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The Delegation of Federal Power to International Organizations: New Problems with Old Solutions

Julian G. Ku[†]

[T]he World Trade Organization exercises a supranational authority in conflict with our forefathers' vision of an America forever sovereign and independent.

—Patrick J. Buchanan¹

[The American people] see the UN aspiring to establish itself as the central authority of a new international order of global laws and global governance. This is an international order the American people will not countenance.

—Senator Jesse Helms²

It is tempting to brush off such concerns about the growing power of international organizations like the World Trade Organization (WTO) and United Nations (UN) as demagogic and paranoid. At the core of their concerns is a conviction that some large measure of power and authority held by the United States government has been impermissibly transferred to remote and unaccountable international organizations in violation of basic constitutional principles or American “sovereignty.” Messrs. Buchanan and Helms are hardly alone in holding this view. Similar concerns, however inarticulate or incoherent,³ may have motivated thousands of protestors of all

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1. PATRICK J. BUCHANAN, *THE GREAT BETRAYAL* 313 (1998).

2. Senator Jesse Helms, Address Before the United Nations Security Council (Jan. 20, 2000), at http://www.senate.gov/~helms/FedGov/UNSpeech/body_unspeech.html (last visited Sept. 20, 2000).

3. See Jodie T. Allen & Dori Jones Yang, *Trade's Battle Hits Seattle*, U.S. NEWS & WORLD REP., Dec. 13, 1999, at 20. In describing the ironies of the

political stripes to take to the streets of Seattle in December 1999.⁴ But do these fears have any serious legal basis?

This Article investigates the constitutional basis for objections to United States participation in important international organizations like the WTO and the UN. The somewhat surprising conclusion is that the inchoate rage of the Seattle protestors has greater constitutional substance than most academic commentators would like to admit.⁵ Some international organizations have begun to acquire real powers from the federal government, and the future growth of international organizations is likely to support this trend. Moreover, the nature of these transfers raises serious constitutional doubts that the currently accepted view of constitutional interpretation cannot adequately address.

This Article proposes a framework for analyzing the constitutional issues raised by relationships between the United States and international organizations. The constitutional issues implicated in these relationships are most usefully understood as *international delegations*. An *international delegation* is the transfer of constitutionally-assigned federal powers—treaty-making, legislative, executive, and judicial powers—to an international organization. This Article evaluates the propriety of these delegations by incorporating analysis from existing commentary on the

WTO protest movement, the writers note: "Their sneakers were made in Indonesia, their jeans in Mexico, their backpacks in China, and their cell phones in Finland. Only their hand-lettered signs were made in the U.S.A." *Id.*

4. One paper described the scene as follows: "A guerrilla army of anti-trade protesters took control of downtown Seattle today, forcing the delay of the opening of a global meeting of the World Trade Organization." John Burgess & Steven Pearlstein, *Protests Delay WTO Opening: Seattle Police Use Tear Gas; Mayor Declares a Curfew*, WASH. POST, Dec. 1, 1999, at A1; see also Bryan Denson & Richard Read, *Violence Disrupts WTO in Seattle*, PORTLAND OREGONIAN, Dec. 1, 1999, at A01; Jonathan Peterson et al., *Protest Delays Start of World Trade Summit*, L.A. TIMES, Dec. 1, 1999, at A1.

5. Some prominent public affairs commentators, however, have noted the trend toward more powerful international organizations. See, e.g., George F. Will, *See You in Congress*, WASH. POST, May 20, 1999, at A29 (emphasizing the dangers of congressional delegations to the President as well as delegations to international organizations); Robert Wright, *Continental Drift*, NEW REPUBLIC, Jan. 17, 2000, at 18 (describing international organizations as a form of world government). Wright has written extensively on this subject and welcomes a shift toward greater world governance from a left-of-center political perspective. See ROBERT WRIGHT, *NONZERO: THE LOGIC OF HUMAN DESTINY* 209-28 (2000).

constitutional framework for separation of powers and federalism.⁶ On the other hand, it also recognizes that international organizations pose special constitutional problems that not even traditional modes of constitutional analysis can easily resolve.

Few academic commentators would concur with these conclusions. In fact, very little commentary has seriously considered the constitutional difficulties posed by international organizations. Rather, many commentators have spent considerable energy developing theories for more effective international institutions,⁷ defending the value of U.S. participation in international organizations,⁸ and criticizing the United States's refusal to support the creation of additional international institutions more vigorously.⁹ There has been energetic debate on the *indirect* incorporation of international law into the federal court system,¹⁰ but surprisingly little

6. Constitutional theorists have only begun to consider the effect of international organizations on the existing constitutional order. The most prominent example of this can be found in Mark Tushnet's recent speculation that the limited role of the current Supreme Court can be explained by the transfer of powers down toward the states and up toward international organizations. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 109 (1999) (noting that sovereignty appears to be flowing "upward, to supranational government institutions" and "downward, to subnational governments").

7. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 298-336 (1997) (developing strategies to facilitate more effective international institutions); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2626 (1997) (developing a "transnational legal process" strategy to pressure states to comply with international rules).

8. See, e.g., Richard B. Bilder, *The United States and the World Court in the Post-"Cold War" Era*, 40 CATH. U. L. REV. 251, 259 (1991) (supporting greater U.S. participation in the International Court of Justice (ICJ)); Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1474-82 (1985) (condemning U.S. attempts to resist ICJ jurisdiction over its involvement in the Nicaraguan civil war).

9. For instance, the refusal of the United States to sign the treaty establishing an International Criminal Court (ICC) received substantial academic criticism. See, e.g., Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337 (1999) (evaluating and rejecting the U.S. government's international law arguments against the ICC); Diane F. Orentlicher, *Politics By Other Means: The Law of the International Criminal Court*, 32 CORNELL INT'L L.J. 489, 489 (1999) (asserting that the legal arguments made by the United States against the ICC are fundamentally flawed).

10. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary*

discussion of the constitutional consequences of the *direct* incorporation of international rules.

The relatively sparse academic commentary analyzing the constitutional questions raised by international organizations can be divided into two groups. One line of commentary focuses on a specific international organization and looks at the conflict that organization might create with a particular part of the Constitution.¹¹ While illuminating, these discussions lack a broader theoretical framework that accounts for the unique role that international organizations play within our constitutional system. In other words, these articles explore specific problems but do not give many answers that would help to resolve new problems.

International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 816-17 (1997) (arguing that customary international law should not be viewed as part of federal common law). Their provocative argument received a number of sharp rebuttals. See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1826-27 (1998); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 *passim* (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397-99 (1997).

11. See 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, 1456-58 (1992) (arguing that binational panel arbitration of anti-dumping petitions violates constitutional guarantees of federal judicial adjudication); Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power be Delegated to the United Nations?*, 82 GEO. L.J. 1573 *passim* (1994) (exploring the constitutional limitations on U.S. military participation in U.N. military actions); Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 *passim* (2000) (suggesting that a reading of Article III that applies Noam Chomsky's linguistic theory supports the constitutionality of supranational tribunals); Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 101-36 (1995) (rejecting constitutional challenges to the ICC); James A.R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 421-36 (1998) (analyzing the effect of Security Council resolutions on U.S. constitutional law); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 116-30 (1998) (arguing that the inspection provision of the Chemical Weapons Convention violates the Appointments Clause). Of those commentators, only Professor Havel has offered a broad theoretical approach to reconciling legal globalization and U.S. constitutional law. He limits the application of his self-described "neo-originalist" Chomskyan reading of constitutional text to Article III, however, and does not analyze whether other types of transfers to intentional organizations would pass constitutional muster. See Havel, *supra*.

The second line of commentary tries to remedy this problem by developing a general constitutional approach to analyzing our relationship with international organizations.¹² The leading commentator in this group is Louis Henkin.¹³ Henkin flatly dismisses claims that international organizations create serious constitutional difficulties. First, he contends that international organizations, as a practical matter, do not pose any serious threat to U.S. government authority.¹⁴ Second, he argues for a flexible and functional interpretation of the Constitution's structural requirements, rejecting what he calls a "straitjacket" interpretation that prevents the United States from participating in world affairs and responding to new needs by new means and new remedies.¹⁵ Finally, Henkin displays skepticism toward resolving any constitutional difficulties that might arise through judicial review, except in the protection of individual rights.¹⁶

This Article challenges each of Henkin's conclusions. It begins by highlighting how the evolution of the international

12. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 231-73 (2d ed. 1996) [hereinafter *FOREIGN AFFAIRS*]. Other commentators have only given cursory examination to the issues discussed by Henkin. See, e.g., George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463 *passim* (1998) (considering possible constitutional difficulties raised by participating in regional institutions without drawing any conclusions); Lori Fisler Damrosch, *"Sovereignty" and International Organizations*, 3 U.C. DAVIS J. INT'L LAW & POL'Y 159, 159-69 (1997) (briefly commenting on Henkin's analysis of U.S. participation in international organizations).

13. Henkin's views matter because he has published widely and influentially on a number of important topics related to international law and the U.S. Constitution over a four decade period. See generally LOUIS HENKIN, *ARMS CONTROL AND INSPECTION IN AMERICAN LAW* (1958); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1st ed. 1972). Henkin also served as the Chief Reporter to the *Restatement (Third) of the Foreign Relations Law of the United States*. Given the dearth of other serious academic commentary on these questions, this Article uses Henkin's views as a likely approximation of academic attitudes toward U.S. constitutional law and international organizations.

14. For instance, the World Health Organization issues recommendations that U.S. officials are not legally bound to accept. Furthermore, the United States is protected from organizations that do issue binding rules by weighted voting rules or outright vetoes. *FOREIGN AFFAIRS*, *supra* note 12, at 263.

15. *Id.* at 254.

16. He points out that the Supreme Court has never invalidated any act of the political branches that is closely related to international affairs on the ground that it violates the structural requirements of the Constitution. *Id.* at 141 n.4.

law system is creating new pressures on the U.S. constitutional system. The rise of this new kind of international law, increasingly administered by independent international organizations, has led to the *delegation*¹⁷ of powers away from the constitutionally-assigned branches of the federal government. In some cases, the powers to make international agreements, to legislate and execute federal law, and to adjudicate federal questions have already been delegated to international organizations. Moreover, such delegations are hardly isolated examples. In fact, these "international delegations" are only likely to continue in the future as the new international law becomes even more ubiquitous and ambitious.

Even when he concedes that these types of international delegations could occur, Henkin suggests that they would not violate the structural requirements of the Constitution.¹⁸ It is true that the most applicable Supreme Court jurisprudence on this subject, found in cases dealing with separation of powers and federalism questions, does not provide clear guidelines for deciding whether international delegations are permissible. Moreover, none of the case law specifically addresses the significance of a delegation to an international institution.

How one resolves the propriety of international delegations depends on whether one applies a formalist or functionalist analysis to constitutional interpretation. When evaluating an adjustment to the Constitution's structure, formalists rely heavily on the Constitution's text, structure and history, while functionalists reason from the broader purposes of the Constitution's structure. A formalist would likely take a skeptical view of international delegations while a functionalist would find such delegations more acceptable. Indeed, cases where the courts take a flexible, functionalist approach to constitutional interpretation seem to permit wide-ranging delegations of federal power to non-federal entities like state governments and private groups. Henkin draws on this tradition when he derides "straightjacket" readings of the constitution.¹⁹

17. I use the term *delegation* to refer to any transfer of federal powers away from the constitutionally-designated branch of the federal government. This includes delegation between branches of the federal government as well as delegations outside the federal government. See discussion *infra* Part II.A.

18. See FOREIGN AFFAIRS, *supra* note 12, at 141 n.2, 254.

19. See *id.* at 254.

This Article argues, however, that a formalist straightjacket is precisely what is needed in the case of international delegations because such delegations are meaningfully different from delegations to states and private parties in at least two important ways. First, international delegations place an unusually heavy strain upon the ideal of political accountability that animates much of the Constitution's structural design. Second, international organizations lack an independent source of political legitimacy. Both of these considerations, accountability and legitimacy, weigh in favor of taking a formalist approach toward international delegations.

The formal structural requirements of the Constitution are carefully designed to preserve a substantial measure of political accountability of the people's representatives. Furthermore, the formal structure, representing the Founders' original vision and backed by the force of a powerful historical *mythos*, serves as an important source of the federal government's own political legitimacy. To the extent that international delegations depend on non-formalist rationales, however, delegations to international organizations will upset the Founders' scheme for maintaining political accountability. Additionally, without an independent source of legitimacy, international organizations will suffer from a serious legitimacy deficit when attempting to acquire direct authority over the U.S. citizenry.

Even accepting that a formalist structure should be used to constrain international delegations, it is far from clear that judicial review is an attractive or feasible method of limiting international delegations. Courts have generally avoided resolving cases that implicate foreign affairs and at least one influential commentator has advocated reliance on the political process to restrain excessive international delegations.²⁰

This Article contends, however, that judicial enforcement of a formalist structure is the most obvious mechanism to resolve the accountability and legitimacy problems created by international delegations. Courts can and should play a role in policing the delegations of powers from the federal government to international organizations. Because courts have traditionally policed the delegation of powers within the federal government and to the states, it is not difficult to envision

20. See FOREIGN AFFAIRS, *supra* note 12, at 85.

courts playing a similar role in mediating between the newly prominent international organizations and the federal government. Courts are the only institution that can provide the crucial imprimatur of legitimacy necessary to sustain the international delegation of federal power in the long run.

This Article proceeds in four parts. Part I describes how the evolution of modern international law has led to the creation of new kinds of international organizations and international law. Part II reviews examples of how certain federal powers have been transferred to international organizations. After discussing the two major approaches to analyzing constitutional structure and the Supreme Court's most applicable doctrine, Part III goes on to argue that the unique weaknesses of international institutions in the areas of political accountability and legitimacy support adopting a formalist approach to international delegations. Part IV concludes that an active judicial role in reviewing international delegations is not only feasible, but may in fact be necessary.

This Article does not aim to provide technical arguments against specific international delegations, leaving the resolution of a particular delegation's constitutionality to future articles (and, if the argument is accepted, to future courts). Ideally, the Article will provide the foundation for such analysis by highlighting the basic fundamental questions that must be resolved before future work can usefully proceed. Thus, while the Article reviews specific cases, resolving the constitutionality of a particular delegation is less important than explaining *why* these delegations are occurring, *how* these delegations are different from domestic delegations, and *what* institution should decide the propriety of international delegations.

It is also important to emphasize that when exploring these questions, the Article does not advance normative claims about the value of international organizations or of the new type of international law. Rather, it assumes that the policy merits of adhering to organizations like the International Criminal Court or the World Trade Organization do not resolve the constitutional dilemmas they raise. While not necessarily hostile toward the creation of stronger and more powerful international institutions, this Article refuses to assume that the relationship between the United States and such institutions can be easily reconciled, if at all, with basic constitutional understandings.

I. THE NEW INTERNATIONAL LAW

This part describes the rise of a “new” international law characterized by three noteworthy qualities. First, international organizations have begun to replace nation-states as the major, if not primary, administrators of international law. Second, international law has become increasingly “codified” through wide-ranging “positive law” contained in multilateral treaties and is far less dependent on custom and state practice. Finally, international law’s modern emphasis on human rights has increasingly concerned itself with the regulation of a state’s relationship with its own citizens, an area of regulation traditionally understood as exclusively within the sovereignty of individual nation-states. These characteristics of the “new” international law have created, and will continue to create, pressures for the delegation of federal powers to international organizations.

A. TRADITIONAL INTERNATIONAL LAW

International law has an ancient pedigree and reviewing its long historical development is beyond the scope of this Article. Nevertheless, a brief discussion of how the term “traditional international law” is used in this Article will help clarify the claims made about the “new international law.”²¹ Used here, “traditional international law” refers to the dominant understanding of international law in the eighteenth century and existing up to the establishment of the United Nations in 1945. The classic statement of the traditional approach to international law is found in the *S.S. Lotus* opinion of the Permanent Court of International Justice (P.C.I.J.). “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. . . .”²² The pillar of traditional international law is the absolute sovereignty of nation-states, or as the P.C.I.J. put it, their own “free will.” Under this approach, international law binds a state only by those rules that a state has voluntarily

21. I borrow this term from Paul Stephan. See Paul Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1556-62 (1999) (describing a new international law).

22. The *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

accepted. A state may express this acceptance either through formal treaty or through practice and custom. In this system, there is no central organization that may enforce rules on states that have not voluntarily accepted them. Moreover, in this system, the nation-state is the only actor because international law applies exclusively to relations between sovereigns. "[T]he orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law."²³ Therefore, private actors are largely excluded.

Traditionally, international law is created in two ways. First, a nation-state enters into treaties that create international obligations similar to the manner in which contracts create private law obligations. Once having entered into a treaty, a nation-state is bound to the commitments it makes in the treaty unless it chooses to breach the treaty or terminate it pursuant to the treaty's own provisions.²⁴ Because most treaties in the nineteenth and early twentieth centuries were bilateral, very few established generally applicable principles of international law. Indeed, "it is more probable that the very reason of the treaty was to create an obligation which would not have existed by the general law, or to exclude an existing rule which would otherwise have applied."²⁵

Second, nations look to the dominant source of "general international law" as developed through custom. Determining what rules have been established by custom, however, requires looking "at what states do in their relations with one another and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain

23. MALCOLM N. SHAW, *INTERNATIONAL LAW* 126 (2d ed. 1986) (quoting H. Lauterpacht). As Shaw points out, this traditional assumption was challenged as early as 1871 over the status of the Vatican. *Id.* But for the most part, the idea that states were the primary, if not sole, subjects of international law was widely accepted prior to the establishment of the United Nations in 1945 and is not controversial. See John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 U. KAN. L. REV. 605, 618 (1993) (noting that the old idea of natural law restraining states had been discarded by the end of the nineteenth century, leaving the state "absolutized"—bound only by those rules that emerged from its own volition, as shown by actual practice"); Stephan, *supra* note 21, at 1564-68 (describing "old" international law as focusing on relations between states).

