

(2/6/06)

Unratified Treaty Amendments and Constitutional Process

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[Prepared for Duke Workshop on Delegating Sovereignty]

In this workshop paper, I consider the relationship between the U.S. Constitution and what I will call “unratified treaty amendments.” 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. Sometimes these amendments relate to the principal terms of the treaty, but often they relate to schedules or annexes attached to the treaties that give specific content to the principal treaty obligations. Often these amendments will apply to a party only if it fails to object to them, but sometimes they will apply to a party even over its objection. In many ways these amendments resemble the exercise of delegated authority by U.S. administrative agencies, and they can in fact be seen as a component of a growing international administrative law. As Professor Ed Swaine has noted, “[t]he practice of delegating to international institutions – vesting them with the authority to develop binding rules – sometimes looks like the next New Deal.”¹

The United States is a party to dozens of treaties that contain unratified amendment provisions. Many of these provisions allow for “tacit” amendments, whereby amendments are adopted by an international body and automatically take effect for a party unless the party objects within a specified time period. One common justification for tacit amendment procedures is that they allow for the regular updating of technical or administrative provisions in a treaty, without the need for potentially lengthy and unwieldy national ratifications. In explaining why a tacit amendment process has been incorporated into many of the conventions adopted under the auspices of the International Maritime Organization, for example, the Organization’s website notes that this process “facilitates the quick and simple modification of Conventions to keep pace with the rapidly evolving technology in the shipping world.”²

Although often described as technical or administrative in nature, unratified treaty amendments can substantially affect a party’s treaty obligations. Consider, for example, the International Convention for the Regulation of Whaling, which the United States ratified in 1948. In an effort to “establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale

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¹ Edward T. Swaine, *The Constitutionality of International Delegations*, 104 Colum. L. Rev. 1492, 1494-95 (2004).

² See http://www.imo.org/Conventions/mainframe.asp?topic_id=148#tacit.

stocks,” this Convention establishes an International Whaling Commission, which is composed of one representative from each party country. The Convention also includes a Schedule, which the Convention describes as an “integral part” of the Convention. The Commission is given the authority, upon a three-fourths vote, to amend the Schedule with respect to such basic issues as the species subject to protection; the open and closed waters and seasons; the time, methods, and intensity of whaling; and the types of gear that can be used. These amendments to the Schedule become effective for all parties to the Convention except those that object during a specified period of time. In other words, a failure to object constitutes a tacit acceptance of the amendments.

Another example of a treaty containing a tacit amendment procedure is the Chemical Weapons Convention, which the United States ratified in 1997. Parties to the Convention have agreed, among other things, never to develop, produce, acquire, stockpile, retain, transfer, or use chemical weapons. They have also agreed to be subject to international inspections to verify their compliance. The Convention’s definition of chemical weapons refers to “toxic chemicals,” and that term is defined as “[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.” The schedules contained in an Annex on Chemicals attached to the Convention then list the toxic chemicals subject to the Convention’s verification measures. The Convention provides for tacit amendments to these schedules “if proposed changes are related only to matters of an administrative or technical nature.” Under this process, “If the Executive Council [which consists of 41 states parties with rotating membership] recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation.”

In the above examples, the United States can prevent itself from being bound by the treaty amendments by lodging an objection to them. Some treaty amendment procedures, however, allow for amendments to take effect for a party even over its objection. Consider, for example, the Montreal Protocol on Substances that Deplete the Ozone Layer, which the United States ratified in 1988. Certain changes to the annexes to this Convention can be adopted by a two-thirds majority vote and thereby take effect for all the parties, including those that voted against the amendments. Similarly, the Protocol Additional to the Safeguards Agreement between the United States and the International Atomic Energy Association (IAEA), which the United States ratified in 2004, allows the IAEA’s Board of Governors to amend the annexes to the Protocol (which set forth definitions of nuclear activities, equipment, and material subject to declaration under the Protocol) “upon the advice of an open-ended working group of experts established by the Board,” and such amendments take effect four months after being adopted by the Board. Although the IAEA Board (which is composed of representatives from 35 member states, including the United States) generally takes action on the basis of consensus, it has the authority to take action even when there is dissent.

