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# Globalization and Structure

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## GLOBALIZATION AND STRUCTURE

JULIAN KU\* & JOHN YOO\*\*

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## INTRODUCTION

Sovereignty in the United States is uniquely intertwined with its founding document. An important part of the Constitution is the definition and protection of individual rights, which is a sign of the government's authority and responsibility for the nation's people.<sup>1</sup> A more important aspect of sovereignty, however, rests in the Constitution's creation of the national government, the definition of its powers, and the limits thereon. The Constitution channels the national government's sovereignty through two structures: the separation of powers, which organizes authority within the national government;<sup>2</sup> and federalism, which distributes power between the national government and the states.<sup>3</sup> One need not subscribe to Justice Sutherland's theory in *United States v. Curtiss-Wright Export Corp.*—that the federal government must possess all sovereign powers available to any nation-state<sup>4</sup>—to agree that the Constitution, at the very least, grants to the federal government many powers traditionally associated with national sovereignty.<sup>5</sup> These powers include the power to enact and enforce domestic laws,<sup>6</sup> make war,<sup>7</sup> reach international agree-

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1. See U.S. CONST. amends. I-VI, VIII-X, XIV-XV, XIX.

2. See *id.* art. I, § 1 (granting the legislative power to Congress); *id.* art. II, § 1 (giving the executive power to the President); *id.* art. III, § 1 (vesting the courts with judicial power). Collectively these are the "vesting clauses."

3. See *id.* amend. X (retaining for the states and people those powers not explicitly granted to the federal government).

4. 299 U.S. 304, 316-18 (1936). For more recent discussion, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1295-99 (1996); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 3-7 (2002); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379-87 (2000).

5. For classic criticism of Justice Sutherland's opinion, see David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 478-90 (1946); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 28-32 (1973).

6. U.S. CONST. art. I, § 1 (stating that Congress holds legislative power); *id.* art. I, § 7 (describing procedure by which bills become law); *id.* art. II, § 1 (explaining that the President holds executive power).

7. *Id.* art. I, § 8, cls. 11-12 (granting to Congress the power to declare war and raise and support armies); *id.* art. II, § 2, cl. 1 (naming the President as Commander-in-Chief of armed

ments,<sup>8</sup> and regulate international commerce.<sup>9</sup> The Constitution often addresses these powers through the structures of the separation of powers and federalism. Separation of powers dictates, for example, that the power to make war is divided between Congress and the President but that the power to make treaties is shared between the executive and the Senate.<sup>10</sup> As a matter of federalism, the Constitution prohibits the states from making war and treaties and from regulating international commerce.<sup>11</sup>

Globalization does not directly pressure these structures. A nation could respond to the growing interconnectedness of the international economy by doing nothing, and its constitutional structures would remain unaffected. But it is the natural, and perhaps inevitable, reflex of nations to try to regulate globalization's effects. It is this attempt by governments to expand their regulatory reach in response to globalization that creates distortions in the constitutional structure and, in turn, poses challenges to American sovereignty.

Increased cross-border human activity has led to more frequent international cooperation.<sup>12</sup> Take pollution, for example. Pollution crosses national boundaries, contaminates global commons such as the seas, and may even lead to a rise in world temperatures. A single nation cannot undertake unilateral action to successfully regulate pollution of this kind, and international cooperation would suffer from free riders: nations that benefit from the reduction in pollution but refuse to contribute resources or bear any costs to improve the environment. Similar problems are faced by efforts to combat international terrorist groups, control the international drug trade, or stop the spread of nuclear, chemical, or biological weapons technologies.<sup>13</sup>

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forces).

8. *Id.* art. II, § 2, cl. 2 (permitting the President to make treaties with advice and consent of the Senate).

9. *Id.* art. I, § 8, cl. 3 (giving Congress the power to regulate commerce with foreign nations).

10. *See supra* note 4.

11. U.S. CONST. art I, § 8, cl. 11 (discussing congressional power to declare war); *id.* art. I, § 10, cl. 3 (prohibiting state warmaking).

12. *See, e.g.,* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol].

13. *See, e.g.,* Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature*

To reap the benefits of collective action, international cooperation is likely to take forms that resemble those of the American administrative state. An international regulatory regime generally will need to reach all activity, regardless of each individual nation's internal hierarchy of authority. In order to regulate global warming successfully, for example, the Kyoto accords must be able to reach all forms of energy use that produce carbon emissions.<sup>14</sup> The Chemical Weapons Convention (CWC) formally regulates all chemicals, no matter their use, source, or location.<sup>15</sup> This sweeping reach usually combines with a permanent international organization that is empowered to settle disputes over the agreement between interested nations.<sup>16</sup> The organization will often aid implementation by issuing regulations that adapt the regime to new circumstances or delegate authority.<sup>17</sup> Under the United Nations Charter, the Security Council can call upon member states to use any necessary means, including the use of force, against a threat to international peace and security.<sup>18</sup> The World Trade Organization (WTO) agreement establishes a dispute settlement body that hears claims by one nation against another's alleged trade violations.<sup>19</sup> The International Criminal Court brings prosecutions for human rights violations that member states cannot or will not properly investigate on their own.<sup>20</sup> We do not exaggerate the extent of global governance currently in place. Nations still control the reality of world politics, but emerging forms of international cooperation are determining the future of international law and setting the outlines for expansion in international organizations.<sup>21</sup>

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July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

14. Kyoto Protocol, *supra* note 12.

15. Organization for the Prohibition of Chemical Weapons, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter CWC].

16. *See, e.g., id.* art. VIII.

17. *See, e.g., id.* Verification Annex, pt. 2, para. 27.

18. U.N. Charter arts. 41-43.

19. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr 15, 1994, 1867 U.N.T.S. 3 [hereinafter WTO Agreement].

20. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter ICC Statute].

21. *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 83-87 (2000); John C. Yoo, *The New*

Although relatively new to the international scene, these forms and orders should sound familiar to students of the American administrative state. Just as new international regimes seek more pervasive regulation of garden-variety conduct, so too did the New Deal seek national control over private economic decisions that had once rested within the control of the states. The Kyoto accords, for example, had their counterpart in the federal government's efforts to control the production of every bushel of wheat on every American farm, as discussed in *Wickard v. Filburn*.<sup>22</sup> The new international courts and entities have their counterparts in the New Deal's commissions and independent bodies, which were created to remove politics from administration in favor of technical expertise.<sup>23</sup> To remain neutral, these international bodies must have officials who are free from the control of any individual nation. Similarly, the New Deal witnessed the creation of a slew of alphabet agencies whose officials could not be removed by the President.<sup>24</sup> The New Deal's stretching of constitutional doctrine sparked a confrontation between President Franklin D. Roosevelt (FDR) and the Supreme Court, which initially espoused a narrower and less flexible vision of federal power and the role of administrative agencies.<sup>25</sup> Without a theory that allows for an accommodation of international policy demands with the U.S. constitutional system, these new forms of

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*Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 95-96 (1998).

22. 317 U.S. 111, 113-14 (1942).

23. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 36 (Greenwood Press 1977) (1955) ("The Progressives had an abiding faith in regulation, expertness, and the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations."); MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* 44 (1993) (describing how independent regulatory bodies were "envisioned as an institution capable of compensating for the shortcomings of the 'political' institutions of American government").

24. See *Morrison v. Olson*, 487 U.S. 654, 690-93 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629, 631-32 (1935); 5 *PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 668-81 (1938) (discussing reorganization of the executive branch according to the report of Committee on Administrative Management).

25. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 313-17 (1936) (voiding laws regulating the coal industry); *United States v. Butler*, 297 U.S. 1, 68 (1936) (voiding the Agricultural Adjustment Act and several other pieces of legislation); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (voiding the National Industrial Recovery Act).

international cooperation may well produce an analogous collision with constitutional law.

## I. THE STRUCTURAL CONSTITUTION

Developing such a theory requires a baseline for the regulation of normal domestic affairs. The Constitution relies on two main structures to regulate and limit the exercise of governmental power: federalism and the separation of powers. Federalism, in our view, encompasses two interlinked authoritative bodies: a national government that exercises limited, enumerated powers, and states that retain sovereignty over the great mass of everyday affairs. By contrast, the separation of powers allocates authority within the national government over the powers delegated to it by the Constitution.

### *A. Federalism and the Separation of Powers*

Although the Constitution mentions neither federalism nor the separation of powers in its text, scholars and government officials have understood from the start that both principles lay at the very core of the American government. *The Federalist Papers* extensively described the various provisions of the Constitution that conform to both structures.<sup>26</sup> They pointed, for example, to Article I, Section 8 of the Constitution to show that the federal government's powers would be limited, though obviously broader in scope than those of the Articles of Confederation.<sup>27</sup> Opponents urged Americans against ratification because they argued, in part, that the Constitution did not contain even more forceful protections for federalism and the separation of powers. In defending the Constitution, James Madison argued that the government was "neither wholly *national* nor wholly *federal*," but a mixture.<sup>28</sup> "In its foundation, it is federal, not national"—in other words, the Constitution required the consent of

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26. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (separation of powers), NOS. 14, 45 (James Madison) (federalism), NO. 51, (James Madison) (separation of powers).

27. See U.S. CONST. art. I, § 8.

28. THE FEDERALIST NO. 39, at 242 (James Madison) (Clinton Rossiter ed., 2003).

the states.<sup>29</sup> “[I]n the sources from which the ordinary powers of the Government are drawn, it is partly federal and partly national”—that is, the House of Representatives represented the majority of the American people as a whole, but the Senate gave the states equal representation, while the Electoral College made the President a product of both.<sup>30</sup> “[I]n the operation of these powers, it is national, not federal”—indeed, the Constitution’s powers directly regulated individuals, and not the states.<sup>31</sup> “[I]n the extent of them, again, it is federal, not national”—finally, supremacy over some subjects rested with the national government, and some with the states.<sup>32</sup>

If federalism refers to a political system that allocates authority between governmental bodies that coexist within the same territory, then the question of federalism was one the British Empire and its colonies had struggled with for some time.<sup>33</sup> The American Revolution did not truly solve the challenge of distributing power between the national and state governments, and it was the delegates to the Philadelphia Convention who finally attempted to solve the problem. The proposed Constitution that resulted from the Convention, however, is notable not just for its enumeration of new national powers, but also for its rejection of efforts to reduce the role of the states in the national political system.<sup>34</sup>

The Constitution vested Congress with numerous powers that it had lacked under the Articles of Confederation. The national government now could impose taxes and duties, borrow and spend money, regulate interstate and international commerce, conduct foreign relations, establish a military, control naturalization and

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29. *Id.*

30. *Id.*

31. *Id.* at 242-43.

32. *Id.* at 243.

33. See, e.g., ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 7-16 (1935); Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 LAW & HIST. REV. 451, 455-57, 464-72 (2010); Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 215-19 (1918); see generally JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITICS OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, at 79-104 (W.W. Norton & Co. paperback ed. 1990) (1986).

