

Against Constitutional Excess: Tocquevillian Reflections on International Investment Law

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Contributing to democratic malaise in operative democracies are transnational constitution-like commitments, such as those found in international investment law. Among its constraints, citizens are legally discouraged from initiating policy innovations that will upset investment expectations. Yet, one of the great virtues of democratic society, according to Alexis de Tocqueville, is the capacity of people to change their minds: an ability to repair mistakes. Though the threat of continual legislative innovation resulted in costly instability, it served as a catalyst for an energetic public and private life. So as to tame the threat of intemperate change, Tocqueville looked to the guiding hand of lawyers and judges—the functional equivalent of an aristocracy—to moderate majoritarian excess. International investment lawyers have lost sight of the equilibrium that Tocqueville envisaged, privileging legal disciplines over the ability of democratic polities to experiment and innovate. For Tocqueville, democratic life would be intolerable and citizens reduced to a “herd of timid and industrious animals” if too many constraints were placed upon legislative energy. This Essay brings Tocqueville’s lessons to bear on the field of international investment law. It pleads for a reduction in the influence of lawyers and their legal strictures, beyond those constraints contained in national constitutional systems, on democratic practice.

INTRODUCTION

Political sociologist Claus Offe has diagnosed the participatory deficit in North Atlantic democracies as the product of an imbalance in state–market relations. When the market is supreme, public policy can do little to constrain the market’s ever-expanding realms. When taxing and spending are off the agenda, Offe claims, “democratic politics [becomes] largely a pointless activity.”¹ Among the strategies for reversing democratic malaise, he

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¹ Claus Offe, *Participatory Inequality in the Austerity State: A Supply-Side Approach*, in Armin Schäfer and Wolfgang Streeck, eds, *Politics in the Age of Austerity* 196, 214 (Polity 2013). I address the implications of this diminution in policy space in David Schneiderman, *Disabling Constitutional Capacity: Global Economic Law and Democratic*

notes well before the election of President Donald Trump, is the rise of authoritarian populism premised on strengthening borders and protecting populations from the threat of foreign “others.” Populists of this sort “are the only political agents in the decades since 1990 who have managed to broaden their political base and enhance participation.”²

While there undoubtedly are innumerable contributing factors to democratic backsliding in operative democracies in the North Atlantic, principal among them is the shrinking policy space associated with the spread of neoliberal legality. If neoliberal thought has had some difficulty identifying stable boundaries between states and markets,³ it also has been dedicated to shrinking state policy space. Driven by anxieties associated with rent seeking, means are sought to tame state action beyond extant constitutional constraints. Jurists have today taken up a question that also preoccupied Alexis de Tocqueville: What constraints, other than national constitutional ones, are available to limit majoritarian politics?⁴

At the urging of legal advisors, states have turned to regimes like international investment law in order to attain this end. This is the transnational legal order made up of over 3,330 bilateral investment treaties, together with a number of regional trade and investment agreements, intended to protect foreign investors from adverse economic consequences. In this Essay, I argue that such regime efforts have contributed to the decline of democratic constitutionalism—paradoxically, in the name of constitutional values like stability, predictability, and the rule of law. It was to this end that the World Bank in 1997 promoted strategies of precommitment. The World Bank defined “arbitrary” government as exhibiting, among its other faults, “unpredictable, ad hoc regulations and taxes.”⁵ The World Bank aimed to contain the penchant for constant legislative changes that sank the confidence of the owners of capital.⁶ Replacing defective national legal systems with international adjudication was the

Decline, in Mark A. Graber, Sandy Levinson, and Mark Tushnet, eds, *Constitutional Democracies in Crisis?* (Oxford forthcoming 2018).

² Offe, *Participatory Inequality* at 216 (cited in note 1).

³ See Jamie Peck, *Constructions of Neoliberal Reason* 7, 20 (Oxford 2010) (referring to the “awkward reality that neoliberals have never been able to live with, or without, the state”).

⁴ See Larry Siedentop, *Tocqueville* 61–63 (Oxford 1994).

⁵ World Bank, *World Development Report 1997: The State in a Changing World* 41 (Oxford 1997).

⁶ See *id.* at 34.

proposed solution.⁷ The World Bank therefore recommended strategies from which it would be expensive to exit:

Clearly, sovereign countries can still reverse course . . . by withdrawing from such agreements. But they then have to calculate not just the benefits and costs of the policy reversal, but also the broader costs of renegeing on an international commitment for which their partners will hold them accountable. The threat of international censure makes countries less likely to reverse course.⁸

Exemplary of this strategy has been the global take-up of bilateral investment treaties that commit states to voluntarily cabin their regulatory capacity. Treaty disciplines reinforce the view that states have little more to do in regard to economic subjects other than to get out of the way of markets. If Professor Mark Tushnet described the “new constitutional order” as one that condones extensive regulation but “chasten[s] the most aggressive forms of regulation,”⁹ the regime I am describing renders even nonextreme forms of regulation susceptible to a claim for monetary damages. Citizens, as a consequence, disengage and consign the control of such subjects to legal elites who are better suited, citizens are told, to steer state policy. In this way, legal elites and the institutions that they control serve constitution-like functions by limiting the capacity of citizens and states to pursue their preferred policy objectives.¹⁰ They “help[] governments” resist “recalcitrant domestic economic and political lobbies” by imposing “external discipline,” Professor Thomas Wälde declares.¹¹ This disempowerment of citizens in North Atlantic democracies contributes to the malaise that tolerates democratic backsliding.

⁷ Id at 100–01.

⁸ Id at 101.

⁹ Mark Tushnet, *The New Constitutional Order* 65 (Princeton 2003).

¹⁰ See David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* 3 (Cambridge 2008) (“[I]nvestment rules can be viewed as a set of binding constraints designed to insulate economic policy from majoritarian politics.”). See also generally David Schneiderman, *Global Constitutionalism and International Economic Law: The Case of International Investment Law*, in Marc Bungenberg, et al, eds, *European Yearbook of International Economic Law 2016* 23 (Springer 2016).

¹¹ Thomas Wälde, *Judicial and Similar Proceedings Introductory Note to Svea Court of Appeals: Czech Republic v. CME Czech Republic B.V.*, 42 Intl Legal Mat 915, 915 (2003).

The analysis that follows is guided by lessons learned from Tocqueville's first volume of *Democracy in America*.¹² One of Tocqueville's lessons is that among the great virtues of democratic society is the capacity to make "repairable mistakes."¹³ Another of Tocqueville's lessons is that the guiding hand of lawyers and judges can serve to moderate majoritarian excess.¹⁴ Tocqueville envisaged both features as essential to democracy's durability. He did not intend to bifurcate these two essential features of democratic society. Democracy promotion, however, has not been a priority for new transnational legal norms and institutions.¹⁵ International investment lawyers and arbitrators, instead, have succeeded in bifurcating Tocqueville. It is rule by lawyers in transnational arenas that is preferred over democratically authorized decisionmaking. This results in excessive constitutional oversight, the problem at which this Essay takes aim.

