

INTERNATIONAL DELEGATION AND DOMESTIC AUTHORITY
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International law's strength and reach have grown significantly over the last half century. Once the province primarily of diplomatic and trade treaties, international law now reaches not just interactions between states but states' behavior within their own borders as well. In the early years of the 21st century, over 50,000 international treaties cover topics ranging from taxation to trade to torture—and just about everything in between.¹

This revolution in international law has brought with it many new challenges. Perhaps the greatest is the increasingly salient tension between the ideal of an international order based on law and the traditional concept of “Westphalian” or “exclusive” sovereignty—the notion that states alone have ultimate authority over what goes on within their borders.² States now routinely make legal promises that are in direct conflict with this longstanding conception of state sovereignty, including delegating to international institutions authority that has traditionally been held solely by states.³

This progression has not, of course, been without controversy or resistance. Indeed, it has given rise to a powerful backlash in the United States and elsewhere. Critics of international law fear that its ever-expanding scope has or will encroach on domestic law and authority, taking power from local authorities and delegating it to international actors that are far removed—physically, culturally, and politically—from those they seek to govern.

The broader project to which this paper contributes is motivated in part by such concerns. The very thoughtful introductory article by Curtis Bradley and Judith Kelley offers a description of international delegation that places delegation's impositions on sovereignty at the center of the conversation. According to their account, the precise extent of the sovereignty costs that flow from international delegation vary along with the precise characteristics of the delegation, but they are, constant companions.

¹ The United Nations Treaty Series currently contains over 50,000 treaties. United Nations Treaty Series Overview (2003), online at <http://untreaty.un.org/English/overview.asp> (visited Nov 24, 2004).

² Though most agree that the nation-state has more recent origins than the Treaty of Westphalia, this conception of sovereignty is still widely referred to as “Westphalian” sovereignty. See, for example, Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999): 20-25.

³ In this paper, for purposes of simplicity, I refer interchangeably to international law and international delegation. The relationship between the two, however, is somewhat more complicated than this suggests. Though the introductory paper by Curtis Bradley and Judith Kelley is not explicit about this, it appears to be the case that the delegations that are the subject of this project are *all* created through international law—hence international delegation requires international law. The opposite is not necessarily the case, however: International law does not always give rise to delegation—though as a matter of fact, most significant international treaties do delegate some authority, if we accept the very broad definition of authority adopted by the introductory paper (of any authority, whether it creates binding legal obligations on states or not).

The effort to parse the specific characteristics of international delegation and the sovereignty costs that flow from it is an important contribution to the literature. And yet at the same time it has the potential to misdirect the focuses of scholarly attention in two ways. First, while Bradley and Kelley are undoubtedly right that there is a tension between international delegation and domestic sovereignty, it is less clear that international delegation *always* and *necessarily* restricts state autonomy and hence imposes sovereignty costs, as their approach seems to suggest.⁴ Second, in centering attention on the costs of delegation, their project might encourage scholars to ignore its benefits.

In this paper, I seek to illuminate the various ways in which international law, and the delegation to international authority it often entails, comes into contact with—and, yes, sometimes conflicts with—domestic sovereignty. Though I agree with Bradley and Kelley (and many others) that international delegation can carry sovereignty costs, I differ on where the important costs lie. Hence the paper aims to take up the conversation begun by Bradley and Kelley and offer a somewhat different view of the sovereignty costs associated with international delegation.

The paper also briefly examines the tension between international delegation and state sovereignty from the other side of the cost-benefit equation—asking how the intrusion of international law into areas that were once exclusively domestic might be explained and perhaps even justified. No matter where the sovereignty costs of delegation lie, whether they lead us to question the wisdom of specific delegations hinges on the justifications that balance against those costs. Many acts of delegation, for example, allow states to achieve ends that would otherwise be unattainable. Moreover (and more controversially), an imposition on state sovereignty might be justified by reference to other values—human rights chief among them. By exploring both sides of the equation in greater depth, we can come to a richer and more empirically grounded argument about the proper role of international delegation.

I. When and How International Law and Domestic Authority Intersect

In the late 1980s, Robert Putnam proposed viewing the relationship between international and domestic politics through the lens of what he called the “two level game:”⁵ At the national level, domestic groups pursue their interests by pressuring the government to adopt their favored policies, and politicians seek power and influence by constructing coalitions between these groups. At the international level, governments aim to maximize their ability to satisfy domestic pressures, while at the same time seeking to avoid adverse foreign developments. As long as countries remain interdependent as well as sovereign, Putnam argued, the central decision-makers must play on both the international and domestic boards at once. What makes the game

⁴ Bradley and Kelley use the term “sovereignty costs” to refer to reductions in state autonomy.

⁵ Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 INTERNATIONAL ORGANIZATION 427 (1988).

difficult, however, is not that the central policymakers must play on both boards, but that a move on one necessarily changes the situation on the other.⁶

Putnam was not thinking specifically of international delegation or international law when he wrote of the two level game—he instead focused his attention on diplomacy and politics. The metaphor nonetheless offers a useful lens through which to examine the relationship between international and domestic law. It focuses attention, in particular, on the interdependence between the international and domestic spheres: Decisions made on the international stage reverberate at the domestic level, and vice versa. Moreover, it recognizes that there are multiple actors involved at both levels, each with their own interests and goals. This creates a complex situation in which there are overlapping strategic environments with national government officials sitting at the fulcrum. Viewed through this lens, international law and domestic law and politics are not distinct phenomena. Domestic politics can cause international law and international law can, in turn, cause domestic law and politics.

Though it has been undertheorized, the relationship between the domestic and international has not gone unnoticed in legal scholarship. Critics of international law have long expressed concern about the instances in which international law infringes on domestic sovereign authority.⁷ Their discomfort, and hence their criticism, stems from the shared (often not explicitly acknowledged) premise that the state ought to retain unfettered authority to make the laws that govern its own citizens. In this view, international law, by its very nature, takes control out of the hands of local decision makers and hands it to persons and locations far removed from those the law governs—undermining self-government and the value of citizenship within the state in the process.⁸

⁶ *Id.*

⁷ See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, STANFORD LAW REVIEW 55 (2003): 1557-1596; Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, MINNESOTA LAW REVIEW 85 (2000): 71-145. See generally Edward T. Swaine, *The Constitutionality of International Delegations*, COLUMBIA LAW REVIEW 104 (2004): 1492-1614; Ernest A. Young, *The Trouble with Global Constitutionalism*, TEXAS INTERNATIONAL LAW JOURNAL 38 (2003): 527-545. This debate has played out in the public eye most recently in the debate over the use of foreign and international law by U.S. courts. See, for example, Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POLICY REVIEW (January 2005): 33-50.

⁸ Moreover, when the countries affected are democratic, the critics raise the specter of not just a shift of power from local authorities to distant decision makers, but a shift of power from democratic domestic institutions to unelected, undemocratic, and unaccountable international organizations. New Sovereignists, of course, are not the only ones who are worried about whether international institutions are sufficiently democratic and accountable. Even the strongest advocates of international law recognize the possible problems. See, e.g., Ruth W. Grant and Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, AM. POLI. SCI. REV. 99 (2005). Moreover, there is a three-year ongoing project in Global Administrative Law centered at NYU that aims at addressing such problems.

The introductory article to this collection by Bradley and Kelley reiterates the critics' view in at least one important respect: Its careful description of international delegation and the sovereignty costs that delegation imposes equates international delegation with an imposition on state sovereignty. The precise extent of the sovereignty costs imposed are determined by the type of delegation, the issue area, the type of delegated authority, the legal effect of the delegation, and the autonomy of the international body. As long as there is a delegation, however, there is a sovereignty cost arising from it.

Missing from the otherwise comprehensive discussion of international delegation is whether states have control over the decision to delegate authority and when they have the power to monitor and to revoke that authority. This is an important omission, for I would argue that delegations in which states retain this power generally do not undermine state autonomy (understood as independence or self-governance). In other words, if international law only exists where domestic lawmaking authorities say it does, then international law is not best understood as contrary to domestic authority—it is simply another site in which that authority is exercised.

When, for example, a state joins the World Trade Organization—retaining in the process not only the power to withdraw from the Organization but also the ability to ignore its decisions and accept the resulting countermeasures instead—it is difficult to say that this entails a loss of state autonomy. Indeed, even the opposite could be said: The transfer of some of the state's decision-making authority can enhance autonomy by expanding a state's policy options (as Bradley and Kelley briefly acknowledge).⁹ The WTO allows states to obtain favorable trade access from every member state—a goal that at the very least would be much more difficult and time-consuming to obtain in the absence of the WTO.