34. For discussion of federalism and the framing, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161-202 (1996).

bankruptcy, grant patents and copyrights, and create the lower federal courts and the post office.<sup>35</sup> Congress had the power to govern the territories and admit new states into the Union, and it had an important role in amending the Constitution.<sup>36</sup> The Constitution prohibited the states from interfering in matters of foreign relations, war, and interstate commerce.<sup>37</sup> The Federalists also succeeded in creating a federal government that could act directly upon individuals, without relying upon the intervention of the states. As Alexander Hamilton argued in *The Federalist No. 15*, “[t]he great and radical vice” of the Articles of Confederation lay “in the principle of Legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist.”<sup>38</sup> With the creation of an independent executive and judicial branch and the elimination of any state veto over legislation, the national government would be able to enact, execute, and adjudicate its laws independently and directly. With the authority to enact laws “necessary and proper” to the execution of the government’s powers, Congress could also claim a certain breadth of implied powers.<sup>39</sup> After the Civil War, the Reconstruction Amendments expanded Congress’s powers to enforce constitutional guarantees of antislavery, equal protection and due process, and voting rights against the states.<sup>40</sup>

The new government, however, would be neither a consolidated nation nor a confederation of sovereign nations. Instead, it would constitute, in Madison’s classic phrase, a “compound republic,” partly federal and partly national.<sup>41</sup> “The proposed Constitution therefore, ... is, in strictness, neither a national nor a federal Constitution, but a composition of both,” Madison wrote.<sup>42</sup> Despite Article I, Section 8’s enumeration of new national powers vested in Congress and Article I, Section 10’s prohibitions on state action,

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35. Compare ARTICLES OF CONFEDERATION of 1781, with U.S. CONST. art. I, § 8.

36. See U.S. CONST. arts. IV-V.

37. See *id.* art. I, § 10.

38. THE FEDERALIST NO. 15, *supra* note 28, at 103 (Alexander Hamilton).

39. U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause).

40. *Id.* amends. XIII-XV. See generally DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 389-481 (2d ed. 2005).

41. THE FEDERALIST NO. 51, *supra* note 28, at 320 (James Madison).

42. THE FEDERALIST NO. 39, *supra* note 28, at 242 (James Madison).

the Constitution clearly accommodated the independent sovereignty of the states over most affairs in everyday life.<sup>43</sup> In *The Federalist No. 39*, Madison declared that the federal government's "jurisdiction extends to certain enumerated objects only," whereas the states continued to possess "a residuary and inviolable sovereignty over all other objects."<sup>44</sup> Aside from the written exceptions to their powers in the Constitution, the states emerged from the Philadelphia Convention with their sovereignty intact and protected by the mechanisms—in particular, the Senate and judicial review—built into the national government.<sup>45</sup>

American federalism, as enshrined in the Constitution's structure, makes the federal government one of limited, enumerated powers. All powers that are not encompassed in the Constitution's grants of power are left to the states and the people. As Madison wrote in *The Federalist No. 45*: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>46</sup> This proposition is clearly articulated in Article I, Section 1 of the Constitution, which gives to Congress only the "legislative [p]owers herein granted,"<sup>47</sup> and in the Tenth Amendment, which declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>48</sup> Only states may exercise a "police power," the general legislative authority to regulate on any subject not expressly prohibited by the federal Constitution.<sup>49</sup> At the Philadelphia Convention, the Framers rejected an early proposal to give Congress a broader, unenumerated legislative power to make law on matters on which the states were "incompetent."<sup>50</sup>

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43. See *supra* notes 35-37 and accompanying text.

44. THE FEDERALIST NO. 39, *supra* note 28, at 242 (James Madison).

45. On the importance of the Senate as the representative of the states in federal lawmaking, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1342-46 (2001).

46. THE FEDERALIST NO. 45, *supra* note 28, at 289 (James Madison).

47. U.S. CONST. art. I, § 1.

48. *Id.* amend. X.

49. The Supreme Court first mentioned the term "police power" in 1827, when it held that "the police power ... unquestionably remains, and ought to remain, with the States." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827); see also U.S. CONST. amend. X.

50. For discussion of this proposal, see Donald H. Regan, *How To Think About the Federal*

Changing times, particularly the expansion of the national economy and the growth of the size and tax revenues of the federal government, have historically allowed the national government to expand its reach. Following the New Deal, the Supreme Court read the Commerce Clause so broadly as to allow the federal government to control not just the national economy, in terms of wages and hours, but also socioeconomic issues, such as racial discrimination in employment.<sup>51</sup> Moreover, using its Spending Clause powers, Congress offers the states large sums to follow national standards in education, health care, and other issues that lie beyond its power of direct regulation.<sup>52</sup> According to the Supreme Court, Congress cannot use its spending power to force states to violate the Constitution or to withhold so much money for relatively small conditions that its dictates become "coercive."<sup>53</sup> Nonetheless, the states retain control over most areas of daily life. States enforce their own criminal laws, subject to the Due Process<sup>54</sup> and Equal Protection Clauses,<sup>55</sup> and set the rules of property, contract, torts, and family law, among many other areas.<sup>56</sup> State governments dwarf the size and ability of the federal government to enforce regulation.<sup>57</sup>

The separation of powers deals with the horizontal, rather than the vertical, allocation of authority. Like federalism, the separation of powers was, in practice, an American innovation. At the time of the Revolution, Great Britain was governed by an unwritten "mixed" constitution that shared power among different social classes—the House of Commons representing the people, the House of Lords representing the aristocracy, and the Crown representing the King.<sup>58</sup> The separation of powers in its pure form existed

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*Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 555-57 (1995) (arguing that the enumeration of Congress's powers was meant merely to comprehend all of the situations in which states were incompetent).

51. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

52. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).

53. See, e.g., *id.* at 211.

54. U.S. CONST. amend. XIV, § 1.

55. *Id.*

56. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885-87 (1986).

57. *Id.* at 899.

58. FARBER & SHERRY, *supra* note 40, at 4.

primarily in the minds of John Locke and Baron de Montesquieu.<sup>59</sup> Locke defined the legislative power as the power to establish rules of conduct, whereas the executive was a “power always in being” whose responsibility was to execute the laws.<sup>60</sup> Foreign affairs such as war and peace, according to Locke, constituted a separate, “federative” power.<sup>61</sup> Although distinct, the federative power was almost always vested in the executive because foreign affairs are “much less capable to be directed by antecedent, standing, positive laws.”<sup>62</sup> Montesquieu agreed that legislation ought to determine the rules of conduct that citizens owe to one another or speak in the “voice of the nation,”<sup>63</sup> whereas foreign affairs would fall to “the executive in respect to things dependent on the law of nations.”<sup>64</sup> Although Montesquieu’s warning that tyranny would begin when the executive, legislative, and judicial powers did not remain distinct inspired the Framers, he was writing about an imaginary constitution and not the British Constitution as it truly existed.<sup>65</sup> Nonetheless, Blackstone maintained this distinction between the powers over war and peace, which were vested in the Crown, and the regulation of domestic conduct, which was within the sole authority of Parliament.<sup>66</sup>

It was not until the American Constitution that the separation of powers was attempted in practice. Like federalism, the separation of powers does not appear by name in any specific clause of the Constitution, though it is inferred from the Constitution’s basic structure. The fundamental principle is that there are three types of governmental power—executive, legislative, and judicial—and that those functions should be exclusively assigned to the President, Congress, and the judiciary, respectively. The Constitution makes this clear in the first clauses of Articles I, II, and III establishing the

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59. See JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* §§ 143-47 (J.W. Gough ed., Basil Blackwell 1948) (1689); BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., Hafner Publ’g Co. 1966) (1748).

60. LOCKE, *supra* note 59, §§ 143-44.

61. *Id.* §§ 145-47.

62. *Id.*

63. MONTESQUIEU, *supra* note 59, at 151.

64. *Id.*

65. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 91-92 (Liberty Fund 1998) (1967).

66. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*245.

federal government; these clauses vest the legislative power in Congress,<sup>67</sup> the executive power in the President,<sup>68</sup> and the judicial power in the federal courts.<sup>69</sup> These articles follow a general principle of separation of powers: Congress receives all of the federal power to legislate the rules of domestic conduct; the President executes the laws and enjoys a large role in foreign and military affairs; and the courts only decide federal cases and controversies.<sup>70</sup>

As with federalism, opponents to ratification claimed that the new Constitution violated "the political maxim that the legislative, executive and judiciary departments ought to be separate and distinct,"<sup>71</sup> a principle they received from "the celebrated Montesquieu."<sup>72</sup> In response, Federalists claimed fealty to the separation of powers. "The accumulation of all powers, legislative, executive and judiciary in the same hands," Madison wrote in *The Federalist No. 47*, "whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>73</sup> Madison, however, argued that the separation of powers did not require a strict separation of the legislative, executive, and judicial powers from each other, but instead allowed for some branches to have a hand in the operations of another.<sup>74</sup> Montesquieu "did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."<sup>75</sup> Rather, he meant "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."<sup>76</sup> Thus, according to Madison, the Constitution could allow the President a qualified veto, or the Senate to sit as a court of impeachment, or the Senate to approve

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67. U.S. CONST. art. I, § 1.

68. *Id.* art. II, § 1.

69. *Id.* art. III, § 1.

70. *See id.* art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

71. THE FEDERALIST NO. 47, *supra* note 28, at 297 (James Madison).

72. *Id.* at 298.

73. *Id.*

74. *Id.* at 299.

75. *Id.*

76. *Id.*

treaties and nominees for executive office without violating the separation of powers.<sup>77</sup>

The Constitution, therefore, does not embody a pure separation of powers along the lines envisioned by Montesquieu or Locke or suggested by the vesting clauses standing alone. In specific areas, the Constitution inserts checks and balances into the basic plan. The war power, for example, had rested solely in the hands of the Crown and was considered part of the executive powers by Locke and Montesquieu.<sup>78</sup> The Constitution, however, divides the war powers between Congress, which has the power to raise and fund armies and declare war,<sup>79</sup> and the President, who is Commander-in-Chief.<sup>80</sup> Article II's Appointment<sup>81</sup> and Treaty<sup>82</sup> Clauses give the Senate the right to reject presidential nominations or proposals, while Article I grants the President a conditional veto over legislation.<sup>83</sup> On the other hand, the vesting clauses of Articles II and III—in contrast to the specific, enumerated limits on Congress in Article I—have been understood to give the Presidency and the federal courts powers of an executive or judicial nature that are not specifically enumerated. Thus, the Supreme Court has interpreted the President's executive power to include the authority to remove subordinate U.S. officers, except in highly unusual cases of public need for independence.<sup>84</sup> The Court's own right of judicial review itself is nowhere specifically granted in the constitutional text, but has been inferred from Article III.<sup>85</sup>

This structure of separate and independent branches of government, overlaid with checks and balances, can be violated in several ways: one branch can try to aggrandize its own power beyond its constitutional limits; one branch can interfere with another's ability

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77. *Id.* at 300.

78. See W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 95-96 (1965); VILE, *supra* note 65, at 108-10. See generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 30-142 (2005).

79. U.S. CONST. art. I, § 8, cls. 11-12.

80. *Id.* art. II, § 2.

81. *Id.* art. II, § 2, cl. 2.

