

International Delegations and the Structural Constitution

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In this paper, I will consider some of the constitutional implications of U.S. delegations of authority to international institutions.¹ Since World War II, there has been a vast growth in the number and importance of international institutions. Although some of these institutions are merely forums for discussion and negotiation, many of them exercise judicial, legislative, regulatory, investigative, or prosecutorial authority. Despite its isolationist reputation, and despite recently announcing that it would not become a party to the International Criminal Court, the United States has committed itself to many of these institutions. By virtue of these commitments, the United States has consented to have international institutions make certain decisions, and take certain actions, that can affect the United States' rights and duties under international law and, in some instances, the enforceability of U.S. domestic law. Although the number and extent of future U.S. commitments will likely vary depending on the presidential administration, the general trend internationally – as illustrated most dramatically by developments the European Union – is towards vesting ever-increasing authority in international institutions.

Without prejudging their validity, delegations of authority by the United States to international institutions could be said to raise “delegation concerns.” By transferring legal authority from U.S. actors to international actors – actors that are physically and culturally more distant from, and not directly responsible to, the American public – these delegations may entail a dilution of domestic political accountability. This accountability problem may be heightened by the lack of transparency associated with some international decisionmaking, which in turn may increase monitoring costs and, relatedly, the potential for rent-seeking.² In addition, transfers of authority to international

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¹ For other general discussions of this topic, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 247-73 (2d ed. 1996); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* 14-20 (1998); George Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 *AM. J. COMP. L.* 463 (1998); Lori Fisler Damrosch, “*Sovereignty*” and *International Organizations*, 3 *U.C. DAVIS J. INT’L L. & POL’Y* 159 (1997); Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 *N.C. L. REV.* 257 (2000); and Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *MINN. L. REV.* 71 (2000).

² For an excellent discussion of the political economy of international lawmaking, and the potential for diminished accountability associated with such lawmaking, see Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 *NW. J. INT’L L. & BUS.* 681, 693-706 (1996/97). See also Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 *AM. J. INT’L L.* 489 (2001) (discussing the “democracy-legitimacy deficit” in international lawmaking); Paul B. Stephan, *International Governance and American Democracy*, 1 *CHI. J. INT’L L.* 237 (2000) (discussing tensions between international governance and American democracy).

institutions may enhance the power of one branch of the federal government relative to the others. Specifically, these transfers tend to enhance the power of Executive Branch, because the United States is represented in these institutions by Executive Branch agents. Finally, delegations of authority to international institutions – as with the expansion of international law more generally – may also enhance the power of the entire federal government vis-à-vis the states.³

Although these delegation concerns are not entirely new,⁴ they have become much more pronounced in recent years. In the domestic context, similar concerns about accountability and aggrandizement of power are addressed by a variety of separation of powers and federalism doctrines. I will argue in this paper that, whether viewed from a formal or functional perspective, these doctrines are relevant to international delegations.⁵ I will also argue that at least some of the constitutional concerns associated with these delegations can be addressed by treating the decisions and actions of international institutions as “non-self-executing” – that is, as not creating enforceable federal law within the United States. As I will explain, this has in fact been the approach intuitively followed by U.S. courts in recent years when confronted with delegation concerns, and it also is an approach increasingly mandated by the U.S. treaty-makers and Congress.

I. Limits on Delegation

In the domestic context, the Supreme Court has recognized a variety of constitutional doctrines that limit delegations of authority. Some of these doctrines are based on constitutional text, whereas others are implied from constitutional structure and history. The following is a brief description of some of the constitutional doctrines that may be relevant to international delegations:

³ See generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994).

⁴ In the early 1900s, U.S. officials expressed concern about the jurisdiction of a proposed international prize court, arguing that it would be unconstitutional for the United States to allow prize decisions by Article III courts to be annulled by an international court. See QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 117-18 (1922). In 1911, the Senate Foreign Relations Committee argued that it would be unconstitutional to delegate to international arbitration commissions the authority to determine the scope of their own jurisdiction. See CHARLES CHENEY HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 504, at 24-25 (1922). And, in negotiating the structure of the proposed International Labour Organization in 1919, U.S. delegates argued against giving the Organization the power to create binding labor standards, on the ground that this power would improperly give the Organization the ability to impose new treaty obligations on the United States without going through the treaty process specified in the U.S. Constitution. See Pittman B. Potter, *Inhibitions on the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456, 456-57 (1934) (summarizing and quoting the objections).

⁵ I do not consider here whether the standard formal/functional distinction is a useful way of thinking about structural constitutional issues. For criticism of this distinction in the context of separation of powers law, see M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000); and M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001).

Nondelegation Doctrine: The Supreme Court has stated that “Congress generally cannot delegate its legislative power to another Branch.”⁶ The “fundamental precept” of this nondelegation doctrine, the Court has said, is that “the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.”⁷ At least in theory, this doctrine “forces a politically accountable Congress to make the policy choices, rather than leave this to unelected administrative officials.”⁸ Under this doctrine, when Congress delegates power, it must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”⁹ This “intelligible principle” requirement “seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.”¹⁰

The modern Supreme Court has nevertheless allowed Congress to delegate substantial interpretive and regulatory authority to the Executive Branch and the Judiciary, and it has not found a violation of the “intelligible principle” requirement since the mid-1930s. The Court has explained that its nondelegation doctrine “has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”¹¹ Although some Supreme Court Justices and academic commentators have called for reinvigorating the nondelegation doctrine, the Court has not yet shown an inclination to do so.¹² The Court has sometimes construed statutory delegations narrowly, however, in order to avoid constitutional concerns.¹³ In addition, the Court has invalidated statutory delegations on

⁶ *Mistretta v. United States*, 488 U.S. 361, 372 (1989). See also *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (“[I]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”).

⁷ *Loving v. United States*, 517 U.S. 748, 758 (1996).

⁸ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 235 (1997).

⁹ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹⁰ *Loving*, 517 U.S. at 748.

¹¹ *Mistretta*, 488 U.S. at 372.

¹² See, e.g., *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001) (finding that broad delegation of authority to the EPA satisfied the “intelligible principle” requirement). For recent academic discussion of the nondelegation doctrine, compare Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (arguing that Founding history and enumerated powers structure of the Constitution supports a nondelegation doctrine), with Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine* (draft) (arguing that there is no constitutional support for the nondelegation doctrine). See also Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731-1018 (1999).