State consent to international law thus holds out the promise of reconciling international law and domestic authority, transforming them into allies rather than opponents. And yet the tension between international delegation and domestic authority identified by Bradley and Kelley and others is real. Even where consent is present, there remain potential, sometimes unavoidable, conflicts between international law and domestic authority. The rest of this section is devoted to understanding the specific contours of the intersection of international law and domestic authority—that is, where the true sovereignty costs lie.

I focus, in particular, on four issues that highlight the potential for conflict between international delegation and domestic authority. All of this might be seen as an effort to unpack and critically examine what it means for “a grant of authority” to be made “by a state.”¹⁰ First, who consents to the delegation? Second, what happens when preferences change? Third, what happens when the delegated authority extends beyond that originally granted. Fourth, what if consent is coerced? It is to these issues that I now turn.

⁹ Bradley & Kelley define international delegation as “a grant of authority by a state to an international body or another state to make decisions or take actions.” Bradley & Kelley, *supra* note ?, at 2.

¹⁰ *Id.* at 2- 3.

A. Consent by Whom?

Sovereign state consent has long been regarded as the bedrock of the international legal system.¹¹ The primary source of consent-based international law the delegations to which it gives rise is international treaties, agreements entered into by states through their appointed representatives. A state that has not accepted an agreement cannot be required to follow the rules that it lays out. Hence the power to enter or refuse to enter an international agreement is the power to accept or refuse the vast majority of international law.¹²

And yet there are at least two difficulties with talking about state consent to international law that delegates domestic authority to international organizations. The first has to do with thinking of the state as a unitary entity. Political scientists have often talked of states as “rational unitary actors” who act in a purposeful way to achieve self-interested goals. Legal scholars, too, frequently think of states as unitary actors—at least in the context of treaty ratification—perhaps in part because international law in fact has its origins in private contracts between individual princes.¹³ In this view, then, the state “consent” to a treaty could be treated much like a contract between individuals.

The idea of consent is much more complicated, however, when we acknowledge that states are not in fact unitary actors. Decisions to ratify (formally consent to) treaties and the regimes they create are the end result of domestic politics, which involves filtering often conflicting interests of multiple political actors through domestic political

¹¹ Perhaps the most famous statement of the idea that international law is based on sovereign consent was made by the Permanent Court of International Justice in 1927 in the *S.S. Lotus* case: “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.” *The S.S. Lotus (France v Turkey)*, 1927 PCIJ (ser A) No 10, 18.

¹² I have written more on the voluntary nature of treaties in Oona A. Hathaway, “Between Power and Principle,” *University of Chicago Law Review* 72:2 (2005): 469-536. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt I, introductory note at 18 (1987) (“Modern international law is rooted in acceptance by states which constitute the system.”); Vienna Convention on the Law of Treaties art 19, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan 27, 1980. (“A treaty does not create either obligations or rights for a third State without its consent.”); Louis Henkin, *International Law: Politics and Values* (The Netherlands: Kluwer 1995), 28 (“For treaties, consent is essential. No treaty, old or new, whatever its character or subject, is binding on a state unless it has consented to it.”).

¹³ Wilhelm G. Grewe, *The Epochs of International Law*, trans Michael Byers 196 (New York: Walter de Gruyter, 2000); Randall Lesaffer, *Peace Treaties and International Law in European History: Form the Late Middle Ages to World War One* 113 (Cambridge: Cambridge University Press, 2004). In the earliest years of international law, treaties were considered to be private contracts between the signatory princes. The princes represented only themselves and not an abstract “state.” Hence the law that applied to private contracts applied to treaties. Lesaffer, *supra*, at 113-117. This continued until around 1540, when the concept of the internal sovereignty of the state appears to have begun to emerge.

institutions.¹⁴ Hence the decision to ratify a treaty may have the support of only some—possibly even a minority—of citizens of the state.

The same can be said, of course, of domestic legislation as well. It is a necessary fact of lawmaking that some will support the result and some will not. The likelihood that legislation will be supported by only a minority of the population of course depends in significant part on the composition of the government and the lawmaking process. Yet in even the most democratic of states, it is possible—maybe even inevitable—that laws will be made that have the support of only a fraction of the citizenry. The fact that international law is likely to have less than complete support among the citizenry thus cannot, by itself, undermine the law's claim to consent—or at least does not serve as a special reason for questioning international law's legitimacy. The difficulty, if there is one, instead arises from the fact that a treaty need not even have the support of the political actors that are ordinarily empowered to make domestic legislation, because the process of ratifying treaties may be different from that for creating ordinary legislation.

International law only provides that to bind itself to a treaty agreement, a state must ratify it. The specific requirements for ratification are determined by domestic law and hence vary across states.¹⁵ Some, for example, require that the chief executive officer's agreement is sufficient for a treaty to be ratified, while others require that the treaty be approved through the same process used to pass regular legislation, and yet others adopt some process in between. The United States falls somewhere in the middle of the two extremes: The Constitution calls for the President to submit a treaty to the Senate, which then must approve it by an affirmative vote of two-thirds of its members.¹⁶ More important for our purposes here, the United States provides for a ratification process that differs in significant ways from its process for passing ordinary legislation. Indeed, the ratification process excludes the House of Representatives entirely from the treaty-making process.¹⁷

¹⁴ In my view, state behavior is the end result of contest for control by multiple political actors within the state, mediated by domestic political institutions. This perspective is most closely identified with what political scientists would call "liberal institutionalism." For a nice overview of this approach, see Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51 (1997): 513-?. See also Peter Alexis Gourevitch, "Squaring the Circle: The Domestic Sources of International Cooperation," *International Organization* 50 (1996): 349-73.

¹⁵ See Vienna Convention on the Law of Treaties, arts. 11-17.

¹⁶ A team of researchers and I have examined the ratification processes specified in every existing national constitution in the world. We have found that the United States system—where the House is involved in making federal statutes but not in treaty-making—is unusual. See Oona A. Hathaway & James Wilson, *The Domestic Political Foundations of International Law* (unpublished manuscript 2006). See also *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, eds. Stephan A. Riesenfeld & Frederick M. Abbott, (The Netherlands: Kluwer Academic Publishers, 1994)

¹⁷ Indeed, the United States is unusual among democracies in its exclusion of part of the legislative apparatus from the decision to ratify treaties. In the vast majority of

When domestic actors choose a process for ratifying treaties that differs in important ways from the process used to pass ordinary legislation (as does the United States), this makes it possible—in theory at least—for international law to be used as an end-run around the domestic political process. Where there is a difference between the two processes, government actors may use international law to gain leverage over domestic policy choices.¹⁸ For example, research shows that as the number of government actors who can stop legislation (known in political science as “veto players”) increases, states become more likely to seek agreements with the International Monetary Fund that “force” them to make policy changes.¹⁹

This type of reverse two-level game is particularly likely to occur where the government actors who have influence or control over international law are different in their policy positions and goals from those who have influence or control over domestic law. Furthermore, these efforts can be expected to be more pronounced in cases where control of government by one party is tenuous and hence those currently in control of foreign policymaking seek to delegate authority to an international body in order to constrain their successors.

Even when there is no difference in the *actors* who are engaged in international and domestic lawmaking, there may still be differences between the lawmaking *processes*

states, the process used to ratify treaties is functionally equivalent to that used for passing legislation. Oona A. Hathaway & James Wilson, *The Political Foundations of Law* (unpublished manuscript, 2006).

¹⁸ Even when there is no difference in the *actors* who are engaged in international and domestic lawmaking, there may still be differences between the lawmaking *processes* that allow some government actors to achieve policy aims that might otherwise be unattainable. Again, I elaborate this argument in greater detail elsewhere.