82. *Id.*

83. *Id.* art. I, § 7. Additionally, the Vice President has the ability to cast a legislative vote in the Senate in the case of a tie. *Id.* art. I, § 3, cl. 4.

84. See *infra* notes 98-101 and accompanying text.

85. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

to perform its core constitutional functions; or two branches can collude to expand their powers or those of another branch. Congress, for example, would violate the separation of powers if it promulgated laws that actually decided cases between parties in court or reopened final judgments.<sup>86</sup> Under the separation of powers, however, the three branches of government are coordinate and independent, in that one cannot prevent another from performing its constitutionally assigned functions. Thus, the President cannot exercise lawmaking authority without the delegation or approval of Congress.<sup>87</sup> Courts cannot decide hypothetical cases that necessitate the review of law enforcement policies.<sup>88</sup>

The interaction of the independent branches, as mediated by the Constitution's specific power-sharing provisions, has produced some enduring principles. One of the earliest and most profound is that of judicial review, articulated by the Supreme Court in the famous case of *Marbury v. Madison*.<sup>89</sup> Judicial review sprung from the basic structural principle that the Constitution represents higher law, superior to any act of the federal government. The agents of the people could not use their delegated powers to supersede the original terms of the founding document. No branch of government, therefore, could act in a manner inconsistent with the Constitution, even if that meant that a federal court had to refuse to obey an act of Congress that violated the Constitution's terms. The separation of powers requires that the courts even refuse a congressional effort to expand their jurisdiction, if it exceeds the maximum jurisdiction set out by the Constitution. It also prohibits Congress from transferring certain federal cases from the jurisdiction of the courts to

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86. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872).

87. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585-89 (1952).

88. See, e.g., U.S. CONST. art. III, § 2; *Allen v. Wright*, 468 U.S. 737, 756-61 (1984); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297-98 (1979); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983).

89. *Marbury*, 5 U.S. (1 Cranch) at 180. See generally John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

administrative agencies, lest judicial independence be threatened.<sup>90</sup> Judicial independence, as clarified in other cases, also prohibits Congress from reviewing or reopening final judgments or asking judges to perform a nonjudicial function.<sup>91</sup>

The Constitution's definition of the lawmaking process places further restrictions on Congress. Article I, Section 7's bicameralism and presentment requirements prohibit Congress from regulating the rights and duties of private citizens or other branches of government except through the enactment of legislation.<sup>92</sup> In *INS v. Chadha*, the Court read this structure to prevent Congress from reversing a decision by an administrative agency through the exercise of a veto that passed in the House but did not go to the President for signature.<sup>93</sup> In *Clinton v. New York*, the Court held that Article I, Section 7 prohibited the President from exercising a line-item veto, which would have allowed the President to delete individual line items before a new statute could take effect.<sup>94</sup> It is important to recognize that these cases do not just prevent the self-interested expansion of Congress's powers. In the line-item veto case, for example, Congress improperly attempted to transfer power from itself to the President.

Limits on Congress's enactment of legislation, combined with Article II's vesting of the power to execute the laws in the President, concentrates control over law enforcement in the executive branch—much of which relies on the powers of appointment and removal. The Appointments Clause gives the nomination of important federal officers to the President, with the advice and consent of the Senate,

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90. See Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 59 (2007) ("Congress's Exceptions power does not authorize jurisdiction stripping."); Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953) (recounting Congressionally created exceptions to the Court's jurisdiction are only Constitutional if they do not "destroy the essential role of the Supreme Court"); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority To Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981) ("An 'exception' implies a minor deviation from a surviving norm; it is a nibble, not a bite."); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 135 (1981).

91. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225-26 (1995).

92. U.S. CONST. art. I, § 7.

93. 462 U.S. 919, 958-59 (1983).

94. 524 U.S. 417, 448-49 (1998).

and of inferior officers to the President, cabinet officers, or the courts.<sup>95</sup> It does not explain how officers of the United States may be removed, but nonetheless, ever since the first Congress of 1789, the removal power has generally been understood to rest with the President. Power over the removal of inferior officers gives the President control over the executive branch to ensure that he can impose a uniform execution of federal law. The negative implication is that the Appointments Clause also precludes the other branches from appointing or removing important executive branch personnel, because to do so would interfere with law enforcement by the President. In *Buckley v. Valeo*, for example, the Court prohibited Congress from appointing members of the Federal Elections Commission, because it would have given Congress control over officers who would enforce federal law.<sup>96</sup> In *Bowsher v. Synar*, the Court struck down a budget reduction act because it gave the Comptroller General, an officer subject to removal by Congress, a role in deciding on spending cuts.<sup>97</sup>

The Court, however, has allowed Congress to place conditions on the President's freedom to remove inferior officers if there is an important public reason to clothe them in independence. Chief Justice Taft explained the basic rule in *Myers v. United States*: the removal of federal officers must reside with the President so he can control the execution of federal law.<sup>98</sup> But in *Humphrey's Executor v. United States*, the Court upheld restrictions on the removal of the chairman of the Federal Trade Commission (FTC) because the FTC performed "quasi-legislative" and "quasi-judicial" functions that were not wholly executive in nature.<sup>99</sup> Independent regulatory agencies, apparently, could function outside the President's direct control. In *Morrison v. Olson*, the Court extended the concept of independence to the special counsel statute, even though prosecu-

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95. U.S. CONST. art. II, § 2, cl. 2; see also Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 578 (1994); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1781 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 113 (1994).

96. 424 U.S. 1, 124-44 (1976) (per curiam).

97. 478 U.S. 714, 726-27, 736 (1986).

98. 272 U.S. 52, 163-64 (1926).

99. 295 U.S. 602, 629-30 (1935).

tion had long been considered a core executive power.<sup>100</sup> The Court upheld restrictions on the counsel's removal because they did not "impede the President's ability to perform his constitutional duty" and because the need for independence when investigating the White House and cabinet officers was sufficiently important.<sup>101</sup>

Discussion of the appointment and removal powers shows that although the Framers erected three independent branches of government, they did not create "a hermetic division among the Branches."<sup>102</sup> In general, the vesting of the legislative, executive, and judicial powers in Congress, the President, and the courts followed a separation of powers model, but the Constitution left those terms undefined, thereby allowing for a certain amount of pragmatic evolution in the forms of government.

### *B. Nationalization, Globalization, and the Constitution*

The greatest strain on this framework, one in which these flexible components of the Constitution were pressed beyond the breaking point, occurred during the New Deal. In response to the Great Depression, the Roosevelt administration and a large Democratic majority in Congress wrought sweeping changes in the structure of the Constitution.<sup>103</sup> Constitutional law of the day was unprepared for the national focus of economic regulation and the creation of a powerful and independent administrative state. It had still kept to the forms and orders of a relatively decentralized system of government that was unprepared for the New Deal's demands for national regulation. Before examining how globalization is producing a similar strain on our governmental structures today, we must first understand how nationalization caused one of the most significant constitutional conflicts in American history.

Nationalization of the American economy began in earnest at the end of the Civil War. War had spurred the spread of a nationwide transportation network: the transcontinental railroad was com-

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100. 487 U.S. 654, 691 (1988).

101. *Id.*

102. *Mistretta v. United States*, 488 U.S. 361, 381 (1989).

103. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 274-82 (1985); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 213-14 (1995).

pleted in 1869, and the length of railroad tracks jumped from 30,000 miles in 1860 to 240,000 miles by World War I.<sup>104</sup> Faster speeds and sharp reductions in the cost of transportation throughout the country laid the foundations for a national market in goods. Railroads became the nation's largest corporations and the biggest investors in other industries, and they gave form to great national trusts.<sup>105</sup> A nationwide communications system had come a little earlier, with the first transcontinental telegraph link in 1861<sup>106</sup> and the first transatlantic cable in 1866.<sup>107</sup> After Alexander Graham Bell's invention of the telephone in 1876, AT&T installed over two million telephones by 1905.<sup>108</sup> Electricity networks spread in the 1870s, allowing for more efficient lighting and power generation. The invention of steel led to demand for the mining of coal, the development of oil, and greater industrial production.

Nationalization of the economy prompted two responses, one by the private sector and one by the public. Railroads accelerated the growth not just of transportation but also of the modern corporate form, which quickly spread to other industries. Limited liability for investors in common stock allowed corporate leaders to tap large amounts of capital for expensive projects.<sup>109</sup> Industrial corporations began to pursue horizontal and vertical integration of their industries. By the end of the nineteenth century, large trusts had gained monopoly control over different sectors of the economy. The first great trust, John D. Rockefeller's Standard Oil, was founded in 1870, and by the turn of the century it controlled about 90 percent of all oil in the nation.<sup>110</sup> U.S. Steel, created by J.P. Morgan in 1901, produced about two-thirds of all steel in the country.<sup>111</sup> The private

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104. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 189 (1989).

105. See ALAN BRINKLEY, *THE UNFINISHED NATION: A CONCISE HISTORY OF THE AMERICAN PEOPLE* 463-65 (4th ed. 2004).

106. See ROBERT LUTHER THOMPSON, *WIRING A CONTINENT* 368 (1947).

107. See ANNTERESA LUBRANO, *THE TELEGRAPH: HOW TECHNOLOGY INNOVATION CAUSED SOCIAL CHANGE* 155 (1997).

108. N. AM. TELECOMMS. ASS'N, *INDUSTRY BASICS: INTRODUCTION TO THE HISTORY, STRUCTURE AND TECHNOLOGY OF THE TELECOMMUNICATIONS INDUSTRY* 1 (4th ed. 1991).

109. See BRINKLEY, *supra* note 105, at 464-65.

110. *Id.* at 465-66.

111. *Id.* at 465; see also ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 361 (1977); ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920*, at 187 (1967).

sphere responded to industrialization and nationalization by thus concentrating economic power.

The U.S. government began to address these developments with national regulation. In 1887, Congress enacted the Interstate Commerce Act to regulate national railroad rates,<sup>112</sup> and in 1890 the Sherman Antitrust Act prohibited anticompetitive monopolies.<sup>113</sup> Neither law, however, saw much enforcement until the presidency of Theodore Roosevelt. In the following decades, Congress attempted to create the rudiments of administration to regulate the national economy. It enacted more national regulation of the markets, such as a ban on child labor and quality standards for foods and drugs.<sup>114</sup> Efforts to regulate hours and wages, the securities markets, and old age and disability stalled in Congress, however. Under Woodrow Wilson, the Federal Reserve Act of 1913 established the first national banking system since Andrew Jackson had destroyed the Second Bank of the United States.<sup>115</sup> The Wilson administration also bulked up the government's resources to attack monopolies through the Federal Trade Commission and the Clayton Antitrust Act.<sup>116</sup>

These efforts, which culminated in the New Deal, followed two institutional patterns. First, the reach of regulation had to be national in scope. Corporations could escape state regulations simply by relocating their headquarters or operations to other states with more lenient standards. New Deal legislation, for example, set employment hours and wages throughout the nation to ensure uniformity and to discourage states from a destructive race to the bottom.<sup>117</sup> National regulations could avoid the profound, and sometimes unforeseeable, effects of uncoordinated, conflicting local

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112. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

113. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2006)).