¹³ See generally John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

other separation of powers grounds, such as a failure to satisfy the Constitution’s bicameralism and presentment requirements.¹⁴

The Appointments Clause: The Appointments Clause in Article II of the Constitution gives the President the power to appoint, with the advice and consent of the Senate, ambassadors, other public ministers and consuls, Supreme Court Justices, and all other “Officers of the United States” whose appointment is not otherwise provided for in the Constitution. It also states that Congress may vest the appointment of “inferior Officers” in either the President, the courts, or in the heads of departments. The Supreme Court has made clear that “[u]nless their selection is elsewhere provided for [in the Constitution], all officers of the United States are to be appointed in accordance with the Clause.”¹⁵ The Court also has stated that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed” by the Clause.¹⁶ The Clause does not apply, however, to “lesser functionaries subordinate to officers of the United States.”¹⁷ These requirements, the Court has explained, are designed both to prevent aggrandizement of power by one branch at the expense of another and to ensure public accountability in the appointments process.¹⁸

Limits on Non-Article III Courts: Article III of the Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” and it also specifies that the federal judicial power is to be exercised by judges who “shall hold their Offices during good Behaviour, and [who] shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.” This language has been interpreted as at least sometimes precluding the vesting of the judicial power of the United States in tribunals that are not ordained and established by Congress and that do not have the Article III tenure and salary protections.

Although the Supreme Court invalidated an important piece of bankruptcy reform legislation on the ground that it unconstitutionally delegated judicial power to non-Article III courts,¹⁹ the Court has not provided clear guidance about when such courts are

¹⁴ See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998) (invalidating Line Item Veto Act for failure to comply with bicameralism and presentment requirements); *Bowsher v. Synar*, 478 U.S. 714, 725 (1986) (disallowing assignment of certain powers to Comptroller General on the ground that “Congress cannot reserve to itself the power of removal of an officer charged with the execution of the laws except by impeachment”); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto provision for failure to comply with bicameralism and presentment requirements); see also *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275-76 (1991) (applying these principles to an entity created under state law).

¹⁵ *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

¹⁶ *Id.* at 126.

¹⁷ *Id.* at 126 n.162.

¹⁸ See, e.g., *Edmond v. United States*, 520 U.S. 651, 660 (1997); *Ryder v. United States*, 515 U.S. 177, 182 (1995); *Freytag v. Commission of Internal Revenue*, 501 U.S. 868, 878, 884 (1991).

¹⁹ See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

allowed or disallowed. There was no majority opinion in the bankruptcy case, and the Court’s *holding* was limited to the narrow proposition that “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.”²⁰ In subsequent decisions, the Court has applied a case-by-case balancing approach, whereby it weighs the need for the non-Article III court against the danger to separation of powers. In assessing this balance, the Court considers a variety of factors, and it has indicated that non-Article III courts are more likely to be permitted if the parties consent, if appellate review is available in an Article III court, and if the dispute involves “public rights” created by the government.²¹

Hayburn’s Case: An early Supreme Court case, *Hayburn’s Case*,²² has come to stand for the proposition that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. That case involved a 1792 statute that authorized pensions for disabled veterans of the Revolutionary War. The statute provided that the federal circuit courts were to determine the appropriate disability payments, but that the Secretary of War had the discretion either to adopt or reject the courts’ findings. The Supreme Court did not address the constitutionality of this arrangement, but the views of several circuit courts (reflecting the views of five Supreme Court Justices) were reported with the case, and these courts reasoned that the statute was unconstitutional because it asked the federal courts to do something that was not “judicial.”²³

Interference with Judicial Power: In *Plaut v. Spendthrift Farm, Inc.*,²⁴ the Court held that Congress does not have the power to reopen, retroactively, a federal court’s final judgment in a civil case. In that case, Congress had authorized the reinstatement of certain lawsuits that had been dismissed on statute-of-limitations grounds. Analogizing to *Hayburn’s Case*, the Court held that Congress’s reopening of a final judgment unconstitutionally interferes with the power of the federal courts to decide cases, in violation of Article III of the Constitution and principles of separation of powers. The Constitution, reasoned the Court, “gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article

²⁰ *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985).

²¹ *See Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide*, *supra*.

²² 2 U.S. (2 Dall.) 409 (1792).

²³ *See also Miller v. French*, 530 U.S. 327, 343 (2000) (*Hayburn’s Case* “stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch”) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)). *Hayburn’s Case* is also frequently cited for the broader proposition that the federal courts may not issue advisory opinions.

²⁴ 514 U.S. 211 (1995).

III hierarchy – with an understanding, in short, that ‘a judgment conclusively resolves the case’ because ‘a “judicial Power” is one to render dispositive judgments.’”²⁵

Anti-Commandeering: The Court has held that Congress may not “commandeer” state legislatures or executive branch officials to implement federal regulatory programs.²⁶ In addition to finding that such commandeering violates the “dual sovereignty” implicit in the Constitution, the Court has explained that commandeering undermines political accountability, because “it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”²⁷ The Court also has expressed concern that such commandeering could allow Congress to implement federal law without the assistance of the President, thereby enhancing its power vis-à-vis the Executive Branch.²⁸ Among other things, these anti-commandeering decisions suggest (as do some of the Court’s non-delegation decisions) that the Court’s concerns about accountability and aggrandizement of power extend beyond horizontal delegations of authority.

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There is of course substantial academic and judicial debate about the validity and scope of the above doctrines. The key point for present purposes is that the Court and most commentators believe that the Constitution imposes *some* restraints on governmental delegations of power in order to preserve accountability and limit aggrandizements of power.

II. International Delegations

Whether applied in a formal way (with an emphasis on constitutional text, structure, and history) or in a functional way (with an emphasis on the underlying policy concerns and the practical effect of the delegation), some of the above doctrines may be implicated by U.S. participation in international institutions.²⁹ A variety of examples illustrate this point:

²⁵ *Id.* at 218-19 (quoting Frank Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1999)).

²⁶ *See* *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). To the delight of comparative constitutionalists, Justice Breyer’s dissent in *Printz* refers to the constitutional practices of other federal systems in arguing that some commandeering should be allowed. *See* *Printz*, 521 U.S. at 976-77 (Breyer, J., dissenting).

²⁷ *New York*, 505 U.S. at 168-69.

²⁸ *See id.* at 922-23.