¹⁹ JAMES VREELAND, INSTITUTIONAL DETERMINANTS OF IMF AGREEMENTS (2003) (arguing that governments that are more constrained domestically often seek to use IMF agreements to push through unpopular policies that would otherwise be impossible to achieve); Vreeland, 24 INT’L POL. SCI. REV. 321 (arguing that as the number of veto players increases, executives are more likely to turn to IMF agreements). For related arguments, see Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders* at 13 (putting forward a “boomerang” model of international politics); Moravcsik, 54 INT’L ORG at 225–43 (arguing that “international institutional commitments, like domestic institutional commitments, are self-interested means of ‘locking in’ particular preferred domestic policies . . . in the face of future political uncertainty.”); Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT’L ORG. 881, 911 (1978) (arguing that “[t]he international system is not only a consequence of domestic politics and structures but a cause of them”); Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 457 (1988) (arguing that governments exploit “IMF pressure to facilitate policy moves that [are] otherwise infeasible internally”); Luigi Spaventa, *Two Letters of Intent*, in JOHN WILLIAMSON, ED, IMF CONDITIONALITY 441, 463 (Institute for International Economics 1983) (arguing that IMF demands allowed the Italian government and Italian unions to force their constituencies to accept unpopular, but necessary, fiscal programs to help turn around Italy’s economic recession in the mid-1970s).

that allow some government actors to achieve policy aims that might otherwise be unattainable. By their very nature, multilateral agreements do not permit line-by-line negotiation of the law. Some do permit states to enter Reservations, Understandings, and Declarations, known in shorthand as “RUDS”—which in effect permit states a line-item veto.²⁰ And many treaties are not self-executing but instead require implementing legislation to come into force—legislation that must be passed in just the same way as any other law and which may restrict the domestic effect of the treaty.²¹ Yet some agreements restrict the availability of RUDs. The World Trade Organization, for example, insulates the entire body of rules embodied in the treaty that underlies the system from individual attention. Unlike standard legislation, therefore, domestic legislatures must take or leave the entire pre-formed package. Bilateral agreements are more amenable to specific negotiation. Even then, however, legislators have less control over the final shape of the law than they ordinarily do over domestic legislation, because it is necessary to gain the agreement not only of all the relevant domestic actors but of another country’s representative as well (a representative that must respond to her own domestic constituencies).²²

²⁰ RUDS are a well-recognized, if controversial, element of treaty law. Vienna Convention on the Law of Treaties art. 19, May 23, 1969, S. EXEC. DOC. L, 92-1, at 16 (1971), 1155 U.N.T.S. 331, 336-37; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000):100-130. RUDs are subject to significant abuse, as they are significantly less visible and less well-understood than treaty ratification. Hence a state may ratify a treaty in order to obtain the benefits of membership, and then issue RUDs that make that commitment unenforceable. In fact, the United States did just that in the cases of the International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987).

²¹ For example the United States entered a RUD declaring the Convention Against Torture not self-executing. For more on self-executing treaties, see Curtis A. Bradley, “International Delegations, the Structural Constitution, and Non-Self-Execution,” *Stanford Law Review* 55 (2002): 1557-96; Carlos Manuel Vazquez, “Treaty-Based Rights and Remedies of Individuals,” *Columbia Law Review* (1992): 1082-1163; Jordan J. Paust, “Self-Executing Treaties,” *American Journal of International Law* 82 (1988): 760-783; David Sloss, “Non-Self-Executing Treaties: Exposing a Constitutional Fallacy,” *U.C. Davis Law Review* 36 (2002): 3-84.

²² There are two other potentially important differences between international and domestic lawmaking. First, in international lawmaking, the president generally has the origination power whereas in domestic lawmaking, the origination power generally rests with the legislative branch. Second, some states permit executives to enter into congressional-executive agreements or sole executive agreements with other states—agreements that in some cases extend beyond the usual scope for unilateral executive authority and hence give the executive greater lawmaking power than in the domestic context.

It is sometimes possible, in other words, for a subset of domestic political actors to use consensual international law to achieve policy goals that it cannot achieve through domestic politics—delegating authority to an international body or group of states that will in turn impose policies on the state that the domestic government never could or never would. This creates a tension between international delegation and domestic authority, for it allows domestic actors to use delegation to harness the power of international bodies to press policies that might not receive support from the domestic legal and political institutions that generally determine the law the governs within the state.²³

B. Time-Inconsistent Preferences

There is a second and related difficulty with treating “state consent” to international delegation as the sole answer to concerns about how delegation might undermine domestic authority. States are not only made up of multiple actors who may have different preferences from one another. They are also made up of a shifting constellation of actors who may individually and collectively have different preferences across time. Individual political leaders may simply change their preferences, perhaps due to new information or a change in circumstances. Even more important, many fundamental facts about a state are subject to change over time—the political leaders might be replaced by leaders who hold entirely inconsistent views and even the entire political structure can be replaced with another,

In the earliest international legal agreements, time inconsistent preferences of states could be more easily addressed than they can today. In many cases, the agreements between rulers were seen as essentially private agreements that bound only those individuals who signed them.²⁴ Hence, the “law” that they created had the potential to shift markedly with each change in ruler. While that had significant drawbacks, it did mean that new regimes were less encumbered by decisions they did not themselves make. But that is no longer true. Changes in government, no matter how radical they may be (for example from autocracy to democracy) and no matter how they are accomplished (by legal or violent means) do not affect the legal obligations of the state.²⁵ Only the absorption of the state into another or the dissolution of the state into separate entities can override the principle of continuity.²⁶

²³ As I discuss in brief below, one might argue that such restrictions on domestic authority are a good thing, either because they allow more efficient outcomes or because they protect other values. This might be particularly true if the domestic government is not democratic and hence does not pursue the citizenry’s interests.

²⁴ *Id.* at 118.

²⁵ See, e.g., Oscar Schacter, “State Succession: The Once and Future Law,” 33 *Va. J. Int’l L.* 253 (1993); Daniel P. O’Connell, 1 *State Succession in Municipal Law and International Law* 3-7 (1967).

²⁶ *Id.* Even then the new states may choose to accept all the legal obligations of the original parent state, as for example Serbia did in the wake of the breakup of Yugoslavia. There are, however, some exceptions to the general rule that a change in state personality dissolves prior commitments. The International Committee of the Red Cross takes the view that a successor state is automatically bound by the international

This strong principle of continuity is clearly essential to international law. Were governments unable to bind their future selves or their direct successors, then international agreements would be rendered nearly useless. The entire reason for an agreement, after all, is to create a commitment now to do something in the future that the state might otherwise not choose to do. The ability of the state to commit its future self allows others to rely on that commitment and engage in coordinated or cooperative activity premised on the expectation that other parties to the agreement will act in accordance with it. Consider, for example, an agreement that establishes the border between two states. With an agreement in place, a state need not maintain a significant military presence to protect the area from foreign intrusion and the state and its citizens can engage in investments in infrastructure, buildings, and the like without fear of usurpation. None of this would be possible if the states that are parties to the agreement were not committed to abide by the agreement regardless of their preferences later in time.

And yet the principle of continuity gives rise to problems for the concept of state consent. An international agreement permits the current domestic political actors to bind their future counterparts. That may be unproblematic when the government remains consistent over time. Yet it can be harder to defend when a government undergoes a significant change. Since 1960, for example, the 188 states that presently have some form of constitutional regime have adopted entirely new constitutions (not simply minor amendments) a sum total of 261 times.²⁷ In addition, since 1945, forty-nine countries have experienced considerable short-term improvements in democracy and many more have experienced significant longer-term improvements.²⁸ Such shifts can create

humanitarian instruments that were binding on the predecessor state, unless it makes a specific declaration to the contrary. See H. Coursier, *Accession des nouveaux etats Africains aux Conventions de Geneve*, AFDI (1961) 760-61; O'Connell, 2 *State Succession in Municipal and International Law* 220 (1967). Similarly, the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights has declared that "all the peoples within the territory of a former State party to the Covenant remained entitled to the guarantees of the covenant." UN Doc. A/49/40, para. 49. For more on succession in the context of human rights treaties, see Menno T. Kamminga, *State Succession in Respect of Human Right Treaties*, 7 *Eur. J. Int'l L* 469 (1996).

²⁶ UN Doc. A/49/40, para. 49. For more on succession in the context of human rights treaties, see Menno T. Kamminga, *State Succession in Respect of Human Right Treaties*, 7 *Eur. J. Int'l L* 469 (1996). Similarly, the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights has declared that "all the peoples within the territory of a former State party to the Covenant remained entitled to the guarantees of the covenant." UN Doc. A/49/40, para. 49. For more on succession in the context of human rights treaties, see Menno T. Kamminga, *State Succession in Respect of Human Right Treaties*, 7 *Eur. J. Int'l L* 469 (1996).