24. See SHAW, *supra* note 23, at 78 (describing the role of treaties as contracts "whereby the states participating bind themselves legally to act in a particular way or set up particular relations between themselves").

25. J.L. BRIERLY, *THE LAW OF NATIONS* 57 (Sir Humphrey Waldock ed., 6th ed. 1963).

course.”²⁶ Rules of international law are implicitly accepted by state actors when they act on the international stage in accordance with such rules. The sources of evidence for state practice include diplomatists, correspondence, official instructions to diplomats, consuls, naval and military commanders, national legislation and decisions of national courts, and opinions of law officers.²⁷

For U.S. purposes, most of these sources of evidence for “state practice” fall under the constitutional powers of the President in his conduct of foreign relations and military affairs.²⁸ Congress is empowered under the Constitution to “punish offences against the Law of Nations”²⁹ and its legislation creating such punishments can be taken as evidence of state practice. Courts look to international law for guidance in much the same way that they look to principles of general common law.³⁰ In reality, however, Congress and the courts rarely affect the customary international lawmaking sphere, especially when customary international law focused almost exclusively on the intercourse between nation-states in matters such as war-making, cession or acquisition of territory, and diplomatic affairs. These are areas where the President holds primary constitutional authority.

In any case, actions of all branches of the U.S. government in the realm of customary international lawmaking are ad hoc and particularized, rarely involving intentional efforts to create certain customary rules. The President acts to advance U.S. interests that may or may not involve the advancement of a particular customary rule.³¹ Congress legislates with similar

26. *Id.* at 59-60.

27. *Id.* at 60-61.

28. See, e.g., U.S. CONST. art. II, § 2 (“The President shall be Commander in Chief . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls.”).

29. U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations . . .”).

30. See Paul B. Stephan, *International Law in the Supreme Court*, 4 SUP. CT. REV. 133, 144-45 (1990) (describing pre-twentieth century Supreme Court cases relying on “general principles” of international law as a priori norms); SHAW, *supra* note 23, at 81 (likening “general principles of international law” to general principles a judge might rely on from equity, justice, or public policy); see also BRIERLY, *supra* note 25, at 63 (“International law . . . does not borrow from this source [general principles] . . . it rather looks to them for an indication of a legal policy or principle.”).

31. For instance, during its first seventy years, the United States strongly advocated for a “free ships, free goods” rule of customary international law,

attitudes and the courts profess to be simply clarifying or discovering rules that are already established.

Additionally, traditional international law rarely develops rules for the purpose of regulating private party rights or activities. Such matters are presumed beyond the reach of traditional international law, and private parties have no independent rights to assert in the intercourse between sovereigns. Indeed, a violation of international law affecting a private individual, such as the unlawful detention of an ambassador, is seen as a violation of the *sovereign's* right not to have his agents detained. A private individual seeking vindication of his rights against another sovereign must convince his own sovereign to seek some sort of diplomatic settlement.³² The International Court of Justice articulated this view as late as 1970 when it rejected the right of individual shareholders to seek remedies under international law against a state. This understanding makes sense because traditional international law focuses on developing rules for states in their relations with one another and not between private individuals and states.

[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.³³

If an individual seeks help in domestic court, that court would use international law rules as a source of guidance or persuasive authority. Courts will apply rules of general international law³⁴ only when no other rules of decision, in the

which prevented belligerents from seizing non-contraband items on neutral vessels in times of war. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1139-43 (1999) (describing the United States flip-flop on the "Free Ships, Free Goods" principle). Its strident advocacy of this rule led to conflicts with Great Britain and was largely responsible for the War of 1812. *Id.* During the Civil War, however, the U.S. government abruptly reversed course and claimed the right to essentially seize any neutral vessel, along with its goods. *Id.* Goldsmith and Posner use this example, among others, to support their theory that customary international law is best explained through rational choice and game theory analysis. *Id.* at 1120-23. Discussing the merits of their theory, which are many, lies beyond the scope of this Article.

32. See Stephan, *supra* note 21, at 1566.

33. *Barcelona Traction, Light, and Power Company, Limited, (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 78 (Feb. 5).

34. International law not created by treaty or executive agreement is

form of treaties or executive declarations, are provided by the executive branch. As Justice Gray explained: "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators."³⁵

Thus, traditional international law assumes the absolute sovereignty of nation-states and relies heavily on custom as developed through state practice for its development. It is relatively uninterested in matters affecting private parties except to the extent such rules affect the intercourse between sovereign states. In this regime, the executive plays the most important role in developing international law through his control of diplomatic and military organs. International agreements affect the development of international law only to the extent that they bind the United States to specific (usually bilateral) agreements. The power to make international agreements does not usually lead to rules of general applicability. Indeed, such agreements are often made to alter the application of a general customary rule. Because traditional international law rarely affects the private rights of individuals, and if it does, it does so only incidental to its regulation of intercourse between states, the traditional international law system has rarely been concerned with recognizing private party rights.

B. THE "NEW" INTERNATIONAL LAW

More recently, commentators have been observing the rise of a new kind of international law. Indeed, some commentators have begun using a different term for this sort of law: supranational law.³⁶ This Article will continue to refer to this

generally referred to as customary international law. This Article is primarily concerned with what might be called positive international law, which is created through treaties, executive agreements, statutes, and other "positive" lawmaking methods. Therefore, this Article does not take part in the energetic debate over *which* court system, federal or state, controls the interpretation of *customary* international law. Compare Bradley & Goldsmith, *supra* note 10, at 816-17 (arguing that customary international law is not federal common law), with Koh, *supra* note 10, at 1827, 1861 (arguing that customary international law is federal law).

35. The Paquete Habana, 175 U.S. 677, 700 (1900).

36. The term "supranational law" has been used to describe the particular kind of international law created and implemented by regional organizations, such as the European Union or the North American Free Trade Agreement (NAFTA). See Peter Hay, *Supranational Organizations and United States*

"new" law as "international law" because it still retains many features of traditional international law and because the term "supranational law" has often been used to refer to regional organizations. More important than terminology, however, are three noteworthy features of this new international law.

First, the new international law has been developed in large part by the rise of a new legal creature: the international organization. These organizations have varying levels of authority, ranging from technical administrative coordination to regulation of political interaction among states.³⁷ Their establishment, however, has changed one of the fundamental assumptions of traditional international law. Whereas traditional international law continued to accord states absolute sovereignty, some of the new international organizations have the legal authority to encroach on that sovereignty.³⁸

Second, the new international law has become less dependent on custom and state practice as a source of development. Instead, the new international law is often created via large multilateral treaties. While some of these multilateral treaties are intended to codify existing customary law, many of them are self-consciously intended to "legislate" new rules of international law. As one commentator explains, these treaties serve as "the substitute in the international system for legislation, and they are conveniently referred to as 'lawmaking'; their number is increasing so rapidly that [the new treaty-created international law] has taken its place beside

Constitutional Law, 6 VA. J. INT'L L. 195, 195-96 (1966) (describing criteria for supranationalism); Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 399-404 (1996) (describing supranational law and the rise of supranational organizations). For the purposes of this Article, supranational law is treated as a subset of the larger body of new international law that encompasses non-regional international organizations like the United Nations and the World Trade Organization.

37. See generally FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING: SELECTED DOCUMENTS 1-10* (1992) (reviewing and classifying different kinds of international organizations).

38. For instance, the member states of the United Nations, in theory at least, have given up one of the most precious rights of absolute sovereignty: the right to use military force against another state. U.N. CHARTER art. 2, para. 4.

the old customary law and already far surpasses it in volume."³⁹

These multilateral treaties cover a wide variety of subjects, and some of them are intended only to prescribe norms or default rules.⁴⁰ Moreover, few of these agreements have independent international organizations to enforce their terms. Still, many of these multilateral agreements are self-consciously establishing a set of generally applicable rules through *positive* and not *customary* law. In this way,

they do in fact perform the function which *legislation* performs in a state, though they do so only imperfectly; and . . . they are the only machinery which exists for the purposive adapting of international law to new conditions and in general for strengthening the force of the rule of law between states.⁴¹

Finally, and perhaps not surprisingly given its new character, the new international law has moved away from its exclusive focus on state-to-state relations and is openly concerned with the regulation of private rights and actions. The new international law's interest in regulating private conduct represents an important shift from the traditional international law. The *Restatement (Second) of the Foreign Relations Law of the United States*, approved in 1965, did not take a position on whether international law related to any matter other than state-to-state relations.⁴² Twenty-five years later, the *Restatement (Third)* unequivocally states that international law includes rules and principles governing "states' relations with persons, whether natural or juridical."⁴³

39. BRIERLY, *supra* note 25, at 58; see also SHAW, *supra* note 23, at 77-81 (contrasting "law-making" treaties, which are intended to have universal or general relevance, with "treaty contracts").

40. See, e.g., United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/Conf/97/18, art. 1 (1980), available at <http://cisgw3.law.pace.edu/cisg/text/treaty.html>. These rules are not binding but serve as a background set of rules that individual parties may adopt through private contracting.

41. BRIERLY, *supra* note 25, at 58-59 (emphasis added); accord SHAW, *supra* note 23, at 78-79; see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 271-85 (1995) (discussing the increased deference of nation states to international organizations); Head, *supra* note 23, at 624 (attributing the shift away from state-centered relations to the "radical change" in international law caused by the establishment of the United Nations).

42. Stephan, *supra* note 21, at 1576 (highlighting equivocal language in the *Restatement (Second) of the Foreign Relations Law of the United States*).

43. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE

This represents a significant shift from the ICJ's assertion that individuals "have no remedy in international law."⁴⁴ If the *Restatement's* view is accepted,⁴⁵ the rules of international law will apply to the rights of individuals against states as well as states against other states. The ability of individuals to claim international law rights creates pressures for international institutions to directly administer and adjudicate these rights.⁴⁶

In sum, the new international law is increasingly centered around newly powerful international organizations that are sometimes empowered to impose binding international obligations on sovereign states. Moreover, the rules these organizations impose are often developed through a formalized, multilateral treaty process. In this way, the new international law is created via a process of "international legislation" rather than through state practice and custom. Finally, the goals of the new international law have expanded far beyond traditional international law's exclusive focus on regulating state-to-state relations. Indeed, the new international law has expanded widely into areas involving a state's relations with individuals, and even a state's relations with individuals within its own jurisdiction.

These characteristics of the new international law create pressures on the allocation of powers within the federal government in two ways. First, the rise of independent international organizations means that non-state organs are increasingly charged with interpreting and adjudicating international obligations. The organization may have a voting rule which allows a majority of the members to amend the

UNITED STATES § 101 note 1 (1986).

44. *Barcelona Traction, Light, and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 78 (Feb. 5).

45. The *Restatement*, of course, is hardly conclusive and other aspects of the *Restatement (Third)* have been severely challenged. For instance, commentators have questioned the historical and doctrinal support for the *Restatement's* conclusion that customary international law is "federal common law." See generally Bradley & Goldsmith, *supra* note 10. Others have attacked the *Restatement's* conclusion that the treaty power is not constrained by a subject matter limitation. See generally Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998). Still, the *Restatement* accurately represents the consensus of the international law academy and the notion that modern international law encompasses individual human rights is widely accepted.

46. See discussion *infra* Part II.B.3-4 (reviewing transfer of executive and judicial powers).

terms of the agreement and impose obligations against the will of the United States. This type of mechanism means that the power to impose international obligations on the United States, previously limited almost completely to the power to make international agreements, may be wielded by an international organization via a majority vote.⁴⁷ Further, as international agreements take on broader "legislative" characteristics by creating rules of broad applicability, the international organization authorized to administer the vaguer, more broadly worded agreements acquire greater discretion when interpreting the obligations. An international organization's power to define or interpret a broadly worded agreement can effectively decide whether the United States has an international obligation. Moreover, its "third party" role makes it far less amenable to the normal motivations of bilateral diplomacy.

Second, and perhaps more importantly, the expansion of the new international law into the regulation of private party conduct creates pressures for a more direct role for the international organizations. Thus, it not only seeks the discretion to effectively create international obligations, but the subject matter of these obligations increasingly deals with matters of private party conduct. To ensure compliance with these individual obligations, it is not surprising that international organizations have sought a direct role in administering these agreements within the domestic jurisdiction.⁴⁸

C. SUMMARY

The new character of international law increases the pressure to shift powers away from national governments toward international organizations. Countries are banding together to "legislate" rules of general applicability which are administered by independent organizations. Moreover, these rules have broadened beyond the scope of traditional state-to-state relations into spheres of traditional domestic regulation. This has created pressures to transfer the authority to make, enforce, and interpret international agreements to the

47. See discussion *infra* Part II.B.1 (discussing in part voting rules in the World Trade Organization).

48. See discussion *infra* Part II.B.4 (discussing transfer of judicial powers).

independent international organizations. None of these characteristics of the new international law are necessarily undesirable as a matter of foreign policy. As the next part explains, however, the U.S. relationship with certain international organizations has already begun to strain the traditional allocation of powers under the Constitution's structure.

II. INTERNATIONAL DELEGATIONS

Because the new international law creates pressures to transfer powers away from the federal government, this part focuses on the constitutional theory and doctrine surrounding *delegations*. For the purposes of this Article, a *delegation* is any transfer of constitutionally-assigned powers away from the constitutionally-designated branch. An *international delegation* is the transfer of constitutionally-assigned powers to an international organization.⁴⁹ In each of the examples discussed in this section, some federal power—whether it be the treaty-making, legislative, executive or judicial power—has been shifted to an international organization. Recognizing that not all delegations are unconstitutional, this section concentrates on establishing that these kinds of transfers to

49. I am not the first scholar to consider the United States's relationship with international organizations from a delegation standpoint. See JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 10-22 (1998) (discussing the delegation of constitutional powers to international organizations as a loss of sovereignty). Professor Rabkin's argument differs from mine, however, both in scope and in kind. In general, his book makes a political argument for preserving U.S. autonomy from international encroachment that is not necessarily grounded in constitutional theory. See *id. passim*. Thus, he addresses the complicated question of how customary international law is incorporated into the U.S. court system, even though this question does not directly implicate constitutional law. See *id.* at 49-65 (discussing perils of international human rights law); see also *supra* text accompanying note 10 (discussing the incorporation of customary international law).

In contrast, I analyze the legal basis for objections to U.S. participation in international organizations, drawing on concerns about political accountability and legitimacy when they are relevant to illuminating constitutional concerns. See discussion *infra* Part III.C.

Additionally, some articles have analyzed the transfer of powers to international organizations by analogizing the U.S. relationship with international organizations to the rise of the European Union rather than focusing on domestic constitutional doctrine. See, e.g., Hay, *supra* note 36, at 241-51 (investigating constitutional concerns created by U.S. participation in European community-like institutions); Tangney, *supra* note 36, at 449-56 (comparing U.S. and German constitutional barriers toward ceding powers to international organizations).

international organizations are occurring, and that constitutional objections can be raised.

A. THE SEPARATION OF POWERS FRAMEWORK

Delegation has most often been analyzed within the separation of powers framework because it usually involves the transfer of powers among the three branches of the federal government. Therefore, any discussion of an *international delegation* approach must begin with the way that delegation fits into the Supreme Court's understanding of separation of powers. Chief Justice Taft summarized the basic formula for separation of powers in this classic passage:

The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power . . .⁵⁰

There is reason to believe that the Framers intended the separation of powers structure to protect individual liberty because each branch would check the other from exercising too much governmental power.⁵¹ On the other hand, there is also evidence that the Framers sought to create a more effective national government than the previous Articles of Confederation regime and hoped that the new Constitution's system of separated branches would also work together.⁵² Extending this line of thought, Taft believed that the separation of powers did not preclude inter-branch cooperation and advised that "[i]n determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."⁵³

50. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

51. See THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) (defining "tyranny" as the absence of separation of powers); THE FEDERALIST NO. 51, at 347-48 (James Madison) (Jacob E. Cooke ed., 1961) (explaining the importance of dividing interests against each other).

52. See THE FEDERALIST NO. 15, at 90 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (reflecting strong consensus that the Articles of Confederation suffered from serious failures); THE FEDERALIST NO. 51, at 347-48 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that the government must be able to govern effectively).

53. *Hampton*, 276 U.S. at 406.

Not surprisingly, "common sense" has failed to easily resolve such questions and courts have struggled to parse between permissible and impermissible inter-branch cooperation. In doing so, courts have identified two categories of impermissible transfers of constitutional powers⁵⁴ that could threaten the separation of powers scheme to such an extent as to justify judicial intervention.