I argue that operative democracies should rejoin these two sides of Tocqueville and diminish the influence of investment-law norm entrepreneurs. These advocates aim to "universalise their preferences" of privatization, limited states, and open borders.¹⁶ As they go about performing their drafting, interpretive, and adjudicative functions—functions that they genuinely believe they are best suited to perform—they aim to establish a different kind of equilibrium, one in which states are reprimanded for undermining investors' expectations.¹⁷ So as to reinvigorate democratic experience and mitigate democratic backsliding, this Essay calls for less transnational constitutional oversight in economic domains and more reliance on already-existing constitutional settlements. If we are to take seriously the "dangerous adventure[]" that is democratic existence and that so inspired Tocqueville,¹⁸ we must necessarily render the

¹² Further references are to Alexis de Tocqueville, *Democracy in America* (Library of America 2004) (Arthur Goldhammer, trans) ("Tocqueville (2004)"). Occasionally, references are to Alexis de Tocqueville, *Democracy in America* (Chicago 2000) (Harvey C. Mansfield and Delba Winthrop, trans) ("Tocqueville (2000)"), and to Alexis de Tocqueville, *Democracy in America* (Oxford 1946) (Henry Reeve, trans) ("Tocqueville (1946)").

¹³ Tocqueville (2000) at 222 (cited in note 12).

¹⁴ See id at 251–58.

¹⁵ See Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* 91 (Oxford 2000).

¹⁶ Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, in Martti Koskenniemi, *The Politics of International Law* 219, 235 (Hart 2011).

¹⁷ They, after all, expect to be "justly rewarded for their astute risk-taking" according to Wolfgang Streeck, *The Crisis in Context: Democratic Capitalism and Its Contradictions*, in Armin Schäfer and Wolfgang Streeck, eds, *Politics in the Age of Austerity* 262, 266 (Polity 2013).

¹⁸ Tocqueville (2004) at 280 (cited in note 12).

investment-law bar, indifferent to the checks and balances of national constitutional orders, less influential in determining the proper limits of state capacity.¹⁹

This might be viewed as a difficult argument to make for a number of reasons. The first is the difficulty of trying to piece together the meandering and often contradictory argument that Tocqueville makes in *Democracy in America*.²⁰ It is also awkward to invoke, in defense of the mutability of democratic practice, an early nineteenth-century French aristocrat who described himself as being “in the grip of a kind of religious terror” when confronted with American democratic life.²¹ A related difficulty is the value that Tocqueville placed on law and lawyers, whose roles are elevated in investment law and whose influence I propose be diminished.²² What Tocqueville maintained, and what should not be overlooked, is the reciprocal influence of democracy on the ways of lawyers. Neither exclusively determined democratic outcomes.²³ Even if he considered “mixed government” (or what in England was called the “balanced constitution”) as a “chimera,” Tocqueville was in search of constitutional equilibrium.²⁴

For this reason, constitutions alone were insufficient to check majority tyranny.²⁵ The US Constitution was only one

¹⁹ For more on arbitrator preferences, see generally Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford 2013).

²⁰ See Jon Elster, *Alexis de Tocqueville: The First Social Scientist 2* (Cambridge 2009) (describing Tocqueville’s “constant ambiguity, vagueness of language, tendency to speculative flights of fancy, and self-contradictions”). See also James T. Schleifer, *The Making of Tocqueville’s Democracy in America* 212–23 (North Carolina 1980).

²¹ Tocqueville (2004) at 6 (cited in note 12).

²² Tocqueville’s famous quip about the inevitable legalization of politics speaks to that influence. See Tocqueville (2004) at 310 (cited in note 12) (“There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question.”). See also *id.* at 111.

²³ Tocqueville tended to think “in contrasting pairs, or pairs in tension.” James T. Schleifer, *Tocqueville’s Democracy in America Reconsidered*, in Cheryl B. Welch, ed., *The Cambridge Companion to Tocqueville* 121, 123 (Cambridge 2006). See also Pierre Manent, *Democratic Man, Aristocratic Man, and Man Simply: Some Remarks on an Equivocation in Tocqueville’s Thought*, 27 *Persp Polit Sci* 79, 80 (1998) (Daniel J. Mahoney and Paul Seaton, trans) (discussing Tocqueville’s pairing of democracy and aristocracy); Claude Lefort, *Writing: The Political Test* 37 (Duke 2000) (David Ames Curtis, ed and trans) (“Tocqueville is a master in the art of contrast.”); Arthur Kaledin, *Tocqueville and His America: A Darker Horizon* 247 (Yale 2011) (“A random reading of nearly any paragraph or sentence . . . reveals an elaborate system of balances.”).

²⁴ Tocqueville (2004) at 289 (cited in note 12). Tocqueville describes this as an “admixture of lawyer-like sobriety with the democratic principle.” Tocqueville (1946) at 203 (cited in note 12).

²⁵ See Harvey C. Mansfield, *Tocqueville: A Very Short Introduction* 41 (Oxford 2010).

element contributing to the country's democratic makeup. The "success of the experiment" for Tocqueville depended on other elements like mores and traditions that were "not . . . designed by constitutional provisions."²⁶ So it was the conjoined effects—the "admixture"²⁷—of democracy and legality that rendered democracy sustainable in the long run. After all, citizens of democratic states must have the ability, Tocqueville insisted, of committing errors that can be corrected.

Finally, it might be said that international investment law does not prevent democratic polities from making repairable mistakes; rather, states need only pay damages in order to exercise that privilege. This reply not only misses the value of democracy's "ceaseless agitation" that energizes civil society²⁸—it also underestimates the gravity of a threat of a claim for damages. As the World Bank observed, the "threat of international censure makes countries less likely to reverse course."²⁹ If the World Bank is correct, a threat of costly damages, on top of international censure, is more likely to dampen experimentation.³⁰

In spite of these risks, the argument gives rise to an opportunity to bring to bear the insights of an innovative comparative constitutionalist on a cognate field of law. It also offers up the possibility of asking investment lawyers and arbitrators to consider how well their enterprise holds up to the thought of an icon of the liberal tradition. I surmise that it does not hold up very well.

This Essay proceeds as follows. First, I discuss Tocqueville's descriptive and normative account of democratic practice in Jacksonian America, contrasting instability in the land of equality with the role played by lawyers serving quasi-aristocratic functions. I turn subsequently, in Part II, to a discussion of international investment law as a regime of neoliberal legality that is intended to reduce policy space, rendering policy changes

²⁶ Sheldon S. Wolin, *Archaism, Modernity, and Democracy in America*, in Sheldon S. Wolin, *The Presence of the Past: Essays on the State and the Constitution* 66, 72–73 (Johns Hopkins 1989). See also Tocqueville (2004) at 284 (cited in note 12) ("Custom has accomplished even more than law."); id at 291 ("[T]he reasons for the mildness of government must be sought in circumstances and mores rather than in the laws.").

²⁷ Tocqueville (1946) at 203 (cited in note 12). See also Tocqueville (2004) at 36 (cited in note 12).

²⁸ Tocqueville (2004) at 279 (cited in note 12).

²⁹ *World Development Report 1997* at 101 (cited in note 5).

³⁰ See, for example, Gus Van Harten and Dayna Nadine Scott, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada*, 7 *J Intl Dispute Settlement* 92, 93 (2016) (finding that "[g]overnment ministries have changed their decision-making to account for trade concerns including ISDS").

and reversals costly. In Part III, I consider how attentive high courts in North America have been to constitutional excess in transnational legal realms. It turns out they are not so good at recognizing transnational legal effects on national constitutional space.