114. Keating-Owen Child Labor Act of 1916, ch. 432, 39 Stat. 675, *invalidated by* *Hammer v. Dagenhart*, 247 U.S. 251 (1918); Federal Food and Drugs Act of 1906, ch. 3015, 34 Stat. 768.

115. Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.).

116. Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-51 (2006)); Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27 (2006)).

117. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2006)).

regulation. The Agricultural Adjustment Act of 1938, for example, allowed the Agriculture Department to set production quotas for all wheat grown in the nation, no matter how small the farm.<sup>118</sup> If all small farms were exempt from the statute, they could produce enough wheat in the aggregate to undermine the federal effort to regulate the quantity available on the national market.<sup>119</sup> When markets were more fragmented, economic activity in one state or region might not have such an immediate impact. The communications and transportation revolutions allowed the decisions of even small producers or buyers to have national effects. Because the scope of economic activity had become national, effective government regulation had to extend its reach to keep pace.

Second, government institutions had to change to come to grips with the complexity and speed of the new markets. Instead of enacting extensive schedules of regulations itself, Congress delegated broad swaths of authority to the executive branch. A grant of power to the administrative state often came with few stringent standards for exercising that power. The Interstate Commerce Act, for example, gave the Interstate Commerce Commission the task of setting "reasonable and just" railroad rates.<sup>120</sup> The Sherman Antitrust Act declared as illegal "every contract, combination in the form of trust or otherwise, or conspiracy" that was "in restraint of trade or commerce."<sup>121</sup> Political scientists have identified several reasons for such broad delegations. One reason is transaction costs. As an elected body of 535 Representatives and Senators, Congress suffers from severe difficulties in deliberating, negotiating, and reaching agreement because of its large size.<sup>122</sup> The second reason is technical expertise. Congress does not have the resources to develop the knowledge and judgment to solve difficult policy problems in technical and scientific areas.<sup>123</sup> The third reason is uncertainty. Congress will delegate policy choices in areas of unpredictability

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118. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31 (codified as amended in scattered sections of 7 U.S.C.); *see also* *Wickard v. Filburn*, 317 U.S. 111, 119 (1942).

119. *See Wickard*, 317 U.S. at 128.

120. Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379, 379.

121. Sherman Antitrust Act of 1890, ch. 647, § 1, 26 Stat. 209, 209.

122. ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 171-77 (2000).

123. *See, e.g.,* WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 101-02 (2003).

and high stakes, such as foreign affairs and war, because individual legislators do not want to be blamed for making the wrong policy choice.<sup>124</sup> The fourth reason is political accountability. Congressmen, who are primarily interested in reelection, will not risk taking stands on controversial issues when political opposition will result no matter which option they choose.<sup>125</sup> Reelection will be less difficult for a legislator to achieve if an agency makes the trade-offs between gas mileage and traffic fatalities or if courts decide abortion policy.

Independence accompanied these broad delegations of authority. Presidents had once seen agencies such as the Post Office primarily as a source of patronage, which buttressed the decentralized, party-based nature of American politics. Agencies under these new national regulatory statutes served a different objective—they were to take partisan politics out of government action. It was understandable that Congress would be reluctant to delegate broad rule-making authority to agencies that were under the direct control of its constitutional rival, the President. A constitutional mechanism that provided the agencies with independence from executive control would increase Congress's ability to influence rulemaking decisions. But Presidents since George Washington had exercised direct policy control over the executive branch agencies through their power to replace subordinate officials with ones who would carry out their wishes. In *Myers v. United States*, the Supreme Court affirmed that Congress could not place limitations on the President's authority to remove executive branch officers, in that case, a postmaster.<sup>126</sup> Congress later sought to insulate the new commissions and boards from political influence by restricting the ability of the President to remove their officers except for "good cause," which usually meant a violation of federal law or serious malfeasance in office.<sup>127</sup>

We should be clear that we take no normative position here on whether the New Deal's reworking of the administrative state was desirable. As a matter of consequences, economic historians generally believe that other causes such as an expansionary monetary

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124. *Id.* at 103-05.

125. *Id.* at 108-10.

126. 272 U.S. 52 (1926).

127. *Morrison v. Olson*, 487 U.S. 654, 685, 691 (1988).

policy and the fiscal stimulus in the lead-up to World War II, rather than New Deal programs, ended the Great Depression.<sup>128</sup> Nonetheless, our point is not whether the New Deal was effective at bringing the United States out of the worst economic slump in its history but whether it effectively responded to nationalization of the economy and society with regulation of similar scope. It seems apparent that it did. The New Deal established federal regulation of the national economy in many areas, which expanded after World War II to cover civil rights, the environment, and health care. In order to regulate an economy of such scope and complexity effectively, Congress delegated broad authority to independent agencies that stressed technical expertise over partisan politics.

The parallels with the move toward international regulation are striking. Globalization has produced an impact on the economy and society that is equally as remarkable today as nationalization was more than a century ago. Just as progress in transportation and communication welded together states and regions into a single national market in the nineteenth century, shipping advances, jet air transport, and the Internet have created a global market in many goods and services today. Billions of dollars move instantaneously between national stock markets, and the events and policies in one developed country can quickly influence the economy of another. As one example, witness the speed with which the recent American credit crisis spread to the financial markets of the other developed economies.<sup>129</sup> Problems such as pollution, disease, terrorism, and crime have also become global, moving through the same fast channels of transportation and communications as international trade and capital.

International efforts to regulate the effects of globalization, both the good and the bad, similarly resemble the New Deal's twin characteristics—the breadth of regulation and the delegation to independent regulators. As with nationalization, effective solutions need to be global. Efforts to coordinate government policies on global

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128. See Christina D. Romer, *What Ended the Great Depression?*, 52 J. ECON. HIST. 757 (1992).

129. See generally Saule T. Omarova, *The New Crisis for the New Century: Some Observations on the "Big-Picture" Lessons of the Global Financial Crisis of 2008*, 13 N.C. BANKING INST. 157 (2009).

warming through the Kyoto accords provide a good example. Imposing industrial emission standards to lower pollution will have limited effect if companies can relocate to jurisdictions with less stringent requirements.<sup>130</sup> A truly global solution would require regulation of the carbon-based pollution of every country on the planet. Whether in the form of quotas or taxes or credits, government standards would have to press beyond the limits of the national government's powers to regulate the market to reach conduct that tends to be private or noncommercial. Setting emissions targets for large industrial enterprises may capture a large portion of energy use, but to effectively regulate its total output, a nation would have to regulate home activity, such as heating, cooking, and transportation, as well.

International cooperation has also adopted the forms of domestic regulations in the establishment of regulatory institutions. Multilateral treaties have created institutions, independent of any nation, to verify compliance with agreements, resolve disputes, and develop proposals for their own extensions. These institutions usually do not depend on any state parties for their decisions, though they could call upon third-party nations for help. As broad multilateral agreements have spread, independent international organizations (IOs) have grown with them. IOs address the likelihood that some treaty parties will not obey an agreement or will interfere with verification. They can also help overcome the temptation to cheat for short-term advantage, ruining the greater long-term benefits of cooperation—what social scientists call the prisoners' dilemma. An IO can also help build trust between state parties by vesting implementation in a neutral, impartial entity that is not beholden to any single nation or alliance.

The Chemical Weapons Convention illustrates these developments in the structure of international agreements and organizations.<sup>131</sup> Unlike other arms control agreements, which place numerical caps on arsenals or limit the use of weapons in combat, the CWC seeks to ban the development, production, and stockpiling

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130. For discussion of this race-to-the-bottom thesis in domestic environmental law, see generally Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

131. See CWC, *supra* note 15.

of an entire class of weapons. If the treaty only regulated weapons arsenals, it would not raise any innovative questions of arms control agreement design. The problem with chemical weapons, and indeed with other forms of weapons of mass destruction, is that the chemicals and the facilities used to produce them have dual uses. Chemicals that have civilian uses, such as pesticides, plastics, and manufacturing, can have military uses as well. A nation that seeks to build a covert chemical weapons capability or arsenal could easily disguise its activities behind a civilian-use front.

To be fully effective, the CWC must regulate not just national stockpiles of chemical weapons, but also the private chemical industry that produces "toxic chemicals" or their "precursors."<sup>132</sup> Thus, industrial chemical facilities, as well as the public weapons arsenals of state signatories to the treaty, fall within the Convention's scope.<sup>133</sup> Chemicals that have been used as weapons are banned.<sup>134</sup> Facilities that produce chemicals that are toxic or are immediate precursors to weapons, but are also used for commercial purposes, are subject to on-site verification and monitoring.<sup>135</sup> States are to enact regulations and criminal penalties for anyone who violates the ban on the possession or production of the most dangerous chemicals.<sup>136</sup> To provide full coverage, the CWC must go even further than regulation of major industrial chemical facilities. A laboratory of no more than 1600 square feet in size can manufacture 100 tons of chemical weapons in one year.<sup>137</sup> Successfully regulating chemical weapons requires that the treaty reach all sites that use and produce civilian chemicals, in addition to the usual military and defense contractor sites that are the subject of most arms control agreements. According to the Office of Technology Assessment, the United States alone has potentially 10,000 sites that qualify for inspection under the treaty.<sup>138</sup>

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132. *See id.* arts. II, VI.

133. *Id.* art. V.

134. *Id.* art. IV.

135. *Id.* art. V; *see also* Kathleen C. Bailey, *Problems with the Chemical Weapons Convention*, in SHADOWS AND SUBSTANCE: THE CHEMICAL WEAPONS CONVENTION 17, 23-24 (Benoit Morel & Kyle Olson eds., 1993).

136. CWC, *supra* note 15, art. XI.

137. *See* Bailey, *supra* note 135, at 20.

138. OFFICE OF TECH. ASSESSMENT, THE CHEMICAL WEAPONS CONVENTION: EFFECTS ON THE U.S. CHEMICAL INDUSTRY 15 (1993).

In order to advance compliance, the treaty regime relies upon the second pillar of modern regulation—the creation of an independent institution.<sup>139</sup> In order to verify compliance, the CWC requires that state parties allow personnel of the treaty organization to conduct surprise “challenge” inspections of any location on their territory.<sup>140</sup> The CWC creates an IO, the Organization for the Prohibition of Chemical Weapons, which has a Technical Secretariat in charge of identifying targets and conducting challenge inspections.<sup>141</sup> Under the treaty, the Secretariat has the right to enter a nation and receive unimpeded access to any chemical site, its personnel, and its records. The Secretariat’s decisions are not reviewable by any domestic governmental body.<sup>142</sup> This independence is critical to the CWC’s ability to monitor compliance, particularly by states that might be conducting illicit chemical weapons activity. It builds trust between the state parties by vesting the authority over verification in a neutral entity outside the control of any single nation. Agreeing to enforcement by an independent organization may even be a way for nations to signal that they can be trusted to comply with the agreement in the future. The independence of the organization from national control or influence thus becomes crucial for a nation to meaningfully bind itself.

## II. REGULATION AND GLOBALIZATION

History suggests that the movement toward international regulation will place stresses on the Constitution’s structural frameworks. New Deal innovations placed similar stresses on the existing constitutional law of the day, which produced one of the sharpest constitutional conflicts among the President, the Congress, and the Supreme Court in American history. Only after the President imposed extreme political pressure on the courts did they alter constitutional law doctrines on federalism and the separation of powers to accommodate the New Deal’s expanded administrative

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139. See CWC, *supra* note 15, art. VIII.