²⁷ This is based on my analysis of a new database I am in the process of generating on the international lawmaking processes of 186 countries going back to the 1960s.

²⁸ More specifically, forty nine countries experienced at least a three-point one-year improvement in the 10-point "democracy" scale from Polity. There were 172

circumstances in which the state that is bound by an international agreement is importantly different from the state that consented to the agreement in the first place.

In such cases, the principle of continuity might permit a government that represented a small subset of the population to not only bind the population living under its rule, but also project its control forward in time to bind the country in the future. Even when there has been less radical change—one party loses control and another gains it—there may be similar concerns. If the reason for the change in party is a rejection by the population of the views of the old party and an endorsement of the new, then permitting the old to retain power through its international commitments may seem once again to frustrate popular control.

This problem is not limited to the international law context, of course. The same dilemma faces domestic laws enacted by a prior government. Constitutions in general can be understood as self-binding mechanisms intended to provide some shelter from the turbulent winds of social and political change. After all, the Constitution sometimes requires unelected judges and elected officials to defy the popular will to do what they believe the Constitution requires. This gives rise to the well-known Anti-Majoritarian (or Counter-Majoritarian) difficulty: How can decisions to defy the popular will be legitimate in a nation that traces its power to the people's will? As Laurence Tribe succinctly puts it: "In its most basic form, the question in such cases is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change."²⁹ Most who have considered such questions conclude that the answer to the puzzle, if there is one, must be that such self-imposed constraints allow the nation to achieve ends closer to the true popular will over the long term than would be possible were the polity not constitutionally constrained—a point to which I will return in more detail below.³⁰

The claim that constitutional constraints give rise in the long term to governance that reflects the true will of the people rests on a series of assumptions—among them that it is possible for representative processes to ever in fact meaningfully reflect majority will and that the constitutional constraints can succeed in checking momentary whims and at the same time not excessively inhibit change and thus produce stagnation. The later

instances in which states' democracy scores increased by at least one point—often for several years in a row. Author's calculations, based on the Polity Dataset.

²⁹ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2nd Ed. 1988).

³⁰ Tribe argues that this remains an important puzzle of constitutional theory, but suggests that the "outlines of an answer" can come from studying impulse control. He cites a study that suggests that even pigeons are capable of acting to "bind their 'own future freedom of choice' in order to reap the rewards of acting in ways that would elude them under the pressures of the moment." Jon Elster considers similar questions and arrives at a similar conclusion. He argues that "inconsistent time preferences" arise in part from "weakness of will"—that is, the tendency to privilege the present over in the future. This weakness of will leads individuals to act in ways that later give rise to regret. A rational response to such irrational impulses, Elster argues, is for an individual to seek to bind its later self—that is, to adopt the "Ulysses strategy." JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 65-76 (1984).

assumption rests on a claim that the constitutional regime strikes the right balance—resisting and permitting change in correct measure. Most domestic legal systems hence do not prohibit changes to higher law. They instead address the problem of time-inconsistent preferences by providing that the domestic laws remain binding unless and until those laws are formally revoked or changed. The process required to change the laws may be more or less cumbersome depending on how resistant to change they are intended to be—that is, how securely the nation wishes to bind itself.

The majority of treaties adopt a similar solution: states retain the authority to revoke power that has been delegated to an international institution through a treaty, either by denouncing or by withdrawing from the relevant treaty.³¹ The treaty may be very easy to denounce or may include any number of hurdles—including time restrictions or specific consent requirements.³² Unlike most Constitutions,³³ however, there are some treaties that create obligations that are not just difficult but impossible for states to escape. Treaties that prohibit unilateral exit or withdrawal are uncommon, but they do exist.³⁴ A particularly notable example is the Charter of the United Nations, which does not contain any provision on exit and is generally (though not universally) regarded as an irrevocable treaty.³⁵ Moreover, the 1969 Vienna Convention on the Law of Treaties

³¹ The majority of treaties include provisions for withdrawal in the treaty text itself. Those that do not are generally considered to be governed by Article 56 of the Vienna Convention on the Law of Treaties, which applies to treaties completed after 1980. For more on treaty exit and the related decision to “unsign” a treaty, see Laurence R. Helfer, *Exiting Treaties*, VIRGINIA LAW REVIEW 91 (2005): 1579-1648; and Edward T. Swaine, *Unsigning*, 55 STANFORD LAW REVIEW (2002): 2061-2089.

³² Helfer, examining the United Nations office of Legal Affairs Handbook of Final Clauses, identifies six types of denunciation and withdrawal clauses: (1) treaties that may be denounced at any time; (2) treaties that preclude denunciation for a fixed number of years, calculated either from the date the agreement enters into force or from the date of ratification by the state; (3) treaties that permit denunciation only at fixed time intervals; (4) treaties that may be denounced only on a single occasion, identified either by time period or upon the occurrence of a particular event; (5) treaties whose denunciation occurs automatically upon the state’s ratification of a subsequently-negotiated agreement; and (6) treaties that are silent as to denunciation or withdrawal.” Helfer, *supra* note ?, at 1597.

³³ Germany’s post-war constitution is a notable exception.

³⁴ There is no comprehensive data currently available on the number of treaties that include the various types of exit provisions. In the human rights area, Larry Helfer identifies only four treaties that do not contain denunciation clauses. Helfer, *supra* note ?, at 1642 n.172. Helfer also notes that “Treaties that expressly preclude unilateral exit are uncommon.” See Helfer, *supra* note ?, at 1593 n. 31.

³⁵ See Egon Schwelb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, AMERICAN JOURNAL OF INTERNATIONAL LAW 61 (1967): 661-672, 671; Joseph H. H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, ISRAEL LAW REVIEW 20 (1985): 282-288; Kelvin Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, BRITISH YEARBOOK OF INTERNATIONAL LAW 53 (1983): 83-?.

adopts a default rule that provides that states may not unilaterally exit from a treaty that does not explicitly provide for denunciation or withdrawal.³⁶ Under the Convention, even a fundamental change in circumstances cannot be invoked as grounds for withdrawing from or terminating a treaty except in very limited circumstances.³⁷ These provisions stand in some tension with the principle of domestic autonomy.³⁸

States may, of course, deal with the problem of time inconsistent preferences in these cases by simply violating their international legal commitments and accepting the consequences that follow. Most states allow some form of subsequent modification of international law's domestic effect, even when doing so might place the state in violation of international law. In the United States, for example, Congress can pass legislation that implements, modifies, or even contradicts a treaty obligation. Such legislation, the courts have ruled, always takes precedence over the treaty itself.³⁹ This hands Congress an

³⁶ One of the best modern discussions of the topic is Laurence R. Helfer, *Exiting Treaties*, VIRGINIA LAW REVIEW 91 (2005): 1579-1648. For earlier works on the topic, see Egon Schwelb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, AMERICAN JOURNAL OF INTERNATIONAL LAW 61 (1967): 661-672, 671; Joseph H. H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, ISRAEL LAW REVIEW 20 (1985): 282-288; Kelvin Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, BRITISH YEARBOOK OF INTERNATIONAL LAW 53 (1983): 83-?.

³⁷ Vienna Convention on the Law of Treaties Art. 62 (Fundamental change of circumstances) (providing that "A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.")

³⁸ This remains a matter of debate. See Helfer, *supra* note?, and Widdows, *supra* note ?, for a discussion of the ongoing debate.

³⁹ See, e.g., *Medellin v. Dretke*, 544 U.S. 660, pin ("[W]herever the Convention, which has been in continuous force since 1969, conflicts with this subsequently enacted statute, the statute must govern."); *Breard v. Greene*, 523 U.S. 371 (1998) ("We have held 'that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion))); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that when an act of legislation conflicts with the self-executing provisions of a treaty, "the one last in date will control the other"); Curtis Bradley & Lori Fischer Damrosch, *Medellin v. Dretke: Federalism and International Law*, COLUMBIA JOURNAL OF TRANSNATIONAL LAW 43 (2005):667-703, 680 (calling the doctrines of the relationship between statutes and treaties that give subsequently enacted statutes precedence "well-settled"); and Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, INDIANA LAW JOURNAL 80 (2005): 319-390. The enactment of subsequent contrary legislation may very well leave the country in violation of international law, but

immense power to shape the domestic effect of a treaty commitment even after it has been made and even if international law does not permit unilateral change or revocation. Again, however, these enactments affect only the domestic legal effect of the international commitment. Despite the new law revoking the power of the treaty—and of the international organization that oversees it—within the state, the law may nonetheless remain binding as a matter of international law, and the failure to abide by it might bring consequences in the form of reciprocal defection and retaliation by other states or enforcement through international organizations.