First, courts have found separation of powers problems in cases where one branch appears to be *aggrandizing* power from another branch to itself. The classic example of such aggrandizement occurred when Congress took over appointments of members of the original Federal Election Commission in *Buckley v. Valeo*.⁵⁵ The notion in *Buckley* is that when Congress takes away power from a rival branch, the basic separation of powers structure, which seeks to keep powers divided among different branches, is undermined when one branch begins collecting all these constitutionally-assigned powers for itself.⁵⁶

Second, courts have also scrutinized *delegations*, or transfers of power away from constitutionally-designated branches, but not necessarily to the benefit of the transferring branch. The classic case of delegation is Congress transferring its Article I legislative powers to the President or the judicial

54. The Court has also found that "[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996); see also *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (quoting *Loving*, 517 U.S. at 757); *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 443 (1977). The *impairment* of one branch does not necessarily require a transfer of power. The operative question is whether the effect of an action by one branch makes it impossible for another branch to fulfill its constitutional duties. For instance, when the Court considered the constitutionality of a private lawsuit against President Clinton, it asked whether the effects of such litigation would impair the functioning of the President so as to prevent him from fulfilling his constitutional duties. *Clinton*, 520 U.S. at 701. The Court found that a sexual harassment lawsuit against President Clinton would be "highly unlikely to occupy any substantial amount of [Clinton's] time." *Id.* at 702. No transfer of powers occurred, but the separation of powers could have been violated.

55. 424 U.S. 1 (1976).

56. *Id.* at 90-91. Other cases rely on the "anti-aggrandizement" principle. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-77 (1991) (rejecting an attempt to staff an airport governing board with officers responsible to Congress and not to the President); *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (rejecting Congress's attempt to grant executive powers to the Comptroller General, an officer that it controls).

branch, a situation that Chief Justice Taft said would create a "breach of the National fundamental law . . ."⁵⁷ Courts have repeatedly stated that such delegations would also undermine the separation of powers⁵⁸ although it has rarely found any delegations worthy of judicial intervention.⁵⁹

Delegations can be distinguished from aggrandizements because they involve the transfer of constitutionally assigned powers between branches without directly bolstering the power of the branch making the transfer. Cases like *Buckley* involve direct confrontations between the political branches with one branch gaining power at the direct expense of the other. In a delegation case, the transferring branch, Congress, is either giving away its own power voluntarily or it is taking power from one of the other branches and giving it to a third branch or to a non-federal entity. In either case, Congress is not directly strengthening its own position.

Understood in this context, the Court has recognized three types of constitutionally-suspect delegations. First, Congress may try to transfer its legislative power to some other entity. This is the classic form of delegation that has drawn the vast majority of academic commentary.⁶⁰ Second, Congress may attempt to transfer powers conferred on the President under

57. *Hampton*, 276 U.S. at 406.

58. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("Congress generally cannot delegate its legislative power to another Branch."); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring) (warning that the National Industrial Recovery Act amounted to "delegation running riot"); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Hampton*, 276 U.S. at 405 (referring to the transfer of legislative power to the executive branch as a "breach of fundamental law"); *Washington v. W.C. Dawson*, 264 U.S. 219, 225 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163-64 (1920); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("Congress cannot delegate legislative power to the President.").

59. See *Mistretta*, 488 U.S. at 373-74 (observing that the Court has not struck down a delegation since 1935).

60. See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST* 131-34 (1980) (arguing for the revival of the non-delegation doctrine for legislative delegations to administrative agencies); THEODORE J. LOWI, *THE END OF LIBERALISM* 93 (2d ed. 1979) (same); DAVID H. SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993) (same); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) (same). But see JERRY L. MASHAW, *GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAWS passim* (1997) (arguing in favor of broad delegations); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 777, 790-93 (1999) (questioning the plausibility of the revived non-delegation doctrine).

Article II. One famous example of this type of delegation was raised when Congress transferred the President's power to appoint a prosecutor of the United States to a three-judge panel in *Morrison v. Olson*.⁶¹ The plaintiffs claimed that this transfer constituted an impermissible delegation of the President's power to appoint executive officials. While upholding the Independent Counsel Act, the Court's analysis implied that if the independent counsel was *not* an "inferior officer" within the meaning of the Appointments Clause, an impermissible delegation of executive powers would have occurred.⁶²

Third, Congress may decide to create "courts" administered by the executive branch or independently constituted. This would effectively transfer some part of the "judicial power" assigned to the judiciary in Article III. According to the Supreme Court's caselaw, "Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."⁶³

These three types of delegations do not necessarily constitute the universe of all possible delegations. The next section will argue that the power to make treaties and international agreements can also be effectively delegated away from Congress and the President. The Court has never considered delegation in the treaty and international agreement context, but the framework is the same: a power assigned to Congress and to the President is being effectively transferred to another organization.

Because Congress is not directly aggrandizing itself when it delegates, courts have been reluctant to conduct extensive judicial review of congressional delegations. In particular, because Congress is assumed to protect its own interests, its decision to delegate away its own power is given less scrutiny.⁶⁴

61. 487 U.S. 654, 654 (1988).

62. *Id.* at 670-71 ("The initial question is, accordingly, whether appellant is an "inferior" or a "principal" officer. If she is the latter . . . then the Act is in violation of the Appointments Clause.").

63. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (quoting *Nat'l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)) (noting that Article III "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims . . . but also serves as an inseparable element of the constitutional system of checks and balances") (internal citation omitted).

64. *See Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("[T]he system of

Its decisions to transfer powers that the Constitution gives to the President or the courts, however, are more suspect than delegations of its own legislative powers. Even so, delegations of presidential or judicial powers to states or private parties are still more likely to be upheld than aggrandizements that bolster Congress's own powers.⁶⁵

Overall, the Supreme Court has recognized that impermissible delegations may occur when legislative, executive, and judicial powers are transferred away from their constitutionally-assigned branches. It is true that the Court has not erected rigid barriers blocking all re-allocation of these powers. For instance, Congress has been given broad discretion to delegate its legislative powers, the definition of "inferior officer" has been liberally expanded to cover a wide range of executive officials, and non-Article III courts have handled a huge number of important legal disputes. But the Court has never explicitly abandoned Chief Justice Taft's basic understanding that some constitutional limitations constrain the delegations of federal powers away from their respectively-assigned branches.

B. EXAMPLES OF INTERNATIONAL DELEGATIONS

International delegations occur when powers assigned by the Constitution to a particular branch of the federal government are transferred to an international organization. International delegations do not fit exactly within the Court's standard separation of powers framework because transferring power to international organizations does not necessarily affect the balance of powers between the federal branches. Nonetheless, this part explores ways in which these delegations to international organizations can still create conflicts with the Constitution's basic structural requirements.

1. Treaty Making Powers

The Constitution vests the power to make international agreements in the President, subject to the approval of two-

separated powers and checks and balances established in the Constitution was regarded by the Framers as a 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam)).

65. The Court made this point explicit in *Morrison*. See *Morrison*, 487 U.S. at 694-95 (distinguishing Congressional aggrandizement in *Bowsher* and *Chadha* from the Independent Counsel Act).

thirds of the Senate.⁶⁶ Additionally, courts and some commentators have generally accepted that the President enjoys the power to make certain international agreements under his own authority and other kinds of agreements with the consent of both Houses of Congress.⁶⁷ At any rate, the power to make international agreements on behalf of the United States is vested in one of these entities: (1) the President alone; (2) the President acting with two-thirds of the Senate; and (3) the President acting with a majority of both Houses of Congress.⁶⁸ The Constitution restricts the states

66. U.S. CONST. art. II, § 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

67. I do not propose to add to the growing academic literature debating the interchangeability of congressional-executive agreements and treaties. See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (advocating the interchangeability thesis as an example of a "constitutional moment"); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998) (offering functional attacks on the interchangeability of treaties and executive agreements); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998) (offering an originalist resolution of the interchangeability debate); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (rejecting the interchangeability thesis and theory of "constitutional moments"). This debate has been going on for some time. See generally RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 140-56 (1974) (attacking the interchangeability thesis on originalist grounds); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944) (rejecting interchangeability); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive Agreements or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945) (advocating interchangeability).

Recent court decisions confronting the Treaty Clause have supported the interchangeability thesis. See *Ntakirutimana v. Reno*, 184 F.3d 419, 424-27 (S.D. Tex. 1999), *cert. denied*, 120 S. Ct. 977 (2000) (rejecting a challenge to the non-treaty extradition agreement with international war crimes tribunal); *Made in the U.S.A. Found. v. United States*, 56 F. Supp. 2d 1226, 1240-41 (N.D. Ala. 1999) (rejecting a challenge to NAFTA, a non-treaty trade agreement).

For the purposes of this section, I do not consider the merits of the "interchangeability" thesis that sees congressional-executive agreements and treaties as interchangeable methods for making international agreements. Instead, I focus on how federal powers are being transferred to international organizations and not on what procedures were used to accomplish this transfer. My argument that meaningful delegations are occurring, however, may add another functional argument for scholars advocating exclusive adherence to the treaty clause as a way to constrain these delegations.

68. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1986) (discussing various mechanisms for making

from making any kind of international agreement without the consent of Congress⁶⁹ and it makes no other reference to how the power to make international agreements should be exercised.

Not surprisingly, the Constitution's text and structure relating to international agreement-making provides little guidance for the challenges posed by the new kind of international law. For instance, it makes no reference to international organizations and it is not likely that the Founders contemplated multilateral treaties seeking to legislate universalistic norms. Nevertheless, the rise of a new kind of international law has created pressures to delegate the international agreement-making power away from the political branches of the U.S. government and toward neutral international organizations.

This problem was anticipated by U.S. government officials who participated in the creation of the first great wave of international organizations established in the aftermath of World War I. In the process of negotiating the constitution of the International Labor Organization (ILO), the United States representatives objected to giving the proposed ILO the authority to declare law, citing several constitutional grounds, including that

[t]he Senate has, under the Constitution, the power and the duty of giving its advice and consent in the matter of treaties. To permit a foreign body to conclude a treaty binding upon the United States would be equivalent to *delegating the power of making treaties in the measure of the provisions of the treaty in question*.⁷⁰

In other words, the creation of an international organization empowered to create international obligations on the United States, could essentially delegate the power to make international agreements to an international organization.

international agreements).

69. U.S. CONST. art. I, § 10 ("No State shall enter into any Treaty, Alliance, or Confederation. . . . No State shall, without Consent of Congress . . . enter into any Agreement or Compact with . . . a foreign Power . . .").

70. Pitman B. Potter, *Inhibitions on the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456, 456 (1934) (emphasis added). The U.S. delegation also objected to the proposed ILO on the grounds that the ILO would encroach on the powers reserved to the states by the Tenth Amendment and the judicial power of the Supreme Court conferred by Article III. *Id.* at 456-57. Potter goes on to decry these types of constitutional arguments against U.S. participation in international organizations as arising from the "fanatically nationalistic confraternity of constitutional lawyers . . ." *Id.* at 474.

This argument was recognized at the time by some commentators,⁷¹ but did not receive significant attention. One possible reason is that few of the international organizations created in the wake of World War I were given meaningful legal authority and the issue of delegation remained almost purely theoretical.

In the modern era, however, international organizations have begun to gain new prominence as well as substantial legal power. Perhaps the best-known example of an international organization that has acquired the legal authority to impose international obligations is the World Trade Organization. The WTO Agreement⁷² has led to the effective transfer of the power to make international agreements in two ways.

First, the WTO permits a three-fourths majority of the member states to adopt an interpretation of the terms of the various trade agreements falling under the WTO jurisdiction.⁷³ Because the trade agreements comprising the WTO often set out broad principles to promote global trade rather than giving specific detailed obligations, an interpretation adopted by three-fourths of the WTO membership could effectively create a new obligation on a member state against the will of that member state.⁷⁴

For instance, in the famous "sea turtle" case, a WTO Appellate Body used a disputable interpretation of broadly framed language to rule against U.S. regulations restricting shrimp importations from countries whose practices harm sea turtles.⁷⁵ Article XX of the GATT Agreement, the pre-WTO trade agreement incorporated into the WTO regime, lists the exceptions that permit countries to depart from general WTO free-trade obligations. The provision reads, in part:

71. See, e.g., CHARLES CHENEY HYDE, *INTERNATIONAL LAW* §§ 495-509 (1922).

72. Agreement Establishing the World Trade Organization, 33 I.L.M. 9 (1994) [hereinafter WTO Agreement].

73. *Id.* art. IX, § 2, at 9 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. . . . The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.").

74. Thus far, the WTO member states have not yet exercised this power, but it remains, at least in theory, an option.

75. United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, at <http://www.wto.org/wto/ddf/ep/public.html> (last visited Sept. 20, 2000).

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries . . . nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.⁷⁶

The WTO panel went on to find that the U.S. policy restricting sea-turtle importation improperly favored some nations over others. Key to the decision was its view that the policy of exemptions in favor of Caribbean nations who had signed separate regional agreements on sea-turtle protection constituted "unjustifiable discrimination."⁷⁷

The merits of the case under the WTO rules is not important here. Rather, it is simply worth noting that the WTO Council also has the power to make this interpretation permanently binding on the United States with a three-fourths vote. Therefore, even if the United States opposed the interpretation of an important term such as "unjustifiable discrimination" (as it did in this case), it could still be held responsible for obeying the interpretation if three-fourths of the other member states voted against the United States.

The policy merits of this voting procedure are obvious. In the old GATT regime, any decision on an interpretation had to be reached by unanimous consensus, giving any member state an effective veto over the interpretation process. A three-fourths majority would still require strong consensus but it would avoid allowing individual holdouts to hamstring the whole organization.⁷⁸

76. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. 1700, 55 U.N.T.S. 187 (emphasis added).

77. United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, at <http://www.wto.org/wto/ddf/ep/public.html> (last visited Sept. 20, 2000).

78. The WTO is only the most prominent example of this type of international institutional arrangement, in which unanimous voting rules do not exist. Others include the International Criminal Court, the Montreal Protocol for Ozone Reduction, and the International Convention for the Regulation of Whaling. See International Whaling Convention, art. V, 161 U.N.T.S. 72 (1946) (providing for a three-fourths voting rule to amend whaling reduction obligations); Montreal Ozone Protocol, art. 2.9(c), 26 I.L.M. 1550 (1987) (providing for a two-thirds vote for adjusting amounts and timing of ozone reduction policies); Rome Statute of the International Criminal Court, art. 9(1) (adopted July 17, 1998), 37 I.L.M. 999 (1998) (providing for a two-thirds vote in defining elements of an international crime). See generally David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154 (1995) (describing conflicts

For U.S. constitutional purposes, however, the three-fourths majority procedure raises the theoretical possibility that three-fourths of the WTO membership could vote to create a new international law obligation on the United States. Moreover, this obligation could be imposed over the explicit objections of the U.S. government. In other words, the United States has prospectively committed itself to agree to whatever interpretations are adopted by three-fourths of the WTO membership or a WTO dispute panel. To the extent such interpretations turn on broad phrases such as "unjustifiable discrimination," the power to interpret these agreements can become, effectively, the power to *amend* the terms of the original agreement⁷⁹ without further participation by Congress or the Senate. When ratifying the WTO's terms for "unjustifiable discrimination," did Congress really agree that it would cede some of its discretionary ability to pursue environmental protection policies? This is one way that the WTO has been delegated some portion of the U.S. government's international agreement-making power,⁸⁰ and raises the exact same delegation concerns expressed by the U.S. delegation to the ILO.

The United States may always withdraw from the WTO Agreement⁸¹ if it opposes a WTO interpretation or panel decision. Moreover, under the terms of the WTO implementing legislation, none of the panel determinations are directly enforceable in U.S. courts.⁸² But the fact that the United States can withdraw from an international obligation—and

created by the nonconsensual voting rule).

79. The WTO Agreement also explicitly allows a three-fourths majority of member states to amend the WTO Agreement. See WTO Agreement, *supra* note 72, art. X, § 1, at 20. Unlike the interpretation procedures, however, no member state is held responsible under international law for amendments that would alter its rights and duties until it has accepted the amendment. See *id.* art. X, § 3, at 20.

80. The WTO Agreement also establishes dispute resolution panels that are authorized to issue binding interpretations on the application of the global trade agreements. WTO Agreement, *supra* note 72, at 112-35. Such decisions, while binding under the terms of the agreement and international law, are not enforceable as a matter of U.S. law unless independently implemented by Congress.

81. See WTO Agreement, *supra* note 72, art. XV, § 1, at 23 ("Any Member may withdraw from this Agreement.").

82. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b)(2)(B)(i), 108 Stat. 4815 (1994) (codified at 19 U.S.C. § 3512) (preventing a WTO panel decision from being "binding or otherwise [being] accord[ed] deference" by federal courts).

that those obligations cannot be directly enforced in U.S. courts—does not mean that the constitutional procedures creating that obligation are unimportant. Rather, the Constitution contemplates that the power to enter into any important international agreement is to be held by the U.S. government and exercised only in accordance with certain constitutional procedures.⁸³ As the U.S. representatives at the original ILO conference argued, allowing a non-U.S. entity to interpret or effectively create new obligations circumvents this basic constitutional design.

It is important to point out that even if one concedes that some delegation of U.S. international agreement power has been transferred, such a delegation could still be constitutional. The constitutional arguments will be discussed in Part III. The purpose here is simply to emphasize *how* the power to create international obligations on the United States has been effectively transferred to an international organization. Indeed, this delegation of power is not surprising given the characteristics and ambitions of the new kind of international law.

2. Legislative Powers

The Constitution vests the power to legislate in Congress.⁸⁴ While there are no specific prohibitions on delegating this legislative power to other parts of the government or even to non-government entities, courts have consistently held that Congress cannot voluntarily transfer this power to legislate absent constraining principles without violating its constitutional duties. As the Supreme Court famously declared, "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever law as he thinks may be needed or advisable"⁸⁵

83. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(1)-(4) (1986) (discussing various mechanisms for making international agreements).

84. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . .").