Do arrangements like these present any constitutional difficulties for the United States? In thinking about this question, legal scholars would normally start with the text of the Constitution. Article II of the Constitution states that the President has the power

to make treaties “by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur.”³ The Founders had a number of reasons for including this senatorial advice and consent requirement, including their desire to protect state interests, check executive power, and limit the number of international commitments that the country entered into.⁴ In light of the text of Article II, unratified treaty amendments may seem constitutionally problematic because they can impose binding treaty obligations on the United States without any senatorial approval of these obligations, and sometimes without even the tacit approval of the President.

U.S. constitutional practice, however, is more complicated than the text of Article II might suggest. Since the late 1930s, the vast majority of international agreements concluded by the United States have been “executive agreements” rather than agreements concluded through the Article II process.⁵ There are three types of executive agreements: agreements authorized by an Article II treaty; agreements approved before or after the fact by Congress (“congressional-executive agreements”); and agreements concluded solely by the President (“sole executive agreements”).⁶ While there has been significant academic discussion of the constitutionality of executive agreements, most scholars accept that the Article II process is not the exclusive means for concluding international agreements, and the Supreme Court has specifically enforced a number of sole executive agreements.

The practice of executive agreements might support the constitutionality of tacit treaty amendments (but not amendments that can take effect over a U.S. objection) because tacit amendments become binding on the United States only if the Executive representative in the international body acquiesces in them by failing to object. This assumes, of course, that the practice of *express* executive agreements can be applied to the circumstance of a mere *lack of executive objection*. Even putting that issue aside, however, it is unlikely that the President has the constitutional authority to conclude international agreements outside the Article II treaty process in every instance. Under current doctrine, Article II treaties may regulate matters beyond Congress’s legislative powers,⁷ but this proposition is based in part on the special federalism protections associated with the two-thirds senatorial consent requirement in Article II, protections that do not exist for either congressional-executive agreements or sole executive agreements. Moreover, U.S. historical practice does not demonstrate complete interchangeability, as presidents have not generally attempted to use either congressional-executive agreements or sole executive agreements for certain subjects such as arms

³ U.S. Const. art. II, § 2.

⁴ See generally Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, 1 *Persp. Am. Hist.* 233 (1984).

⁵ In the 50-year period between 1939 and 1989, the United States entered into 11,698 executive agreements and only 702 Article II treaties. See Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, 106th Cong., 2d Sess., S. Prt. 106-71, p.39 (2001) (hereinafter “CRS Study”).

⁶ See Restatement (Third) of the Foreign Relations Law of the United States § 303 (1987).

⁷ See *Missouri v. Holland*, 252 U.S. 416 (1920).

control, human rights, and environmental regulation, and the Senate has indicated that it would resist any such attempts on constitutional grounds.⁸ While there is some scholarly support for complete interchangeability between congressional-executive agreements and Article II treaties, a number of commentators have questioned that proposition in recent years, and, in any event, there is little scholarly support for complete interchangeability between *sole* executive agreements and Article II treaties. As Professor Louis Henkin (who is otherwise supportive of executive agreements, especially congressional-executive agreements) notes, the view that sole executive agreements are completely interchangeable with Article II treaties “is unacceptable, for it would wholly remove the ‘check’ of Senate consent which the Framers struggled and compromised to write into the Constitution.”⁹

The analogy to sole executive agreements is probably not the best one, however, since the tacit amendment procedure is itself typically authorized by an Article II treaty.¹⁰ The better analogy may be to executive agreements authorized by treaty. It is arguable that such agreements are fully interchangeable with Article II treaties even if other executive agreements are not. The argument here is that, because these agreements are authorized in Article II treaties, the Senate is giving its advice and consent to them – it is simply consenting to them *in advance*. As a study on treaties prepared for the Senate’s Foreign Relations Committee noted in discussing tacit amendments, the Senate can be said to have “given its consent in advance to the modifications adopted pursuant to those processes.”¹¹ This “advance consent” argument could be made not only for tacit amendments, but also for amendments that can be adopted over U.S. objection, because that process, too, will have been authorized in advance by the Senate.