C. Unintended Consequences

Many of those who have focused critical scrutiny on international delegation (including some of the participants in this workshop) point to the problem that the authority states delegate to an international body can sometimes differ from the authority later exercised by that same international body. This might be called the problem of unintended consequences of delegation. The existence of such unintended consequences can once again generate tension between international delegation and domestic sovereignty.

A particularly notable example of unintended consequences of international delegation is the European Community. Alec Stone Sweet and Thomas Brunell argue that the transformation of the European Community from an organization of sovereign states governed by international law into a “multi-tiered system of governance founded on higher-law constitutionalism” was unanticipated—indeed even opposed—by many member states. The European Court of Justice “constitutionalized” Europe through what can only be seen as judicial fiat, they argue, by expanding the zone of its own discretion over time. It did so most notably by ruling that in any conflict between EC and national law, EC law must be given primacy (a principle now referred to as the doctrine of “supremacy”) as well as that the EC confers legal rights on individuals that national government must respect and which can be pleaded, and must be enforced, in national courts (a principle now referred to as the doctrine of “direct effect”). Neither principle, Sweet and Brunell emphasize, was provided in the treaty that created the EC: “[i]t cannot be stressed enough that the Court initiated and sustained this process in the absence of express authorization of the Treaty, and despite the declared opposition of Member State governments.”⁴⁰ States, in other words, created the European Community and the Court and delegated authority to them. An unintended consequence of this delegation followed:

that law would be unenforceable in domestic courts. In order for the treaty to no longer be binding according to international law, the country must formally withdraw from it. For more on treaty withdrawal, see *supra* note 15.

⁴⁰ Alec Stone Sweet & Thomas Brunell, “Constructing a Supranational Constitution,” in ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004). Some disagree with this interpretation of events. Andrew Moravcsik argues that there were no such “unintended consequences.” ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATES POWER FROM MESSINA TO MAASTRICHT* (1998). For more on the European transformation, see also KAREN ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001).

the Court seized the opportunity to reinterpret its mandate to expand its authority in ways not sanctioned by the member states.

The existence of “unratified treaty amendment” of which Curtis Bradley writes in this workshop has a similar effect. As Bradley explains, unratified treaty amendments are “changes to treaties proposed by international bodies that become binding upon parties to the treaty without the expectation of a national act of ratification.”⁴¹ Treaties that include such procedures might open the door to unintended consequences because the procedures delegate to an international organization the power to modify the treaty’s obligations without the approval of the state parties. The amendments may simply be tacit—changes that a state can prevent by objecting. Others, however, can take place even over as state’s objection. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer provides that the annexes, which specify which substances are to be controlled and by how much, can be amended by a vote of two-thirds of the members and will bind all members, including those who oppose the changes.⁴² This process has the potential, at least, to lead to unanticipated changes in the states’ legal obligations—changes over which they may have little control.

The World Trade Organization offers yet another example of the way in which international delegation might generate unintended consequences. The WTO puts in place two mechanisms that allow for change in members’ legal obligations over time. The first is the Dispute Resolution Body, which considers complaints filed by member states and issues a decision. The Body has the power to make decisions that legally bind member states as a matter of international law; states must either follow the ruling or accept sanctions.⁴³ This mechanism, like any international judicial body, delegates to the WTO the power to fill the interstices in the treaty and interpret any ambiguities. In this way, the requirements of the treaty may evolve—or at the least become more precise—

⁴¹ Curtis Bradley, *Unratified Treaty Amendments and Constitutional Process* (unpublished workshop paper 2006).

⁴² The unratified treaty amendments can also raise the type of problem discussed in the first subsection above (“Consent by Whom”). Bradley argues that unratified treaty amendments that allow the executive greater sole control over the amendment process arguably delegates unconstitutional powers to the executive. More important, for the purposes of this paper, it creates a lawmaking process that differs in important ways from the usual domestic lawmaking process.

⁴³ There is an ongoing debate as to whether a state that accepts and complies with sanctions is acting in compliance with the treaty. It is not necessary to resolve that question here. It is enough to notice that the GATT does not provide for any further method of compulsion. Compare Warren Schwartz and Alan Sykes, “The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization,” *Journal of Legal Studies* 31 (2002): 179-? (arguing that the WTO is a liability rule system that promotes efficient breach), to John Jackson, “International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?”, *American Journal of International Law* 98:1 (2004): 109-125 (arguing that the WTO imposes a property rule with an obligation to perform) and Joost Pauwelyn, *How Strongly Should We Protect International Law?: Navigating between European Absolutism and American Voluntarism* (unpublished manuscript).

over time, sometimes in ways states might not fully anticipate.⁴⁴ The second mechanism for implementing change in the regime is by altering the terms of the agreement. Here, states cede limited, but real, authority. Amendments are generally made by a two-thirds vote of the members (and amendments are usually only binding on those who accept them).⁴⁵ Modifications can be made outside the amendment process, however. Such changes formally require consensus of all members,⁴⁶ but informally the process is often dominated by the most powerful members, leaving others with significantly less input and potentially subjecting them to changes they do not fully endorse.⁴⁷

One response to the concern that delegation might lead to unintended consequences centers on the intention of the state at the time it delegates. Yes, the state might not anticipate—and hence intend—every individual decision that the international body to which authority is delegated might make. But the state intentionally accedes to a process that it must realize will lead to an evolution in its legal obligations over time. Indeed, one might argue that this is precisely what states intend when they delegate the authority to make future decisions to international bodies. They *want* to have future decision taken out of their hands (both for reasons of efficiency and perhaps to isolate themselves from the political fallout that otherwise might flow to them); they *want* the institution to grow and evolve, and they *want* the institutions to broaden and deepen the legal commitment they have made to one another. Hence to argue that the particular

⁴⁴ See, e.g., Judith L. Goldstein & Richard H. Steinberg, *Delegation to the WTO: Liberalizing Through Legislation or Litigation?* (unpublished manuscript 2006), at pp. 8-11).

⁴⁵ Article IX to the Agreement Establishing the World Trade Organization provides that, “Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter shall be decided by voting.” Consensus is defined in the following way: “The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.”

⁴⁶ The Agreement Establishing the World Trade Organization provides that most amendment be made by a two-thirds vote: “Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.” Article X of the

⁴⁷ See, for example, Richard H. Steinberg, *In the Shadow of the Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INTERNATIONAL ORGANIZATION 339 (2002). For a detailed account of the process of changing WTO law, see Hunter Nottage and Thomas Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, 9 JOURNAL OF INTERNATIONAL ECONOMIC LAW 989 (2006).

decisions that these processes produce are “unintended” could be said to miss the broader point.

There remains, nonetheless, at least the theoretical possibility that states could delegate authority to an international institution based on a particular set of expectations about what that institution will do with the authority granted to it, only to find that those expectations were wrong. The international body may make wildly different substantive decisions than expected (for example, adopting a new substance to be regulated or a phase-out schedule once considered unimaginable) or might assert powers never anticipated (the ECJ’s doctrine of direct effect might fit this characterization). There may be reason, once again, to believe that delegations of this type create tension with domestic authority.

D. When “Consent” is Coerced

An international delegation is obviously not consensual is when a state is coerced into agreeing to it. The problem of coerced agreements was once a significant one for international law. Perhaps the most famous example comes from the mid-19th century, when four U.S. naval vessels commanded by Commodore Matthew Perry sailed into the Tokyo Bay in an effort force Japan to abandon two centuries of isolation.⁴⁸ The resulting convention signed at Kanagawa in March opened the ports of Japan to trade with the United States.⁴⁹

More than a hundred and fifty years later, however, the threats are rarely so blatant. In fact, that kind of gunboat diplomacy is now illegal. Entered into force in 1980, the Vienna Convention on the Law of Treaties provides that a treaty is void if its conclusion has been procured by the “threat or use of force in violation of the principles of international law.”⁵⁰ Hence today the Treaty of Peace and Amity between the U.S. and

⁴⁸ Upon seeing the U.S. ships, some Tokyo residents gathered their possessions and fled to the countryside for fear of war and pillage. *James Fallows, After Centuries of Japanese Isolation, a Fateful Meeting of East and West*, SMITHSONIAN (July 1994): 20-33. Commodore Perry’s entrance into Tokyo Bay was such a dramatic act of diplomacy that it later became the centerpiece of Stephen Sondheim’s musical *Pacific Overtures*.