²⁹ U.S. participation in international institutions is typically accomplished by means of a treaty or congressional-executive agreement and thus may also implicate issues relating to the scope of the treaty power. For that debate, compare Bradley, *supra* note 3 (arguing in favor of federalism limitations), and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) (same), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the*

UN Security Council: The United Nations Security Council, which was established pursuant to the United Nations Charter, consists of five permanent members (the United States, Russia, Great Britain, France, and China) and ten rotating non-permanent members. Under the Charter (a treaty that has now been ratified by almost all nations in the world), the Council is charged with “primary responsibility for the maintenance of international peace and security.”³⁰ If the Security Council determines “the existence of any threat to the peace, breach of the peace, or act of aggression,” and it determines that non-military measures “would be inadequate or have proved to be inadequate,” the Council can authorize “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”³¹ The Charter obligates each member, including the United States, to “accept and carry out the decisions of the Security Council.”³²

Some commentators have suggested that, even if the Constitution ordinarily requires that the President obtain congressional authorization before ordering the use of military force, this requirement does not apply when the United States is enforcing a Security Council resolution.³³ In effect, this argument would mean that, through the UN Charter, some of Congress’s war authorization power has been delegated to the Security Council. (Similar arguments have been made with respect to the NATO self-defense treaty.) Such a delegation may be constitutionally questionable under both the formal and functional approaches to separation of powers. From a formal perspective, the war declaration power is assigned to Congress, and the Supreme Court has said that Congress may not ordinarily delegate away its powers. Furthermore, the UN Charter is a treaty, not a statute, and thus one of the two houses of Congress was not even involved in the purported delegation. Furthermore, the full Congress has, if anything, attempted to

Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075 (2000) (arguing against federalism limitations). International institutions established by congressional-executive agreement also implicate the debate over the legitimacy of using such agreements in lieu of Article II treaties. For that debate, compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995), and David Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). Cf. *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001) (dismissing challenge to the constitutionality of the NAFTA congressional-executive agreement based on political question doctrine).

³⁰ CHARTER OF THE UNITED NATIONS, art. 24, 59 Stat. 1031 (June 26, 1945).

³¹ *Id.*, art. 42.

³² *Id.*, art. 25.

³³ See, e.g., Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT’L L. 63, 64, 67-69 (1991). But see Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT’L L. 74 (1991); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEORGETOWN L.J. 597 (1993). See also James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. INT’L L. 421 (1998) (discussing this issue).

preclude this sort of delegation.³⁴ From a functional perspective, it is far from clear that the Security Council is an adequate substitute for Congress in checking presidential uses of force. The Council does not purport to represent the interests of the American public, and, although the United States has a veto power on the Council, the U.S. representative on the Council is appointed by, and subject to the direction of, the Executive Branch.³⁵

International Court of Justice: The UN Charter also established the International Court of Justice (ICJ), which has jurisdiction to resolve international law disputes between nations. A member of the United Nations, such as the United States, is bound to “comply with the decision of the International Court of Justice in any case to which it is a party.”³⁶ The Court can only hear cases, however, in which both parties have consented in some fashion to the Court’s jurisdiction.³⁷ For many years, the United States consented generally to the Court’s jurisdiction. But in 1985, after the Court exercised jurisdiction over a suit brought against the United States by Nicaragua, the United States withdrew its general consent. As a result, it can now be sued in the Court only if it has consented to the Court’s jurisdiction in a particular treaty with the complaining party or if it gives its specific consent to jurisdiction at the time the suit is filed. The United States continues to be a party, however, to a number of treaties that contain clauses authorizing the Court to resolve disputes arising under the treaties.

As a general matter, U.S. participation in the ICJ would not seem to raise serious delegation concerns. The Court applies only international law, not U.S. law; it hears only disputes between nations, not disputes involving private parties; and the cases heard by the ICJ are filed there in the first instance, which means that the Court will not ordinarily review U.S. judicial decisions. Moreover, in terms of historical practice, the United States has participated in international arbitration and international claims settlement

³⁴ Soon after U.S. ratification of the UN Charter, Congress enacted the United Nations Participation Act, 22 U.S.C. §§ 287-287e. This Act authorizes the President to negotiate a special agreement with the United Nations for the use of U.S. forces, subject to congressional approval. However, the President has never negotiated such an agreement, and the Act makes clear that “nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.” *Id.*, § 287d. At the end of the Vietnam War, Congress enacted the War Powers Resolution, 50 U.S.C. §§ 1541-48. This Resolution states, among other things, that authorization to use force shall not be inferred “from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.” *Id.*, § 1547(a)(2).

³⁵ There may also be delegation concerns associated with placing U.S. forces under UN or NATO command. *See, e.g.*, Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power be Delegated to the United Nations?*, 82 GEORGETOWN L.J. 1573 (1994); David Kaye, *Are There Limits to Military Alliance? Presidential Power to Place American Troops under Non-American Commanders*, 5 TRANSNAT’L L. & CONTEMP. PROBS. 399 (1995); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000).

³⁶ UN CHARTER, *supra* note 30, art. 94.

³⁷ *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, 59 Stat. 1055 (June 26, 1945).

procedures throughout its history, dating all the way back to the 1794 Jay Treaty.³⁸ Furthermore, the United States has participated in the ICJ itself for more than fifty years. For these reasons, it is difficult to argue that it is unconstitutional for the United States to delegate interpretive authority to the ICJ concerning the United States' rights and duties under international law, at least if the international law materials being interpreted have been agreed to by the United States and are reasonably specific.³⁹

The ICJ's recent *Breard* and *LaGrand* decisions, however, suggest that the Court's decisionmaking will sometimes intersect with U.S. domestic practices in a way that can raise delegation concerns. These decisions involve U.S. obligations under the Vienna Convention on Consular Relations, which the United States ratified in the late 1960s. Article 36 of the Convention provides that, when arresting foreign nationals from a country that is a party to the Convention, the arresting authorities shall inform them "without delay" that they have the right to contact and seek assistance from their consulate. In *Breard* and *LaGrand*, foreign nationals had been convicted of murder and sentenced to death by state courts in the United States. The countries of which they were citizens (Paraguay in *Breard* and Germany in *LaGrand*) subsequently brought suit against the United States in the International Court of Justice, arguing that the United States had violated the Vienna Convention because state authorities had failed to advise the foreign nationals of their right to consular access. In both of these cases, the ICJ issued preliminary orders stating that the United States was to "take all measures at its disposal" to stay the executions while the Court considered the claims.⁴⁰ In response to these orders, neither Congress nor the Executive Branch attempted to compel the states to stop the executions, and the Supreme Court similarly refused to order a stay of execution.⁴¹ Some commentators have nevertheless argued that the orders were binding on the United States and should have been enforced by U.S. authorities, including the Supreme Court. In effect, these commentators argue that the orders had the status of self-executing federal law that automatically superseded the relevant state law.⁴² If the orders

³⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 902, reporters' note 8 (1987) (discussing examples); A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877, 896-98 (2000) (same); see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding transfer of claims to Iran-United States Claims Tribunal). Article VII of the Jay Treaty provided for the establishment of a commission to determine the legality of captures of U.S. and British vessels during Britain's war with France, and to award compensation for illegal captures. For a description of the commission, see 1 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 299-349 (1898).

³⁹ See 2 HYDE, *supra* note 1, § 504, at 24 ("That the United States may constitutionally agree to refer to an international tribunal future controversies which may not prove to be susceptible of amicable adjustment by direct negotiation, is not to be doubted.").