140. See *id.* art. IX, paras. 8-25.

141. *Id.* art. VIII.

142. *Id.*

state.<sup>143</sup> Constitutional law had not come to grips with the effects of nationalization and the government's efforts to regulate them. Unless we have a better grasp of the current and potential effects of globalization on constitutional law, a similar fate might be in store for us.

To understand the tension between globalization and constitutional law, it is worthwhile to examine the confrontation that occurred in response to nationalization. In the period between Reconstruction and the New Deal, the Supreme Court developed several doctrines that limited the public's ability to regulate private business conduct. First, the Court limited the national government's power to regulate interstate commerce, which is today's great fount of federal authority. In response to the Progressive Era's effort to regulate business, the Court held that Congress's Commerce Clause powers could not reach manufacturing or agriculture within a state. These matters, according to the Court's theory of dual federalism, were reserved for state control. In the 1895 case of *United States v. E.C. Knight Co.*, the Court blocked the Justice Department's attempt to use the antitrust laws to break up a trust that controlled virtually all sugar refineries in the country.<sup>144</sup> The majority reasoned that the sugar refining occurred wholly within the borders of individual states and so did not constitute interstate commerce, which meant it was subject to the "police powers" of the states.<sup>145</sup> In 1918, the Court, in *Hammer v. Dagenhart*, struck down a federal law that prohibited the interstate transportation of goods made with child labor.<sup>146</sup> Even though the federal ban applied only when the product moved across state lines, the Court declared that "the production of articles, intended for interstate commerce, is a matter of local regulation."<sup>147</sup>

The Court later enforced its distinction between commerce, which could be regulated by the national government, and manufacturing and production, which remained within the authority of the states and beyond the reach of the Commerce Clause. After *Hammer v.*

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143. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 203-04 (Kermit L. Hall et al. eds., 1992).

144. 156 U.S. 1, 9 (1895).

145. *Id.* at 16-18.

146. 247 U.S. 251, 272 (1918).

147. *Id.*

*Dagenhart*, Congress attacked child labor by imposing a 10 percent excise tax on all such goods.<sup>148</sup> The Court struck down the law, even though it was enacted by a different power, on the ground that Congress could not use a tax to achieve a prohibited end.<sup>149</sup> The Court imposed parallel limits on Congress's power to tax and spend and on its regulatory powers under the Commerce Clause.

The Court matched its limits on federal authority to regulate the economy with similar restrictions on the states. Even though the states enjoyed the police power to regulate anything not touched by the Constitution's grants of power to the national government, the federal courts read the Due Process Clause of the Fourteenth Amendment<sup>150</sup> to place limits on the states. These limits also applied to the federal government pursuant to the Fifth Amendment's Due Process Clause.<sup>151</sup> In the most famous example of the courts' limits on state governments, *Lochner v. New York*, the Court struck down a state law that limited the hours that bakers could work.<sup>152</sup> Over the memorable dissent of Justice Holmes,<sup>153</sup> the majority concluded that the Constitution protected the individual right of the bakers to contract to work as much as they liked.<sup>154</sup> Government could not redistribute income within an industry, which was the effect of the law, nor infringe the right of free labor.

A third doctrine posed a threat to the administrative state itself. Under the nondelegation doctrine, the Court had held that Congress could not delegate "legislative power" to the administrative agencies.<sup>155</sup> In *Field v. Clark*, the Court upheld a trade law that allowed the President to restore tariffs if a foreign nation did not provide reciprocal reductions for American imports.<sup>156</sup> The Court declared that the fact that "Congress cannot delegate legislative power to the President" is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitu-

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148. See *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 34-35 (1922).

149. *Id.* at 43-44.

150. U.S. CONST. amend. XIV, § 1.

151. *Id.* amend. V.

152. 198 U.S. 45, 64-65 (1905).

153. See *id.* at 74-76 (Holmes, J., dissenting).

154. *Id.* at 64-65 (majority opinion).

155. *Field v. Clark*, 143 U.S. 649, 692 (1892).

156. *Id.* at 662-63.

tion.”<sup>157</sup> In *Field*, the Court found that no unconstitutional delegation had occurred because the statute specified when the President could restore tariff rates.<sup>158</sup> “He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.”<sup>159</sup> In other words, the nondelegation doctrine would be satisfied if Congress specified factual circumstances in which the executive branch could exercise delegated authority, but would bar open-ended provisions that granted power without any standards as to its use. The Court did not invalidate the federal law, but it made clear that the legislature could only delegate power to the agencies to apply Congress’s principles to specific cases, not to make the policies themselves.

FDR’s efforts to impose regulation on the national economy came into direct conflict with standard constitutional doctrine as it existed in 1932. The National Industrial Recovery Act (NIRA) did not just ban a single product or manufacturing process; indeed, it placed all industrial production in the nation under federal regulation.<sup>160</sup> The Agricultural Adjustment Act (AAA) did the same with farms,<sup>161</sup> and a third act concerned the coal industry.<sup>162</sup> The second wave of New Deal laws, such as the National Labor Relations Act<sup>163</sup> and the Public Utility Holding Company Act<sup>164</sup> set uniform rules on the activities of unions and utilities, while the Social Security Act created a nationwide system of unemployment compensation and pensions.<sup>165</sup> New Deal lawyers believed that the Interstate Commerce Clause should be interpreted to include almost all economic activity in the nation because almost all goods produced in a state traveled through the channels of interstate commerce.

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157. *Id.* at 692.

158. *Id.*

159. *Id.* at 693.

160. National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935).

161. Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (codified as amended at U.S.C. § 601-27 (2006)), *invalidated by* United States v. Butler, 297 U.S. 1, 68-78 (1936).

162. Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991.

163. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (2006)).

164. Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803.

165. Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

They reasoned that the states were powerless to reverse the collapse of the national economy of the Great Depression.<sup>166</sup>

But constitutional law doctrine did not provide enough space for national regulation of this sort. In its first case examining a New Deal law in 1935, the Court invalidated the NIRA's "hot oil" provision, which allowed the prohibition of petroleum produced in excess of quotas.<sup>167</sup> Chief Justice Hughes wrote for an 8-1 majority that the law unconstitutionally delegated legislative power to the President because it gave the President the wide discretion to make the violations of quotas illegal based on circumstances he deemed proper.<sup>168</sup> That was only a prelude to *A.L.A. Schechter Poultry Corp. v. United States*, decided later that year, in which the owners of a chicken slaughterhouse were prosecuted for violating industrial codes of conduct—specifically the "live poultry code"—issued pursuant to the NIRA.<sup>169</sup> The NIRA purported to reach all industrial production in the country, even the selling of poultry by local dealers, and it allowed the executive branch to delegate the development of industrial codes to trade associations or groups representing the industries themselves.<sup>170</sup> The *Schechter Poultry* Court found the NIRA codes unconstitutional in a direct attack on the foundations of the new administrative state.<sup>171</sup> First, it held that Congress had engaged in unconstitutional delegation by allowing the President to decide how whole industries should operate, limited only by what he thought was beneficial for the economy.<sup>172</sup> Congress then compounded this problem by allowing trade groups to develop administrative rules: "Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress," Chief Justice Hughes wrote for the Court.<sup>173</sup> This ruling threatened the New Deal laws

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166. See Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 646-47 (1946).

167. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 414-20 (1935); see also *id.* at 436 (Cardozo, J., dissenting).

168. See *id.* at 432-33 (majority opinion).

169. 295 U.S. 495, 519-24 (1935).

170. See National Industrial Recovery Act of 1933, ch. 90 § 3, 48 Stat. 195, 196-97.

171. *Schechter Poultry*, 295 U.S. at 541-42.

172. *Id.* at 537.

173. *Id.*

that vested significant lawmaking authority in the executive branch and the independent agencies.

*Schechter Poultry* attacked the other principle of the administrative state: that its regulations had to have nationwide scope. The Court held that the NIRA violated the Constitution's limits on the reach of federal economic power, even though 96 percent of the chickens that were bought and sold in New York City, where *Schechter Poultry* operated, came from out of state.<sup>174</sup> The owners of the slaughterhouse bought their goods from interstate wholesalers, but they only sold their chickens to a local market, which did not directly impact interstate commerce.<sup>175</sup> Their activity could not fall within Congress's reach because they had not brought the chickens across state lines themselves, and their only purpose was to sell the poultry to local buyers.<sup>176</sup> If the Court had kept to its precedent that intrastate manufacturing and agriculture lie outside of federal authority, more pillars of the New Deal—perhaps even the whole program itself—might have collapsed. In pointed language, the Court specifically rejected the Roosevelt administration's overarching approach to the Great Depression: "Extraordinary conditions do not create or enlarge constitutional power."<sup>177</sup>

In the spring of 1936, the Court declared unconstitutional more elements of the New Deal. In *United States v. Butler*, the Court held unconstitutional the AAA's use of taxes and grants to regulate agricultural production.<sup>178</sup> The majority declared that Congress could not use taxes and spending to regulate intrastate agriculture because intrastate regulation lay within the reserved powers of the states.<sup>179</sup> *Butler* also implicated the Social Security Act, which used a combination of taxes and spending to provide relief and pensions to the unemployed and elderly.<sup>180</sup> In *Carter v. Carter Coal Co.*, a 5-4 majority struck down a 1935 law that set prices, wages, hours, and collective bargaining rules for the coal industry.<sup>181</sup> The Court found

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174. *Id.* at 520.

175. *Id.* at 521.

176. *Id.*

177. *Id.* at 528.

178. 297 U.S. 1, 68 (1936).

179. *Id.* at 60-61.

180. See Social Security Act of 1935, ch. 531, §§ 201-02, 302, 49 Stat. 620, 622-23, 626.

181. 298 U.S. 238, 310-11 (1936).

that the production of coal did not amount to interstate commerce, and also fell within the reserved powers of the states.<sup>182</sup> “[T]he effect of the labor provisions ... primarily falls upon production and not upon commerce,” Justice Sutherland wrote for the majority.<sup>183</sup> “[P]roduction is a purely local activity.”<sup>184</sup> *Carter* made clear that *Schechter Poultry* was not a fluke, so any federal regulation of in-state industrial production or agriculture was now in constitutional doubt. In *Jones v. SEC*, the Justices attacked the proceedings of the Securities and Exchange Commission as “odious” and “pernicious” and compared them to the “intolerable abuses of the Star Chamber.”<sup>185</sup> In *Morehead v. New York ex rel. Tipaldo*, the Court found that New York’s minimum wage law violated the Due Process Clause, just as it had earlier found that such laws interfered with the right to contract.<sup>186</sup> As the Court had already found a federal minimum wage in the District of Columbia unconstitutional in the 1920s, the Court had made the regulation of wages, in FDR’s words, a “no-man’s land”—forbidden to both the federal and state governments.<sup>187</sup>

After his 1936 reelection, FDR proposed a restructuring of the Court that would eliminate it as an opponent of the New Deal.<sup>188</sup> On February 5, 1937, FDR sent Congress a judiciary “reform” bill that would add a new Justice to the Court for every member over the age of seventy.<sup>189</sup> Because of the advanced age of several Justices, Roosevelt’s proposal would have allowed him to appoint six new Court members. Rather than criticize the Court for its opposition to the New Deal, Roosevelt disingenuously claimed that the elderly Justices were delaying the efficient administration of justice.<sup>190</sup> FDR only indirectly implied a link between the advanced age of the Justices and their opposition to the New Deal. “Modern complexities call also for a constant infusion of new blood in the courts,” FDR

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182. *Id.* at 303-04.