I. DEMOCRATIC ADVENTURES

Tocqueville understood well the capacity of a democratic polity, despite its dangers, to maintain a sustainable equilibrium of societal forces.³¹ What Tocqueville observed in early nineteenth-century America was a democratic community “agitated by an ill-defined excitement and by a kind of feverish impatience, that engender[s] a multitude of innovations, almost all of which are attended with expense.”³² “[W]hen public power is in the hands of the people . . . [t]he improving spirit bends itself to a thousand different purposes,” he observed.³³ Those “improvements [] cannot be had for free, for the goal is to improve the lot of the poor man, who cannot help himself.”³⁴ Tocqueville, therefore, expressed concern that this form of government was “costly” and “expensive.”³⁵ Nevertheless, its “superabundant force” and “energy” were among the real advantages of democracy.³⁶ Its benefits spilled over into civil society, generating material improvement and spreading prosperity.³⁷ Even if the majority could pursue its “capricious propensities in the formation of the laws,”³⁸ the majority could always reflect on legislative choices

³¹ See Jon Elster, *Political Psychology* 101–02 (Cambridge 1993) (“Although Tocqueville points to some possible sources of instability in democratic societies, his central assumption is very clearly that the America he had observed around 1830 was in stable equilibrium.”); Elster, *Alexis de Tocqueville* at 95–104 (cited in note 20) (discussing Tocqueville’s theories regarding social equilibrium in American democracy).

³² Tocqueville (1946) at 153 (cited in note 12). It was the prevalence of ever-changing “secondary laws” that prompted Tocqueville’s observations about repairable mistakes. These are in contrast to the “generating principles of the laws,” by which he must have meant the law of the Constitution. As to the ever-changing secondary laws, Tocqueville mentions “three stout volumes” enacted by the state of Massachusetts legislature since 1780. See Tocqueville (2004) at 286 n 2 (cited in note 12). I discuss some of the costly legal innovations that Tocqueville had in mind below. See text accompanying notes 49–57.

³³ Tocqueville (2004) at 241 (cited in note 12).

³⁴ *Id.*

³⁵ *Id.* at 241–42.

³⁶ Tocqueville (1946) at 180 (cited in note 12).

³⁷ See Tocqueville (2004) at 279–80 (cited in note 12). A life accustomed to agitation and change is a quality “equally needed for success in commerce.” Alexis de Tocqueville, *Journeys to England and Ireland* 116 (Faber & Faber 1958) (J.P. Mayer, ed, and George Lawrence and K.P. Mayer, trans).

³⁸ Tocqueville (1946) at 186 (cited in note 12).

and change its mind. This was one of the true advantages of democracy: the ability to repair mistakes. The “great privilege of the Americans is not only to be more enlightened,” wrote Tocqueville, “but also to enjoy the faculty of committing errors that can be corrected.”³⁹

Being a novice in US affairs, Tocqueville relied heavily on local informants. Among them was the young Cincinnati lawyer and Federalist (and later Chief Justice of the US Supreme Court) Salmon P. Chase, who privately expressed misgivings about the American experiment in mass democracy. It had the disadvantage of responding to redistributive demands of the unpropertied, Chase lamented.⁴⁰ In his 1831 meeting with Tocqueville, Chase admitted that America had “carried democracy . . . to its ultimate limits,” resulting in “very bad choices.”⁴¹ In conversation the next day with the young Whig lawyer Timothy Walker,⁴² Tocqueville asked, “Are the laws changed often?” “Incessantly,” replied Walker, “That is one of the greatest disadvantages of our democracy.”⁴³ Based on these conversations, Tocqueville, in his notebooks, described democracy in Ohio as being “without limits,” giving “an impression of prosperity, but not of stability.”⁴⁴ It was this instability—this “ceaseless agitation”⁴⁵—that so unsettled Tocqueville. It also held out the most promise, he wrote in *Democracy in America*. This “superabundant strength, an energy that never exists without it, and which, if circumstances are even slightly favorable, can accomplish miracles.”⁴⁶

³⁹ Tocqueville (2004) at 258 (cited in note 12). For differing translations of the French text, see Tocqueville (2000) at 216 (cited in note 12); Tocqueville (1946) at 165 (cited in note 12). For the original, see Alexis de Tocqueville, *De la Démocratie en Amérique* 339 (Librairie Nouvelle 1874) (“le faculté de faire des fautes réparables”). Tocqueville appears to be following Montesquieu’s observation about the government of England. See Montesquieu, *Considerations on the Causes of the Greatness of the Romans and Their Decline* 88 (Hackett 1999) (David Lowenthal, trans) (“In a word, a free government—that is, a government constantly subject to agitation—cannot last if it is not capable of being corrected by its own laws.”).

⁴⁰ See Alexis de Tocqueville, *Journey to America* 92 (Yale 1960) (J.P. Mayer, ed, and George Lawrence, trans).

⁴¹ *Id.*

⁴² For an account of Walker’s career, see generally Gordon A. Christenson, *A Tale of Two Lawyers in Antebellum Cincinnati: Timothy Walker’s Last Conversation with Salmon P. Chase*, 71 U Cin L Rev 457 (2003).

⁴³ Tocqueville, *Journey to America* at 98 (cited in note 40).

⁴⁴ *Id.* at 262.

⁴⁵ Tocqueville (2004) at 279 (cited in note 12).

⁴⁶ *Id.* at 281. See also Letter from Tocqueville to Ernest de Chabrol (9 June 1831), in Alexis de Tocqueville, *Letters from America* 68 (Yale 2010) (Frederick Brown, ed and trans); Tocqueville, *Journey to America* at 182–83 (cited in note 40).

In this vein, Tocqueville asked: Does Ohio “prosper because of democracy or despite of it?”⁴⁷ The answer is provided in the subsequent paragraphs of his notebooks, in which he discusses the differences between Ohio, a free state, and Kentucky, a slave state situated just across the Ohio River. The economy languished in Kentucky, lacking the energy and vitality of its neighbor to the North. “[N]othing shows more clearly,” he concluded contra Montesquieu, “that human prosperity depends much more on the institutions and the will of man than on the external circumstances that surround him.”⁴⁸

Tocqueville complained, nevertheless, that the mutability of laws in America “encourages democratic instability in every way possible.”⁴⁹ “America is the one [country] in which the duration of laws is the shortest,”⁵⁰ he declared, “allow[ing] [it] to follow its capricious propensities.”⁵¹ Yet it turns out that Ohio’s laws did not change as rapidly as Tocqueville was led to believe. Laws that were repealed were often replaced by substantially similar, though more comprehensive, legislation. Of thirty acts passed by the Ohio legislature in the 1820–1821 session, twenty were repealed by 1834. Upon further examination, repeal of laws having to do with such diverse subjects as divorce and alimony, incorporation of religious societies, and gaming and billiard tables were often improvements on older versions.⁵² To be sure, there were some reversals, but these turn out not to have been predominant.⁵³ Even if Chase privately expressed concerns about extension of the franchise in his conversation with Tocqueville, in the “preliminary sketch” to his three-volume *The Statutes of*

⁴⁷ Tocqueville, *Journey to America* at 263 (cited in note 40).

⁴⁸ *Id.* at 264. Sheldon S. Wolin observes that Tocqueville omitted to mention this connection—made in his notebooks—between Ohio’s nonslave status and its “radical democracy,” in *Democracy in America*. See Sheldon S. Wolin, *Tocqueville between Two Worlds: The Making of a Political and Theoretical Life* 136–37 (Princeton 2001).

⁴⁹ Tocqueville (2004) at 286 (cited in note 12).

⁵⁰ *Id.*

⁵¹ Tocqueville (2007) at 208 (cited in note 12).

⁵² I am grateful to Kyle Gooch, Georgetown University Law Center Class of 2009, for compiling these findings at my request, based on a study of Salmon P. Chase, ed, 1 *The Statutes of Ohio and of the Northwestern Territory: Adopted or Enacted from 1788 to 1833 Inclusive* (Corey & Fairbank 1833).