⁴⁰ See Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America) (Request for the Indication of Provisional Measures) (March 3, 1999), *reprinted at* 38 I.L.M. 308 (1999); Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America) (April 9, 1998), *reprinted at* 37 I.L.M. 810 (1998).

⁴¹ See *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999); *Breard v. Greene*, 523 U.S. 371 (1998).

⁴² See, e.g., Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679 (1998) (arguing that the ICJ order was binding and had the status of a self-executing treaty

did have this status, however, the ICJ arguably would be exercising legislative or judicial authority in violation of the constitutional doctrines discussed above, since the Court would be directly preempting state law within the U.S. legal system (and perhaps also overriding earlier inconsistent federal law).⁴³

Subsequent developments in the *LaGrand* case further demonstrate the potential for conflict between international and domestic institutions. In *Breard*, Paraguay abandoned its case after its national was executed. In *LaGrand*, however, Germany did not abandon its case before the ICJ after its nationals were executed, and the Court subsequently issued a final decision in the case. In its decision, the Court held that the United States had violated the Vienna Convention; that the United States had also violated the Court's provisional order, which the Court held was legally binding; and that in future situations in which German nationals "have been subjected to prolonged detention or convicted and sentenced to severe penalties," the United States would be required "to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."⁴⁴ The Court also stated, however, that "[t]his obligation can be carried out in various ways" and that "[t]he choice of means must be left to the United States."⁴⁵ It remains to be seen what, if any, effect the Court's decision will have on U.S. judicial enforcement of the Convention.⁴⁶

World Trade Organization: The United States is a party to the World Trade Organization (WTO), which was established in 1995 to administer the General Agreement on Tariffs and Trade and related treaties. The WTO includes a Dispute Settlement Body, which adjudicates trade disputes between the member countries. The Dispute Settlement Body's decisions are binding, and, if the losing party does not comply with a decision, the Dispute Settlement Body may authorize the prevailing party to impose trade sanctions on the losing party. The United States has already participated in numerous cases before the Dispute Settlement Body, both as a plaintiff and as a defendant. As defendant, the United States has lost several significant cases, including a case challenging clean air regulations issued by the Environmental Protection Agency, a

obligation); Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998) (arguing that the Supreme Court should have treated the ICJ order as self-executing federal law as a matter of jurisdictional comity); Carlos Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998) (arguing that if the ICJ order was binding it had the status of self-executing federal law).

⁴³ For additional discussion of the *Breard* case, see *Agora: Breard*, 92 AM. J. INT'L L. 666-712 (1998); Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999); and Weisburd, *supra* note 38, at 892-96.

⁴⁴ *LaGrand Case (Germany v. United States of America)* (June 27, 2001), *reprinted at* 40 I.L.M. 1069, 1096, 1100 (2001).

⁴⁵ *Id.* at 1100.

⁴⁶ Prior to the decision, U.S. courts had uniformly declined to provide relief for violations of the Vienna Convention on Consular Relations, even on direct review. *See, e.g.,* *United States v. La Pava*, 268 F.3d 157 (2d Cir. 2001); *United States v. Lawal*, 231 F.3d 1045 (7th Cir. 2000); *United States v. Li*, 206 F.3d 56 (1st Cir. 2000).

case challenging U.S. limits on shrimp imports designed to protect sea turtles, and a case challenging U.S. tax treatment of foreign sales corporations.⁴⁷ The WTO is thus reviewing the validity of, and ordering changes to, U.S. domestic laws that affect international trade.

The rulemaking powers of the World Trade Organization may raise additional delegation concerns. The WTO Council has the power to adopt binding interpretations of the various WTO trade agreements by a three-fourths vote, and thus in theory can adopt an interpretation over the United States' dissent.⁴⁸ Many of the obligations in the trade agreements contain broad principles rather than specific requirements, such as a prohibition on "unjustifiable discrimination." The Council's interpretations therefore could, in effect, create new obligations for the United States not foreseeable at the time that it ratified the relevant treaties. If so, it is arguable that the United States has delegated part of the Article II treaty power away from the President and Senate to an international institution.⁴⁹ Even when the new interpretations are adopted with U.S. consent, it is arguable that the Senate's or Congress's role in the international agreement process is still being evaded, since the U.S. representative in the WTO is a representative of the Executive Branch. Although the nondelegation doctrine has not been enforced vigorously in recent years with respect to domestic delegations (such as delegations to administrative agencies), it is arguable that international delegations like the one for the WTO should be subject to greater scrutiny because the institutions exercising rulemaking authority do not possess independent constitutional power and are less accountable to the American public.

NAFTA: In 1993, the United States became a party, along with Canada and Mexico, to the North American Free Trade Agreement (NAFTA). Chapter 19 of NAFTA allows import decisions of the member countries concerning anti-dumping and countervailing duties to be reviewed by binational arbitral panels. These panels apply the standard of review and substantive law that would be applied by the importing country's own courts, and the panels' decisions are final and binding. In the case of the United States, the panels exercise review over the application of U.S. trade law by the International Trade Commission (a federal administrative agency), whose decisions otherwise would be subject to review by the Court of International Trade, an Article III court. In situations in which a matter is referred by a panel back to the Commission, the Commission is bound by statute to "take action not inconsistent with the decision" of the

⁴⁷ See United States – Tax Treatment for "Foreign Sales Corporations" (Recourse to Article 21.5 of the DSU by the European Communities) (Jan. 14, 2002), *reprinted at* 41 I.L.M. 447 (2002); United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia) (Oct. 22, 2001), *reprinted at* 41 I.L.M. 149 (2002); Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline (May 20, 1996), *reprinted at* 35 I.L.M. 603 (1996).

⁴⁸ Other international institutions, such as the International Monetary Fund, have similar rule making procedures. See Stephan, *supra* note 2, at 685.

⁴⁹ For additional discussion of this point, see Ku, *supra* note 1, at 96-98.

panel.⁵⁰ The panel members, however, will not necessarily be Article III judges. Nor is their selection subject to the Article II appointments process.⁵¹

Another feature of NAFTA is Chapter 11, which requires each country to accord investors of the other two countries certain minimum standards of treatment, including protection against uncompensated expropriation. Investors who allege a violation of Chapter 11 may submit claims to a panel of three private arbitrators who can award monetary damages but not injunctive relief. Recently, a NAFTA arbitral panel held, in a case filed against the United States, that a judicial decision – in that case, a decision by a Mississippi trial court – can itself constitute an expropriation and thus can be challenged under Chapter 11.⁵² In a somewhat similar case, a Canadian company is suing the United States for alleged expropriation after the Massachusetts Supreme Judicial Court dismissed its breach of contract suit against the City of Boston on sovereign immunity grounds.⁵³ As a result, the NAFTA treaty is being used, at least indirectly, to conduct international review of the fairness and outcome of U.S. judicial decisions.⁵⁴