183. *Id.* at 304.

184. *Id.*

185. 298 U.S. 1, 27-28 (1936).

186. 298 U.S. 587, 609-11, 617-18 (1936).

187. See LEUCHTENBURG, *supra* note 103, at 106.

188. See 1937 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 51 (1941) [hereinafter PUBLIC PAPERS].

189. See *id.* at 51, 61, 63-66.

190. 81 CONG. REC. 878 (1937).

wrote.<sup>191</sup> “A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation.”<sup>192</sup> FDR declared that the remedy would bring a “constant and systematic addition of younger blood” that would “vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.”<sup>193</sup>

Despite his electoral success, FDR’s court-packing plan—the first domestic initiative of his second term—succumbed to a humiliating defeat, never coming up for a full vote on the floor of Congress. Historians and political scientists have argued ever since over whether FDR still won the war,<sup>194</sup> because immediately in the midst of the struggle in Congress, the Justices made a sharp turn. In March 1937, the Court handed down a 5-4 decision upholding a Washington minimum wage law for women.<sup>195</sup> In *West Coast Hotel v. Parrish*, the lineup of votes for and against New York’s minimum wage, which had been struck down in *Tipaldo* the year before, remained the same—except for Justice Roberts, who switched sides to uphold Washington’s law.<sup>196</sup> In April 1937, the Court upheld the National Labor Relations Act, which had been challenged on the same grounds raised in *Schechter Poultry* and *Carter*.<sup>197</sup> This time, in *NLRB v. Jones & Laughlin Steel Corp.*, Chief Justice Hughes led a 5-4 majority in rejecting the doctrine that manufacturing did not constitute interstate commerce.<sup>198</sup> Jones & Laughlin Steel was the fourth-largest steel company in the nation, with operations in

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191. See PUBLIC PAPERS, *supra* note 188, at 55.

192. *Id.*

193. *Id.*

194. See, e.g., JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT 153-56 (2009); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 11, 30-32 (1998); LEUCHTENBURG, *supra* note 103, at 154-62; G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 304-05 (2000).

195. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 388-400 (1937).

196. *Id.*

197. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937).

198. *Jones & Laughlin Steel Corp.*, 301 U.S. at 41.

multiple states.<sup>199</sup> As the Court observed, “the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce.”<sup>200</sup> “It is obvious,” the Court found, that the effect “would be immediate and might be catastrophic.”<sup>201</sup> Henceforth the Court would allow federal regulation of the economy, even of wholly intrastate activity, because of the interconnectedness of the national market. To do otherwise would be to “shut our eyes to the plainest facts of our national life” and to judge questions of interstate commerce “in an intellectual vacuum.”<sup>202</sup>

Although FDR lost in Congress, he had won his larger objective. The Supreme Court would not strike down another federal law that regulated interstate commerce for almost sixty years. Journalists and political scientists immediately attributed the “switch in time that saved nine” to FDR’s threat to pack the Court.<sup>203</sup> Even today, creative scholars defend the sweeping constitutional changes of the New Deal—which, unlike Reconstruction, was never written into a constitutional amendment—by citing the 1936 electoral landslide and the attack on the Court.<sup>204</sup> More recent work argues that the Court’s Commerce Clause doctrine was evolving in a more generous direction toward federal power, irrespective of FDR’s actions.<sup>205</sup> For our purposes, identifying the precipitating cause of the “switch in time that saved nine” is not as important as the context within which it occurred. The political branches and the judiciary reached a confrontation over the Constitution because existing doctrine could not grapple with the effects of economic and social nationalization. In cases such as *Hammer v. Dagenhart*, the Court’s view of the economy ignored the transportation and communications advances that had knitted the states and regions into a national market.<sup>206</sup> Its view that manufacturing and production were distinct and separate from interstate commerce placed strict limits on the national

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199. *Id.* at 26.

200. *Id.* at 41.

201. *Id.*

202. *Id.*

203. See, e.g., JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); MERLO J. PUSEY, *THE SUPREME COURT CRISIS* 51-53 (1937).

204. 1 BRUCE ACKERMAN, *WE THE PEOPLE* 105-30 (1991).

205. See CUSHMAN, *supra* note 194, at 195-206.

206. 247 U.S. 251 (1918).

government's ability to regulate the economy during the Great Depression.<sup>207</sup> In cases such as *Schechter Poultry*, the Court placed limits on the structure of the administrative state that grew in response to the nationalization of the economy.<sup>208</sup> Constitutional law had failed to keep up with the demands of the twentieth century. The results were a destructive confrontation between the President and the Court, in which both arguably lost in the short term, and a constitutional law that lifted almost all restraint on the regulatory powers of the administrative state.

### III. GLOBALIZATION AND CONSTITUTIONAL ACCOMMODATION

If history provides any guidance, we might expect a confrontation again among the branches of government unless constitutional law adapts to globalization. On one side of the equation, globalization has prompted government responses similar in form to those that arose with nationalization. Although national economic and social activity comfortably falls within the federal government's regulatory grasp, existing constitutional law doctrines cannot easily accommodate the broader demands of international regulation. The political branches and the courts have not thought through how best to adapt the U.S. legal system to mediate between its constitutional structure and global governance. In this Part, we describe how the tension between international regulation and the Constitution both resembles the confrontation of the New Deal but also, in important respects, exceeds it.

Multilateral efforts to regulate globalized activity mirror the administrative state's efforts to extend into both public and private conduct. The CWC attempts to regulate all possession and produc-

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207. *Id.* at 272 ("Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation.").

208. 295 U.S. 495, 549-50 (1935) ("Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state.").

tion of specified chemicals.<sup>209</sup> A global warming agreement would reach most, if not all, forms of energy production and use in the United States.<sup>210</sup> This reach, however, conflicts with the Supreme Court's recent efforts to limit Congress's Commerce Clause powers. As interpreted by the courts, the Clause gives Congress broad authority to regulate the movement of goods, people, services, and intangible goods. Congress can prohibit certain articles in interstate commerce, even if its true motive was to regulate the intrastate activities that resulted in their production.<sup>211</sup> Congress can even regulate activities that substantially affect interstate commerce, even if those activities are wholly intrastate and even if their individual impact is trivial, so long as Congress has a rational basis for concluding that their consequences are substantial in the aggregate.<sup>212</sup>

Under Commerce Clause doctrine as it had existed prior to 1995, the broad sweep of treaty regimes like the CWC would not have given courts much pause. After the New Deal revolution, the Supreme Court had not found any federal law to exceed the limits of the Clause, and Congress, not surprisingly, resorted to this power to regulate a wide variety of subjects, including discrimination,<sup>213</sup> individual rights,<sup>214</sup> crime,<sup>215</sup> the environment,<sup>216</sup> and food and drug safety.<sup>217</sup> But beginning in 1995, the Rehnquist Court imposed limitations on what had become the most sweeping aspect of the Commerce Clause: its application to conduct that had "substantial effects" on interstate commerce.<sup>218</sup> In *United States v. Lopez*, the Court held unconstitutional a federal law that banned handguns

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209. See CWC, *supra* note 15.

210. See, e.g., Kyoto Protocol, *supra* note 12.

211. See, e.g., *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 359-60 (1914); *Hoke v. United States*, 227 U.S. 308, 322-23 (1913); *Champion v. Ames (Lottery Case)*, 188 U.S. 321, 360 (1903).

212. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *United States v. Darby*, 312 U.S. 100, 119-20 (1941).

213. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964).

214. See, e.g., *Hamm v. City of Rock Hill*, 379 U.S. 306, 308, 317 (1964).

215. See, e.g., *Scarborough v. United States*, 431 U.S. 563, 575-77 (1977).

216. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282-83 (1981).

217. See, e.g., *United States v. Walsh*, 331 U.S. 432, 437-38 (1947).

218. *United States v. Lopez*, 514 U.S. 549, 565-66 (1995).

near school zones because the conduct lacked an essentially economic character and the guns had not traveled through interstate commerce.<sup>219</sup> First, the handgun law was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise,” the Court concluded.<sup>220</sup> A second important point for the Court was that the link between handgun possession and interstate commerce was too attenuated to justify federal regulation.<sup>221</sup> If the Court allowed regulation of handgun possession because handguns caused violence that harmed economic productivity, it would be “hard pressed to posit any activity by an individual that Congress is without power to regulate.”<sup>222</sup>

In *United States v. Morrison*, the Court held that Congress could not provide a civil remedy for gender-motivated violence that occurred wholly within one state.<sup>223</sup> It reasoned again that the activity had no commercial character, did not involve the crossing of state borders, and could not be considered to affect interstate commerce in the aggregate.<sup>224</sup> This recent jurisprudence, however, explicitly reaffirmed and left wholly unqualified the other two “broad categories of activity that Congress may regulate under its commerce power”: the “channels” and the “instrumentalities” of interstate commerce.<sup>225</sup> Neither *Lopez* nor *Morrison* involved a statute that included a jurisdictional element or “jurisdictional nexus” in which the subject of federal policy is, has been, or perhaps will be in the “channels” of interstate commerce. As a consequence, the Court has given no indication of how elastic this category might be to insulate similar legislation from constitutional invalidation.

Still, the lines drawn by *Lopez* and *Morrison* would seem to exclude some activities from international regulation when pursued by the federal government through the Commerce Clause. For example, if the regulation of marriage is considered noneconomic conduct, then it would not benefit from the aggregation principle of *Wickard v. Filburn*. Although the Court did not draw a bright line

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219. *Id.* at 567.

220. *Id.* at 561.

221. *Id.* at 567.

222. *Id.* at 564.

223. 529 U.S. 598, 617-19, 626-27 (2000).

224. *Id.*

225. *Id.* at 608-09 (quoting *Lopez*, 514 U.S. at 558).

in *Morrison* against aggregation in such cases, it observed that the aggregation principle has only been held to operate in areas of a commercial character.<sup>226</sup> In other words, Congress cannot add up all of the individual economic effects that a regulated conduct may have on interstate commerce to justify national regulation of intrastate activity. This principle was not disturbed by the Court's recent decision in *Gonzales v. Raich*, which upheld regulation of a purely intrastate activity even though the Court conceded that it was not "commercial."<sup>227</sup> The Justices held that the federal prohibition of intrastate cultivation and use of marijuana, even when permitted by state law for medicinal purposes, was subject to the aggregation approach because Congress had a rational basis for the effective regulation of the interstate market and traffic in illicit drugs, a quintessentially economic activity.<sup>228</sup>

Another important limitation on Congress's regulation of intrastate activity arises when the conduct falls within an area of "traditional state concern."<sup>229</sup> First raised in Justice Kennedy's concurrence in *Lopez* and then incorporated into the majority opinion in *Morrison*, this concept precludes Commerce Clause regulation into areas historically considered to be subject to state regulation.<sup>230</sup> The underlying offense in both *Lopez* and *Morrison* was criminal in nature, which came within the state's police power.<sup>231</sup> This incursion prompted Justice Kennedy to worry that "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."<sup>232</sup> In *Lopez*, the majority identified specific areas—"family law (including marriage, divorce, and child custody) ... criminal law enforcement [and] education ... [in

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226. See *id.* at 610-11.