85. *A.L.A. Schechter v. United States*, 295 U.S. 495, 537-38 (1935). Of course, the Court has not used the non-delegation doctrine to overturn a federal statute since *Schechter*. But the doctrine lives on, in theory at least, if not in practice. See *Clinton v. New York*, 524 U.S. 417, 484 (Breyer, J., dissenting) (rejecting the majority's analysis striking down the Line Item Veto statute but noting that "[t]he 'nondelegation' doctrine represents an added constitutional check upon Congress[s] authority to delegate power to the

There are two methods by which Congress may transfer legislative powers to international organizations. First, and most commonly, Congress may delegate the power to create legislation via a self-executing treaty or international agreement. Second, Congress may assimilate international or foreign law by using normal legislation to incorporate international or foreign laws as "laws of the United States" for the purposes of Article III and Article VI of the Constitution.

a. Delegation by International Agreement

Under Article II, treaties are made by the President with the concurrence of two-thirds of the Senate. Many international agreements are also made by executive agreement and the approval of both Houses of Congress.⁸⁶ No matter what the process, the Constitution plainly intended the creation of international obligations to be exercised by one, or both, of the federal political branches. Because such agreements, if deemed self-executing, can have the status of federal law and are equivalent to normal legislation, they must be enforced by the President and the courts just like any other federal law.⁸⁷

Executive Branch").

One lower federal court has recently applied the non-delegation doctrine to invalidate environmental regulations. See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (remanding an administrative order to the agency due to lack of the "intelligible principle" required by the nondelegation doctrine), *reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999). The Supreme Court has granted certiorari and could use the case to revive the doctrine. See *Browner v. Am. Trucking Ass'ns*, 120 S. Ct. 2003 (2000). At the very least, this case indicates that some form of the non-delegation doctrine continues to exist in federal court jurisprudence.

86. See *supra* text accompanying note 69.

87. See U.S. CONST. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."); see also *United States v. Belmont*, 301 U.S. 324, 331 (1937) (holding that a sole executive agreement between the President and the Soviet Union supersedes inconsistent New York law).

Recently, John Yoo has offered an exhaustive historical study of the treaty power and concluded that the original understanding supports a presumption against the self-execution of treaties. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2091-94 (1999). Yoo's conclusions have drawn two strong rebuttals. See generally Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (critiquing the historical evidence supporting Yoo's conclusions); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (critiquing Yoo's approach to the original

The rise of international organizations and multilateral agreements means that the power to make international agreements, assigned by the Constitution to the President and the Senate, is no longer exclusively a tool of diplomacy between equal and sovereign states. Rather, the international agreement power can place the United States under the authority of an international organization that is itself empowered to create and possibly enforce new international obligations and norms.

For instance, just as a legislative act raises delegation concerns if it does not specify standards constraining an agency's discretion, a broadly worded international agreement could effectively transfer the power to make international agreements, which is sometimes also the power to make binding federal law, to an international organization empowered to interpret and enforce the terms of the agreement. In other words, international obligations, previously exclusively imposed through recognition of custom or voluntary acceptance by agreement, can now be created by an international organization acting under the broad authority of a general multilateral agreement. Moreover, because these agreements increasingly seek to regulate areas of private party conduct, these agreements can serve as an alternate mechanism for domestic legislation.

This kind of delegation of legislative power via international agreement can be seen in a recent case involving the ICJ and Virginia's administration of capital punishment. In 1998, Paraguay sued the United States in the World Court⁸⁸ seeking to block Virginia's execution of Angel Francisco Breard, a Paraguayan national and convicted murderer, on the grounds that Breard was not advised of his rights to see consular officials pursuant to the Vienna Convention on Consular Relations.⁸⁹ The ICJ is authorized by the Statute of the ICJ, a treaty of the United States, to decide questions of international law within its jurisdiction including: (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of

understanding as "contractual" rather than "democratic").

88. Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. (Apr. 9, 1998), 37 I.L.M. 810 (1998), *available at* <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited Sept. 20, 2000).

89. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, 292 [hereinafter Vienna Convention].

any fact which, if established, would constitute a breach of international law.⁹⁰ Moreover, the Vienna Convention itself specifically gives the ICJ compulsory jurisdiction over disputes about the interpretation or application of the Convention.⁹¹ The ICJ therefore asserted jurisdiction pursuant to this Article.⁹²

Because Breard's execution was scheduled shortly after Paraguay brought its suit, the ICJ issued an order that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . ." ⁹³ The "provisional measures" order was issued pursuant to Article 41 of the Statute of the International Court of Justice, which states: "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."⁹⁴

The substantive dispute before the ICJ concerned whether a violation of the Vienna Convention creates an international legal obligation on the United States (and, therefore, Virginia) preventing Virginia from executing Breard. But for the purposes of this discussion, the important question is: What is the domestic legal status of the ICJ's provisional order?⁹⁵

In its petition before the Supreme Court, Paraguay argued that the provisional order is the equivalent of a self-executing treaty under U.S. law. As such, Paraguay argued that the Supreme Court was obligated to order Virginia to stay Breard's

90. Statute of the International Court of Justice, June 25, 1945, art. 36(2)a-c, 59 Stat. 1055, T.S. No. 933. [hereinafter Statute of ICJ]

91. Vienna Convention, *supra* note 89, art. I.

92. *See* Para. v. U.S., 37 I.L.M. at 818.

93. *Id.* at 819.

94. Statute of ICJ, *supra* note 90, art. 41(1).

95. For a useful discussion of the *Breard* affair's implications for international law in the United States, see Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999). Professor Bradley uses the *Breard* saga to highlight a conflict between the conceptions of international law advocated by many academics and the manner in which international law is treated by U.S. courts and policymakers. *Id.* at 531-32. Thus, he seems to argue that a federal court should reject the view that ICJ provisional orders are self-executing treaties. *Id.* at 561. The important point relevant to this Article, however, is that prominent scholars have argued for the equivalent of a delegation of treaty-making and legislative power and the Supreme Court has not explicitly considered or rejected this theory.

execution because the provisional order was the equivalent of a normal treaty and therefore the "law of the land" under the Supremacy Clause.⁹⁶

In other words, Paraguay was asking the Supreme Court to treat an order interpreting a treaty, in this case the Statute of the ICJ, as equivalent to the original treaty itself as a matter of U.S. law. Thus, the ICJ has not been delegated the power to overrule the Supreme Court. Rather, the ICJ, using its Article 41 provisional measures powers, essentially has been delegated the power to create a new treaty obligation. But this international obligation to obey ICJ provisional orders may not have been contemplated by the Senate when it ratified the Statute. Moreover, Paraguay and prominent U.S. commentators argued that the provisional order, as the equivalent of a treaty, is a self-executing obligation enforceable in U.S. courts.⁹⁷ Therefore, they asked the Supreme Court to grant a stay based on the authority of the provisional order.⁹⁸ As such, they argued that provisional orders from the ICJ are indistinguishable, as a matter of U.S. law, from legislation passed by Congress.

In the *Breard* litigation, the Supreme Court did not address the status of the ICJ's provisional order under U.S. law. Instead, it found that *Breard's* Vienna Convention claim was procedurally defaulted because *Breard* had failed to raise this claim during his previous appeals.⁹⁹ Alternatively, it noted that Paraguay's suit against Virginia was barred under the Eleventh Amendment.¹⁰⁰ The Court's failure to even address the status of the ICJ order leaves the question open.¹⁰¹

96. Petition for a Writ of Habeas Corpus, *In re Angel Francisco Breard*, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8660).

97. Paraguay filed a motion supporting *Breard's* habeas petition and a group of prominent international law professors filed a friend-of-the-court brief. Motion for Leave to File a Bill of Complaint, Complaint, and Memorandum in Support, *Republic of Paraguay v. Gilmore*, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-125); Statement Amicus Curiae of International Law Professors George A. Bermann, David D. Caron, Abram Chayes, Lori Fisler Damrosch, Richard N. Gardner, Louis Henkin, Harold Hongju Koh, Andreas F. Lowenfeld, W. Michael Reisman, Oscar Schachter, Anne-Marie Slaughter, and Edith Brown Weiss, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-1390).

98. *See id.*

99. *Breard*, 523 U.S. at 375-77.

100. *Id.* at 377-79.

101. At least one lower federal court, however, has rejected claims that final judgments of the ICJ should be treated as self-executing treaties

The *Breard* case highlights the collision between a creature of the new international law, the ICJ, and the basic structure of the U.S. Constitution.¹⁰² In this case, a multilateral treaty, the Statute of the ICJ, designated an independent international organization to interpret the Statute's obligations as well as the obligations imposed by other treaties. In the process of interpreting the obligations, the independent international organization, in this case the ICJ, essentially creates a new treaty obligation that many argue is the equivalent of federal law and enforceable in U.S. courts. If this view is accepted, the ICJ has potentially garnered the power to create treaty obligations that are equivalent to the "law of the land."

The ICJ, however, is not Congress acting pursuant to its Article I powers. It is also not the Senate acting pursuant to its Article II powers. Rather, it is a non-federal entity acting pursuant to a delegation, via an Article II treaty, to interpret and create the equivalent of new Article II treaties that might be enforceable in U.S. courts. This is a delegation of Congress's power to legislate, normally exercised via Article I or Article II, and it creates a tension with the Constitution's allocation of "all legislative power"¹⁰³ to Congress.¹⁰⁴

enforceable in U.S. courts. See *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (finding that obligations to abide by ICJ judgments created by the U.N. Charter do not intend to "vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government"); see also *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 311 (E.D.N.Y. 1995) (rejecting the petitioners' claim that U.N. resolutions condemning Libyan terrorism authorize a private right of recovery on the part of terrorists' victims).

102. The merits of the ICJ's decision under international law are not discussed here, but the authority of the provisional orders under international law is contested. See *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 903, reporter's note 6 (1987).

103. U.S. CONST. art. I, § 1.

104. Along similar lines, some litigants have sought to enforce resolutions of the U.N. Security Council in U.S. courts arguing that Article 25 of the U.N. Charter requires member states to obey all Security Council resolutions. This issue raises somewhat different questions than the ICJ situation because the President's representative on the Security Council holds a veto. Still, under this Article 25 theory, the Security Council, acting with the President, could create law enforceable in U.S. courts without congressional participation. Two courts have recognized this possibility, but both have avoided directly deciding the issue. See *Diggs v. Richardson*, 555 F.2d 848, 850 n.9 (D.C. Cir. 1976) ("[W]e avoid the larger question raised by this case . . . whether Article 25 of the U.N. Charter . . . can ever give rise to a self-executing resolution . . ."); *United States v. Steinberg*, 478 F. Supp. 29, 33 (N.D. Ill. 1979) (noting in dicta that the United States has a "continuing obligation to observe . . . all of its

b. *Delegation by Assimilation*

Congress may also delegate its legislative powers through the process of normal legislation. For instance, Congress has historically assimilated state law through statutes that adopt a state's law as the federal law governing a federal territory or enclave.¹⁰⁵ Such federal statutes have also adopted any subsequently enacted state law, thereby essentially allowing state law to define the content of federal law in a particular area.¹⁰⁶

In one situation, a federal statute has similarly assimilated foreign law into federal law. The Lacey Act, a statute regulating interstate commerce of wildlife, was amended in 1981 to criminalize commercial trade in wildlife "taken in violation of federal, state, foreign or tribal law."¹⁰⁷ In doing so, the statute essentially adopts foreign law as federal law for the purposes of regulating commerce in wildlife. Thus, a foreign law adopted after the passage of the Lacey Act amendments can form the basis for a Lacey Act prosecution.

In effect, the foreign government defines the legal violation that serves as the basis for a Lacey Act prosecution. Because Congress's incorporation of foreign law is not limited to laws existing at the time that Congress passed the statute, it is not plausible to argue that Congress simply incorporated an existing set of laws into federal laws. Rather, it has incorporated any laws that might relate to the importation of wildlife that are subsequently passed by a foreign government.

undertakings under" the U.N. Charter, "including support of the resolutions adopted by the Security Council"). Although Congress has authorized the President to apply economic and other kinds of sanctions pursuant to Security Council Resolutions, see 22 U.S.C. 287 c(A), it has not endorsed judicial enforcement of such resolutions. The President had gone out of his way to disclaim such a judicial role in an executive order implementing Security Council obligations against Rwanda that such an order "does not create any right enforceable in court." See Exec. Order. No. 12,918, 59 Fed. Reg. 28,205 (May 26, 1994).

105. For a useful review of the historical evolution of federal assimilation of state law, see Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 238-53 (1997).

106. See, e.g., 18 U.S.C. § 13 (1994) (adopting all state criminal laws, future and existing, as federal criminal laws for enclaves subject to exclusive federal jurisdiction). This statute was upheld against challenges that it unconstitutionally delegated legislative power to state governments in *United States v. Sharpnack*, 355 U.S. 286, 286 (1958).

107. 16 U.S.C. § 3372(a) (1994).

Courts have generally upheld Lacey Act prosecutions in the face of defendants challenging the law as constituting an impermissible delegation of federal legislative power to foreign by arguing that the foreign law violation is simply a factual predicate for the application of federal law.¹⁰⁸ Nevertheless, the controversy over the Lacey Act has not been settled by the Supreme Court and the delegation attack continues to be advanced by some commentators.¹⁰⁹ In any case, the purpose here is to illustrate how Congress could directly incorporate foreign or international law into federal law through simple legislative assimilation. For instance, when Congress passed the Torture Victim Protection Act (TVPA),¹¹⁰ which permits individuals to sue foreign officials engaged in official torture, it defined violations as a matter of federal law.¹¹¹ However, it relied heavily on customary international law to shape its definition. The legislative report stated that prohibition on torture and summary executions has "assumed the status of customary international law."¹¹² Furthermore, Congress specifically stated that its definition "tracks the definition of torture" outlined in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.¹¹³ Congress explicitly relied on the definitions created in an international treaty to create federal law, and it is only one step away from simply delegating the power to define torture to the international body holding the power to interpret or modify the Torture Convention.

108. See, e.g., *United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998) (holding that the "foreign law" requirement is only a factual predicate for the application of federal law); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (same); *United States v. Molt*, 599 F.2d 1217, 1218 (3d Cir. 1979) (same).

109. The Supreme Court's casual attitude toward assimilation of state law has been recently subjected to academic criticism. See Sarnoff, *supra* note 105, at 270-77. Additionally, the Office of Legal Counsel has criticized delegations via assimilation to non-federal entities, arguing, for instance, that permitting a non-federal entity to amend congressional legislation establishing an arbitration panel would constitute an unconstitutional delegation of federal legislative power. See *Constitutional Issues Raised by Inter-American Convention on International Commercial Arbitration*, 4B Op. Off. Legal Counsel 509, 510-12 (1980).

110. 28 U.S.C. § 1350 (1992).

111. *Id.* (defining "torture" and "extrajudicial killing").

112. H.R. REP. NO. 102-367, at 2-3 (1991).

113. *Id.* at 4.

This scenario may seem fanciful, but it is based on a real example. In 1994, the United Nations Human Rights Committee (UNHRC) asserted its right to interpret the compatibility of reservations and declarations of understandings made in relation to the International Covenant on Political and Civil Rights (ICCPR). The Committee argued that many reservations or interpretations to the ICCPR are illegal under international law and that "[it] necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant."¹¹⁴ It is not hard to imagine the UNHRC asserting similar authority to interpret the definitions of torture in the TVPA or other U.S. statutes purporting to incorporate definitions from customary international law.¹¹⁵

Again, the constitutionality of this kind of delegation is difficult to resolve. But it is worth pointing out the potential conflict between international organizations or foreign governments acquiring the power to define and create the *substance* of U.S. law and Article I's allocation of this power to Congress.

3. Executive Powers

The new international law's ambitions have also increased pressures for international organizations to directly enforce international law, rather than relying exclusively on national government enforcement. Acquiring the power to directly enforce international obligations has an obvious appeal to international organizations that seek to maintain uniformity and fairness in the enforcement of the new international law. This section reviews examples of how such delegations of executive powers have already begun to occur.

The President is entrusted with the power to "take care" that the laws passed by Congress are properly executed.¹¹⁶ He is also provided with the power to appoint officers of the United

114. See U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382d mtg. at ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom24.htm>.

115. For a sharp criticism of General Comment 24's attitude toward reservations, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 151 U. PA. L. REV. (forthcoming 2000) (on file with author).

116. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . .").

States with the advice and consent of the Senate.¹¹⁷ These appointment powers have been understood to be an important tool for maintaining the President's control of the executive branch and crucial to preserving the President's constitutional authority as Chief Executive.¹¹⁸

These appointment powers, however, serve as a stumbling block to efforts to provide independent international oversight of certain multilateral agreements. Most prominently, arms control agreements, especially the recently ratified Chemical Weapons Convention (CWC),¹¹⁹ rely on verification of treaty compliance through the use of international inspectors who are not accountable to domestic governments.¹²⁰

The CWC creates an ambitious verification regime intended to maintain a complete prohibition on the stockpiling and production of chemical weapons.¹²¹ In order to detect cheating, the CWC empowers an independent international organization, the Organization for the Prohibition of Chemical Weapons, to enter and search suspect sites.¹²² Unlike previous arms control agreements, the verification measures will likely require searches of private party sites because many non-governmental sites also have the capability of producing chemical weapons materials.¹²³

The Technical Secretariat inspection teams are empowered, under the CWC's implementing legislation, to conduct inspections of any U.S. facilities suspected of

117. U.S. CONST. art. II, § 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States . . .").

118. See *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam) (noting that the purpose of the Appointments Clause is rooted in separation of powers concerns rather than simply "etiquette or protocol").

119. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21 (1993), 32 I.L.M. 800 (1993) [hereinafter CWC]; see also Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-856 (codified at 22 U.S.C. §§ 6701-71 (Supp. IV 1999)).

