth century, Canada enjoyed substantial independence from Britain in domestic and foreign policy matters, but it was not until the 1982 repatriation of the constitution that the last vestiges of the imperial supraconstitution were erased (although even now the British monarch remains Canada's head of state).

Throughout the decline of the imperial supraconstitutional order, a second supraconstitutional order centred on the United States was emerging, whose loosely interrelated elements had complicated effects on Canadian autonomy and capacity. One aspect was Canada's position as a generally loyal junior partner in the American Cold War alliance. Canadians performed, with considerable success, a somewhat schizophrenic role as good Cold Warriors and simultaneously strong advocates of multilateral arrangements outside

the Cold War framework (Whitaker 2006). On the foreign policy front, Canada's role as Cold War ally constrained it from openly criticizing American foreign policy, but the quid pro quo was substantial Canadian independence to pursue its liberal internationalist foreign policy and to undertake certain missions the Western bloc leader would not or could not take on itself.

In defence policy, the limitations were more severe. Ottawa was in effect obliged to establish defence forces and doctrines to the Pentagon's satisfaction. If Canada did not finance the military structures and adopt the tactical orientation deemed necessary in Washington, American forces would do the job themselves. Although generations of Canadian politicians have insisted on Canadian defence sovereignty at a rhetorical level (as they must, for political survival), the reality is that Ottawa's resistance to this arrangement has been rare and short-lived, whether in relation to BOMARC nuclear missile deployment during the 1960s or cruise missile testing in the 1980s. In 2005, Ottawa refused to support the US Ballistic Missile Defense program. Whether this latest act of resistance will be sustained, dropped, or made irrelevant by new efforts to construct a "Fortress North America" as part of the US war on terror has yet to be seen. Canada's lop-sided defence relationship with the United States was formalized in the North American Air Defense Command (NORAD, established 1957), a prototype for North America's asymmetrical institutions, in which a real reduction in autonomy for the periphery was nominally offset by increased capacity to affect American policies via Canadian participation in NORAD's joint command. This trade-off between domestic autonomy and nominally enhanced capacity to be heard in Washington was replicated across a range of policy arenas, as we will see.

A second element of the nascent supraconstitutional order was Canada's semi-peripheral position in an American-dominated continental and global economic system. Canada's resource-oriented economy, its asymmetrical dependence on trade with the US, and its high level of American foreign direct investment imposed limits on Canadian domestic autonomy and foreign affairs capacity. When, for instance, the Progressive Conservative government of John Diefenbaker set up a commission to design a national strategy for the petroleum industry, the major American oil companies along with the US Department of State participated directly in the advisory process and effectively wrote the Diefenbaker government's National Oil Policy of 1961. The 1965 *Canada-US Automotive Products Agreement* (Auto Pact) was not the first bilateral economic integration agreement to introduce an externally controlling element in a Canadian policy area, but it was economically

the most consequential because it transformed one of Canada's biggest tariff-protected industries into a continentally rationalized sector that guaranteed a minimum level of Canadian production in US-owned assembly plants. President Nixon's unilateral 1971 detachment of the US dollar from the price of gold and imposition of a surcharge on all imports produced shockwaves around the world, but closer to home it was seen as a cataclysm. Previously, the bilateral relationship had been governed by a norm of "quiet diplomacy" in which Canadian-American disagreements were to be mediated to the extent feasible by bureaucrats behind closed doors in order to keep political tensions at bay (Merchant and Heeney 1965). Nixon unilaterally amended the parameters of this informally constituted relationship, simultaneously reducing Ottawa's capacity to influence American decision makers and increasing America's autonomy over its own affairs.

In the global economic context, Canada was a semi-peripheral player in a post–Second World War international economic system characterized by the "compromise of embedded liberalism," which combined an agenda of trade liberalization at the international level with a commitment to state intervention to moderate the adverse impacts of this liberalization at the domestic level (Ruggie 1982). The main objective of the 1947 *General Agreement on Tariffs and Trade* (GATT) was to promote economic growth and prosperity by limiting the power of national governments to impede the movement of goods across borders. The GATT was born out of a belief that excessive protectionism had contributed to the calamity of the Great Depression and that freer trade would spur a rising tide of prosperity that would lift all boats. The quid pro quo, however, was agreement to embed the international trade liberalization agenda in the fabric of the West's emerging Keynesian welfare states. National states would use their armament of fiscal, monetary, and social policy to moderate the impacts of trade liberalization and to promote employment, economic development, education, health, and welfare.

In these ways, elements of a new external constitution began to materialize for Canada during the latter half of the twentieth century, displacing its colonial one. But they remained rudimentary, disconnected, and largely informal, allowing Canada a considerable degree of autonomy domestically and independence in foreign policy. This relative freedom found expression in Canada's post-war prominence in multilateral diplomacy and peacekeeping, its friendly policy toward Cuba, its decision to sit out the Vietnam conflict, and its development of socialized medicine, old age security, unemployment

insurance, and other features of the Canadian welfare state. This situation was transformed rapidly starting in the 1980s, when Canada's fragmentary supraconstitution was shaped into a more coherent and intrusive form by an aggressive transnational political program.