Chemical Weapons Convention: In 1997, the United States ratified the Chemical Weapons Convention, which bans the development, retention, and use of chemical weapons. The Convention further establishes a new international organization, the Organization for the Prohibition of Chemical Weapons, which has the power to verify Convention compliance by ordering inspections of public and private facilities in the United States. Inspections are conducted by the Organization’s Technical Secretariat, members of which are not appointed by or removable by U.S. officials. It is arguable that

⁵⁰ 19 U.S.C. § 1516a(g)(7)(A). Although the panel decisions cannot be judicially challenged, the constitutionality of the binational panel scheme itself can be challenged in the U.S. Court of Appeals for the D.C. Circuit. *See id.*, § 1516a(g)(2), (g)(4)(A). Even if the scheme is found to be unconstitutional, however, the President has statutory discretion “to accept, as a whole, the decision of a binational panel,” in which case the International Trade Commission shall “take action not inconsistent with such decision.” *Id.*, § 1516a(g)(7)(B).

⁵¹ Panel members are selected by the parties to the dispute from a roster of individuals developed by the three NAFTA countries, which “shall include sitting or retired judges to the fullest extent practicable.” NORTH AMERICAN FREE TRADE AGREEMENT, Dec. 17, 1992, 32 I.L.M. 289, Annex 1901.2(1). This scheme was challenged in the D.C. Circuit on various delegation grounds, but the plaintiff (a trade association) was found to lack standing, so the D.C. Circuit did not address the delegation issues. *See American Coalition for Competitive Trade v. Clinton*, 128 F.3d 761 (D.C. Cir. 1997). For discussion of the constitutionality of this scheme, see Ethan Boyer, *Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 INT’L TAX & BUS. LAW 101 (1996); Demetrous G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT’L L.J. 141 (1994); and Matthew Burton, Note, *Assigning the Judicial Power to International Tribunals: Reconsidering the Constitutionality of NAFTA Binational Panels Through the Prism of Foreign Affairs Flexibility*, 89 VA. L. REV. (forthcoming 2002).

⁵² *See The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award on Jurisdiction, Jan. 5, 2001, at <<http://www.naftaclaims.com>>.

⁵³ *See Public Citizen, Canadian Corporation Uses NAFTA to Attack U.S. Judicial System*, at <http://www.citizen.org/trade/nafta/CH_11/articles.cfm?ID=1887>.

⁵⁴ For a discussion of these cases, see Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT’L L. 43, 51-61 (2001).

the delegation of inspection authority to these members violates the requirements of the Appointments Clause.⁵⁵ These searches may also raise Fourth Amendment concerns.⁵⁶ The legislation implementing the Convention attempts to address some of these constitutional concerns by, for example, requiring that employees of the federal government accompany the Technical Secretariat officials on their inspections, limiting the scope of the inspections, and providing for the issuance of search warrants.⁵⁷

International Criminal Court: In 1998, approximately 120 nations agreed on the text of a treaty that would establish a permanent International Criminal Court. The treaty, entitled the “Rome Statute of the International Criminal Court,” recently took effect after it had been ratified by 60 nations. Under the treaty, an international court, based in the Hague, will have jurisdiction to try the offenses of genocide, crimes against humanity, war crimes, and the crime of aggression. Despite expressing a number of concerns about the treaty, President Clinton signed it shortly before leaving office. The Bush Administration recently informed the United Nations, however, that the United States has no intention of ratifying the treaty.⁵⁸ If the United States *did* become a party to the treaty, the court would have jurisdiction to try U.S. citizens for the covered offenses, even if committed in the United States.⁵⁹ In trying these offenses, the court would apply the terms of the treaty, other applicable treaties, “rules of international law, including the established principles of the international law of armed conflict,” and, as a last resort, “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.”⁶⁰ As a party to the treaty, the United States would be required to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court,” and to “comply with requests for arrest and

⁵⁵ See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENTARY 87 (1998). For an early and important discussion of the constitutional issues associated with arms control inspection, see LOUIS HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* (1958).

⁵⁶ See Jonathan P. Hersey & Anthony F. Ventura, *Challenging Challenge Inspections: A Fourth Amendment Analysis of the Chemical Weapons Convention*, 25 FLA. ST. U.L. REV. 570 (1998); Ronald D. Rotunda, *The Chemical Weapons Convention and Constitutional Issues*, 15 CONST. COMMENTARY 131 (1998); Robert F. Greenlee, Comment, *The Fourth Amendment and Facilities Inspection Under the Chemical Weapons Convention*, 65 U. CHI. L. REV. 943 (1998).

⁵⁷ See Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681.

⁵⁸ See Press Statement, International Criminal Court: Letter to UN Secretary General Kofi Annan, at www.state.gov/r/pa/prs/ps/2002/9968.htm.

⁵⁹ Even if the United States does not become a party to the treaty, the court will purportedly have jurisdiction to try U.S. citizens for offenses committed in the territory of nations that are parties to the treaty. See ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 12(2), U.N. Doc. A/CONF. 183/9th, available at <http://www.un.org/law/icc/statute/romefra.htm>. Expressing concern about this jurisdiction, the House Appropriations Committee recently proposed legislation authorizing the President to use military force to rescue any Americans held by the Court. See Adam Clymer, *House Panel Approves Measures to Oppose New Global Court*, N.Y. TIMES, May 11, 2002, at A3, clm. 1.

⁶⁰ ROME STATUTE, *supra* note 59, art. 21(1).

surrender.”⁶¹ Some commentators have argued that the extent of the Court’s jurisdiction is such that U.S. participation in the Court would violate the constitutional limits on non-Article III courts.⁶²

Incidentally, the Bush Administration’s decision to make an official public announcement of its intent not to ratify the International Criminal Court treaty (instead of merely declining to present the treaty to the Senate) highlights a more general delegation issue lurking behind the U.S. signature of modern treaties. Normally it is ratification rather than signature that binds nations to multilateral treaties. Article 18 of the Vienna Convention on the Law of Treaties, however, states that, upon signing a treaty, a nation is “obliged to refrain from acts which would defeat the object and purpose” of the treaty “until it shall have made its intention clear not to become a party to the treaty.” Although the United States has not ratified the Vienna Convention, U.S. officials have often indicated that they view at least much of the Convention as reflecting binding customary international law. In announcing its decision not to ratify the International Criminal Court treaty, the Bush Administration noted that, because of its announcement, “the United States has no legal obligations arising from its signature” of the treaty, an apparent reference to Article 18 of the Vienna Convention. Moreover, in defending the Bush Administration’s action before the Center for Strategic and International Studies, an Administration official expressly stated that the Administration’s actions were “consistent with the Vienna Convention on the Law of Treaties.”⁶³ It is open to question, however, whether the United States could constitutionally agree to the Article 18 “object and purpose” provision. Article II, Section 2 of the U.S. Constitution requires that the President obtain the advice and consent of two-thirds of the Senate before committing the United States to a treaty. It is generally accepted that the United States may also conclude international agreements, at least in many instances, as “congressional-executive agreements,” pursuant to which the President obtains a majority approval of Congress rather than two-thirds approval of the Senate. While Presidents sometimes also enter into “sole executive agreements” without obtaining the approval of either two-thirds of the Senate or a majority of Congress, there is substantial uncertainty concerning the scope of the President’s authority to conclude such agreements. Assuming there are

⁶¹ *Id.*, arts. 86, 89.