⁵³ An anonymous reviewer in the *United States Democratic Review*, October 1837, rightly complained that “[i]n points of minor importance, our laws are no doubt [] altered, though not more frequently than those of other nations.” Alexis de Tocqueville, *Democracy in America*, 659, 662 (Norton 2007). James Bryce, speaking of the book as a whole, captured such flaws in saying that Tocqueville’s “analysis is always right so far as it is qualitative, sometimes wrong where it attempts to be quantitative.” James Bryce, *Studies in History and Jurisprudence* 327 (Oxford 1901).

Ohio, Chase characterized the “unlimited extension of the elective franchise” as having produced not “any evil” but a “safe and sufficient check upon injurious legislation.”⁵⁴ Contributing to this opinion was the ban on slavery in the Northwest Ordinance, which ensured that the “great doctrine of equal rights” would generate “good government” and “wise legislation.”⁵⁵

In other words, democracy was made sustainable by placing public power in the hands of the people. There was further value to majoritarian politics. Compliance with democratic outcomes will be honored, Tocqueville observed, because losing political forces are expected to have the opportunity of securing a majority in subsequent elections: “[A]ll parties are prepared to recognize the rights of the majority, because all hope some day to exercise those rights.”⁵⁶ Majorities, therefore, were respected, with few obstacles to impede their progress—a “state of affairs,” he worried that is “dire and spell[s] danger for the future.”⁵⁷

If no one, in theory, is excluded from democratic practice, then the “tyranny of the majority” continually was a threat, particularly at the level of states.⁵⁸ Democracy spelled danger unless mechanisms were present to check its mismanagement. Such mechanisms, for Tocqueville, were expected to be “functional equivalents or stand-ins for aristocracy.”⁵⁹ Aristocratic traces could be found dwelling in the lawyerly class. The “conservative and antidemocratic”⁶⁰ element of the legal profession ensured that judges and lawyers could serve as “a strong opposition to the revolutionary spirit and the unthinking passions of democracy.”⁶¹ Few laws escaped judicial review, observed Tocqueville, “for there are very few laws that are not adverse to some person’s interest and that litigants cannot or should not invoke before the courts.”⁶² This conferred an immense power on

⁵⁴ Chase, 1 *The Statutes of Ohio and of the Northwestern Territory* at 48 (cited in note 52).

⁵⁵ *Id.* As Frederick J. Blue notes, Chase ignored the prevalence of Black Codes in Ohio. See Frederick J. Blue, *Salmon P. Chase, First Historian of the Old Northwest*, 98 *Ohio Hist* 52, 66 (1989).

⁵⁶ Tocqueville (2004) at 285 (cited in note 12). See also Stephen Holmes, *Tocqueville and Democracy*, in David Copp, Jean Hampton, and John E. Roemer, eds, *The Idea of Democracy* 23, 30 (Cambridge 1993).

⁵⁷ Tocqueville (2004) at 285 (cited in note 12).

⁵⁸ See Tocqueville (2004) at 175 (cited in note 12) (observing that the “business of the Union is infinitely better conducted than that of any of the states”).

⁵⁹ Wolin, *Tocqueville between Two Worlds* at 159 (cited in note 48).

⁶⁰ Tocqueville (2004) at 305 (cited in note 12).

⁶¹ *Id.* at 303.

⁶² *Id.* at 115. These comments anticipated A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 338 (Macmillan 3d ed 1889).

the judicial branch in “pointing out the faults of the legislator.”⁶³ “Confined within proper limits,” Tocqueville maintained, “the power granted to American courts to pronounce on the unconstitutionality of laws still constitutes one of the most powerful barriers ever erected against the tyranny of political assemblies.”⁶⁴

The legal profession offered another prophylactic to majoritarian excess. Although Tocqueville had occasion to speak disparagingly of lawyers,⁶⁵ they valued order and formalities. Their “spirit will be eminently conservative and anti-democratic,” as they will have acquired the “tastes and the habits of aristocracy.”⁶⁶ In a letter to his friend, Ernest de Chabrol, Tocqueville described lawyers as forming the “resistance”—they are the “stay-put class.”⁶⁷ Yet they “serve the people’s cause”⁶⁸ and so function as a connective tissue—a “natural liaison”⁶⁹—between the aristocratic and the democratic elements. Tocqueville’s paean to the legal profession concludes by describing how the power of lawyers “envelops the whole of society, worms its way into each of the constituent classes, works on the society in secret, influences it constantly without its knowledge, and in the end shapes it to its own desires.”⁷⁰

Democratic excess was curbed institutionally by a jury system that enabled citizens to learn about governing affairs not exclusively in their own interest.⁷¹ The people learn the “ideas

⁶³ Tocqueville (2004) at 116 (cited in note 12).

⁶⁴ *Id.* But see Montesquieu, *The Spirit of the Laws* 156 (Hafner 1949) (Thomas Nugent, trans) (originally published 1748) (characterizing judicial power as “in some measure, next to nothing”).

⁶⁵ See Tocqueville (2004) at 305 (cited in note 12) (noting the ease with which lawyers may be turned into “most useful instruments of royal authority”); Alexis de Tocqueville, 1 *The Old Regime and the Revolution* 258 (Chicago 1998) (François Furet and Françoise Mélonio, eds, and Alan S. Kahan, trans) (originally published 1856) (observing that “[a]longside a ruler who is violating the law, it is very rare not to see a lawyer”). For an excellent discussion of this paradox, see generally Harold L. Levy, *Lawyers’ Spirit and Democratic Liberty: Tocqueville on Lawyers, Jurors, and the Whole People*, in Peter Augustine Lawler and Joseph Alulis, eds, *Tocqueville’s Defense of Human Liberty: Current Essays* 243 (Garland 1993).

⁶⁶ *Id.* at 304–05.

⁶⁷ Letter dated June 20, 1831, in Tocqueville, *Letters* at 81 (cited in note 46). Yet he also describes lawyers as “supplely bend[ing] to the exigencies of the times and surrender[ing] without resistance” to public opinion. Tocqueville (2004) at 311 (cited in note 12).

⁶⁸ Tocqueville (2000) at 254 (cited in note 12).

⁶⁹ Tocqueville (2004) at 306 (cited in note 12).

⁷⁰ *Id.* at 311.

⁷¹ See *id.* at 331 (arguing that the jury system, along with federalism, a vibrant associational life, and judicial power, curbed the excesses of America’s democratic system). See also Schleifer, *The Making* at 248–49, 256 (cited in note 20) (discussing Tocqueville’s analysis of the “enlightened self-interest” of American democracy that fosters in citizens an ability “to sacrifice a portion of their personal interests in order to save the rest”).

and language of the courts,” and thus “the language of the judiciary becomes the vulgar tongue.”⁷² So much so that the “legal spirit, born in law schools and courtrooms, gradually spreads beyond their walls.”⁷³ It eventually “infiltrates all of society, . . . filtering down to the lowest ranks, with the result that in the end all the people acquire some of the habits and tastes of the magistrate.”⁷⁴ Juries were the “most effective means of teaching the people how to rule,” Tocqueville insisted.⁷⁵ The jury system performed functions similar to individual property rights—if felt by all, the matter at hand could be understood by all.⁷⁶ If democracy did not ensure the best government, Tocqueville admitted, it was the best means of enabling citizens to learn from their mistakes.