120. This argument is associated most prominently with John Yoo. See generally Yoo, *supra* note 11.

121. CWC, *supra* note 119, at 804 ("Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction . . .").

122. *Id.* at 860-63.

123. See Yoo, *supra* note 11, at 91-92 & n.19.

involvement in the production of illegal substances.¹²⁴ Refusing such inspections is a violation of federal law.¹²⁵ Thus, the inspection teams are empowered by the federal government to directly search private facilities without seeking permission from officials of the U.S. government.¹²⁶ The members of the CWC inspection teams are not appointed by the President or any U.S. official.¹²⁷ They are also not accountable to or removable by any U.S. official. Although they are required to notify U.S. officials when they begin a search, they do not take orders from any U.S. official.

As John Yoo has usefully pointed out, this CWC inspection regime creates tensions with the Constitution's allocation of appointment powers to the President.¹²⁸ The Appointments Clause serves to ensure that any officials exercising the power to execute and enforce federal law are responsible to the President, who is himself accountable to the general electorate. While Yoo's analysis of the Appointments Clause's application to the CWC regime has been criticized for not focusing on the inspectors' status as non-employees of the federal government,¹²⁹ his broader point about the inherent tensions

124. 22 U.S.C. § 6723(b)(1) (Supp. IV 1999) ("Any duly designated member of an inspection team of the Technical Secretariat may inspect any plant, plant site, or other facility or location in the United States subject to inspection pursuant to the Convention.").

125. *Id.* § 6726 ("It shall be unlawful for any person willfully to fail or refuse to permit entry or inspection, or to disrupt, delay, or otherwise impede an inspection, authorized by this Chapter.").

126. The CWC legislation does require, however, that the U.S. government be notified and that a representative of the federal government accompanies the inspection team. *Id.* § 6723(b)(2).

127. While the President may object to a particular inspector, he may do so only under extremely narrow conditions such as a reasonable belief that the inspector is engaged in terrorist activities, has committed acts that would be felony crimes in the United States, or poses a risk to the national security or economic well-being of the nation. *Id.* § 6723(b)(3)(A)(i)-(iii). This reverses the normal appointments procedure whereby the President selects an individual and asks Congress to approve.

128. See Yoo, *supra* note 11, at 116-30.

129. See Neal Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 392-96 (1998) (arguing that Appointments Clause procedures do not apply to individuals unless they are employees of the federal government). Professor Kinkopf relies heavily on the warrant requirement as a sufficient check on overzealous inspectors. See *id.* at 395 (discussing the "check" vested in an "Article III judge"). But the Appointments Clause serves as another check, separate and independent from the warrant requirement, because it makes all officials accountable to the

between independent verification regimes and the Appointments Clause is persuasive.

To the extent that international agreements require independent verification regimes, and in the arms control area such verification is crucial,¹³⁰ officials empowered to conduct such verification procedures must be independent of member states who might prevent the effectiveness of their searches. On the other hand, the U.S. Constitution squarely contemplates vesting the power to execute federal laws in officials who are appointed by the President alone. Any future international regime dependent on effective verification procedures will run into the same competing goals: independent verification versus constitutionally-mandated accountability.¹³¹

4. Judicial Powers

The recognition of private party rights under international law has created pressures to shift adjudication of such rights away from domestic courts and toward international tribunals. As international law increasingly affects private party rights, it is not surprising that pressures for neutral trans-border adjudication of these private rights lead toward the displacement of national courts.¹³² The best example of this

President. The Court has never held that a warrant requirement sufficed to solve an Appointments Clause dilemma.

130. Verification concerns may have doomed passage of the Comprehensive Nuclear Test Ban Treaty. *See generally* Comprehensive Test-Ban Treaty, 35 I.L.M. 1439 (1996); R.W. Apple, Jr., *The G.O.P. Torpedo*, N.Y. TIMES, Oct. 14, 1999, at A1 (describing and condemning the Senate's rejection of the test-ban treaty); Richard Perle, *Neither Isolationists Nor Fools*, N.Y. TIMES, Oct. 19, 1999, at A23 (criticizing the test-ban treaty for weak verification procedures).

131. As Yoo points out, other international agreements have created structures similar to the CWC, although none of these agreements have been ratified or implemented by Congress yet. *See* Yoo, *supra* note 11, at 130 n.175 (discussing ozone reduction, air pollution, and whaling treaties).

There are other areas in which the President's power could be delegated. Most prominently, the President could delegate his authority as Commander-in-Chief of U.S. military forces to foreign commanders. The limits of the President's authority to delegate this power have never been fully explored because there have been no recent examples of U.S. soldiers serving under exclusively foreign command. Some commentators have argued that the provisions of the U.N. Charter authorizing the President to transfer command over U.S. military forces to U.N. commanders could be deemed an unconstitutional delegation of the Commander-in-Chief power. *See* Glennon & Hayward, *supra* note 11, at 1593-95.

132. Similar pressures of a much greater magnitude have occurred in Europe with the rising importance of the European Court of Justice (ECJ).

trend in the United States can be found in the dispute resolution panels for dumping cases created by the North American Free Trade Agreement (NAFTA).¹³³

Dumping cases involve challenges by U.S. parties to a foreign company's alleged sale of goods in the U.S. market at a price below the sale of the same good in the foreign company's home market. Prior to NAFTA and its predecessor agreement,¹³⁴ the Secretary of Commerce and the International Trade Commission (ITC) had the sole authority to impose duties on foreign companies found to be dumping.¹³⁵ Such determinations were reviewable in the Court of International Trade (CIT)¹³⁶, a court created to exercise the judicial power found in Article III of the Constitution.¹³⁷ The CIT, in turn, was reviewed by the Court of Appeals for the Federal Circuit and the Supreme Court.¹³⁸

Under NAFTA, the ITC and the Secretary of Commerce still retain initial jurisdiction over dumping claims. However, if a U.S. party seeks appeal of an ITC decision, the foreign party may remove the case to a NAFTA arbitral panel.¹³⁹ Under the terms of NAFTA, such removal eliminates any possibility of further judicial review by an Article III court.¹⁴⁰ Thus, at least one commentator has forcefully argued that this structure violates the Article III requirement that "the judicial power of the United States shall be vested in" courts meeting

Commentators have seen the transfer of more cases to the ECJ as a natural process paralleling increased integration. See generally Dieter Grimm, *The European Court of Justice and National Courts: The German Constitutional Perspective After The Maastricht Decision*, 3 COLUM. J. EUR. L. 229 (1997); Nicholas Stewart, *The Relationship Between the European Court of Justice and the Courts of the Member States of the European Communities*, 5 INT'L L. PRACTICUM 41 (Autumn 1992).

133. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (codified at 19 U.S.C. §§ 3301-3473 (1993)).

134. NAFTA was preceded by an agreement between Canada and the United States. See Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281. For the purpose of this section, the Free Trade Agreement and NAFTA have identical provisions relating to dumping cases.

135. See 28 U.S.C. § 251(a).

136. See 19 U.S.C. § 1671-73h, 1677(1), (2) (1999).

137. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . .").

138. 28 U.S.C. § 1295(a)(5) (2000).

139. 19 U.S.C. § 1516(g).

140. See 19 U.S.C. § 1516(g)(2)(B).

Article III's requirements of life tenure and guaranteed income.¹⁴¹

Furthermore, under Supreme Court doctrine, the NAFTA arbitration panels might be upheld because the private party dumping challenges could be considered "public rights" not requiring Article III judicial review.¹⁴² But the larger trend is what matters, because the pressures of the new international law are not limited to dumping rights. For example, the proposed International Criminal Court, which is in the process of garnering enough ratifications for its creation, will require member nations to turn over suspected international criminals to its jurisdiction.¹⁴³

In order to promote neutral adjudication of international rules in favor of free trade policies, the new international law creates pressures to shift judicial review of private party challenges away from domestic courts. Leaving such adjudication to domestic judicial review and federal court litigation threatens to disrupt the smooth flow of international trade rules. From the standpoint of international law development, such neutral and independent adjudication is obviously desirable because it prevents each member country from allowing private party lawsuits to block implementation of international trade rules. From the standpoint of constitutional structure, however, the elimination of an Article III court's power to review a federal question lawsuit is far less attractive.¹⁴⁴

141. See Chen, *supra* note 11, at 1456-58.

142. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589-93 (1986). Chen disputes the application of the "public rights" doctrine to anti-dumping cases because the United States is not a party to a dumping case and such cases do not create compelling interests requiring unreviewable administrative discretion. See Chen, *supra* note 11, at 1470.

143. See Rome Statute of the International Criminal Court, art. 89 ¶ 1, (adopted July 17, 1998), 37 I.L.M. 999 (1998) ("State Parties shall . . . comply with requests for arrest and surrender."). This provision could potentially create a problem if the United States is forced to turn over a criminal who it wants to prosecute. If the proposed ICC actually tries but acquits that criminal, the United States could not bring another prosecution. For a useful review of this quirk in the proposed ICC statute, see Lara A. Ballard, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 144-46 (1997).

144. Professor Havel argues that eliminating an Article III court's appellate authority over the decision of an international tribunal would require some kind of constitutional transformation, see Havel, *supra* note 11, at 347-65, but he does not recognize that the NAFTA procedures *already* shift the final appellate authority away from Article III courts; *supra* notes 134-41

C. SUMMARY

These examples illustrate how the “new” international law has already begun to create pressure for the transfer of the international agreement, legislative, executive, and judicial powers to international institutions. Because substantial portions of the federal government’s constitutionally-assigned powers are being transferred to international organizations, these transfers may be called “international delegations.”

In contrast to traditional international law, the aspirations of the new international law seek to develop general *positive* rules of broad applicability and create pressures on states to *delegate* the authority to administer these rules to independent international organizations like the WTO and the ICJ. Moreover, the international law’s ambition to create a uniform law independent of national government interference, as well as its expansion into areas affecting private party rights, has led to the transfer of enforcement and adjudication powers to independent agencies like the CWC Secretariat and the NAFTA arbitration panels. In each of these cases, powers assigned to a particular branch of the federal government by the Constitution have been *delegated* to an international institution. Not every such delegation necessarily violates the Constitution, however, so the next part will examine how the existing separation of powers and delegation doctrines might resolve the constitutional questions raised by the international delegation framework.

III. THE CONSTITUTIONALITY OF INTERNATIONAL DELEGATIONS

Determining the constitutionality of the international delegations identified depends in large part on how one approaches questions of constitutional structure. Commentators on the subject of constitutional structure generally fall into two camps: formalists and functionalists.

and accompanying text. This point exemplifies the difference between Professor Havel’s analysis and the analysis advanced in this Article. While Professor Havel seeks to develop a theory of interpretation to ground certain kinds of international delegations, this Article argues that such delegations are *already* occurring and that no elaborate theory to justify such delegations is required because the current Supreme Court would permit them. Indeed, the final two parts of this Article provide reasons why a departure from current doctrine is necessary to restrain international delegations.

Though the Supreme Court approach to delegations in the domestic context appears to side with the functionalists, this section offers arguments for adopting a stricter, formalist view when analyzing the constitutionality of international delegations.

A. FORMALISM AND FUNCTIONALISM

While delegations may be constitutionally suspect, resolving the ultimate issue of their constitutionality depends a great deal on how one approaches questions of constitutional structure. Commentators analyzing constitutional structure, which includes both separation of powers and federalism questions, can be divided into two groups: formalists and functionalists. Advocates of formalism adhere closely to the text, structure and history of the Constitution in order to analyze the constitutional validity of institutional arrangements.¹⁴⁵ This means they take a skeptical view of structural innovations that substantially alter the Framers' constitutional design. Formalists argue that the text of the Constitution assigns particular powers to particular branches and makes no provision for transferring such powers. Moreover, historical evidence suggests that the Founders understood the separation of powers as a mechanism to discourage dominance by factions¹⁴⁶ and to restrain exercises of government power.¹⁴⁷ Along this line, formalist commentators have sharply criticized the Court's approach to the

145. Although labels can sometimes be misleading, some leading commentators writing on the separation of powers in the formalist tradition include Professors Steven Calabresi, Saikrishna Prakash, Gary Lawson, and Stephen Carter. See generally Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993); Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990). I will discuss the unique characteristics of Carter's approach, and its peculiar relevance to international delegations. See *infra* Part III.C.2.

146. See THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that the government structure would have "so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable").

147. See THE FEDERALIST NO. 84, at 581 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (asserting that a formal bill of rights is unnecessary because the system of separated powers itself serves to protect liberty).

Appointments Clause¹⁴⁸ and the Court's unwillingness to block delegations from the legislative branch to the judicial branch.¹⁴⁹

Other commentators have adopted a more pragmatic "functionalist" view. They disagree that readings of the Constitution's structure should adhere rigidly to a formalist reading of the Constitution's text. Indeed, they argue that the Framers themselves intended "to leave to successive Congresses, through the medium of the necessary and proper clause, the flexibility required for shaping the government to the demands of changing circumstances."¹⁵⁰ Adopting this flexible approach, commentators have urged the Court to avoid formalist readings of the Constitution's text when evaluating an innovative structural arrangement.¹⁵¹ Rather, commentators argue that the Court should balance various constitutional values against each other in determining if the challenged arrangement as a whole interferes with a political branch's core functions.¹⁵²

The Supreme Court's doctrines relating to constitutional structure have shifted between formalist and functionalist readings, but much of the Court's doctrine appears to favor a functionalist approach. In 1996, the Office of Legal Counsel (OLC) published a comprehensive survey of the Court's separation of powers jurisprudence.¹⁵³ While its reading of the Court's doctrine is not undisputed,¹⁵⁴ the OLC's analysis usefully reviews and classifies the major trends in the Court's jurisprudence. The OLC identifies four types of separation of powers analyses, each requiring different levels of

148. See Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1379 (1998); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 105-07 (1988).

149. See Carter, *supra* note 148, at 397-404.

150. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 601 (1984); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 596-97 (1989).

151. *E.g.*, Strauss, *supra* note 150, at 604.

152. *E.g.*, Lessig & Sunstein, *supra* note 150, at 4.

153. The Constitutional Separation of Powers Between the President and Congress, Op. Off. Legal Counsel, 1996 OLC Lexis 6 (May 7, 1996) [hereinafter OLC Memo].

154. See Yoo, *supra* note 11, at 121 n.149 (criticizing the OLC's reading of the Supreme Court's Appointments Clause cases).

constitutional scrutiny.¹⁵⁵ The highest level of scrutiny occurs when a challenged reallocation of powers does not follow the Constitution's textually-prescribed procedures.¹⁵⁶ Courts will also provide rigorous scrutiny when Congress appears to be arrogating power for itself.¹⁵⁷ When Congress is not bolstering itself, however, the Court will conduct less scrutiny and ask only if the challenged action impairs the ability of the branch to fulfill its constitutional duties.¹⁵⁸ Finally, when Congress voluntarily delegates away its own power, the Court's doctrine suggests that it would subject the action to the lowest level of scrutiny.¹⁵⁹

The OLC's description of the Supreme Court's doctrine reflects a functionalist bias because it requires formalist adherence to text only in the case of procedural requirements, like the bicameralism requirement¹⁶⁰ and the Appointments Clause.¹⁶¹ Other textual commands, such as Article I's vesting

155. See OLC Memo, *supra* note 153, at 11-33.

156. *Id.* at 13-14 ("Where the constitutional text is unequivocal as to the manner in which the branches are to relate, any attempt to vary from the text's prescriptions is invalid."). The memo notes that the Court has focused in particular on two express procedures: the bicameralism and presentment requirements for passing legislation and the Appointments Clause. *Id.* at 14. For cases in which the Court has done so, see *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271-77 (1991) (prohibiting legislative encroachment into executive branch activity); *INS v. Chadha*, 462 U.S. 919, 946-51 (1983) (requiring bicameralism and presentment).

157. See OLC Memo, *supra* note 153, at 18-25. Examples of aggrandizements include *Buckley v. Valeo*, 424 U.S. 1, 109-43 (1976) (*per curiam*) (involving Congress encroaching upon the executive's appointments powers), and *Bowsher v. Synar*, 478 U.S. 714, 717-19 (1986) (same).

158. See OLC Memo, *supra* note 153, at 27-37. This principle, which the OLC calls the "general separation of powers principle," has never been invoked on its own to strike down a statute. Cases involving this principle include *Morrison v. Olson*, 487 U.S. 654, 685-96 (1988), and *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding federal judge participation in the Sentencing Commission).

159. See OLC Memo, *supra* note 153, at 170 (going so far as to call the nondelegation doctrine "moribund").

160. Two famous cases demonstrate the Court's vigorous commitment to this particular procedure. See *Clinton v. City of New York*, 524 U.S. 417, 445-49 (1998) (striking down the line-item veto statute for failing to meet the bicameralism requirement); *Chadha*, 462 U.S. at 956-59 (striking down the legislative veto on the same grounds).

161. See *Edmond v. United States*, 520 U.S. 651, 666 (1997) (upholding the authority of the Secretary of Transportation to appoint Coast Guard judges by defining such judges as "inferior officers" for Appointments Clause purposes); *Buckley*, 424 U.S. at 140-43 (rejecting Congressional control of appointments

of legislative power in Congress and Article II's Take Care Clause and Executive Power Clause are evaluated only as guideposts to balancing constitutional values. Thus, the OLC advocates, and the Court's doctrine strongly suggests, that the delegation of powers to international organizations should be analyzed from a functionalist perspective.¹⁶² A brief review of the Court's doctrine analyzing delegations outside the federal government confirms the dominance of this functionalist approach.