Ironically, this neo-conservative supraconstitutional project arose at the very time that the last remnants of Canada's imperial supraconstitution were being dismantled. This was not entirely coincidental. Just as the final demise of the colonial supraconstitution was the result of Prime Minister Trudeau's successful effort to repatriate control over Canada's constitution from Britain, so the new supraconstitution sprang, in part, from his unsuccessful effort to repatriate control over Canadian oil and gas resources from American TNCs. The federal Liberal government's notorious National Energy Program (NEP) of 1980 was the first major effort by a Canadian government to restructure a crucial foreign-controlled industry. It sought to achieve energy self-sufficiency, increase Canadian ownership and control of the industry, substantially enhance federal influence over the sector, and secure a greater share of petroleum wealth for federal coffers (Clarkson 1985, ch. 3). American transnational petroleum firms and their Canadian subsidiaries protested that their property rights had been expropriated. They found allies in the government and citizens of oil-rich Alberta, who saw the NEP as an outrageous ploy by Ottawa to overstep its jurisdiction and steal their riches; in the federal Conservatives, who saw the NEP as a socialist plot to expand an already bloated state, stifle private enterprise, and cripple economic prosperity; and in the newly installed Reagan administration, which pressured Ottawa to abolish the NEP on the grounds that, due to their very presence in the Canadian economy, US corporations had acquired rights not to have the value of their assets diminished by government action. On the other side, the NEP and its theme of "Canadianization" were popular among many citizens outside Alberta and among some traditional critics of the Liberal Party on the political left.

The NEP was ultimately derailed by an unanticipated decline in world oil prices in 1982, but it was one of several factors precipitating a crisis from which a new supraconstitutional project emanated. Others included the oil shocks of the 1970s, rising unemployment and inflation, increasing foreign competition in the Canadian marketplace, ballooning public deficits and debt, and the rapid expansion of environmental regulation of business. By the late 1970s, Canadian big business had abandoned its traditional protectionist stance and concluded that greater economic access to the US market was its only hope. In 1985, the Macdonald Commission, headed by a former

Liberal Cabinet minister, concluded that the Canadian regulatory and welfare state was broken and in need of fundamental reform. The same trends were experienced, to varying degrees, throughout the industrialized democracies. Similar crises gripped the Third World, from the Latin American debt crisis to the Northern backlash against post-colonial states' efforts at economic nationalism and their proposals for a New International Economic Order. The modern Keynesian welfare state was in crisis in the North, as was the national developmentalist state in the South. The compromise of embedded liberalism was unravelling.

This predicament provided an opening for the appearance of a new transnational political project. Incubated in Milton Friedman's Chicago School of Economics during the 1960s and given its first field test in Pinochet's Chile in the 1970s, neo-conservatism came into ascendancy in the capitalist world with the elections of Margaret Thatcher and Ronald Reagan. This transnational neo-conservative political project built upon the supraconstitutional foundations laid during the earlier post–Second World War period, but it differed from these antecedents in important respects. Rejecting the interventionist welfare state as ideologically bankrupt and practically counterproductive, it proposed a radical policy shift that would restrain the state in order to liberate the market. Discarding the compromise of embedded liberalism, it promoted aggressive liberalization of international trade and investment as well as a major reduction of state intervention in markets and society (except to protect private property, contracts, and free enterprise). It advocated a restructuring of the state in the advanced industrialized economies, the developing economies of the Third World, and later the communist bloc, around a set of "free market" prescriptions that could be tailored to varying circumstances. This recipe for reorganization included deep tax and government spending cuts, deficit reduction, downsizing of the public sector, business deregulation, strict cost-benefit analysis of proposed regulations, privatization of government enterprises and public service delivery, elimination of wage and price controls, and free movement of goods and investment across borders. Coupled with this restructuring of the nation-state was the promotion of international norms and institutions dedicated to advancing and entrenching this ambitious agenda. Paradoxically, this supraconstitutional project combined a commitment to the worldwide propagation of liberal democracy with a concerted effort to insulate key aspects of the economy from national democratic control. A central feature of the new constitutionalism was the imposition of lasting constraints on democratic politics

"to prevent national interference with the property rights and entry and exit options of holders of mobile capital with regard to particular political jurisdictions" (Gill 1995, 413).

The triumph of this agenda marked a break from past supraconstitutional projects. Although neo-conservatism was a complete political program, its main supraconstitutional thrust was in the economic realm. We therefore continue our account in Chapter 3 with the genesis of Canada's economic supraconstitution in the 1980s.