⁶² See, e.g., Lee A. Casey, *The Case Against the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 840 (2002); see also SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL CRIMINAL COURT, S. Rep. No. 71, 103d Cong., 1st Sess. (1993) (containing report from the Judicial Conference of the United States raising constitutional concerns); AMERICAN BAR ASSOCIATION TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT, ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, *reprinted in*, 27 *Int’l Law* 257 (1993) (raising constitutional concerns). But see Audrey Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 *STAN. J. INT’L L.* 75 (2001) (arguing that U.S. participation in the Court would be constitutional); Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 *COLUM. J. TRANSNAT’L L.* 73 (1995) (same). The United States has already statutorily committed itself to extradite suspects to the ad hoc international criminal tribunals established for former Yugoslavia and for Rwanda. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486; see also *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999) (upholding extradition to the Rwandan tribunal).

⁶³ Remarks to the Center for Strategic and International Studies, Washington., D.C. (May 6, 2002), at www.state.gov/p/9949.htm.

some international agreements that the President cannot conclude *unilaterally*, one could question whether the President can be delegated the general power to bind the United States not to violate the object and purpose of unratified treaties, especially if the object and purpose requirement imposes significant substantive obligations.⁶⁴

Customary International Law: Another example raising delegation concerns, albeit one that does not involve an international institution *per se*, is the claim that customary international law – the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation,”⁶⁵ – has the status within the United States of self-executing federal common law.⁶⁶ This is a claim that has received widespread support in the international law academy,⁶⁷ as well as endorsement by a number of courts.⁶⁸ If this claim were correct, it would mean that federal courts would have the authority to apply norms developed by the international community to preempt inconsistent state law, and possibly also Executive Branch or congressional action.⁶⁹ From a formal perspective, this argument is problematic because customary international law does not seem to fit within the Supremacy Clause’s list of federal law: it is neither a treaty nor the Constitution, and it is

⁶⁴ For additional discussion of this issue, see MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 169-75 (1990). In recent years, commentators have made broad claims about the United States’ “object and purpose” obligations. For example, the United States has signed but not ratified the Convention on the Rights of the Child. Article 37(a) of the Convention prohibits the execution of juvenile offenders, and some commentators have claimed that U.S. execution of such offenders violates the object and purpose of the Convention. See, e.g., Panel Discussion, *Human Rights and Human Wrongs: Is the United States Death Penalty System Inconsistent with International Human Rights Law?*, 67 *FORDHAM L. REV.* 2793, 2812 (1999) (comments of Professor William Schabas).

⁶⁵ *RESTATEMENT (THIRD)*, *supra* note 38, § 102(2).

⁶⁶ There is in fact some connection between this example and international institutions, since it is often claimed that modern customary international law derives, at least in part, from the non-binding pronouncements, resolutions, and actions of international institutions, such as the United Nations General Assembly. See, e.g., *RESTATEMENT (THIRD)*, *supra* note 38, § 102, reporters’ note 2 (“The practice of states that builds customary law takes many forms and includes what states do in or through international organizations.”).

⁶⁷ See, e.g., *RESTATEMENT (THIRD)*, *supra* note 38, § 111; Louis Henkin, *International Law as Law in the United States*, 82 *MICH. L. REV.* 1555 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824 (1998).

⁶⁸ See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 502 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995). *But cf.* *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (noting the “present uncertainty about the precise domestic role of customary international law”). For a critique of the federal common law claim, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815 (1997); and Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 *HARV. L. REV.* 2260 (1998).

⁶⁹ See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 *SUP. CT. REV.* 295; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 *HARV. L. REV.* 853 (1987); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 *VA. L. REV.* 1071 (1985).

not “made in Pursuance” of the Constitution, as required by the Supremacy Clause for “Laws of the United States.”⁷⁰ Functionally, this argument is problematic because it would give unelected federal judges broad lawmaking authority not stemming from any political branch authorization, in areas in which they may have limited institutional competence.⁷¹

The much-discussed Alien Tort Statute implicates a related delegation issue. That Statute, first enacted in 1789, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁷² In recent years, courts have held that, in addition to conferring jurisdiction on the federal courts, the Statute creates a private cause of action for any violation of an alien’s rights under the “law of nations,” the historic term for a body of unwritten law that included customary international law.⁷³ Courts also have held that the reference to the law of nations is a reference to an *evolving* body of customary international law, such that courts should apply the customary international law that exists at the time of the case rather than the customary international law that existed at the time the statute was enacted.⁷⁴ If this two-fold construction of the Statute is correct,⁷⁵ it would mean that Congress has delegated to the federal courts the power to apply, as federal statutory law, changing rules of unwritten international law.⁷⁶ This

⁷⁰ See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

⁷¹ For additional discussion of the functional concerns associated with treating customary international law (especially modern customary international law) as federal common law, see Bradley & Goldsmith, *supra* note 68, at 861-70.

⁷² 28 U.S.C. § 1350.

⁷³ See, e.g., *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 780 (Edwards, J., concurring) (asserting that “section 1350 itself provides a right to sue for alleged violations of the law of nations”).

⁷⁴ See, e.g., *Filartiga v. Pena-Irala*, 630 F. 2d 876, 881 (2d Cir. 1980).

⁷⁵ For evidence indicating that the First Congress did not view the Statute as creating a private cause of action, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 592-97 (2002). For a suggestion that the Statute’s reference to the law of nations may be limited to the types of international law offenses recognized in 1789, see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-16 (D.C. Cir. 1984) (Bork, J., concurring).