B. DELEGATIONS TO NON-FEDERAL ACTORS

International delegations would most likely be analyzed under the same framework as delegations to other non-federal entities. Usually, this group comprises states, Indian tribes, and private organizations. In a number of cases, plaintiffs have challenged Congress's ability to transfer powers outside the federal government, and in reviewing these cases courts have generally refused to adopt a formalist reading that would prevent these delegations.

For instance, the U.S. Court of Appeals for the Ninth Circuit has refused to apply the Appointments Clause to situations where non-federal officials exercise significant federal power.¹⁶³ Courts have stated that the Appointments Clause applies only to officers who were appointed by the federal government. The idea here is that it is "immaterial whether [officials] exercise some significant executive or administrative authority over federal activity,"¹⁶⁴ if such

to the Federal Election Commission). But the OLC does adopt a reading that refuses to apply the Appointments Clause to individuals exercising significant authority who are not employed within the federal government. OLC Memo, *supra* note 153, at 67. This analysis, however, effectively permits Congress to circumvent the Appointments Clause simply by allocating power to execute federal laws to a non-federal entity. See Yoo, *supra* note 11, at 121 n.149. This approach to the Appointments Clause also reflects the OLC's functionalist bias because it refuses to view substantial historical and textual support for limiting the transfer of federal appointments power as binding and simply asks whether such a transfer would undermine the executive branch's overall authority.

162. See OLC Memo, *supra* note 153, at 32-33 (noting the "existence of a number of impressive studies arguing that the principle of separation was originally understood to be flexible, open-ended, and consistent with a variety of actual institutional relationships among the three branches").

163. See *Seattle Master Builders Ass'n v. Pac. Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986).

164. *Id.* (alteration in original).

officials are not employed by the federal government. Employment by the federal government may be signified by the "tenure, duration, emolument, and duties" that would be associated with a public office.¹⁶⁵ On this basis, even if a state official or private actor wielded power to execute federal law, they have generally not been subject to Appointments Clause analysis if they are not employees of the federal government. This reading is controversial, however, and the Supreme Court has not conclusively resolved this question.¹⁶⁶ In any case, the Ninth Circuit's analysis remains good law today and exemplifies a functionalist reading of the Appointments Clause.

Additionally, courts have refused to find general separation of powers problems in situations where Congress has transferred significant authority to states, Indian Tribes, or private entities. The Supreme Court has upheld, for instance, a statute that required the Secretary of Agriculture to get the approval of two-thirds of a designated group of farmers before taking certain actions. In this case, the Supreme Court reasoned that the consent requirement does not represent an unlawful delegation. Rather, the consent requirement is simply a condition on the exercise of power that the executive has received from the Congress. "Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.'"¹⁶⁷ The Supreme Court has never found violations of

165. *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

166. Some courts have applied the Appointments Clause to non-federal actors who were not employed by the federal government. See *Confederated Tribes of Siletz Indians v. United States*, 841 F. Supp. 1479, 1486-89 (D. Or. 1994). The Supreme Court has not ruled directly on this question, but it did refuse to grant certiorari to *Seattle Master Builders Ass'n*, when the Ninth Circuit refused to apply the Appointments Clause. 786 F.2d at 1365. Justice Scalia has analyzed this question but only in dicta. See *Printz v. United States*, 521 U.S. 898, 910-11 (1997).

The OLC itself has issued conflicting views on this question, but it currently disavows its prior positions. OLC Memo, *supra* note 153, at 74. Wide disagreements still remain. Compare Yoo, *supra* note 11, at 121 n.149 (attacking OLC Memo), with Kinkopf, *supra* note 129, at 364-81 (attacking Yoo's position and the Appointments Clause analysis in *Printz*).

167. *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939). Again, not all courts have applied this approach. A court recently struck down a statute requiring the Secretary of the Interior to obtain the consent of a state governor before issuing a waiver for Indian tribes seeking to open a gaming establishment. See *Confederated Tribes*, 841 F. Supp. at 1491.

general separation of powers principles in the delegation of federal powers to state, Indian, or private organizations.¹⁶⁸

Historically, courts have applied the non-delegation doctrine to the transfer of Congress's legislative power to states or private entities. The Court has found, for example, that impermissible delegations of federal power occurred when Congress instructed federal courts to apply certain state laws to admiralty cases.¹⁶⁹ Because the federal government has exclusive jurisdiction over admiralty, the Court reasoned that instructing federal courts to incorporate state laws amounts to a delegation of Congress's powers over admiralty to the state governments.¹⁷⁰

The Court has also found that standardless delegations to the President, acting under the advice of private parties, can violate the non-delegation doctrine. In *A.L.A. Schechter Poultry Corp. v. United States*,¹⁷¹ the Court found a statute granting the President the authority to adopt codes of fair competition developed by the industry groups (in this case, the poultry growers) unconstitutional.¹⁷² In striking down this delegation, the Court noted that this delegation was "unknown to our law" because it gave private groups the power to create federal codes.¹⁷³

In recent years, however, the non-delegation doctrine has fallen into disuse. Since the *Schechter* decision, the Supreme Court has failed to apply the non-delegation doctrine and has upheld delegations arguably broader than the impermissible delegation in *Schechter*.¹⁷⁴ Most notably, the Court has upheld

168. The OLC Memo, however, maintains that as a theoretical possibility "in certain circumstances, a congressional delegation of authority to non-federal officials or to private parties . . . might be invalid under the general separation of powers principles." OLC Memo, *supra* note 153, at 170-71. It does not state an example of such an impermissible delegation.

169. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163-66 (1920); *Washington v. W.C. Dawson*, 264 U.S. 219, 225-28 (1924).

170. For a comprehensive discussion of the problems raised by delegations of executive powers outside the federal government, see Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 *passim* (1990).

171. 295 U.S. 495 (1935).

172. *Id.* at 537.

173. *Id.*

174. See, e.g., *Yakus v. United States*, 321 U.S. 414, 419-27 (1944) (upholding broad delegation). This trend in court doctrine is not irreversible. See *supra* note 85 (discussing *Browner v. Am. Trucking Ass'n*s).

broad delegations to state governments, which appear to provide no intelligible principle at all, when it refused to invalidate Congress's *prospective* assimilation of state laws into federal laws.¹⁷⁵ In other words, in a single act, Congress assimilated any *existing* state laws as well as any *future* state laws into federal law. Petitioner Sharpnack challenged this act arguing that state governments had been delegated the power to create binding federal law by assimilating subsequently enacted state statutes.¹⁷⁶ Over a sharp dissent,¹⁷⁷ the Court rejected the petitioner's nondelegation argument even though the majority conceded that the statute did not constrain the state government's discretion.¹⁷⁸ In this way, the Court loosened the nondelegation doctrine's already lax "intelligible" principle requirement.¹⁷⁹

Thus, with a few exceptions in the now distant past, courts have refused to adopt a formalist analysis of delegations from the federal government to non-federal actors. Courts have (1) sometimes refused to consider the Appointments Clause to be applicable; (2) never found a delegation outside the federal government impermissible; and (3) shown little interest in applying a non-delegation doctrine with teeth. In all of these cases, the Court's reliance on a functionalist approach is apparent. Indeed, one commentator concedes that the Court's doctrine on delegations to states and private parties could not be justified if one applied a formalist approach.¹⁸⁰ Given the state of the Court's functionalist approach toward delegations to state and private parties, it is hard to imagine a Court following this functionalist approach finding much fault with the similar delegations to international organizations identified in Part I.

175. See *United States v. Sharpnack*, 355 U.S. 286, 297 (1958).

176. See *id.* at 287. A lower court agreed with *Sharpnack*. See *United States v. A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, 519 n.2 (1935).

177. See *id.* at 297-99 (arguing that the prospective assimilation of state law impermissibly delegates Congress's legislative authority to state lawmakers) (Douglas, J., dissenting).

178. See *id.* at 294 ("Rather than being a delegation by Congress . . . it is a deliberate continuing adoption by Congress for federal enclaves . . . as shall have been already put in effect by the respective States for their own government.").

179. See discussion of assimilation *supra* Part II.B.2.b.

180. See Krent, *supra* note 170, at 68 ("[A] formalist justification for delegations outside the federal government is not possible.").

C. THE CASE FOR FORMALISM

There are at least two peculiar characteristics of international delegations, however, that I believe support adopting a more formalist analysis of international delegations than the Court has adopted in the state and domestic context. First, newly powerful international organizations are likely, as a general matter, to be less politically accountable to the affected populations than states, private parties, Indian tribes, or even administrative agencies. Second, these increasingly formidable organizations also suffer from a serious deficiency in political legitimacy. The importance of both of these factors, accountability and legitimacy, supports taking a more formalistic analysis of international delegations. At the very least, these two crucial "constitutional values" need to be added to a stricter functionalist calculus.

1. The Problem of Accountability

The Constitution reflects a concern for political accountability in two ways. First, it requires members of Congress and the President to undergo regularly scheduled elections where they can be subjected to the will of the electorate.¹⁸¹ Second, and most relevant to the discussion here, the Constitution appears to require these elected officials to take responsibility for the policies implemented by the government, thereby ensuring that the electorate can use their voting power to effectively control the creation of policy.

For instance, the Appointments Clause serves to ensure that the President can be held responsible for the execution of the laws. Alexander Hamilton argued that the Appointments Clause requirement of senatorial approval would encourage public awareness enabling them to attribute responsibility for appointments. "[T]he circumstances attending an appointment . . . would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors."¹⁸² In contrast, Hamilton noted, the contemporaneous New York State appointments process allowed the legislature to shroud

181. U.S. CONST. art. I, §§ 2-3 (providing for regular elections for House and Senate members); U.S. CONST. art. II, § 1 (providing for regular elections for President).

182. THE FEDERALIST NO. 77, at 517 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

appointments in secrecy with the result that "all idea of responsibility is lost."¹⁸³

Similarly, the Constitution's vesting of the Congress with the sole power to legislate and its strenuous bicameralism requirements for passing legislation strengthen the government's accountability for legislation. Because Congress alone has the power to make laws, it alone can be held responsible for the results of their legislation. If Congress can transfer the power to legislate, however, the electorate can impose their will on Congress without any effect on the actual legislation.¹⁸⁴

While there has been some criticism of the electoral process for maintaining accountability,¹⁸⁵ the majority of commentary has focused on the manner by which responsibility for policy is shifted away from politically accountable actors. Thus, commentators arguing against congressional authority to delegate executive powers away from the President and commentators criticizing delegation of legislative powers to administrative agencies have both relied heavily on the detrimental effects on political accountability.¹⁸⁶ They have used public choice analysis to explain why politicians have incentives to shift responsibility for policymaking in order to concentrate directly on re-election.¹⁸⁷ For the most part, these commentators have advocated returning to a formal reading of the Constitution's structure, asserting that the formal

183. *Id.* at 518.

184. This point has been tirelessly argued by Schoenbrod. See SCHOENBROD, *supra* note 60, at 82-96 (pointing out political benefits to legislators for delegating away responsibility for laws).

185. Two popular political reform movements represent this type of criticism: movements to put term-limits on elected officials and movements to reform financing rules for political campaigns. See generally CHARLES LEWIS, *THE BUYING OF THE PRESIDENT 2000* (2000) (urging stricter limits on political donations in presidential campaigns); GEORGE F. WILL, *RESTORATION: CONGRESS, TERM LIMITS, AND THE RECOVERY OF DELIBERATIVE DEMOCRACY* (1994) (proposing a constitutional amendment that would create term-limits on members of Congress). Both of these reform proposals concentrate on improving the process of electoral decision-making rather than making substantive social reform proposals.

186. See, e.g., ELY, *supra* note 60, at 131-34 (arguing that delegation weakens democracy); LOWI, *supra* note 60, at 93 (same); SCHOENBROD, *supra* note 60, at 99-106 (same).

187. See SCHOENBROD, *supra* note 60, at 82-96; Aranson, *supra* note 60, at 55-62.

structure of the Constitution will ensure greater political accountability for policymaking.¹⁸⁸

The Court's doctrine has reflected this concern for accountability in two types of cases. First, the Court has argued that delegations from Congress to administrative agencies could weaken the accountability of legislators for their political decisions.¹⁸⁹ Second, in the federalism context, the Court has expressed concern that Congress can avoid political accountability for its policies by using states to carry out its policies.¹⁹⁰ In both sets of cases, the concern is the same: by shifting, even voluntarily, the constitutional allocation of political powers, Congress muddies the lines of authority for policy-making and makes it harder for the electorate to hold a particular government player responsible for a particular policy. As Justice O'Connor explained in the federal-state context,

where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. . . . [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.¹⁹¹

It is true, however, that the Court has rarely found analogous delegations to state and private parties to be unconstitutional, despite their deleterious effects on political accountability. As discussed previously, the Supreme Court has permitted wide-ranging delegations of both executive and legislative power to states, Indian tribes, and private parties.¹⁹²

There are at least three good reasons, however, for courts to treat accountability problems created by delegations to international organizations differently. First, because they

188. See SCHOENBROD, *supra* note 60, at 155-80 (arguing on formalist grounds for prohibiting delegations).

189. See *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (emphasizing that the nondelegation doctrine ensures that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (same).

190. See *Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."); *New York v. United States*, 505 U.S. 144, 169 (1992) (describing how the federal government can order states to act, and then "remain insulated from the electoral ramifications of their decision").

191. *New York v. United States*, 505 U.S. at 168-69.

192. See *supra* Part III.B (discussing delegations to non-federal actors).

wield powers transferred from different parts of the federal government, and sometimes implement their own will through the federal government, the lines of authority are blurred to an even greater degree than the Court found unacceptable in *New York v. United States*.¹⁹³ A voter would have a hard time determining which government actor has the actual responsibility for the actions of a international organization.

If, for example, the Governor of Virginia had been instructed by the Court to stop the execution of Breard,¹⁹⁴ a Virginia voter who supported the implementation of the death penalty would have had to untangle a complicated web of political responsibility. The Governor would say that he was simply following the dictates of the Supreme Court, but the Supreme Court's decision in that case would have had to have been based on the treaty with the International Court of Justice (ICJ). The Senate and the President, however, would also not be responsible because they can validly claim that they did not directly authorize the ICJ's provisional order to stop the execution. The buck is passed from Virginia to the different branches of the federal government, but the only actually-responsible actor is also the least accountable to that Virginia voter. Like the federal officials in *New York v. United States*, the ICJ "remain[s] insulated from the electoral ramifications of their decision"¹⁹⁵ even though they are effectively legislating a self-executing treaty through their use of the provisional measures authority.

Second, international organizations are less accountable than states or private parties because they are far less likely to be subjected to effective executive oversight. Indeed, one of the main goals of creating more effective international organizations is to limit their control by member states. Thus, the WTO allocates the power to issue interpretations to three-fourths of its membership.¹⁹⁶ Similarly, the CWC regime specifically prevents the executive branch from blocking a surprise challenge inspection.¹⁹⁷

193. 505 U.S. at 169.

194. See *supra* Part II.B.2.a (discussing delegation by international agreement).

195. 505 U.S. at 169.

196. WTO Agreement, *supra* note 72, art. IX., at 19.

197. See *supra* text accompanying notes 119-31 (discussing the CWC inspection regime).

Third, in contrast to most domestic delegations to states or private parties, the scope of an international organization's authority is rarely limited to the constituencies affected by their rules. A state or private organization that is delegated powers by the federal government often has an independent interest to apply the rules in a limited manner because it is at least responsible to the narrow group affected by the delegated powers.¹⁹⁸ For instance, many federal delegations to private organizations involve the creation of industry-wide rules that apply to the industry alone.¹⁹⁹

Under the traditional view of international law, an international organization's authority extended only to nation states. This understanding limits accountability concerns because the organization's reach does not extend beyond its narrow constituency of member states. In contrast, a modern international organization may still be influenced by relatively narrow constituencies (member states, multi-nationals, and non-governmental organizations) yet its goal is to create rules of broad applicability that may directly affect private party rights. For instance, a WTO panel is, in theory, limited to making decisions affecting the member states involved in the dispute. In practice, however, its decision may require adjustments in the creation or application of domestic law affecting private party interests.²⁰⁰ But these panels are, in formal terms, completely *unaccountable* to private interests.²⁰¹

The peculiar characteristics that make the new breed of international organizations so exciting also makes them uniquely unaccountable entities within the U.S. constitutional system. The Founders' concern with maintaining lines of

198. See Krent, *supra* note 170, at 102 (discussing external checks on delegations to non-federal entities including private groups' "need to satisfy their own constituencies").

199. See *id.* (explaining how Congress might adopt miners' custom to permit miners to govern themselves).

200. A recent example of this can be found in the WTO's finding that the United States tax regime supporting exporters violates the WTO Agreement. See United States—Tax Treatment for "Foreign Sales Corporations," at <http://www.wto.org/wto/ddf/ep/public.html>. An adjustment in the disputed tax provision has been estimated to cost U.S. companies billions of dollars. See Joseph Kahn, *U.S. Loses Dispute on Export Sales*, N.Y. TIMES, Feb. 24, 2000, at A1.

201. To be sure, U.S. companies may pressure these panels indirectly, for instance, by pushing the U.S. government to make appeals before the WTO. This power, however, is informal and indirect, and, as the WTO tax case demonstrates, not even necessarily successful.

political responsibility, and the continued emphasis by courts and commentators on the dangers of political unaccountability, suggests that the delegation of federal power to international organizations creates substantial constitutional stress. At the very least, a formalist reading of international delegations would be more likely to preserve the traditional lines of political accountability.