Political theorists, inspired by Tocqueville’s account, have been preoccupied with filling out the contours of contemporary democratic practice that were only inchoate in the early nineteenth century. Aside from the separation of powers, they have not been all that interested, however, in theorizing about law and the role of lawyers in curbing democratic excess.⁷⁷ The philosopher Claude Lefort, for instance, describes Tocqueville as having articulated democracy’s “prime virtue” as its “ceaseless agitation which . . . influences all social intercourse” and not its ability to provide the best government.⁷⁸ Tocqueville’s work provides no “better description . . . of the democratic adventure,” declares Lefort.⁷⁹ In his work on democratic transitions, Professor Adam Przeworski similarly maintains that democracy is sustainable so long as it exhibits a “ruled open-endedness, or organized uncertainty.”⁸⁰ When political forces are offered the

⁷² Tocqueville (2004) at 310–11 (cited in note 12).

⁷³ *Id.* at 311.

⁷⁴ *Id.*

⁷⁵ *Id.* at 318.

⁷⁶ See Tocqueville (2004) at 273 (cited in note 12).

⁷⁷ See Paul Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* 213 (Chicago 2003) (noting that “little attention is paid” to Tocqueville’s “emphasis upon the role of lawyers and judges”). An unusual exception in the English language is Levy, *Lawyers’ Spirit* (cited in note 65).

⁷⁸ Claude Lefort, *Reversibility: Political Freedom and the Freedom of the Individual*, in Claude Lefort, *Democracy and Political Theory* 165, 168 (Polity 1988) (David Macey, trans).

⁷⁹ *Id.* at 169. The value of democratic experimentation helps to explain Lefort’s famous portrayal of the “locus of power” as being an “empty place.” Claude Lefort, *The Question of Democracy*, in Claude Lefort, *Democracy and Political Theory* 9, 17 (Polity 1988) (David Macey, trans).

⁸⁰ Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* 13 (Cambridge 1991).

opportunity to “advance their interests in the future,” present defeats will be tolerated.⁸¹ For this reason, we should celebrate uncertainty as a “conspicuous characteristic” of democratic practice.⁸²

With markets inhibiting democratic openness, there is much less to celebrate. Proponents of neoliberal reason exploit this malaise, observes Przeworski and his coauthors, even as they underestimate the role of democratically authorized institutions in facilitating public and private life.⁸³ Because the neoliberal path to economic improvement necessarily produces winners and losers, it generates disequilibrium,⁸⁴ deepening social inequality across regions and states.⁸⁵ This “combination of an increasing inequality with a reduced sovereignty is likely to exacerbate social conflicts and weaken” democratic institutions⁸⁶—precisely the point Offe makes about democratic decline in an age of austerity, which introduced this Essay.⁸⁷

II. TRANSNATIONAL BRAKES

In this Part, I take up international investment law as a species of transnational legal regulation, authored by states and administered by a cadre of international economic lawyers, as an example of the limits, internalized by states, that dampen democratic possibilities. It is not that investment arbitration has shown no interest in democratic theory. In *Técnicas Medioambientales Tecmed SA v United Mexican States* (“Tecmed”),⁸⁸ the tribunal relied on the reasoning in *James v The United Kingdom*,⁸⁹ concluding, as did the European Court of Human Rights, that foreigners are not well represented in host-state political processes. Foreign investors are disenfranchised from participating in decisions that give rise to reversals in policy, the tribunal declared, “partly because the investors are not

⁸¹ Id at 19.

⁸² Albert O. Hirschman, *Notes on Consolidating Democracy in Latin America*, in *Rival Views of Market Society and Other Recent Essays* 176, 179 (Viking 1986) (translating the title of Przeworski’s paper from Portuguese as “Love Uncertainty and You Will Be Democratic”).

⁸³ Adam Przeworski, et al, *Sustainable Democracy* 12 (Cambridge 1995).

⁸⁴ See Wolfgang Streeck, *How Will Capitalism End? Essays on a Failing System* 16 (Verso 2016); Wolfgang Streeck, *Comment on Wolfgang Merkel, “Is Capitalism Compatible with Democracy?”*, in Streeck, *How Will Capitalism End?* 185, 192 (cited in note 84).

⁸⁵ See Streeck, *How Will Capitalism End?* at 9 (cited in note 84).

⁸⁶ Przeworski, et al, *Sustainable Democracy* at 10 (cited in note 83).

⁸⁷ See generally Offe, *Participatory Inequality* (cited in note 1).

⁸⁸ 43 Intl Legal Mat 133 (ICSID 2004).

⁸⁹ App No 8793/79, *26–28 (ECtHR 1986).

entitle [sic] to exercise political rights reserved to the nationals of the State.”⁹⁰

Business firms, of course, do not have a vote, and there remain other means by which they can make their preferences known to political actors.⁹¹ Whatever passing interest tribunals have expressed in democratic theory mostly provides cover for the solicitude conferred upon foreign investors.⁹² This is borne out by Professor Gus Van Harten’s content analysis of 162 arbitral awards. “[W]here elections or democracy were mentioned by arbitrators,” he finds, “it was often to suggest that politics had contributed to unsound decisions and that the arbitrators’ role was to ensure that investors were compensated.”⁹³ Arbitrators, for the most part, appear more comfortable with disparaging politics so that democracy is, in Professor Sheldon Wolin’s words, “managed without appearing to be suppressed.”⁹⁴

This element of distrust of public authority in investment arbitral opinions underscores a desire to have democratic governments get out of the way of the movement of capital. There is little tolerance for democratic experimentation or reversals of course. This is a regime that warrants to foreign investors that, given its capacious standards of protection, their interests will be vindicated in the cases in which uncertainty in state policy results in a significant diminution in the value of their investments. The regime sees it as being to no one’s advantage that democracies can reverse course, especially because reversals can give rise to a claim for damages.

The manner in which investment law operates to undercut democratically authorized decisionmaking is exemplified by the incorporation of the “legitimate expectations” doctrine into “fair and equitable” treatment (FET). As Professor Muthucumaraswamy

⁹⁰ *Tecmed*, 43 Intl Legal Mat at 164 at ¶ 122. I have addressed this in David Schneiderman, *Investing in Democracy? Political Process and International Investment Law*, 60 U Toronto L J 909, 915–21 (2010).

⁹¹ See Schneiderman, *Investing in Democracy?* at 931–40 (cited in note 90).

⁹² It was this same tribunal, after all, that declared that host states cannot undermine the “basic expectations that were taken into account by the foreign investor to make the investment.” *Tecmed*, 43 Intl Legal Mat at 173–74 at ¶ 154. For more discussion, see notes 96–103 and accompanying text.

⁹³ Van Harten, *Sovereign Choices* at 73 (cited in note 19). Van Harten undertakes detailed content analysis of most publicly available investment arbitration disputes from 2010 to 2011. An explanation of his methodology can be found in Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 Osgoode Hall L J 211 (2012).

⁹⁴ Sheldon S. Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism* 47 (Princeton 2008).

Sornarajah notes, there was no expectation, when the “vacuous concept” of FET was incorporated into treaty practice, that states would be expected to freeze regulatory frameworks or pay damages for the privilege of doing so.⁹⁵ It was a doctrine seldom recognized in the national laws of contracting states and was, instead, “conjured” up by arbitrators “through a mystical process.”⁹⁶ Nevertheless, F.A. Mann presciently foresaw this development in his 1981 study of the FET clause in the British model Bilateral Investment Treaty (BIT). Admitting that, “[a]lthough these are very familiar terms [referring to FET], they have hardly ever been judicially considered.” Mann anticipated contemporary trends, opining that the language of “unfair and inequitable treatment is a much wider conception” than arbitrary, discriminatory, and abusive treatment and “may readily include [] administrative measures in the field of taxation, licenses and so forth.”⁹⁷

A doctrine of legitimate expectations, it was anticipated, could serve purposes similar to a “stabilization clause” in natural-resource concession contracts.⁹⁸ Such contractual clauses carried with them a commitment to investors that existing laws and regulations would be frozen at the time of the concession or, alternatively, that the concessionaire would be exempt from adverse legal changes. The bargain was that the host state could expect to receive negotiated royalty rates in return for legal stability over the life of an investment.⁹⁹ While such commitments could be enforced via commercial arbitration, so-called umbrella clauses in BITs have had the effect of internationalizing contracts so that they are enforceable before investment tribunals as if they were included in expressly within the terms of the international treaty.¹⁰⁰

While tribunals have accepted arguments that FET mandates that changes of policy that upset express or implied

⁹⁵ M. Sornarajah, *The International Law on Foreign Investment* 350 (Cambridge 3d ed 2010). For information on the origins of FET, see generally Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford 2013).