227. 545 U.S. 1, 18-19 (2005).

228. *Id.* at 22, 25.

229. *Morrison*, 529 U.S. at 611.

230. *Id.* at 610-11 (quoting *Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring)).

231. See *id.* at 618 (quoting *Lopez*, 514 U.S. at 566).

232. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). Justice Kennedy contended that if the line of demarcation between the federal government and the states were blurred, "political responsibility would become illusory," and "[t]he resultant inability to hold either branch of the government answerable to the citizens [would be] more dangerous even than devolving too much authority to the remote central power." *Id.*

which] States historically have been sovereign.”<sup>233</sup> In both opinions, Chief Justice Rehnquist expressed the concern that “if we were to accept the Government’s arguments [to sustain congressional power], we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”<sup>234</sup>

Modern international cooperation will run into these limits on federal power because it requires comprehensive regulation of all public and private conduct in a certain category of activity. Much domestic conduct would fall within federal regulation, but significant portions might not. In the case of chemicals, for example, Congress could implement the CWC’s prohibition with regard to industries and businesses operating in interstate commerce.<sup>235</sup> The more difficult question is whether federal power could reach chemicals produced or possessed by private individuals who themselves are not operating in the national markets and cause no “substantial effect” on interstate commerce. *Gonzales v. Raich*, which upheld the Controlled Substances Act’s prohibition on marijuana possession, suggests that Congress might have the power in the case of chemicals.<sup>236</sup> “Congress can regulate purely intrastate activity that is not in itself ‘commercial,’” the Court declared, “if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”<sup>237</sup> It could be argued that the regulation of chemicals held by individuals with no intention of sale or transportation across state borders would still fall within federal power because it substantially affects the relevant national market.

Congress’s power to regulate interstate commerce, however, might not extend to other types of international cooperation. Energy use, in contrast to chemicals, is not fully regulated by the national government nor significantly produced within private homes for a national market. It is doubtful, for example, that federal regulation could extend to home production or consumption of energy that occurs off of the electric grid, such as wood-burning fireplaces and

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233. *Id.* at 564 (majority opinion).

234. *Morrison*, 529 U.S. at 613 (quoting *Lopez*, 514 U.S. at 564).

235. See *supra* notes 112-19 and accompanying text.

236. 545 U.S. 1, 9 (2005).

237. *Id.* at 18.

home generators. Accepting federal power over home energy use would truly test the principle in *Morrison* and *Lopez* that the courts cannot allow the Commerce Clause to reach every form of human conduct.<sup>238</sup> An international treaty regulating gun possession, to which the United States has objected on Second Amendment grounds, would raise similar problems. If such a treaty were to require the criminalization of the possession of certain weapons, the legislation would involve the same doubts that caused the Court to strike down the federal handgun law in *Lopez*.<sup>239</sup> Human rights treaties, which seek to establish rights that go beyond those required by the Bill of Rights, involve the same difficulties. It would be difficult to conclude that expanded individual rights would involve interstate commerce or commercial activity. Indeed, they would resemble most closely the type of law invalidated in *Morrison*, which sought to expand federal protections against gender-motivated violence.<sup>240</sup>

Even if the Commerce Clause might accommodate the broad scope of international regulatory treaties, their demands could still cause federalism problems of a second sort. In areas clearly within federal power, Congress cannot impose standards that violate the reserved powers or rights of states as independent political entities within the federal system. In *New York v. United States*<sup>241</sup> and *Printz v. United States*,<sup>242</sup> the Court invalidated federal laws that sought to "commandeer" state officers into performing federal legislative or executive functions.<sup>243</sup> The federal government, for example, can regulate nuclear waste, but it cannot force states to enact legislation adopting its preferred regulations.<sup>244</sup> Congress can require background checks before the purchase of a handgun, but it cannot require state officials to carry out the checks.<sup>245</sup> These principles effectively prevent the federal government from shifting the financial and political costs of carrying out its programs. The

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238. *Morrison*, 529 U.S. at 612-13 (quoting *Lopez*, 514 U.S. at 564).

239. See *Lopez*, 514 U.S. at 567-68.

240. See *Morrison*, 529 U.S. at 601-02.

241. 505 U.S. 144, 188 (1992).

242. 521 U.S. 898, 917 (1997).

243. *Id.* at 917; see also *New York*, 505 U.S. at 188.

244. See *New York*, 505 U.S. at 188.

245. See *Printz*, 521 U.S. at 933.

same would apply, it seems, for treaties as well as statutes. The national government could not require state officials to implement treaty requirements, such as conducting searches of chemical facilities or passing state legislation to enforce a treaty.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)<sup>246</sup> provides an illustration of the conflict between international regimes and the sovereignty of American states. Under TRIPs, which itself is part of the WTO agreement, state parties agreed to establish minimum substantive protections for intellectual property and to provide for judicial remedies, including compensatory relief, against infringers.<sup>247</sup> The Supreme Court's recent expansion of the protections for states against private lawsuits for damages would prevent full remedies when state governments have violated intellectual property rights. Under *Seminole Tribe v. Florida*, for example, Congress may not provide a remedy in federal court for damages against a State,<sup>248</sup> and under *Alden v. Maine*, the same is true in state court.<sup>249</sup> Even when Congress had used its powers under Section 5 of the Fourteenth Amendment, rather than its Commerce Clause power under Article I, to protect an individual's intellectual property rights, the Court has invalidated comprehensive federal statutes without a showing of systematic state violations of those rights.<sup>250</sup> These decisions appear to place the United States in violation of TRIPs by eliminating judicial remedies for violations of intellectual property rights against a class of potential infringers.<sup>251</sup>

International regimes create equally difficult problems with the separation of powers. Multilateral treaties and their delegation of authority to new organizations raise the issue of delegation in much the same way that the New Deal did. Vesting authority in the CWC, for example, to prohibit the production or possession of specific

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246. See WTO Agreement, *supra* note 19, Annex 1C.

247. See *id.*

248. 517 U.S. 44, 76 (1996).

249. 527 U.S. 706, 754 (1999).

250. See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999).

251. See Peter S. Menell, *Economic Implications of State Sovereign Immunity From Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1452-53 (2000).

chemicals, raises the same issue as the delegation of similar authority to federal agencies. Under current doctrine, Congress may transfer rule-making power to the agencies so long as it has stated an objective, prescribed method to achieve it, and articulated intelligible standards to guide administrative discretion.<sup>252</sup> These standards prohibit Congress from delegating its legislative power and provide courts with a loose way to evaluate whether the agencies have exercised their authority legally. They keep Congress involved in the formulation of policy and accountable to the electorate for its choices. Although the Court has not invalidated a congressional delegation since *Carter v. Carter Coal Co.*, it continues to observe that Congress cannot transfer lawmaking without meaningful standards.<sup>253</sup>

At first glance, delegation of rule-making authority to IOs would seem to be consistent with these principles. Multilateral treaties usually focus on discrete areas, and the rule-making authority of international institutions is usually circumscribed with standards that are narrower than those used with the American administrative state. There is an important twist, however, created by the need to vest rule-making authority in neutral, independent international institutions. In the case of IOs, the delegation runs not from Congress to the executive branch but from the United States to an institution that does not fall within the national or state governments. This creates serious problems for the underlying mechanisms that police delegations. Congress cannot enforce its standards through the usual legal or political methods when the recipient of the delegated power is not responsible to Congress, the President, or any other federal authority. Congress has no ready means of monitoring and influencing the performance of international officials or of measuring their conduct against intelligible standards. Delegation to IOs also might allow Congress to sidestep the checks on its own lawmaking authority. Bicameralism and presentment promote transparency and accountability in the

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252. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001); *Yakus v. United States*, 321 U.S. 414, 423-24 (1944).

253. 298 U.S. 238, 311 (1936); *see also, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Whitman*, 531 U.S. at 472; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Yakus*, 321 U.S. at 423-24.

exercise of legislative authority.<sup>254</sup> Even when legislative authority is transferred to agencies, executive branch officers remain creatures of the national government and subject to the discipline of the political process.<sup>255</sup> Delegation to private parties, the Court held in the 1930s, undermines the public nature of federal power and risks the capture of government policy by private interests.<sup>256</sup>

International regimes may also raise a second type of delegation problem. We have discussed the case when Congress delegates its authority to another domestic governmental actor, the source of most academic commentary on delegation.<sup>257</sup> A second case occurs when Congress attempts to transfer authority from one of the other branches to a different entity. The independent counsel law presents a good case of this type of delegation.<sup>258</sup> There, Congress vested in

254. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2323-25 (2001).

255. See *id.* at 2323.

256. See *Carter*, 298 U.S. at 311.

257. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-34 (1980); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 152 (1997); MARTIN REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 135-61 (1995); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1300 (2003); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1383-84 (1996); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1415-16 (2000); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236-37 (2005); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231-33 (1994); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223, 277; Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101, 2163 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1741 (2002); Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1331-32 (2003); David Schoenbrod, *Politics and the Principle that Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL'Y 239, 258-60 (2003); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 781-82 (1999); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695-96 (1975); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 309, 336 (1999).

258. See generally Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011 (1998) (incorporating contributions by Jerome J. Shestack, Michael R. Bromwich, George D. Brown, Samuel Dash, Katy J. Harriger, Philip B. Heymann, Brett M. Kavanaugh, Norman J. Ornstein, Julie R. O'Sullivan, Cass R. Sunstein, Arthur H. Christy, Joseph E. diGenova, Donald C. Smaltz, and Lawrence E. Walsh).

the independent counsel the authority to investigate and prosecute federal crimes allegedly committed by high-ranking members of the cabinet agencies and the White House, and protected the counsel from removal by the President except “for cause.”<sup>259</sup> In *Morrison v. Olson*, the Court upheld the delegation because the counsel was an inferior officer who remained subject to the direction of the Attorney General, even if he or she could not be removed at will.<sup>260</sup> But when Congress transfers law execution authority to agents completely outside the control of the executive branch, as occurred in *Bowsher v. Synar*, the Supreme Court has found the delegation unconstitutional.<sup>261</sup>

As we have seen, the Appointments Clause has become the battleground for struggles between the President and Congress over the power to enforce federal law. Delegations to international institutions, however, raise a different problem, addressed only by *Buckley v. Valeo*’s discussion of the Clause. *Buckley* found unconstitutional the Federal Elections Commission, created by Congress in 1974 to enforce the campaign finance laws, because Congress selected four commissioners.<sup>262</sup> According to the Court, commissioners exercised power under federal law, and so were considered officers of the United States.<sup>263</sup> All officers, the Court held, were subject to the Appointments Clause, which gives the President the authority to nominate and appoint officers subject to the advice and consent of the Senate.<sup>264</sup> For an inferior officer, the Clause allows Congress to vest appointment in the President alone, in department heads, or in the courts.<sup>265</sup> *Buckley* described the Clause as “a deliberate change made by the Framers with the intent to deny Congress any authority itself to appoint those who were ‘Officers of the United States.’”<sup>266</sup> In subsequent cases, the Court has emphasized that the Appointments Clause “is among the significant structural safe-

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259. See Jerome J. Shestack, *Foreword: The Independent Counsel Act Revisited*, 86 GEO. L.J. 2011, 2013-14, 2018 (1998).