2. The Problem of Legitimacy

International organizations differ from other non-federal entities in the degree of their accountability. They also suffer from another unique failing: a deficit of legitimacy. In the political context, legitimacy refers to justification of a government's authority to rule over its people. Like many phrases of political theory, its meaning is somewhat contested. Nevertheless, Robert Dahl's formulation captures the key elements of political legitimacy. "[A] government is said to be 'legitimate' if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials, or leaders of government possess the quality of 'rightness,' propriety, or moral goodness—the right, in short, to make binding rules."²⁰² Whether an entity has legitimacy matters from both a normative and positive perspective. The efficacy of that organization is likely to be closely related to its success at making its normative case for a particular rule or decision. In other words, predicting the results of an international organization decision will depend on the ability of that organization to implement its goals. On the other hand, the very fact that an organization is successful, from a positive perspective, does not necessarily mean that legitimacy questions are settled. Therefore, any analysis of international organizations should confront the "legitimacy" question.²⁰³

The delegation of federal powers to international organizations, however, raises two problems of political legitimacy. First, to the extent that an international

202. ROBERT A. DAHL, *MODERN POLITICAL ANALYSIS* 41 (2d ed. 1970). For a lengthy discussion and citation to various definitions of legitimacy, see Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge to International Environmental Law?*, 93 AM J. INT'L L. 596, 601 n.29 (1999).

203. The problem of legitimacy is an old one for domestic political theory. It is a new one, however, for theorists of international law because in the past international organizations rarely seemed powerful enough to face legitimacy questions. See Bodansky, *supra* note 202, at 596-97.

organization gains the "right to make binding rules" over American citizens via an international delegation, it must point to some source of legitimacy authorizing its actions. Additionally, its effectiveness in implementing its rules is a reflection of its legitimacy.

An international organization can bring its own source of legitimacy to buttress its authority. Alternatively, it can seek to acquire legitimacy from the federal government. But when an international organization acquires the power to directly govern U.S. citizens, it has very little independent legitimacy. Even worse, because the federal government's political legitimacy is closely linked to its adherence to formal structural arrangements, the international delegations identified actually reduce the overall legitimacy of the federal government, ultimately weakening the legitimacy of both entities.

International law commentators have recognized that international organizations are vulnerable to charges of illegitimacy.²⁰⁴ In the context of the European Union (EU), commentators have written about the EU's "democratic deficit" and poor political legitimacy.²⁰⁵ In this context, commentators have proposed buttressing the EU's legitimacy by instituting forms of democratic control and greater administrative transparency.²⁰⁶ Some commentators have argued that even a transparent EU constrained by a popularly elected assembly still suffers from legitimacy deficits. As one commentator observed of the EU, "legitimacy continues to be channeled through constitutional structures of the Member States"²⁰⁷ This is not surprising because crucial to democratic legitimacy is agreement on what constitutes the relevant *demos*, or shared

204. For some recent discussions of international legitimacy, see David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 558 (1993); CHAYES & CHAYES, *supra* note 41, at 127-34. See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

205. See, e.g., Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 734-38 (1999) (concluding that even a more democratic EU would suffer from a serious legitimacy deficit); see also Bodansky, *supra* note 202, at 597-98 n.10 (citing the "burgeoning literature on 'democratic deficit'").

206. See, e.g., Renaud Dehousse, *Constitutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue?*, W. EUR. POL., July 1995, at 131 (arguing that more EU democracy is the only solution to credibility and legitimacy problems).

207. Lindseth, *supra* note 205, at 737.

community, for the purposes of exercising democratic power.²⁰⁸ Without a consensus on the proper boundaries for the demos, no legitimate popular government can exist. In the context of the EU, commentators have sharply disagreed over whether the EU populations can now be said to constitute a single demos for the purposes of popular government.²⁰⁹

The United States does not belong to any organization that is nearly as ambitious as the EU. Indeed, none of the international organizations of which the United States is a member has mechanisms making them directly responsible to the populations of its member countries or acquiring forms of legitimacy to affect U.S. citizen interest. Rather, these international organizations, even more than the EU, depend on the legitimacy provided by state consent to membership. Thus, the international delegations discussed in this Article essentially depend on the legitimacy of the U.S. government's consent to the delegation. They do not have an independent source of legitimacy.²¹⁰

Because the legitimacy of the U.S. government's consent to such delegations is highly contestable, however, international organizations cannot rely on such consent as a source of meaningful legitimacy. Stephen Carter has eloquently argued that the political legitimacy of the U.S. government, and of the Supreme Court in particular, rests on its adherence to the formal structural requirements of the Constitution.

The constitutional vision of *demos*, then, supposes that our government is the one that the Founders handed down. The interpreter who is guided by the popular imagination must select an

208. *Demos* refers to the political community or shared community that sees itself as a contiguous unit. In the European Union, one court has used the lack of a European *demos* to acquire the power to limit delegations to the EU. See J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219, 224-31 (1995) (discussing the German Constitutional Court's skepticism toward a European *demos*).

209. Compare *id.*, with Lindseth, *supra* note 205, at 709 (recognizing the continued force of nation-state loyalty and stating that "no European *demos* yet exists as a cultural reality").

210. Lindseth identifies a second source of legitimacy for independent organizations: technocratic decision-making. See Lindseth, *supra* note 205, at 683-99 (arguing that EU organizations should concentrate on seeking legitimacy in the same manner as domestic administrative agencies). I do not disagree with his main point that international organizations have necessarily weak claims for legitimacy outside of their narrow technical expertise. Broader claims implicating important political values, like trade or environmental regulation, are likely to be beyond any technical expertise and should therefore seek regular-style democratic legitimacy.

interpretive method that exerts pressure... on the federal government to confine itself to a set of institutional arrangements substantially continuous with the original design of the Founders whom the popular imagination extols.²¹¹

Rightly or wrongly, the demos of the United States believes that the U.S. government's authority flows from the formal requirements of the Constitution's text. As a consequence, to the extent that the Court allows the other branches to depart from these formal requirements, the political legitimacy of the Court and the whole government suffers.²¹²

The international delegations described in this Article all depart significantly from the Founders' formal structure. The delegation of Appointments Clause powers to the CWC regime, the delegation of the treaty-making power to the ICJ, and the transfer of judicial review to the NAFTA panels all rest on shaky functionalist, rather than textualist, foundations. None of these innovative institutional arrangements appear to conform with the structure designed by the Founders as reflected in the Constitution's text and history. While the current Court's doctrine suggests it would likely uphold these international delegations, the international organizations receiving these delegations cannot draw from the special legitimacy conferred by the Founders' powerful narrative mythos because these delegations do not comply with the Founders' formalist requirements.

In contrast, the state governments, Indian tribes, and private industry groups who have received delegations in the domestic context all claim separate, independent sources of legitimacy. State governments have their own electorates and Indian tribes are responsible to their tribes. Even the private organizations that receive delegated federal power are responsible to their narrow constituencies.²¹³ Thus, while arguably creating conflicts with the Constitution's formalist requirements, each of these domestic delegations draws on a separate source of legitimacy independent from the Constitution. None of these non-federal entities acquired broad powers to affect the general population. Rather, the delegations, however open ended, remain limited because they only affect the constituencies from which the delegated entity has acquired independent legitimacy.

211. Carter, *supra* note 145, at 371.

212. See *id.* at 364-76.

213. See *supra* Part III.B (discussing delegations to non-federal actors).

For this reason, the peculiar inability of international organizations to provide legitimacy commensurate with the scope of their delegated authority—when combined with the serious strains their delegations place upon the federal government's own legitimacy—weigh strongly in favor of adopting a formalist reading. A formalist approach would confer the greatest possible level of legitimacy because any consent to international organization authority would have occurred with the full force of the Constitution's legitimating force. Such an approach might require blocking some delegations, but it would at least ensure the full measure of domestic political legitimacy to support any surviving international delegations.

D. SUMMARY

At first glance, international delegations fall neatly into the Court's constitutional system, creating no serious difficulties. This view depends, however, on the adoption of a functionalist approach to constitutional interpretation. Unlike delegations to states, tribes, and private organizations, international organizations suffer from two serious institutional failings. First, they are less accountable to the constituencies their decisions ultimately effect. Second, and more importantly, they have no independent source of legitimacy to draw upon as they move closer to direct authority over U.S. citizens. For this reason, a formalist reading can help weed out dangerous delegations while also providing the kind of transitive legitimacy needed by international organizations. Commentators bringing a formalist approach to international delegations would focus on how to conform the contested international delegation with the Constitution's formal structure. An academic consensus in favor of a formal analysis of international delegations could affect policymakers who are empowered to create or modify international delegations. It is likely, however, that an institution more influential than the legal academy is needed to articulate and apply a formal reading if such an approach is to have a real effect. In the U.S. system, federal courts seem well-positioned to fulfill this role. The next section discusses the merits of their participation.

IV. A ROLE FOR COURTS

Even if one accepts that the problems of accountability and legitimacy merit a stricter, more formalist approach to

international delegations, it is not obvious that courts are the best institutions to enforce a formalist approach. As commentators have argued in a slightly different context, the constitutional problems raised by an international delegation may raise questions of foreign relations over which courts are uniquely incompetent. Alternatively, courts might avoid intervening in a dispute over an international delegation in order to allow the branches most responsible to the electorate to reach a political, rather than judicially-enforced, solution. This part examines these objections to an active judicial role in policing international delegations and offers several reasons why judicial review of international delegations is necessary and desirable.

A. ARGUMENTS AGAINST JUDICIAL REVIEW

Critics of an expanded judicial role in foreign affairs cases have offered two objections: (1) courts are institutionally incompetent when it comes to adjudicating cases affecting international relations; and (2) political safeguards already provide enough protection for the structural constitution. Each of these objections also could be raised against judicial review of international delegations.

1. Institutional Competence

Courts have repeatedly implied that cases implicating foreign affairs and foreign relations fall within the special expertise of the executive branch and are therefore beyond the competence of judicial resolution as a "political question." For instance, the Court has stated:

But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.*²¹⁴

214. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (emphasis added). The court in *Harisiades v. Shaughnessy* stated:

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a

Given the sweeping scope of this language, a court might well refuse to examine the propriety of a treaty with an international organization on similar grounds.

Statements proclaiming limited judicial competence and invoking the political question doctrine are not limited to foreign affairs. The political question doctrine operates as a self-imposed limitation on judicial review in all matters where the decision has been definitively allocated to final resolution by the other branches or where courts do not have the institutional expertise to handle the case.

Frequently, the political question doctrine is invoked in cases involving foreign affairs because of the assumption that the President has unusual expertise and powers in this arena. As Justice Brennan observed, "[n]ot only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views."²¹⁵ Yet, Justice Brennan also warned, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."²¹⁶ He did not, however, establish an obvious principle for distinguishing between proper and improper judicial invocations of the political question doctrine in matters of foreign affairs.

Rather than seeing the political question doctrine as an automatic check on judicial intervention, Henkin argues that courts should only use the political question doctrine to uphold actions where the court judges that the political branches are acting within their constitutional authority.²¹⁷ In other words, the "political question" doctrine should be applied to analyze whether the issue in the case is of the type entrusted by the

republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

342 U.S. 580, 588-89 (1952).

215. *Baker v. Carr*, 369 U.S. 186, 211 (1962) (footnotes omitted).

216. *Id.* at 212.

217. FOREIGN AFFAIRS, *supra* note 12, at 145-46 (observing that there is no political question case in a foreign affairs case when the court admitted a constitutional violation but refused to provide judicial relief). Henkin first explained the way the political question doctrine has been used to support actions that are already constitutional in his famous 1976 article. Louis Henkin, *Is there a Political Question Doctrine?*, 85 YALE L.J. 597, 601 (1976).

Constitution to a particular branch.²¹⁸ For instance, when the President decides to recognize a government or claim sovereignty over a territory, the Court should still judge whether that action is a type of "political question" that lies within the President's constitutional authority. Because these questions seem plainly allocated to final resolution by the President, the political question doctrine should apply.

Henkin admits, however, that even in cases where the parties have made a claim that the President or Congress has exceeded its constitutional authority, the Court has still invoked the political question doctrine.²¹⁹ For instance, when plaintiffs challenged the prosecution of the Vietnam War charging that the President had failed to get constitutional authorization from Congress, courts still refused to consider the claim even though the Constitution does not plainly lodge all war-making power in the President.²²⁰ In these cases, courts might invoke the political question doctrine as a prudential mechanism, giving itself the discretion to avoid areas of severe inter-branch conflict which could be settled through the normal political process. Though uncomfortable with this broader view of the political question, Henkin seems willing to accept its existence as an uneasy balance between judicial review and political discretion in foreign affairs. He maintains, however, that courts should not invoke this broader view when individual rights are at stake.²²¹

218. FOREIGN AFFAIRS, *supra* note 12, at 146.

219. *Id.*

220. See *Atlee v. Laird*, 347 F. Supp. 689, 708 (E.D. Pa. 1972), *aff'd sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973); *United States v. Sisson*, 294 F. Supp. 511, 515 (D. Mass. 1968); see also Louis Henkin, *Viet-nam in the Courts of the United States: "Political Questions"*, 63 AM. J. INT'L L. 284, 285 (1969). Despite setbacks during Vietnam, congressional challenges to presidential war-making have continued in every recent administration. See *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000) (rejecting a challenge to U.S. intervention in Yugoslavia for lack of standing), *petition for cert. filed*, 68 U.S.L.W. 3741 (U.S. May 18, 2000) (No. 99-1843); *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990) (rejecting a challenge to U.S. intervention in Persian Gulf for lack of ripeness); *Lowry v. Reagan*, 676 F. Supp. 333, 341 (1987) (D.D.C. 1987) (rejecting a challenge to U.S. naval escorts for oil tankers in Persian Gulf); *Crockett v. Reagan*, 558 F. Supp. 893, 903 (D.D.C. 1982) (rejecting a challenge to U.S. military involvement in El Salvador), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam).

221. FOREIGN AFFAIRS, *supra* note 12, at 147. Henkin makes this argument more comprehensively in CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990).

2. Political Safeguards

The acceptance of the broader political question view is strengthened by assurances that the political process will act as a natural check on excessive Presidential or Congressional activities. For instance, even though the President (especially a President acting without fear of judicial review) seems to have tremendous discretion in foreign affairs, he remains constrained by the political influence of Congress.

Congress . . . can nonetheless exercise tremendous influence . . . by non-legislative riders to legislation or appropriations, by 'sense resolutions', by the formal and informal actions of Congressional committees, by the interventions and expostulations of individual members of Congress. For Presidents need Congress, have to get along with it, must take its views into account . . .²²²

The political check works the other way as well. For instance, if Congress seeks to excessively delegate executive powers to an international organization, it must overcome the President's veto and his larger political influence as well. In essence, Congress and the President act as self-regulating political safeguards against the malapportionment of separation of powers.

This type of argument has been more generally made by Jesse Choper,²²³ who theorized a dominant role for the political process in safeguarding the constitutional structure in domestic affairs. Indeed, Choper has argued that judicial review of separation of powers is unnecessary and improper because of the self-regulating political checks that are guaranteed by the political process. Similar arguments have been made in the federalism context, most notably by Herbert Wechsler.²²⁴

222. FOREIGN AFFAIRS, *supra* note 12, at 81; *see also* Bradley, *supra* note 45, at 440-41 (discussing and rejecting the political process safeguards argument for federalism).

223. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260-313 (1980).

224. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-60 (1954). Wechsler's celebrated thesis that federalism can be largely protected through the political process with almost no intervention by the courts continues to resonate today, even though the current Supreme Court appears to reject it. *Cf.* *United States v. Lopez*, 514 U.S. 549, 567 (1995) (overturning a federal gun control measure for exceeding the authority of the Commerce Clause). For a contemporary and creative argument in favor of Wechsler's safeguards position (but not his justification), *see* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 *passim* (2000).

In both the separation of powers and federalism areas, the political safeguards thesis seems to provide a strong argument against aggressive judicial review, not only in foreign affairs cases but in all structural constitutional challenges. It mitigates the potential dangers of applying a broad political question doctrine in cases implicating foreign affairs by providing an alternative check on the political branches. If we adopt Henkin's approach, we can even reserve judicial interventions for cases implicating individual constitutional rights. Given the problems of judicial incompetence in resolving foreign affairs questions and the heightened concerns for foreign policy embarrassments arising out of judicial intervention, the political safeguards/political question approach seems to offer a promising compromise.

B. THE CASE FOR JUDICIAL REVIEW OF INTERNATIONAL DELEGATIONS

There are good reasons to reconsider the political question/political safeguards approach when applying judicial review to international delegations. Because of the different kind of international law created by international delegations, the court is far more competent to adjudicate these kinds of cases. Moreover, the Supreme Court has properly carved out a role for itself as a "constitutional referee" in disputes over structural arrangements that limits its exposure to charges of counter-majoritarian judicial overreaching. Finally, the Court's participation may actually strengthen international delegations because its approval of such delegations would serve as an important legitimating force.

1. The Significance of the New International Law

As Part I argued, the evolution of international law has shifted the focus of international delegations into areas of traditional domestic regulation. The classic foreign affairs political question implicated an area of purely state-to-state relations entrusted by the Constitution to the political branches. For instance, in *Goldwater v. Carter*,²²⁵ members of the Senate brought a court case challenging the President's decision to terminate a defense treaty with Taiwan without the Senate's approval. Though the Court did not reach a majority opinion, four justices held that the political question doctrine

225. 444 U.S. 996, 997-98 (1979).

should prevent judicial review. Other influential justices, including Justice Brennan,²²⁶ rejected this view preferring instead to find that the President's action lay within his constitutional authority.²²⁷

While Justice Brennan's analysis is appealing, one can also see the attractiveness of applying the political question doctrine to this case. The termination of the defense treaty with Taiwan was part of a highly sensitive diplomatic process deeply intertwined with the recognition of the People's Republic of China and the de-recognition of Taiwan. This question of recognition is a classic example of the state-to-state relations in which courts are unlikely to feel sufficiently competent to intervene. To the extent that the President's authority to exercise his recognition powers are affected by his control over the termination of treaties, a court might be justified in withdrawing from a diplomatic arena in which its expertise has little relevance.