⁴⁹ Commodore Perry eventually went ashore for a tense meeting with Japanese officials, where he delivered a letter from President Millard Fillmore and promised to come back for an answer the following year with an even larger force. In February 1954, Commodore Perry made good on his promise, leading eight ships back into Tokyo Bay to begin negotiating. W.G. Beasley, *The Rise of Modern Japan* (London: Weidenfeld and Nicolson, 1995), 28-29. For a thorough discussion of Commodore Perry’s efforts to open Japan, see PETER BOOTH WILEY, *YANKEES IN THE LAND OF THE GODS: COMMODORE PERRY AND THE OPENING OF JAPAN* (New York: Penguin Books, 1990), especially chapters 9 & 12. For Commodore Perry’s account, see *THE JAPAN EXPEDITION, 1852-1854: THE PERSONAL JOURNAL OF COMMODORE MATTHEW C. PERRY*, (Roger Pineau, ed. Smithsonian Institution Press, 1968).

⁵⁰ Article 53 of the Vienna Convention on the Law of Treaties (entered into force in 1980) provides, in full: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the

Japan, signed as it was under the shadow of a small armada of gunboats, would (and should) be void.⁵¹

Modern-day coercion is more subtle, though sometimes perhaps just as effective. States might, for example, offer express or implicit promises of foreign aid or enhanced trade access in return for cooperative behavior or sanctions or withdrawal of aid in return for uncooperative behavior. For example, the United States has pressed over 100 countries into concluding agreements to shield U.S. citizens from the jurisdiction of the International Criminal Court.⁵² States that refuse to enter “Article 98” agreements (so named for Article 98 of the Rome Statute of the International Criminal Court,⁵³ which arguably authorizes such agreements) with the United States may be faced with withdrawal of U.S. military assistance and economic support.⁵⁴

There are, too, even less obvious forms of coercion. Instead of threatening to penalize a state for failing to join a treaty that delegates authority, an international body, state, or group of states might simply offer a deal that is too good to refuse. Today, when membership in the World Trade Organization brings with it access to the markets of over 140 other states, is membership in the GATT truly voluntary? Some might argue that it is virtually impossible for states to choose to remain outside this trading regime, for the benefits to be gained by joining it—and the benefits that would be forgone by not joining it—are too high. Even more pernicious, some argue, are agreements that do not simply offer such tantalizing benefits that cannot be refused, but actually threaten to make states that join the agreement worse off than they were before the agreement existed.

Lloyd Gruber argues that this is exactly what happened to Mexico in the mid-1980s: The 1987 Canada-U.S. Free Trade Agreement fed concerns in Mexico that the lower trade barriers between the Canada and the U.S. would affect Mexico’s ability to compete in the American market. Mexico responded by scrambling to be included in the

Charter of the United Nations.” Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

⁵¹ Notably, in most cases individual states has the option of unilaterally withdrawing from an international agreement—an option that is usually not as readily available in the context of domestic contracts.

⁵² Press Statement, United States Department of State, U.S. Signs 100th Article 98 Agreement, May 3, 2005, <http://www.state.gov/r/pa/prs/ps/2005/45573.htm>.

⁵³ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 I.L.M. 999 (1998).

⁵⁴ Under the American Servicemembers’ Protection Act (ASPA), countries that belong to the ICC are not eligible for U.S. military assistance unless they are explicitly exempted in the ASPA legislation, the President waives the requirement for national security reasons, or the President waives the requirement because the countries have concluded an Article 98 agreement with the U.S. Similarly, under the “Nethercutt Amendment,” originally passed as part of the Fiscal Year 2005 appropriations bill, countries that belong to the ICC are not eligible for U.S. economic support funds unless they are statutorily exempted, the President waives the requirement for national security reasons, or the President waives the requirement because the countries have concluded an Article 98 agreement with the U.S.

deal—even though doing so would force it to make faster and delegate more authority and to make more significant political and economic changes than its people or its government supported. Mexico thus entered the North American Free Trade Agreement not because the agreement would make it better off, but because staying outside the agreement would have left the country *worse* off.⁵⁵

Both the harder and softer forms of coercion constrain the choices available to states or otherwise influence their decision. Yet not all can be said to meaningfully undermine domestic autonomy. At one end of the spectrum stand direct military threats of the kind wielded by Commodore Perry. Such threats, most would agree, impose unacceptable burdens on domestic autonomy by robbing the state of the power given to it by international law to choose its international commitments and to delegate powers to international bodies only when it chooses to do so. On the other end stands indirect economic pressure of the kind experienced by Mexico. Though it is plausible to think that Mexico joined NAFTA even though it preferred a world in which the agreement did not exist, this is not enough to declare the treaty inconsistent with domestic autonomy. Few who care about domestic autonomy would wish for a world in which Mexico could force the United States and Canada *not* to enter an agreement with one another simply because their agreement threatens to put Mexico at a competitive disadvantage. Domestic autonomy rests on both sides of the equation.

The difficult task is to identify the point at which international law crosses the line—when it is that an international agreement undermines domestic autonomy in a meaningful way. One possible answer would be to draw a line between military force and economic pressure. In this view, only threats of attack would be sufficient to render an international agreement nonconsensual. Yet this is not entirely persuasive. Today, national economies are highly intertwined and interdependent. Hence the threat of coordinated economic sanctions—such as those used against South Africa in the 1980s or against Iraq in the 1990s—carry coercive force just as surely as does a gun.

Another possibility would be to consider how we would think about similar problems in everyday life. In private contract law, for example, contracts are regarded as enforceable unless a party can show that there was “no reasonable alternative” but to assent.⁵⁶ States, the argument would go, often find their choices constrained by the free and independent actions of others. But as long as the state remains able to exercise an

⁵⁵ Lloyd Gruber, building on the work of Peter Bachrach and Morton Baratz, among others, makes perhaps the most sustained argument along these lines in his book, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton, N.J.: Princeton University Press, 2000), 95-167.

⁵⁶ RESTATEMENT (SECOND) OF CONTRACTS § 175 (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim”). Of course, the exact bounds of this principle are not perfectly clear. Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion* (University of Michigan John M. Olin Center for Law and Economics Research Paper No. 04-005) (March 3, 2004), 33-38; John Dawson, *Economic Duress: An Essay in Perspective*, MICHIGAN LAW REVIEW 45 (1947): 253-?, 289. (“The history of generalization in this field offers no great encouragement for those who seek to summarize results in a single formula.”).

independent choice, those constraints are not grounds for scuttling the agreement. Of course, this still leaves us with the difficult task of deciding when a state has “no reasonable alternative,” but at least it offers some standard by which to judge the imposition of international law on domestic autonomy.

For now, it is not necessary to definitively resolve the question of precisely where the line resides. It is enough to recognize that there is some point at which external pressures on states can become so great that the state can no longer be said to truly consent. At that point, international delegation undoubtedly usurps domestic authority.

II. When Should Domestic Authority Be Restricted?

I have argued that there is a tension between domestic authority and international law (though I locate that tension in a different place than do Bradley and Kelley). For some, the admission that such a tension exists would mark the end of the conversation. For some, domestic authority is the central value to which all the rest must bow. By contrast, I argue that protecting domestic authority is an important aim, but not the only one. Here, I aim to begin a conversation about how we might mediate conflicts between domestic authority and international delegation—when and why international delegation that restricts domestic authority can sometimes (but not always) be justified.

In particular, I focus here on two reasons why we might want to permit—even advocate—international delegation that restricts domestic authority. First, international delegation is sometimes the least costly way for states to achieve their goals. Thus a country may cede authority over a decision or accept certain limits on its future action in order to, for example, project its ideology or constrain the actions of other states without using military force. A state may also accept restrictions on domestic authority in order to achieve ends that it shares with others who similarly restrict their own authority—that is, to coordinate or cooperate. Second, international delegation might sometimes serve to protect individuals against actions that sovereign nations should not be permitted to take. I consider each point in turn.