⁷⁶ One could argue that the modern construction of the Alien Tort Statute merely makes the Statute a federal choice of law provision, akin to the Rules of Decision Act, which directs the federal courts to apply *state law* as the rule of decision “except where the Constitution, treaties, or statutes of the United States otherwise require or provide.” 28 U.S.C. § 1652. But the Rules of Decision Act does not create a federal statutory cause of action for violations of state law, and, in any event, it may be more problematic to delegate the content of federal law to the “international community” than to state governments. *But cf.* *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (upholding, as sufficiently precise, a criminal statute punishing “the crime of piracy, as defined by the law of nations”). Furthermore, if the Alien Tort Statute’s reference to the law of nations is merely a choice of law and jurisdictional provision, suits between aliens under the Statute may not fall within any of the cases and controversies set forth in Article III of the Constitution. See Bradley, *supra* note 75 (explaining this point).

delegation might be especially problematic with respect to modern customary international law, the sources and content of which are radically different from the customary international law that existed in 1789.⁷⁷

* * *

Given the nature of the relevant constitutional doctrines, the validity of particular relationships with international institutions would have to be determined on an individual basis, with careful scrutiny of the type and scope of authority exercised by the institutions. The important point for now is that the U.S. relationship with these institutions implicates non-frivolous delegation concerns of the sort taken seriously in domestic cases. Indeed, if anything, the delegation concerns may be greater in this context because international actors will tend to be less accountable to the American public than domestic governmental actors.

III. Non-Self-Execution

At least some of the delegation concerns discussed above can be addressed by treating the decisions and rulings of international institutions as “non-self-executing” – that is, as not enforceable as federal law within the United States.⁷⁸ This distinction between self-executing and non-self-executing obligations has long been reflected in U.S. treaty law. The Supremacy Clause makes clear that treaties can override inconsistent state law, and it has been construed to mean that treaties also can override earlier federal statutes (a component of what is often referred to as the “last-in-time rule”).⁷⁹ Although the Clause could be read to suggest that *all* U.S. treaties have these effects, U.S. courts have recognized a distinction between self-executing and non-self-executing treaties. Only self-executing treaties, courts have held, constitute judicially enforceable federal

⁷⁷ Among other things, whereas traditional customary international law was purportedly based on the longstanding practices of nations, modern customary international law is derived at least in part from the views expressed by nations in international institutions. In addition, whereas traditional customary international law regulated primarily the relations between nations, modern customary international law also regulates the relationship between nations and their own citizens. *See generally* Bradley & Goldsmith, *supra* note 68, at 838-42; J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449 (2000).

⁷⁸ This approach is consistent with what international lawyers refer to as “dualism,” pursuant to which international law and domestic law are treated as distinct, the nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law within the legal system is determined by domestic law. *See* Bradley, *supra* note 43, at 530-31 (explaining distinction between monist and dualist approaches to the relationship between international law and domestic law).

⁷⁹ *See, e.g.*, *Cook v. United States*, 288 U.S. 102 (1933). There is more authority for the other component of the last-in-time rule – that is, that federal statutes can override earlier treaties. *See, e.g.*, *Breard v. Greene*, 523 U.S. 371, 376 (1998); *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 600-01 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 597-98 (1884).

law.⁸⁰ Although non-self-executing treaties are binding on the United States, they are not enforceable in U.S. courts and do not by themselves override federal statutes or state laws.

It has long been assumed – by the courts, the political branches, and academic commentators – that the Constitution’s distribution of federal powers is relevant to the self-execution analysis.⁸¹ Thus, for example, ever since the Jay Treaty debates in the 1790s, treaty provisions calling for the appropriation of money have been treated as non-self-executing in order to preserve Congress’s constitutional authority over appropriations.⁸² Similarly, treaties modifying tariff duties have generally been treated as non-self-executing in order to preserve the House of Representatives’ role in raising revenue.⁸³ For somewhat different reasons (relating to notice and the Supreme Court’s rejection in the early 1800s of a federal common law of crimes), it has generally been assumed that treaties calling for the criminalization of conduct are non-self-executing – that is, they do not themselves create criminal liability within the United States.⁸⁴ It is also sometimes said that, because the full Congress has the constitutional power to declare war, a treaty cannot, by itself, place the United States into a state of war.⁸⁵

Applying the non-self-execution approach to international decisions and rulings would mean that they would bind the United States internationally, but Congress or the treaty-makers (or in some instances the Executive Branch) would need to implement the decisions or rulings before they would alter U.S. domestic law or become enforceable in

⁸⁰ See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (stating that if a treaty is not self-executing, “the legislature must execute the [treaty], before it can become a rule for the court”); *United States v. Postal*, 589 F.2d 862, 875-76 (5th Cir. 1979) (same); *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998) (“‘Non-self-executing’ means that absent any further actions by the Congress to incorporate them into domestic law, the courts may not enforce them.”). For a recent debate over the scope and legitimacy of the non-self-execution doctrine, compare John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); with Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095 (1999); and Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

⁸¹ See generally RESTATEMENT (THIRD), *supra* note 38, § 111 cmt. i; HENKIN, *supra* note 1, at 203; WRIGHT, *supra* note 1, at 354-56; *Edwards v. Carter*, 580 F.2d 1055, 1057-59 (D.C. Cir. 1978).

⁸² See SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 164-82 (2d ed. 1916); Quincy Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 AM. J. INT’L L. 64, 65-67 (1918); *Turner v. American Baptist Missionary Union*, 24 F. Cas. 344 (C.C. Mich. 1852); see also U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

⁸³ See CRANDALL, *supra* note 82, at 183-99; *Edwards*, 580 F.2d at 1058; see also U.S. CONST. art. I, § 7, cl. 1 (“all Bills for raising Revenue shall originate in the House of Representatives”).

⁸⁴ See, e.g., *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980); *United States v. Postal*, 589 F.2d 862, 877 (5th Cir. 1979); *The Over the Top*, 5 F.2d 838, 845 (D. Conn. 1925). But see Edwin D. Dickinson, *Are the Liquor Treaties Self Executing?*, 20 AM. J. INT’L L. 444, 449-50 (1926) (questioning this proposition).

⁸⁵ See *Edwards*, 580 F.2d at 1058 n.7.

U.S. courts. For example, if the UN Security Council authorized the use of military force, this authorization might affect the United States' rights and duties under international law, but it would not by itself satisfy the constitutional requirements for the use of force. Similarly, if an international adjudicatory body entered an order concerning the propriety of U.S. conduct or litigation, the order would not by itself change the law to be applied in U.S. courts.