There are good reasons, however, to doubt that the political question doctrine would bar judicial review of the international delegations identified in this Article. First, unlike the question presented in *Goldwater*, which was intimately related to the President's traditional powers of recognition,²²⁸ many of the delegations identified involve fulfilling textually-prescribed constitutional *procedures* like the Appointments Clause. Ruling on compliance with these *procedures* is a matter of constitutional law and does not require any of the executive's foreign affairs expertise.

Because the political question's constitutional underpinnings are uncertain at best, Henkin has suggested that the political question should be understood more as a *prudential* doctrine, rather than a *constitutional* requirement.²²⁹ In this view, the invocation of the political

226. Justice Brennan formulated the modern political question doctrine in *Baker v. Carr*, 369 U.S. 186, 217 (1961); see also *supra* text accompanying notes 215-16.

227. *Goldwater*, 444 U.S. at 1006 (Brennan, J., dissenting).

228. See FOREIGN AFFAIRS, *supra* note 12, at 38; see also QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 146-50 (1922). Both commentators derive the President's recognition powers from his powers to appoint and receive ambassadors. They also observe that, traditionally, Congress has had no role in the decision to *recognize* a nation.

229. See FOREIGN AFFAIRS, *supra* note 12, at 143-48; see also Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 74 (1961) (using the political question doctrine as an

question doctrine depends on the Court's practical judgment as to what would constitute a "lack of respect... or the potentiality of embarrassment... requiring judicial abstention."²³⁰ Thus, the complexity of the factors that a court might consider in making this practical and prudential judgment means that the political question doctrine should not be distilled into inflexible constitutional rules.

Moreover, changing conditions might affect this judgment. To the extent that international relations have made interactions with international organizations commonplace, for instance, the magnitude of international embarrassment from disagreement over foreign policy might be less dramatic today. G. Edward White has argued that the evolution of constitutional attitudes toward the constitutional elements of the treaty clause has fluctuated depending on historical circumstance.²³¹ White further theorizes that the greater the level of U.S. integration into the world community, the greater the likelihood that U.S. courts will be willing to adjudicate matters implicating foreign relations.²³² If true, one might further theorize that the political question's bar on judicial review of foreign affairs would fluctuate as well.

A shift in the view away from the "specialness" of foreign affairs might lead courts to distinguish between a classic

example of how courts should use prudential judgment to withdraw from certain kinds of judicial review).

230. *Baker*, 369 U.S. at 217.

231. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 3 (1999). In this Article, White argues that courts and commentators in the late nineteenth century did not view peaceful foreign relations matters as having special constitutional significance. *Id.* at 8-28. Rather, historical evidence suggests that courts believed that the treaty power was the primary form of foreign relations agreements, that the treaty power was constrained by federalism requirements, and that the political question doctrine did not prevent courts from deciding questions that might implicate foreign relations. See *id.*

232. See G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1113 (1999). White suggests, for instance, that the current debate over the role of customary international law in federal courts reflects a shift from viewing international law as "special" (and therefore exclusively federal) toward an attitude of international law as "normal" (and therefore a question for state courts). *Id.* at 1110-11.

Another prominent commentator has noted the possibility of interpretive shifts in judicial understandings that lead to the transformation of previously well-settled doctrines on foreign affairs. See Lawrence Lessig, *Erie Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1795-97 (1997).

traditional international law issue like *Goldwater* and the proceduralized legalistic relations of the new international law. To the extent that U.S. intercourse with international organizations becomes a more commonplace activity, the need for the political discretion to conduct delicate diplomatic negotiations in cases like the Taiwan dispute lessens. Consequently, the need for application of the political question, a discretionary decision for the court, also lessens. Each court might resolve matters somewhat differently, but the larger point is that the application of the political question should not be understood as automatic. Neither should its constitutional origins be overstated. The political question doctrine should not present an immovable, static doctrinal roadblock to judicial review of international delegations.

2. The Court as Referee

There is reason to doubt that the Supreme Court is willing to leave questions of constitutional structure to protection by the political process. Over the past three decades, the Court's interventions into structural constitutional review have established it as the undisputed "referee" for constitutional disputes between the political branches and disputes between the federal government and the states. As Steven Calabresi observes, "[t]he last quarter century has seen an astonishing revival of judicial, and especially Supreme Court, enforcement of the structural constitution."²³³ Rather than focusing on judicial enforcement of individual rights and leaving questions of constitutional structure to the political process,²³⁴ the Supreme Court has reinvigorated its role in structural constitutional review.²³⁵

233. Steven G. Calabresi, *The Structural Constitution and the Counter-majoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 3, 3 (1998) (footnote omitted).

234. See *supra* text accompanying notes 223-24.

235. See Calabresi, *supra* note 233, at 3. Calabresi argues that the Court's willingness to review questions of constitutional structure is surprising because the Court seemed to have relinquished its role in that sphere after the New Deal revolution of the 1930s. *Id.* at 4. For instance, the Court's decision to uphold congressional regulation of homegrown wheat under the Commerce Clause in *Wickard v. Filburn*, 317 U.S. 111, 133 (1942), seemed to mark the end of judicially enforced protections for federalism. Similarly, the Court's refusal to use the non-delegation doctrine to restrain congressional delegations to the executive or administrative agencies and the Court's refusal to prevent congressional obstructions to executive control over administrative agencies seems to signify the Court's departure from the separation of powers business.

The Court's return to structural constitutional review began in 1974 with its intervention into the dispute over executive privilege between President Nixon and Congress.²³⁶ But its first definitive statement on separation of powers occurred in *Buckley v. Valeo*,²³⁷ where, among other things, the Court invalidated the creation of an independent agency with executive powers and with commissioners appointed by Congress, finding that such an arrangement violated the Appointments Clause.²³⁸ *Buckley* represented a victory for the executive branch's control over its appointments powers and demonstrated how the Court used formal textual devices such as the Appointments Clause to protect separation of powers concerns.

The Court has not retreated from its intervention into the separation of powers sphere. Since *Buckley*, the Court has reviewed separation of powers between the President and the Congress in cases involving, among other things, the legislative veto,²³⁹ deficit reduction devices,²⁴⁰ and the line item veto.²⁴¹ In each case, the Court reviewed innovative legislation to see whether it comported with the Constitution's textual demands and with broader separation of powers principles. In striking down the Line Item Veto Act,²⁴² the Court even went so far as to strike down a device which allowed the President to act with the authority of both Houses of Congress, a device that should have withstood judicial review under the non-structural review approach.²⁴³

See Calabresi, *supra* note 233, at 4.

236. See *United States v. Nixon*, 418 U.S. 683, 716 (1974) (ordering the President to release tapes of executive branch meetings).

237. 424 U.S. 1, 143 (1976) (per curiam).

238. U.S. CONST. art. II, § 2, cl. 2.

239. *INS v. Chadha*, 462 U.S. 919, 928 (1983).

240. *Bowsher v. Synar*, 478 U.S. 714, 717 (1986).

241. *Clinton v. New York*, 524 U.S. 417, 446 (1998).

242. The Line Item Veto Act, 2 U.S.C. §§ 691-692 (Supp. III 1997). The Act sought to give the President budgetary "cancellation" powers over certain spending provisions. See *Clinton*, 524 U.S. at 420-23 (describing the operation of the statute).

243. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring). Justice Jackson's influential concurring opinion has been understood to establish a flexible, tripartite framework emphasizing a functional approach to separation of powers. In particular, the framework gives special deference to cases where the President acts with Congressional authorization. In this case, the President "personifies] the federal sovereignty . . ." and "[h]is actions would be supported by the strongest of presumptions and the widest latitude of judicial interpretation . . ." *Id.* at

In sum, the Court has re-entered the structural fray and has indicated a willingness to conduct structural constitutional review in order to vindicate both federalism and separation of powers principles. But in the domestic sphere, at least, the Court has discarded the once accepted notion that political safeguards obviate the need for structural constitutional review.

Moreover, not only has the Court refused to retreat from structural constitutional review, Calabresi has offered persuasive arguments for an active judicial role in reviewing constitutional structure. When it decides a structural constitutional challenge, the Supreme Court will have the support of at least one of the political branches. In playing this role as "jurisdictional police officer," the Court is really deciding which political branch will have the authority to control the outcome of an issue. Each of these political branches represents different interests of the American electorate and therefore, the Court is simply deciding which segment of the electorate has the constitutional authority to control a particular policy.

In contrast, when it is reviewing potential violations of individual rights, the Court might have to act against the wishes of both of the political branches, giving rise to the well-known "countermajoritarian difficulty." In this way, the Court acts as a complement to the political process checks relied upon by critics of structural review. If the contest between the different political branches and entities is an ongoing contest, the Court's infrequent interventions can be seen as a necessary action, akin to the need to have a boxing referee call an occasional foul. For the most part, the match between Congress and the President proceeds without intervention from the Court, and both branches are understood to protect their interests through their political powers. But in this role, as in a boxing match, there are times when the referee must intervene.

Thus, the Court has increasingly set itself up as a referee between contending political entities, including the states, the Congress, and the President. It has developed constitutional doctrines and precedents, often based on interpretations drawn from the Founders' constitutional text, structure, and history,

636. The Line Item Veto case departs from this approach. See *Clinton*, 524 U.S. at 446-47.

which help to mediate and resolve disputes between these contentious parties.²⁴⁴ More than any other institution, federal courts are particularly skilled at resolving disputes over the proper allocation of constitutional power between competing branches of the federal government and between the federal and state governments. After all, the proper allocation of constitutional powers lies at the heart of most cases about constitutional structure and has been a concern of federal courts since the Marshall Court.²⁴⁵

In the international delegation context, the Court can play a similar mediating role to the one it plays in the domestic context. If we envision international organizations as simply another political entity seeking some portion of constitutional power, then it seems proper that courts would address their claims within the larger constitutional calculus. For instance, a court could help resolve the delicate question of how the Appointments Clause applies to inspectors of an international organization²⁴⁶ or how a provisional order of the ICJ effects federal and state law.²⁴⁷ Thus, instead of refereeing only between the states, Congress, and the President, a modern court could simply add international organizations to the mix when determining the proper allocation of powers.

Most of the time, the question of whether and how to delegate powers to international organizations is likely to be resolved through the give-and-take of the political process. But, as in the domestic context, courts should reserve the right to step in, blow their whistles, and call a constitutional foul when things get out of hand.

3. The Court as a Source for Legitimacy

Part III argued that international delegations create a difficult problem of legitimacy for the American constitutional

244. Some examples of court-created doctrines to mediate between competing powers include: the effects doctrine for the Commerce Clause, the non-delegation doctrine, and the separation of powers doctrine. However imperfect, these doctrines represent judicial attempts to wrestle with competing claims for constitutional authority.

245. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 215 (1824) (deciding state power to regulate waterways must defer to federal power to regulate interstate commerce).

246. See discussion *supra* Part II.B.3 (discussing delegation of executive powers).

247. See discussion *supra* Part II.B.2.a (discussing delegation by international agreement).

system. International organizations usually lack an independent source of political legitimacy that can support their acquisition of significant federal powers. At the same time, their authority depends upon a theory of delegation that departs from the Constitution's formal structural requirements. Thus, international delegations are unable to draw upon the federal government as a meaningful source of political legitimacy.

Judicial review can help alleviate this dilemma. In addition to constraining potentially excessive delegations that would reduce political accountability, the Court can act as a unique legitimating force for those international delegations that *do* comport with the formal structure of the Constitution. In other words, judicial review can actually *enhance* the legitimacy of international delegations. As Charles Black first pointed out, the Court's decisions that *uphold* a government action have an enormous effect on the political legitimacy of that contested action.

I think the legitimating function of the Supreme Court is one of immense—perhaps vital—importance to the nation. I do not see how a government of limited powers could live without developing some agency for performing this function. The Supreme Court has actually attained acceptance in this role, in satisfactory measure. To devise another structurally plausible way of getting this job done would be an immensely difficult task, and to bring about its actual acceptance would be not only difficult but quite chancy.²⁴⁸

By applying a formalist reading of the Constitution's structure, the Court's intervention buttresses the legitimacy of the U.S. government's international actions. The Court's ruling can assure the affected populations that the U.S. government is acting within the formal constitutional structure handed down by the Founders.²⁴⁹ This judicial assurance of conformity with the Founding tradition is an overwhelmingly powerful statement within our political culture.²⁵⁰

To take one example, the court could review the constitutionality of the NAFTA panels and issue a judgment finding that it complies with the formal requirements of the Constitution because the right to challenge anti-dumping decisions is a "public" rather than a "private" right.²⁵¹ Such a

248. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 66-67 (1960).

249. See Carter, *supra* note 145, at 371.

250. See BLACK, *supra* note 248, at 67.

251. See discussion *supra* Part II.B.4 (discussing delegation of judicial powers).

decision is plausible even under a formalist reading of Article III and it would go a long way toward buttressing the overall legitimacy of the NAFTA regime.²⁵² On the flip side, a Supreme Court declaration that ICJ provisional orders are not self-executing treaty obligations would draw a useful boundary line limiting the ICJ's authority to create domestic law.²⁵³ Even this kind of decision, however, could legitimate the ICJ's position as the arbitrator of U.S. treaty obligations under *international* (but not domestic) law. This might still matter because the U.S. relationship with the ICJ, even on an international law plane, has been characterized by serious disputes.²⁵⁴

If a court finds that a challenged international delegation can fit within the Constitution's formal structural requirements, a court (and in the U.S. system perhaps only a court) can confer upon an international organization the independent source of political legitimacy that it currently lacks. Courts can actually foster the development of stronger, more effective, and more legitimate international organizations.

C. SUMMARY

Critics of judicial review have a two-pronged argument against judicial intervention into cases affecting foreign relations. First, they argue that such matters should largely be left to political resolution by the President and the Congress via the political question doctrine. Further, they argue that any fears of excessive actions by either branch, especially the executive, can be allayed by the natural political processes built into the constitutional system.

This section has explained that the political question doctrine need not be understood to mandate automatic judicial

252. In a slightly different vein, a recent district court decision upholding the constitutionality of NAFTA against a challenge alleging violation of the Treaty Clause provides an example of a federal court playing a legitimating role. See *Made in the U.S.A. Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999). The district court's decision, which reached the merits despite the government's political question plea, usefully returned this dispute over NAFTA to the political arena. *Id.* at 1276.

253. See *supra* text accompanying notes 88-104 (discussing the *Breard* case).

254. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 149 (June 27), 25 I.L.M. 1023, 1091 (1986) (ordering U.S. government to stop mining Nicaraguan harbors).

deference in any case implicating foreign affairs. The prudential underpinnings of the doctrine support narrowing the application in the increasingly proceduralized and legalized relationship between the United States and international organizations. Moreover, federal courts have carved out a limited but important role for themselves in review of domestic structural cases that supplements the natural checks of the political process. There is little reason to believe federal courts are less able to play this role in the international context. Indeed, federal courts may be uniquely qualified to balance the complex allocation of powers created by international delegations. Moreover, federal courts, and especially the Supreme Court, can use judicial review to provide the crucial legitimation that international organizations currently lack.

CONCLUSION

This Article has investigated an emerging problem for international and constitutional law: the delegation of constitutional powers from the federal government to international organizations. It argues that the rise of a new kind of international law places correspondingly new kinds of stress on the constitutional system, which has led to questionable delegations of legislative, executive, and judicial powers to international organizations.

A first reading of existing doctrine seems to endorse these delegations because of precedents created by similar delegations to states and private parties. However, this Article has argued that international organizations are meaningfully different from states and private parties. International organizations are unusually unaccountable to the U.S. electorate and suffer from a unique deficit of political legitimacy. Indeed, because international delegations often depend on a non-formalist reading of the Constitution's structural provisions, international organizations have a difficult time drawing support from the federal government's own legitimacy.

Courts can play a useful role in resolving these problems. First, courts wielding a formalist reading can ensure that the lines of political accountability designed by the Founders will similarly restrain international organizations. Second, courts are uniquely positioned to referee the complex interaction of federal, state, and international bodies competing for constitutional powers because it is a job that they have always

done in our constitutional system. Finally, courts can provide the crucial aura of legitimacy that most international organizations currently lack.

The very idea of judicial review in the foreign affairs arena seems fraught with dangers of judicial overreaching. But as the Supreme Court's structural cases of the past three decades have demonstrated, the courts can conduct meaningful and effective (although not perfect) review of the exercise of governmental powers in service of the larger constitutional structure. As our relationship with international organizations becomes a more integrated part of this constitutional structure, there is no reason to think the judiciary's role in this process would, or should, be any different.

The current scholarly consensus discounts the growing importance of international organizations and refuses to recognize the unique significance of their challenge to the constitutional system. This Article has described the constitutional importance of international delegations and explained why these delegations deserve careful scrutiny. In doing so, this Article has tried to illuminate the constitutional source of the uncomfortable, inarticulate opposition to international organizations displayed on the streets of Seattle and (sometimes) in the halls of the U.S. Senate. Only after scholars admit the existence of constitutional weaknesses in our relationship with international organizations can the difficult work of reconciling these important ties with the American constitutional system begin.