⁹⁶ M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 263 (Cambridge 2015).

⁹⁷ F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 *British Yearbook Intl L* 241, 243 (1981).

⁹⁸ Thomas W. Waelde and George Ndi, *Stabilizing International Investment Commitments: International Law versus Contract Interpretation*, 31 *Tex Intl L J* 215, 245 (1996).

⁹⁹ See *id.* at 220–24.

¹⁰⁰ See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* 153–62 (Oxford 2008). See also James Crawford, *Treaty and Contract in Investment Arbitration*, 24 *Arb Intl* 351, 366–70 (2008).

commitments attract compensation, some states have gone so far as to include such commitments in their BITs. For example, the 1998 Italy-Mozambique BIT provides that:

Whenever, after the date when the investment has been made, a modification should take place in laws, regulations, acts or measures of economic policies governing directly or indirectly the investment, the same treatment shall apply upon request of the investor that was applicable to it at the moment when the investment was agreed upon to be carried out.¹⁰¹

Professor Tarcisio Gazzini describes these commitments as “the treaty equivalent of the most robust form of stabilization provisions, the so-called ‘freezing clauses.’”¹⁰²

Though many examples could be drawn from the arbitral record, the decision of the panel in the *BG Group Public Limited Company v Argentine Republic*¹⁰³ case is taken up as it exemplifies the manner in which investment law delimits policy space.¹⁰⁴ BG owned a 45 percent share of a formerly public gas distribution company, having an exclusive license to deliver natural gas to the environs of the city of Buenos Aires.¹⁰⁵ The licensing regime ensured that tariffs collected by the company would be recouped in US dollars, adjusted periodically, converted into pesos at the time of billing, and reviewed every five years.¹⁰⁶ The Argentine economic meltdown of 2000 to 2001 precipitated a variety of measures for societal self-protection, including the abolition of dollarization and, due to the ensuing devaluation of the peso, a refusal to convert tariffs into US dollars. This was a response, Argentina argued, “to a general crisis . . . aimed at maintaining the sustainability of the economy.”¹⁰⁷ Rather than “facilitating . . . the unjust enrichment of certain groups and the

¹⁰¹ Agreement between the Government of the Italian Republic and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments Art 12(3) (Dec 14, 1998), archived at <http://perma.cc/59AQ-QR6E>.

¹⁰² Tarcisio Gazzini, *Beware of Freezing Clauses in International Investment Agreements* (Columbia FDI Perspectives No 191, Jan 16, 2017), archived at <http://perma.cc/C7C6-JJAW>.

¹⁰³ UNCITRAL Ad Hoc Tribunal, Final Award in the Matter of an UNCITRAL Arbitration (Dec 24, 2007), archived at <http://perma.cc/V4CD-FGTM>.

¹⁰⁴ Id. The immobilizing effects of other disputes arising out of the Argentine economic crisis are discussed in David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* 40–51 (Palgrave Macmillan 2015).

¹⁰⁵ See *BG Group* *11–12 at ¶¶ 23–24 (cited in note 103).

¹⁰⁶ See id *13 at ¶¶ 29–32.

¹⁰⁷ Id *89 at ¶ 283.

resulting poverty of others,” all participants in the economy were expected to share in the burden of responding to the economic collapse.¹⁰⁸

BG, together with other foreign investors, were not willing to share in this burden and so, in April 2003, filed a dispute invoking a 1990 Argentina–United Kingdom Bilateral Investment Treaty. The company claimed that it had a “guarantee[d]” rate of return on its investment regardless of the financial hardships being experienced by Argentinians.¹⁰⁹ Argentina “lured investors like BG into investing . . . by representing to them that the investment would be governed by a stable tariff regime, which would guarantee them a reasonable real-dollar income,” the UK investor claimed.¹¹⁰ There were no contractual commitments to enforce. Instead, the investor sought to hold the state to commitments made via legislation and licensing.

Having taken measures at “odds with the stability and predictability” of the legal order,¹¹¹ the Argentinian government’s action precipitated a total collapse in the value of the investment (an estimated worth of over US \$238 million).¹¹² This, the company claimed, amounted to an indirect expropriation of the company’s assets without compensation, an “unreasonable measure[]” impairing the use of the investment that also offended FET.¹¹³ I focus here on this last argument that Argentina failed to provide to the claimant a “stable and predictable investment environment in accordance with its legitimate and reasonable expectations” as part of its FET obligations.¹¹⁴

The Government responded with a variety of arguments, among them that the regulatory framework in place at the time the investment was made “offer[ed] no guarantees.”¹¹⁵ Central to the Argentinian defense were arguments defending the capacity of states and citizens to change policy direction in order to accommodate fiscal exigencies. Argentina, in other words, should be free to take measures for societal self-protection, and no public utilities license or investment treaty could be interpreted as

¹⁰⁸ Id *91 at ¶ 288.

¹⁰⁹ *BG Group* *87–88 at ¶ 280 (cited in note 103).

¹¹⁰ Id.

¹¹¹ Id *88 at ¶ 282.

¹¹² Id *125 at ¶ 415.

¹¹³ *BG Group* *125 at ¶ 413 (cited in note 103).

¹¹⁴ Id *86 at ¶ 276. See also id *103 at ¶ 333.

¹¹⁵ Id *90 at ¶ 286.

freezing that regulatory environment. This particularly is the case when no stabilization clause is included in the relevant BIT.¹¹⁶

The tribunal declined to follow Argentina's logic and accepted BG's claim that the company was denied FET. The company, after all, had invested in Argentina on the basis that the state would guarantee the stability of its investment interest.¹¹⁷ There has been virtual unanimity on the question of liability among tribunals considering claims arising out of the Argentinian economic crisis.¹¹⁸ Most every tribunal, including the *BG Group* tribunal, concluded that Argentina breached the requirement of FET by revamping the legal framework, thereby diminishing expected rates of return for investors.¹¹⁹ Having "entirely altered the legal and business environment by taking a series of radical measures," Argentina entirely undermined investor expectations, the tribunal ruled.¹²⁰ This had the effect of violating "the principles of stability and predictability inherent to the standard of fair and equitable treatment"—the reasonably-to-be-expected "stable and predictable business and legal investment environment."¹²¹ Argentina was ordered to pay BG over US \$185 million.¹²²

The tribunal resisted the proposition that this finding resulted in the "freezing of the legal system."¹²³ Instead, as the tribunal unsatisfyingly put it, "in order to adapt to changing economic, political and legal circumstances the State's regulatory power still remains in place."¹²⁴ The regulatory regime generated "specific commitments" that the state was obliged to honor.¹²⁵

¹¹⁶ See id *90 at ¶ 287.

¹¹⁷ See *BG Group* *97 at ¶ 307 (cited in note 103).