This has in fact been the approach that courts have intuitively followed when confronted with delegation concerns. In *Diggs v. Richardson*,⁸⁶ for example, the Security Council had issued a resolution calling upon all nations to cease certain relationships with South Africa, because of its occupation of the former UN territory of Namibia. Relying on this resolution, a group of plaintiffs sought declaratory and injunctive relief prohibiting the U.S. government from continuing to deal with South Africa concerning the importation of seal furs from Namibia. The D.C. Circuit upheld dismissal of the lawsuit, concluding that the Security Council's resolution was not self-executing. The court noted, among other things, that the resolution was not addressed to the judicial branch, did not by its terms confer individual rights, addressed foreign relations issues within the discretion of the Executive Branch, and did not provide specific standards. The court further observed that, in treating the resolution as non-self-executing, the court was able to "avoid the larger questions raised by this case: under what circumstances a Security Council resolution can create a binding international obligation on the United States; whether Article 25 of the U.N. Charter, in which the member nations agree to carry out the resolutions of the Council, can ever give rise to a self-executing resolution; and so on."⁸⁷

The D.C. Circuit followed a similar approach in *Committee of United States Citizens Living in Nicaragua v. Reagan*.⁸⁸ In that case, various plaintiffs challenged the United States' failure to abide by a decision of the International Court of Justice holding that the United States was "under a duty immediately to cease and to refrain" from assisting the *contra* rebel forces in Nicaragua. The court rejected this challenge, for two reasons. First, it concluded that, under the last-in-time rule, Congress had effectively overridden the United States' obligation to comply with the Court's decision, since Congress had continued to authorize assistance to the *contras* after the Court's decision. Second, citing its earlier decision in *Diggs*, the court concluded that the UN Charter obligation to comply with decisions of the ICJ was not self-executing. The court noted, among other things, that "the purpose of establishing the ICJ was to resolve disputes between national governments," not to "vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government."⁸⁹

⁸⁶ 555 F.2d 848 (D.C. Cir. 1976).

⁸⁷ *Id.* at 850 n.9.

⁸⁸ 859 F.2d 929 (D.C. Cir. 1988).

⁸⁹ *Id.* at 938.

The Supreme Court also implicitly used the non-self-execution approach in the *Breard* case discussed above. The Court's decision took the form of a short *per curiam* opinion that was issued without oral argument and under substantial time pressure, and the opinion does not expressly address the status of the International Court's order. The opinion does state, however, that "while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."⁹⁰ Moreover, the opinion relies on the last-in-time rule, holding that a 1996 habeas corpus statute took precedence over the earlier ratified Vienna Convention on Consular Relations.⁹¹ This analysis implicitly declines to treat the order of the International Court of Justice (which was later in time than the habeas statute) as having independent status as federal law.

The U.S. treaty-makers also are increasingly using the non-self-execution approach to ensure that international obligations are filtered through the U.S. legislative process before they change U.S. domestic law. In ratifying a number of treaties in recent years, especially in the human rights area, the President and Senate have attached declarations stating that none of the substantive terms of the treaties shall be considered self-executing.⁹² Among other things, these declarations mean that interpretations of the treaties by the international institutions established under the treaties will not by themselves operate as U.S. domestic law. To take one recent example, the Human Rights Committee established under the International Covenant on Civil and Political Rights has issued "comments" suggesting that the execution of juvenile offenders violates U.S. obligations under the Covenant, even though the Senate and President expressly declined

⁹⁰ *Breard v. Greene*, 523 U.S. 371, 375 (1998).

⁹¹ *Id.* at 376.

⁹² See, e.g., U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. S14326 (daily ed. June 24, 1994); U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17491 (daily ed. Oct. 27, 1990). In connection with the Genocide Convention, the U.S. treaty-makers did not attach a non-self-execution declaration; instead, they specified that the United States would not deposit its instrument of ratification with the United Nations until Congress enacted implementing legislation. See U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, 132 Cong. Rec. S1378 (daily ed. Feb. 19, 1986). For commentary questioning the validity of the non-self-execution declarations, see, for example, Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); and Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991). For a defense of the declarations, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

to agree to a prohibition on such executions when ratifying the Covenant.⁹³ The U.S. Court of Appeals for the Fifth Circuit recently relied on the non-self-execution declaration (along with other arguments) as a basis for disallowing a challenge to a state death penalty law premised on the Committee's comments.⁹⁴

Congress also has played an important role in limiting the domestic effect of international decisions and rulings. As noted above, Congress has attempted to do this with respect to Security Council authorizations of the use of force. It also imposed warrant requirements and other procedural limitations on the inspections authorized by the Chemical Weapons Convention. In addition, Congress followed a non-self-execution approach in implementing the WTO trade agreements. The implementing legislation for these agreements states that "[n]o provision of [the agreements], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect," and that the agreements may not be enforced in a U.S. court against a state "except in an action brought by the United States for the purpose of declaring such law or application invalid."⁹⁵ Furthermore, Congress approved a "Statement of Administrative Action," which provides that WTO decisions "have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy,"⁹⁶ and Congress's implementing legislation states that the Statement of Administrative Action "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the [WTO] Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."⁹⁷ Congress has thus made clear that domestic political actors must accept and implement WTO decisions before they alter state or federal law.⁹⁸

As international institutions exercise increasing degrees of authority over matters that traditionally have been regulated by U.S. domestic law, these non-self-execution filters – whether imposed by the courts, the treaty-makers, or Congress – are likely to become even more common. These filters may not address all the delegation concerns

⁹³ See Human Rights Committee, Comments on United States of America, ¶ 14, U.N. Doc. CCPR/C/79/Add. 50 (1995); Human Rights Committee, General Comment 24(52), ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

⁹⁴ See *Beazley v. Johnson*, 242 F.3d 248, 267-68 (5th Cir. 2001). For a broader discussion of the international law issues relating to the execution of juvenile offenders, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. (forthcoming 2002).

⁹⁵ 19 U.S.C. §§ 3512(a)(1), 3512(b)(2)(A). See also *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002) (noting that "no party asserts that WTO decisions have controlling status as United States law").

⁹⁶ H.R. Doc. No. 103-316, at 1032 (1994); see also 19 U.S.C. § 3511(a)(2) (approving the Statement).

⁹⁷ *Id.*, § 3512(d)

⁹⁸ Congress also considered but did not enact legislation that would establish a "WTO Dispute Panel Review Board," made up of U.S. judges, to review WTO decisions adverse to the United States. See *WTO Dispute Settlement Review Commission Act*, S. 1438, 104th Cong., 1st Sess. (1995); *NAFTA Renegotiation and WTO Dispute Settlement Review Commission Act*, H.R. 78, 105th Cong., 1st Sess. (1997).

associated with U.S. participation in international institutions, but they will tend to reduce at least many of these concerns. In addition, these filters are likely to be easier for courts to administer than imposing direct constitutional restraints on international delegations.

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[*Note to workshop participants:* My future plans for this paper include (a) expanding the historical discussion to include more details of the debates in the early 1900s; (b) discussing the limits of the non-self-execution approach, e.g., how it may not address concerns about the NAFTA binational panel review; (c) responding to the claim, often associated with the Supreme Court's *Curtiss-Wright* decision, that separation of powers restraints should not be applied with much vigor in the area of foreign affairs; and (d) making a comparison to the constitutional issues faced by European countries as they have delegated increasing amounts of authority to regional international institutions. I also hope to incorporate some of the political science literature on domestic and international delegations of authority.]