1. Efficacy

There is a paradox at the heart of international law. International law is founded on the idea that states are sovereign. And yet the very purpose of international law is to restrict the freedom of states to act as they (more specifically, those who govern them) wish. The sovereign that is subject to international law is, in a sense, no longer fully sovereign, for its freedom is in some way restricted by the law. Of course, as already discussed at length, many of these restrictions are self-inflicted in the sense that they arise out of state consent. And yet they are true restrictions nonetheless—limiting in some way the future behavior of the state and subjecting it to the authority of outside actors, whether other states, international organizations, or other non-state actors. How might we justify this imposition on the state in a way that is consistent with the traditional underlying principle of state sovereignty?

One answer is that restrictions of the kind imposed by international law can be necessary to states’ pursuit of their true ends. Just as Ulysses bound himself to the mast to avoid the sirens and return home safely, states bind themselves to international law in order to avoid short-term temptations and thereby achieve their longer-term goals. States

are willing, in other words, to sacrifice some of their range of freedom to achieve goals that would be difficult or impossible for them to otherwise achieve.

The idea that imposing limits on future action can enhance rather than restrict freedom is certainly not limited to international law. Isaiah Berlin, for instance, speaks of positive liberty—the *freedom to* achieve certain ends—as opposed to negative liberty—the *freedom from* external coercion.⁵⁷ The two forms of freedom are often regarded as existing in conflict with one another, for the latter often requires restrictions of the former—the freedom to achieve ultimate ends sometimes rests on the ability to exercise self control, that is, to impose certain constraints on one’s self.⁵⁸ Jon Elster, too, speaks of human beings as distinct in that we are able to act as “globally maximizing machines”—capable of waiting and using indirect strategies, of deferring gratification to achieve longer-term ends. In particular, he writes that individuals may bind themselves as did Ulysses as a “way of resolving the problem of weakness of will; the main technique for achieving rationality by indirect means.”⁵⁹

Turning back to international law, there is an entire school of international relations theory devoted to making a similar claim. In the late 1970s and early 1980s, a new approach to international relations later dubbed “institutionalism”⁶⁰ emerged in response to Realist claims that states could not both seek their self-interest and engage in meaningful international cooperation. Institutionalists argued instead that effective regimes (including treaty regimes) could emerge to allow countries to engage in cooperative activity by restraining short-term power maximization in pursuit of long-term goals.⁶¹ States will create and comply with international legal rules, in this view, as a

⁵⁷ Many have questioned whether this dichotomy is real or specious. Some argue that the two are indistinguishable in practice while others contend that one cannot exist without the other (for example, it is commonly argued that preservation of negative liberty requires positive action by government to prevent some from taking the liberty of others).

⁵⁸ This, in turn, Berlin worried, opened the door to totalitarianism: “Once I take this view, Berlin says, “I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture in the name, and on behalf, of their ‘real’ selves, in the secure knowledge that whatever is the true goal of man . . . must be identical with his freedom.” Berlin 1969, 132-33. Philip Pettit, among others, attempts to overcome this problem by proposing a third conception of freedom, which he and others dub “republican freedom.” See, e.g., Philip Pettit, *Republicanism* (1997) (arguing for a theory of freedom as “non-domination,” with domination distinct in important ways from interference).

⁵⁹ JON ELSTER, *ULYSSES AND THE SIRENS* 37 (1984).

⁶⁰ This school of thought has been variously recast as “modified structural realism,” “intergovernmental institutionalism,” “neoliberal institutionalism,” and “new institutionalism.”

⁶¹ Early on, “regimes” were defined as “principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area,” STEPHEN D. KRASNER, *STRUCTURAL CAUSES AND REGIME CONSEQUENCES: REGIMES AS INTERVENING VARIABLES*, IN *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1983), and as “sets of governing arrangements” that include “networks of rules, norms, and procedures that regularize behavior and control its effects.” ROBERT O. KEOHANE &

winning long-term strategy to obtain self-interested ends. In other words, states act to maximize their own well-being through cooperative means.

More recently, Ulrich Beck, a German sociologist, made a similar observation in the context of state sovereignty. Writing of what he calls “cosmopolitan sovereignty,” he argues: “if sovereignty is measured in terms of political clout – that is, by the extent to which a country is capable of having an impact on the world stage, and of furthering the security and wellbeing of its people by bringing its judgements to bear” then “increasing interdependence and cooperation, that is, a *decrease* in autonomy, can lead to an increase in sovereignty. Thus, sharing sovereignty does not reduce it; on the contrary, sharing actually enhances it.”⁶²

There are a variety of specific ways in which states might relinquish some autonomy to obtain broader goals. First, they might enter into international agreements as a way of projecting their own values, ideology, and commitment to fair play to others without engaging in costly military conquest. Human rights law, in particular, might be understood as a mechanism for states with commitments to certain fundamental protections to encourage other states to adopt those same protections for their own citizens.⁶³ Similarly, international law might be viewed as a way for weaker countries to bind stronger states to rules of conduct. In short, law can be a relatively low-cost means for states to control one another’s behavior.

Second, states might enter into international agreements as a relatively costless way of coordinating their activity. They might delegate some authority and accept minor restrictions on their freedom of action in order to obtain collective as well as individual efficiency. International law, for example, establishes uniform overflight rules that allow airlines to fly more directly and more safely between states,⁶⁴ provides uniform technical

JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 19 (1977). They required neither formal institutions nor enforcement powers, and hence much of the ensuing literature on regimes focused on informal cooperation and largely ignored traditional international organizations and international law. Yet the most recent work in this vein has adopted a broader view of institutions that encompasses law as well as international legal institutions. In this view, legal institutions, like other institutions, are seen as “rational, negotiated responses to the problems international actors face.” Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 *INTERNATIONAL ORGANIZATION* 761, 768 (2001) (emphasis omitted).

⁶² Ulrich Beck, *Terrorist Threat: World Risk Society Revisited*, 19 *THEORY, CULTURE & SOCIETY* 39 (2002).

⁶³ International law, in particular, might be understood in this way—as essentially a mechanism for proliferating norms without military force.

⁶⁴ The International Air Services Transit Agreement (1944), in conjunction with many bilateral agreements and the Convention on International Civil Aviation (known as the Chicago Convention), permits civilian aircraft to fly across the territories of state parties without obtaining prior permission. The Convention for the Unification of Certain Rules for International Carriage by Air (1999) standardizes and internationalizes the various liability regimes under which air carriers operate.

standards for railways to permit cars to easily pass from one state to another,⁶⁵ allows citizens of one state to drive in another,⁶⁶ and ensures that when they do, they will find recognizable road signs and signals.⁶⁷ The same can be said of a vast array of international regulatory agreements. I can send a piece of mail from almost any country in the world to any other thanks to a little-heralded treaty originally formed in 1874. I can know what time it is anywhere on the planet thanks to the 1884 International Meridian Conference, which established an agreement that provided for universal recognition of the prime meridian and Greenwich Mean Time. I can make a telephone call from one part of the world to another thanks to the oldest intergovernmental organization, the Telecommunications Union, established by international agreement in 1865. And I can be certain that a kilogram is a kilogram and a meter is a meter thanks to the 1st General Conference on Weights and Measures, held under the auspices of the International Office of Weights and Measures, established in 1875. These agreements work not because they are costless, but because they help states coordinate their behavior and thereby establish a regime that makes all those that participate better off delegating authority to international bodies through the agreement than they are retaining the ability to act unrestrained.

Third and perhaps most significant, states might enter into agreements that cede authority to an international body in order to overcome a collective action dilemma. States agree to refrain from acting in certain ways in order to get others to do the same. Hence, for example, states negotiate and enforce lower trade barriers between them,⁶⁸ agree to forego taxing income earned by their citizens in another's jurisdiction,⁶⁹ and offer certain legal protections to the financial investments by the citizens of another country.⁷⁰ States jointly agree to protect migratory species such as turtles, whales, and birds, have begun to tackle global warming, and peacefully share and manage fishery

⁶⁵ The 1886 Convention on Technical Uniformity provides for uniform construction and maintenance of rolling stock and loading of railway wagons among member states.

⁶⁶ The 1949 UN Convention on International Road Traffic, Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 22, allows citizens of member states to obtain an international driver's license.

⁶⁷ The 1968 UN Convention on Road Traffic facilitates and encourages the use of universal traffic rules, road signs and signals in member states.

⁶⁸ For example, the General Agreement on Tariffs and Trade, December 15, 1993, 1867 UNTS 14, and the North American Trade Agreement (NAFTA), Jan. 1, 1994, 32 I.L.M. 289.