¹¹⁸ For a representative sample, see *CMS Gas Transmission Co v Argentine Republic*, 44 Intl Legal Mat 1205, 1231–32 at ¶¶ 239–46, 1234–36 at ¶¶ 266–81, 1237–38 at ¶¶ 296–303 (ICSID 2005) (holding Argentina liable for breach of FET obligations); *Enron Corp and Ponderosa Assets, LP v Argentine Republic*, ICSID ARB/01/3, *74 at ¶ 231, *85 at ¶ 268, *88 at ¶ 277 (May 22, 2007), archived at <http://perma.cc/ZM47-9FUD> (holding Argentina liable for the same treaty breach); *Sempra Energy International v Argentine Republic*, ICSID ARB/02/16, *78 at ¶ 268, *90 at ¶ 304, *93 at ¶ 314 (Sept 28, 2007), archived at <http://perma.cc/H4D6-LQMF> (also holding Argentina liable for this treaty breach).

¹¹⁹ See José E. Alvarez and Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime* *12 (Institute for International Law and Justice Working Paper 2008/5), archived at <http://perma.cc/9NMY-S6L8>; David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, 30 Nw J Intl L & Bus 383, 387–88 (2010).

¹²⁰ *BG Group* *97 at ¶ 307 (cited in note 103).

¹²¹ Id *97–98 at ¶¶ 307, 310.

¹²² Id *136 at ¶ 457.

¹²³ Id *93–94 at ¶ 298.

¹²⁴ *BG Group* *93–94 at ¶ 298 (cited in note 103).

¹²⁵ Id *96 at ¶ 305. See also id *105 at ¶ 345.

Freezing and then reducing the rate of return by converting from US dollars to Argentinian pesos was not in keeping with this form of commitment through legislation and licensing. What policy space remained, in light of these specific commitments, is never made clear. As it turns out, this was precisely the outcome intended by the US State Department when it negotiated the BIT, argues Professor José Alvarez, who was employed there at the relevant time. Despite its “penchant for declaring national emergencies,” as a consequence of the Argentine-US BIT, Argentina could no longer escape liability owed to foreign investors in the wake of future economic crises.¹²⁶

Professor Moshe Hirsch explains that the legitimate expectations doctrine under FET allows for more regulatory flexibility than many will admit. Regulatory changes that merely diminish investment value “alone are insufficient” to give rise to liability.¹²⁷ There must be, in addition, “exceptional factors,” he explains.¹²⁸ Hirsch mentions only two examples that qualify as “exceptional”—namely, abuse of authority and continual legislative change,¹²⁹ neither of which well captures the Argentinian case. Professors Rudolf Dolzer and Christoph Schreuer similarly acknowledge that something more than mere regulatory change is needed to give rise to a violation of FET: “What matters is whether measures exceed normal regulatory powers and fundamentally modify the regulatory framework for the investment beyond an acceptable margin of change,” they conclude.¹³⁰ What is determinative, then, is whether the change is abnormal or “exceptional.”¹³¹ The answer to this sort of question almost always has been determined, as in the past, by powerful capital-exporting states and their surrogates. Departures from their hegemonic version of normality will not be tolerated.¹³²

¹²⁶ Alvarez and Khamsi, *The Argentine Crisis and Foreign Investors* at *33 (cited in note 119). See also *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic*, ICSID ARB/03/17, *90 at ¶ 234 (July 30, 2010), archived at <http://perma.cc/RW7Q-CD7Q>.

¹²⁷ Moshe Hirsch, *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law*, 12 *J World Investment & Trade* 783, 784 (2011).

¹²⁸ *Id.*

¹²⁹ *Id.* at 784, 800 (referring to the continuous legislative change as the “roller-coaster effect”).

¹³⁰ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* 148 (Oxford 2d ed 2012).

¹³¹ Hirsch, *Between Fair and Equitable Treatment* at 784, 800 (cited in note 127).

¹³² See Andrew Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* 239 (Oxford 2011); Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 *Harv L Rev* 546, 549 (1987).

III. LOCAL MISRECOGNITION

Recall that, for Tocqueville, lawyers and judges will be “eminently conservative and antidemocratic”—they are the “stay-put class,” he believed.¹³³ Curiously, they have, for the most part, paid little heed to the disequilibrium produced by the investment treaty regime. Some high courts, as a consequence, have failed to recognize the constitutional implications of outcomes like the one in *BG Group*. Canadian courts, for instance, show a marked reluctance to consider investment law as giving rise to any significant implications for domestic constitutional law. This is despite the fact that investment law’s legal disciplines “impose far stricter limits on Canadian governments than anything in the [Canadian] Constitution.”¹³⁴

A majority of the US Supreme Court disregarded such constitutional effects when undertaking judicial review of the tribunal decision in *BG Group PLC v Republic of Argentina*.¹³⁵ At issue before the Court were not the stabilization effects of BIT commitments, but review of the tribunal’s decision to accept jurisdiction despite the treaty’s local litigation requirement.¹³⁶ As arbitrators have authority to determine a tribunal’s competence, the tribunal permitted the investor to proceed immediately to arbitration regardless of the Argentina-UK BIT requirement that the claimant first seek a remedy in local Argentinian courts for an eighteen-month period.¹³⁷ The DC Circuit unanimously vacated the award.¹³⁸ The Supreme Court ruled otherwise, holding that the tribunal had not exceeded its jurisdiction.¹³⁹

The investment tribunal warranted deference, wrote Justice Stephen Breyer for the majority, because “[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient nations regarding the operation of the [local remedy] provision.”¹⁴⁰ In so doing, the

¹³³ Tocqueville (2004) at 305 (cited in note 12); Tocqueville, *Letters* at 81 (cited in note 46).

¹³⁴ Harry Arthurs, *Constitutional Courage*, 49 McGill L J 1, 7 (2003). The NAFTA constitutional challenge is discussed in David Schneiderman, *Investor Rights and the Judicial Denial of Neo-liberal Constitutionalism*, in Simon Archer, Daniel Drache, and Peer Zumbansen, eds, *The Daunting Enterprise of the Law: Essays in Honour of Harry W. Arthurs* 169, 169–81 (McGill-Queen’s 2017).

¹³⁵ 134 S Ct 1198 (2014).

¹³⁶ See *id.* at 1203–04.

¹³⁷ See *BG Group* *5–7 at ¶ 3 (cited in note 104).

¹³⁸ See *Republic of Argentina v BG Group PLC*, 665 F3d 1363, 1366 (DC Cir 2012).

¹³⁹ See *BG Group*, 134 S Ct at 1206.

¹⁴⁰ *Id.* at 1210.

majority likened investment arbitration to private commercial arbitration.¹⁴¹ The Court's solicitude toward commercial arbitration is informed, in turn, by its deference toward labor arbitration outcomes. Only "deviat[ing] wildly from the contract" or the absence of any "contract to arbitrate in the first place" warrant judicial interference in labor disputes, the Court has held.¹⁴² Because labor arbitration is the "paradigm of private justice"¹⁴³—"a system of private law," according to the Court—significant deference is appropriate.¹⁴⁴ The unusual influence of labor arbitration on *BG Group* is made plain in Breyer's subsequent book on the role of global and comparative legal developments on the Court's work. Breyer compares the Court's approach to investment arbitration to the review of labor arbitration awards under US law.¹⁴⁵ How labor arbitration can be likened to this contentious subfield of public international law is never well explained.