260. 487 U.S. 654, 691-92 (1988).

261. 478 U.S. 714, 733-34 (1986).

262. 424 U.S. 1, 126-27, 140 (1976).

263. *Id.* at 127-28.

264. *Id.* at 132.

265. *Id.*

266. *Id.* at 129.

guards of the constitutional scheme" because it "prevents congressional encroachment upon the Executive and Judicial Branches."<sup>267</sup> In the words of the Court: "[The Clause] preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power."<sup>268</sup> The Clause makes the appointments process public to prevent the diversion of power to individuals not accountable to the political branches and, ultimately, the electorate.<sup>269</sup> "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," the Court has said, and therefore, "[n]either Congress nor the Executive can agree to waive this structural protection."<sup>270</sup>

Placing the enforcement of multilateral treaties in the hands of IOs will run afoul of these structural limitations. The CWC, for example, grants the power to search American chemical facilities to officials of the CWC Technical Secretariat.<sup>271</sup> They are not selected under the Appointments Clause, they are not members of the executive branch, and they are not accountable to the President or to Congress. Yet, they may potentially exercise public authority by choosing the location for searches and carrying them out, while federal law prohibits private citizens from interfering.<sup>272</sup> If the federal government were to conduct similar searches, it would have to choose officers of the United States, chosen under the Appointments Clause, to carry out the searches; furthermore, those officials would have to operate according to the Fourth Amendment, which itself is enforced by the courts.<sup>273</sup> CWC officials, by contrast, are not responsible to any American officials and are not accountable for their actions to the national government. Indeed, their very reason for being is to enforce the CWC without the influence of any single nation. Though necessary to create a multilateral inspection regime, the independence of the CWC organization raises delegation

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267. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

268. *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)).

269. *Freytag*, 501 U.S. at 884.

270. *Id.* at 880.

271. See CWC, *supra* note 15, art. V.

272. See 22 U.S.C. § 6726 (2006).

273. See Yoo, *supra* note 21, at 117-19.

problems that compound those that arose for the New Deal agencies.

A third variant of the delegation issue centers on the judiciary. Congress can violate the separation of powers by vesting the authority to decide cases in tribunals located in the executive branch or in independent agencies rather than the federal courts. The Court has allowed some vesting of adjudicatory authority in non-Article III courts but only if they do not undermine the constitutional role of the federal judiciary.<sup>274</sup> With the administrative state, this problem has arisen when Congress has created rights under new statutory schemes, such as the review of the denial of welfare benefits, or when Congress transfers causes of action from the jurisdiction of federal courts to those of the administrative agencies. Scholars regularly observe that the Court's jurisprudence on this question is unclear.<sup>275</sup> Congress cannot transfer the authority to hear questions of constitutional law or private rights from the Article III courts to an administrative tribunal. It can, however, vest some adjudicative authority in the agencies, and has done so from the beginning of the Republic.<sup>276</sup> Today, such courts handle takings, tax, and bankruptcy claims, for example. Again, as with the delegation of legislative authority, even when Congress vests the adjudicative function outside the branch originally given that authority under the Constitution, here the judiciary, that function still rests within the national government.

The spread of international tribunals and jurisdiction over private claims places stress on this framework. A leading example comes from NAFTA, which creates arbitral panels to hear disputes over dumping, which is the export of goods at prices below cost.<sup>277</sup> Before NAFTA, private parties could bring cases claiming dumping by a competitor to the Secretary of Commerce and the International

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274. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856-57 (1986).

275. See generally Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329 (1991); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

276. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919-26 (1988).

277. See North American Free Trade Agreement, U.S.-Can.-Mex. arts. 1901-05, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

Trade Commission, whose decisions were reviewable in the Court of International Trade, an Article III court subject to the Court of Appeals for the Federal Circuit and the U.S. Supreme Court.<sup>278</sup> Under NAFTA, a private party can only appeal a decision of the ITC or the Secretary of Commerce to a NAFTA tribunal rather than the federal courts.<sup>279</sup> NAFTA thus transfers claims under federal law that were once heard in federal court to non-U.S. courts. The International Criminal Court, which the United States has yet to join, requires member nations to turn over suspects of war crimes for trial.<sup>280</sup> In the context of the Vienna Convention on Consular Relations<sup>281</sup> and the death penalty, foreign nations no doubt have more faith that the International Court of Justice will extend greater neutrality in its decision on whether a foreign defendant's rights under international treaty have been respected than they will that the courts of Texas or Oklahoma will do the same.<sup>282</sup>

Vesting adjudicative authority in international tribunals can, under certain circumstances, promote international cooperation. International tribunals can identify whether a state party has violated the terms of an international agreement and measure possible remedies without any bias that could be associated with domestic courts.<sup>283</sup> But these tribunals' very independence and neutrality cause problems with Article III of the Constitution. As with the other delegations studied here, the international dimension only compounds the nature of the problem. Even if a cause of action can be moved outside of the cognizance of the Article III courts, it is still heard within the American governmental system in a specialized Article I court or an administrative agency. Those two types of tribunals will still be accountable for their decisions to the administra-

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278. See Ku, *supra* note 21, at 111.

279. See *id.*; see also Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1458-63 (1992).

280. ICC Statute, *supra* note 20.

281. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

282. See, e.g., Brief for the European Union and Members of the International Community as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1619203.

283. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 12-14 (2005).

tive agency, the executive branch, or ultimately Congress. They will generally be subject in their procedures to the requirements of the Due Process Clause. An international tribunal, however, is not accountable to the U.S. government and need not follow constitutional norms of fair process in their proceedings. As with the Appointments Clause, Article III displays a strong suspicion of congressional efforts to transfer power away from another branch. Shifting adjudicative authority to international courts creates tensions with this principle, but then adds the additional difficulty that the power is moved wholly outside the national government.

### CONCLUSION

We should not be misread as attacking the movement toward international cooperation. Rather, our goal here has been to show that the forms of the new international law raise deep structural problems for our constitutional system of government. In some cases, the comprehensive sweep of international regulatory regimes pushes the reach of federal power beyond the limits of the Commerce Clause or into the reserved powers of the states. In other cases, international cooperation may require the delegation of rulemaking, enforcement, and adjudication functions to independent IOs in ways that create tensions with the Constitution's protections for the separation of powers.

These questions are not wholly new. They have occurred before, as when the President and Congress enacted the sweeping laws of the New Deal. In response to the Great Depression, Congress transferred broad legislative authority to the executive branch and independent agencies. This new administrative state ran into a head-on conflict with the Supreme Court's formalist doctrines on both federalism and the separation of powers. Because constitutional law had not kept pace with the changes wrought by the nationalization of the American economy and society, the political branches and the courts collided. Constitutional law gave way, but at a high cost in legitimacy for the President and the Supreme Court. A better understanding of the ways in which law can mediate between the similar demands of globalization and international

regulation, on the one hand, and the Constitution on the other, may help prevent a similar conflict in the near future.

Before finishing with our discussion of the tension between globalization and the Constitution's structural provisions, we should make a normative point. At the beginning of this essay, we sought to define federalism and the separation of powers in the Constitution, and in the latter half, we identified the problems created by globalization for its structure. If the American people, however, decided to amend the Constitution to alter these fundamental constitutional principles, these conflicts would begin to disappear. One question that concerns us is that these choices should not be made gradually by the courts, but rather through constitutional mechanisms that grant the decisions on accommodating globalization to the elected branches of government and, ultimately, the electorate. But it is always possible that the American people, as in Europe, could decide to weaken different aspects of their Constitution to make international cooperation easier. They could amend the Constitution, for example, to allow for the explicit delegation of judicial power to international tribunals such as the International Criminal Court.

We openly confess our view, however, that any fundamental change in the Constitution's structures would be a terrible mistake. Putting aside their historical pedigrees, we think that federalism and the separation of powers today guarantee a number of normative benefits for the United States. Federalism, for example, creates policy competition among states; citizens can maximize their preferences by choosing to live in states with policies that they prefer. States such as California can provide high levels of environmental protection at the cost of lower rates of industrial growth; individuals who enjoy the outdoors over high-paying manufacturing jobs or lower taxes can move there. Federalism also encourages innovation in government policy—states serve as fifty “laboratories of democracy” that conduct experiments for solving social problems, which will lead to more effective national solutions. Finally, federalism allows for the more effective provision of public goods—or certain benefits, such as schools, roads, regional transportation systems, parks, and law enforcement—which affect smaller geographic units rather than the nation as a whole. Federalism has signif-

icant advantages above and beyond its historical presence in the Constitution.

The separation of powers also provides significant benefits beyond the happy accident of its inclusion in the Constitution. Dividing legislative power between the two houses of Congress and the President demands that a high level of consensus exist before the government enacts new domestic legislation. As the level of consensus increases, the law is more likely to express the will of the majority and to represent better judgment on the right trade-offs for society. Multiple hurdles for the legislative process reduce the chance that special interest groups will use domestic regulation to capture benefits for themselves at the public's expense. At the same time, the separation of powers encourages the vigorous exercise of national powers at the right moment. For example, the President can lead the nation into war, protect the national security, or conduct foreign affairs with "[d]ecision, activity, secrecy, and dispatch," in the words of Alexander Hamilton in *The Federalist No. 70*.<sup>284</sup> By openly allocating power to the branch best suited for its exercise, the separation of powers encourages accountability to the electorate, which knows which political actors are responsible for success or failures on the field. Finally, the separation of powers provides a safeguard for liberty: it makes it difficult for any one party or group to take over the controls of government altogether, and gives each branch the means to frustrate the plans of the others.

Scholars argue over whether the Constitution's structures have produced a political stability that is responsible for the nation's success. We tend to think that they have. America's decentralized government, both between the national and state governments and among the executive, legislative, and judicial branches, discourages a rush into radical reforms or sweeping alterations of the basic rules of the political system. The American Constitution may allow grievous injustices—such as slavery and segregation—to persist for long periods of time, but it also creates a risk-averse political system that prevents the United States from swinging wildly or hastily in one direction or another. Altering federalism and the separation of powers to allow for greater international cooperation may seem

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284. THE FEDERALIST NO. 70, *supra* note 28, at 423 (Alexander Hamilton).

desirable now, but the long-term benefits may not exceed the costs, if those costs are likely to be the weakening of those governing principles in domestic affairs. Instead, the American system can accommodate the demands of globalization within existing doctrines of the separation of powers and federalism, though with some difficulty. We think that accommodation, even with the higher transaction costs of congressional action or less centralization over policy, is worth the price to preserve the constitutional principles that have served the nation so well, and for so long.