⁶⁹ This is one purpose of bilateral tax treaties, of which there are hundreds. See, for example Andreas F. Lowenfeld, *Investment Agreements and International Law*, COLUMBIA JOURNAL OF TRANSNATIONAL LAW 42 (2003): 123-130 (evaluating the failure of efforts to negotiate multilateral investment treaties and observing that thousands of bilateral investment treaties are in force).

⁷⁰ There are hundreds of bilateral investment treaties between states. See Reuven S. Avi-Yonah, *International Tax as International Law*, TAX LAW REVIEW 57 (2004): 483-500.

stocks and the oil and mineral resources of the seabed.⁷¹ In short, states repeatedly delegate decisions to international bodies to achieve goals that would be much more difficult, if not impossible, for even the most powerful of them to achieve on their own.

2. Human Rights

At the heart of much of the debate over international law lies a basic divide between those who believe that the nature of state sovereignty has changed as a consequence of the rise of human rights and those who do not. The first sees state sovereignty as inherently bounded by certain limits established by core human rights norms. The second instead sees sovereignty as bounded only by those limits that the sovereign state itself accepts—and then only insofar as the sovereign state wishes to be bound.

Those who take the position that sovereignty is limited by human rights norms may disagree about where exactly those limits should lie—whether to draw the line quite narrowly at, for example, unlawful violations of basic bodily integrity through torture, genocide, political killing, and disappearance or to draw it more broadly to encompass rights to health, education, food, and a living wage. But they all accept the underlying idea that certain limits, whatever they may be, exist.⁷²

Critics of this position sometimes seize upon the uncertainty about the precise limits placed by human rights on states sovereignty as evidence that the position is

⁷¹ For example, see the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at www.un.org/Depts/los/index.htm; International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

⁷² See, for example, Kofi Annan, *Two Concepts of Sovereignty*, *The Economist* 352 (September 18, 1999) http://www.un.org/News/press/docs/1999/19990918_kaecon.html (“State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. . . . When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.”); Michael Reisman, *Sovereignty and Human Rights in International Law*, 84 *A.J.I.L.* 866 (1990) (“International law still protects sovereignty, but -- not surprisingly -- it is the people’s sovereignty rather than the sovereign’s sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its ‘invasion’ of the sovereign’s domaine reserve. . . . [N]o serious scholar still supports the contention that internal human rights are ‘essentially within the domestic jurisdiction of any state’ and hence insulated from international law.”); Louis Henkin, *Human Rights and State “Sovereignty,”* 25 *GA. J. INT’L & COMP. L.* 31, 31-32 (1996) (“I suggest that a half-century of human rights has been the cause, or the result, or both, of radical change in the international state system, in the character of international law, and in its relation to national constitutions and to the spread of “constitutionalism.” Those changes, I conclude, have undermined common assumptions about the state system, including the assumed axiom of the system: state “sovereignty.”)

untenable. They note that the disagreement reflects a fundamental problem with the argument—that is, the absence of any specific, legitimate source for this fundamental core of human rights. How can the law be legitimate, they ask, if its source is unidentified, or, even worse, if it simply derives from natural law principles? When law is derived in this way, they argue, it serves as a cloak for morality, not law. And when we impose morality as if it were law, we thereby impose the cultural biases and religious beliefs of those who frame these “laws” on those who do not share them. Such critics cite the expansion of “rights” language to include a diverse array of issues, including labor rights, rights to food, rights to health care, and a right to be free from poverty.⁷³

These concerns are not without some merit. The position that domestic authority can be limited by human rights sometimes leads to such an expansive view of the cases in which human rights can “trump” domestic authority that it threatens to unjustifiably override the principles of self-determination and autonomy. Nonetheless, I think the critics are wrong to think that human rights cannot be justified as an external limit on state authority.

One approach to the problem is to see states as engaging in an implicit bargain when they enter the international community. They receive the benefits of state sovereignty under international law—they are recognized as the proper legal representative for the people located within a certain geographic area, deserving of formally equal treatment among other similarly situated representatives, and capable of bargaining and entering agreements on behalf of those it represents. In return, there are some very basic limits on the state’s behavior that it must accept—including, in particular, a basic regard for human rights. (Those entities that are not members of the international community and hence do not make this bargain may not have all the obligations it entails but they also do not receive all the protections it affords.)

This exchange is symbolized by and embodied in states’ accession to the United Nations Charter. To be permitted to accede to the Charter, a state must be recognized by the international community as the proper representative of a particular kind of legal and political entity. This entrance into the Charter and the community brings recognition of a state’s international legal sovereignty, thus granting it a “ticket of general admission to the international arena.”⁷⁴ At the same time, the Charter carries with it certain obligations. Among them are the most basic limits on unlimited sovereign authority over a state’s treatment of its own citizens. These limits are found in the preamble to the Charter itself, as well as in the statute of the International Court of Justice, which is incorporated into

⁷³ For two views on whether rights language should be used in discussions of economic issues, for example, see the debated between David Ellwood, Jeffery Frankel, and Amartya Sen, “Human Rights Debate: Is the Language of Rights Useful in the Fight Against Poverty?” on February 11, 2005 (available at http://ksgaccman.harvard.edu/iop/events_forum_listview.asp?Type=PS); see also Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, 23 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 57 (2003) (discussing how human rights and international economic discourses intersect).

⁷⁴ MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* (University Park, P.A.: Pennsylvania State University Press, 1995), 12.

the treaty and which explicitly recognizes certain international legal principles—among them the existence of customary international law.⁷⁵

As a consequence, any state that is a full participant in the international community must accept that its sovereignty will be limited by basic human rights principles. How far does this extend? At a minimum, it must extend to a fundamental core of human rights on which there is universal or close to universal agreement—that is, limits on government action that are shared by nearly every culture and religion, at least in aspiration if not always in reality. This fundamental core would include, for example, prohibitions on state-sanctioned torture, genocide, and political killings.

If nothing else, imagining the alternative to this position—that is, that there are no exogenous limits on state sovereignty—makes the case for it. If there were no limits on state action, then a state could openly and flagrantly violate its own citizens' basic human rights and yet no outside entity would be justified in intervening to stop it. Moreover, those who engaged in such acts could not be held responsible for any crime. In this view, then, Nuremburg, the International Court for the Former Yugoslavia, the International Court for Rwanda, and efforts to address the ongoing crimes in Darfur through the International Criminal Court are all unjustified impositions of external morality.

III. Conclusion

International law today touches on almost every area of domestic authority. States are increasingly handing authority to international bodies to set policies on issues ranging from energy use to prisoner treatment and nearly everything in between. And yet the growing international influence has not come without concern for what may be lost in the process. This workshop, indeed, reflects worries among scholars that the real benefits of international delegation come at cost to domestic sovereign authority—that states are less and less able to make decisions for themselves even on issues that have little to do with cross-border interactions.

I have argued that it is wrong to assume that every international delegation generates sovereignty costs. States that consent to international delegations—and retain ongoing power to monitor and revoke that authority—often lose little or no meaningful sovereign power. Nonetheless, I have also sought to show that even in a world in which

⁷⁵ Article 92 of the UN Charter incorporates the Statute of the International Court of Justice. See U.N. Charter art. 92 (“The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”); *id.* art. 93 (“All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”); Statute of the International Court of Justice art. 38 sec. 1, 1946. The Statute of the International Court of Justice, in turn, provides that the Court, “whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.” This article of the Statute is generally regarded as a definitive statement of the proper sources of international law.

most international law is made voluntarily by states, there is still the potential for tension between international delegation, on the one hand, and the rule of local political authorities, on the other.

What does this mean for the future of international delegation? We must not reject it simply because it sometimes restricts domestic authority. Instead we must ask whether the restrictions it imposes are desirable and justified—whether, that is, they make it possible for the state to achieve its (and its citizens’) broader goals, protects people’s most basic human rights against incursions by the state, or both.

With the ever-accelerating pace of globalization, international law is both more intrusive and more essential than it has ever been. People, organizations, and governments are interacting with one another across borders more than ever before. These interactions lead to conflict that must be resolved, to cooperation that must be managed, and to confusion that must be clarified. Modern states cannot afford to reject international law or the tool of international delegation. They must instead learn how to manage their power to most effectively pursue the well being of their citizens.