Equating judicial review of labor disputes with determinations of state regulatory capacity in a wide array of policy fields looks like a category mistake.¹⁴⁶ Chief Justice John Roberts, in dissent with Justice Anthony Kennedy, took a different view: the BIT's local litigation requirement was a condition precedent to an agreement to submit a claim to arbitration. There could be no jurisdiction—no acceptance of the unilateral offer to consent to arbitration—until this condition was satisfied.¹⁴⁷ Roberts had a better sense of the stakes involved. "It is no trifling matter," he declared, "for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly."¹⁴⁸

That the stakes are quite high is revealed by the fact that former President Barack Obama, together with the US Trade Representative (USTR), trumpeted parallels between investment

¹⁴¹ See *id.* at 1206.

¹⁴² Stephen Breyer, *The Court and the World: American Law and the New Global Realities* 186 (Alfred A. Knopf 2015). See also, for example, *United Steelworkers of America v American Manufacturing Co.*, 363 US 564, 568 (1960) ("The courts, therefore, have no business weighing the merits of the grievance," but rather are "confined to ascertaining whether . . . [the] claim . . . is governed by the contract.").

¹⁴³ Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L J 916, 916 (1979).

¹⁴⁴ *United Steelworkers of America v Warrior and Gulf Navigation Co.*, 363 US 574, 581 (1960).

¹⁴⁵ See Breyer, *The Court and the World* at 179–92 (cited in note 142).

¹⁴⁶ See Anthea Roberts and Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v Argentina*, 108 Am J Intl L 750, 754 (2014) ("This approach makes no sense.").

¹⁴⁷ See *BG Group*, 134 S Ct at 1216 (Roberts dissenting).

¹⁴⁸ *Id.* at 1219 (Roberts dissenting).

treaty protections and rights available to citizens under the US Constitution when seeking congressional authorization to complete the Trans-Pacific Partnership Agreement (from which the United States has now withdrawn). Given the breadth of investment treaty protections, they turn out even to exceed safeguards available to US citizens in the Bill of Rights.¹⁴⁹ The majority of the Court seemed curiously disinterested in such linkages. As Tocqueville reminds us, “when free to choose, [lawyers] will not innovate.”¹⁵⁰ If they can avoid it, they will not want to be seen to be impeding the smooth movement of global capital.

CONCLUSION

It seems that Tocqueville’s lesson—that democracy’s great advantage is the ability to make repairable mistakes—has largely been lost on lawyers working within the subfield of international investment law. To be sure, there are tendencies operating in the other direction that are intended to restore (“recalibrate” is the preferred term) some sort of equilibrium to the system.¹⁵¹ Such efforts, however, mostly are modest and, even then, resisted by many investment lawyers and arbitrators.¹⁵² National court judges, at times, rise to the occasion and resist unreasonable encroachments on policy space beyond that available in national constitutional orders.¹⁵³ They are not

¹⁴⁹ See David Schneiderman, *Writing the Rules of the Global Economy: How America Defines the Contours of International Investment Law* *1–2 (unpublished manuscript, 2017) (on file with author).

¹⁵⁰ Tocqueville (2004) at 310 (cited in note 12). Lawyers, Tocqueville acknowledged, were reluctant to change civil law because they had a “direct interest in maintaining it as it is, good or bad, for the simple reason that they are familiar with it.” *Id.* at 51. This was put in stronger terms in notes of his conversation with Albert Gallatin. Lawyers have not revised the civil law, Gallatin advised, because “they defend the abuses and ambiguities from which they profit.” Tocqueville, *Journey to America* at 21 (cited in note 40). We might conclude, then, that it is lawyers’ self-interest, and not merely conservative habits, that render them disinterested in change.

¹⁵¹ See generally José E. Alvarez, *Why Are We “Re-calibrating” Our Investment Treaties?*, 4 *World Arb & Mediation Rev* 143 (2010).

¹⁵² See generally David Schneiderman, *The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and Their Critics*, in C.L. Lim, ed., *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* 131 (Cambridge 2016).

¹⁵³ I have elsewhere discussed the Colombian Constitutional Court behaving in such a fashion in Schneiderman, *Constitutionalizing Economic Globalization* at 177–79 (cited in note 10). A similar tension is identified by the Israeli High Court of Justice in the *Gas Outline Plan* case. See *The Movement for Quality Government v Prime Minister of Israel*, HC4374/15, 7588/15, 8747/15, 262/16 (Isr 2016). The English-language summary is archived at <http://perma.cc/DN8C-3XDM>.

consistently reliable in this regard, however, as the North American record suggests.

This bifurcation of Tocqueville by the legal profession gives rise to concerns addressed at the end of the second volume of *Democracy in America* and taken up again in *The Old Regime and the Revolution*. At the conclusion of his first work, Tocqueville worried about a new kind of despotism that could befall democratic societies. It would isolate individuals, reducing them to children, he wrote. “Rather than tyrannize,” such a form of despotism “inhibits, represses, saps, stifles, and stultifies, and in the end [] reduces each nation to nothing but a flock of timid and industrious animals, with the government as its shepherd.”¹⁵⁴ In a famous passage in *The Old Regime and the Revolution*, Tocqueville expanded on this dystopian vision. It was the very essence of despotism, he declared, to spread the “love of profit” and “material pleasure and comfort” above all else.¹⁵⁵ He castigated “private interests, too given to looking out for themselves alone.”¹⁵⁶ Tocqueville considered eighteenth-century physiocrats (and socialists¹⁵⁷) as exhibiting a penchant for seizing “social power” away from the people in order to “shape” the nation “in a certain way.”¹⁵⁸ For them, “it was for the state to form the citizen’s mind according to a particular model set out in advance.”¹⁵⁹ The state’s “duty was to fill the citizen’s head with certain ideas and to furnish his heart with certain feelings that it judged necessary.”¹⁶⁰ This, for Tocqueville, amounted to “democratic despotism”: “Above society, a single official, charged with doing everything in its name, without consulting it.”¹⁶¹ Have investment lawyers been leading citizens of democratic states in these directions?

Neoliberal legality, I have argued, has helped to precipitate a slide into democratic passivity. Excessive constitutional rights conferred upon powerful economic actors and policed by transnational legal institutions exacerbate these tendencies, rendering democratic politics a less meaningful means for expressing political preferences. International investment law, more particularly,

¹⁵⁴ Tocqueville (2004) at 819 (cited in note 12).

¹⁵⁵ Tocqueville, 1 *The Old Regime* at 87 (cited in note 65).

¹⁵⁶ *Id.*

¹⁵⁷ See Alexis de Tocqueville, *Tocqueville on Socialism*, 1 *New Individualist Rev* 18, 19–20 (Summer 1961) (Ronald Hamowy, trans).

¹⁵⁸ Tocqueville, 1 *The Old Regime* at 212 (cited in note 65).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 212–13.

serves to constrain democratic capacity in operative democracies by conferring privileged access to foreign investors together with legal rights encapsulating the highest standards of protection known to international law. As Professor Jeremy Waldron observes, “no such certainty is available in any other realm of economic activity.”¹⁶² Citizens are reduced to debtors jointly liable for the behavior of their states, and politics is emptied of the long-standing tension between democracy and markets.¹⁶³ If determining the proper sphere of government intervention in economic subjects has long been the work of democratic deliberation, such matters are unlikely to be permanently resolved by the investment-law regime. The tumult of democratic life, which so inspired Tocqueville, ensures that, despite the regime’s constitutional aspirations, it will be, if not short lived, the subject of continued political contestation.

¹⁶² Jeremy Waldron, *The Rule of Law and the Measure of Property* 73 (Cambridge 2012).

¹⁶³ See Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* 92 (Verso 2014) (Patrick Camiller, trans).