⁸ The United States has not concluded any major human rights or environmental treaties through the executive agreement process, and it has concluded only one major arms control agreement – the 1972 SALT I Interim Agreement on Limitation of Strategic Offensive Arms – through this process. In giving its advice and consent to the Treaty on Armed Conventional Forces in Europe, the Senate attached a declaration stating that international agreements that “reduce or limit the armed forces or armaments of the United States in a militarily significant manner” can be approved only pursuant to the Article II treaty process. See 137 Cong. Rec. S17846 (daily ed. Nov. 23, 1991). In 2002, when President Bush expressed an intent to conclude a nuclear arms reduction agreement with Russia, the leaders of the Senate Foreign Relations Committee sent him a letter stating that it was “clear that no Constitutional alternative exists to transmittal of the concluded agreement to the Senate for its advice and consent,” and President Bush did in fact conclude the agreement through the senatorial advice and consent process. See also 22 U.S.C. § 7401 (prohibiting the United States from becoming a party to the International Criminal Court by any means other than an Article II treaty).

⁹ Louis Henkin, *Foreign Affairs and the United States Constitution* 222 (2d ed. 1996); see also 1 Laurence H. Tribe, *American Constitutional Law* 649 (3d ed. 2000) (“That the power to conclude executive agreements coincides perfectly with the treaty power is untenable . . . since such a conclusion would emasculate the structurally crucial senatorial check on executive discretion that the Framers so carefully embodied in the Constitution.”).

¹⁰ Some agreements authorizing tacit amendments have been concluded for the United States as congressional-executive agreements (particularly in areas relating to trade, investment, and monetary affairs) and thus involve delegations from a majority of Congress rather than from a supermajority of the Senate.

¹¹ CRS Study, *supra* note 5, at 183.

Evaluating the advance consent argument moves us to more difficult terrain, where a central issue is the extent to which the legal doctrines that govern separation of powers in the domestic arena should apply to foreign affairs.¹² There are at least two lines of cases that may be relevant here, and they appear to pull in opposite directions. The first line of cases concerns the process that must be followed in order to enact or change legislation. The second line of cases concerns potential limits on congressional delegations of regulatory authority to administrative agencies.

The first line of cases holds that, in order for legislation to be enacted or changed, the legislative process specified in Article I of the Constitution must be followed. That is, the new legislation or alteration of the legislation must be approved by the two Houses of Congress and presented to the President. Enforcing this requirement, the Supreme Court in *INS v. Chadha* held that a provision for a one-House veto of delegated immigration authority was unconstitutional because it allowed for legislative action without compliance with the bicameralism and presentment provisions for legislation specified in Article I of the Constitution. The Court explained that “the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”¹³ The Court also observed that “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”¹⁴ Similarly, in *Clinton v. New York*, the Court held that the Line Item Veto Act was unconstitutional because, by delegating to the President the authority to cancel provisions in appropriations statutes, it allowed for legislative action without bicameralism and presentment.¹⁵ Importantly, in *Clinton*, the fact that Congress had voluntarily delegated cancellation to the President did not save this arrangement from unconstitutionality. The Court stated: “The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7. The fact that Congress intended such a result is of no moment.”¹⁶ If applied to the treaty context, these decisions might suggest that treaty amendment authority cannot be delegated to either the President or to an international body because such a delegation allows for the creation of treaty obligations without compliance with the procedures specified in Article II for making treaties.

The second line of cases concerns the “nondelegation doctrine.” Article I of the Constitution states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,” and the Supreme Court has often stated that Congress

¹² See generally Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *Stan. L. Rev.* 1557 (2003); Julian Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *Minn. L. Rev.* 71 (2000); Swaine, *supra* note 1.

¹³ 462 U.S. 919, 951 (1983).

¹⁴ *Id.* at 944.

¹⁵ See 524 U.S. 417 (1998).

¹⁶ *Id.* at 445.

may not delegate these legislative powers.¹⁷ At the same time, however, it has allowed Congress to delegate broad authority to administrative agencies to implement statutes (as Congress had done uncontroversially in *Chadha* in its initial delegation of immigration authority to the Attorney General). These delegations of regulatory authority are in theory subject to a nondelegation doctrine, pursuant to which Congress must articulate an “intelligible principle” to guide the agencies.¹⁸ That doctrine has been applied to invalidate legislative delegations in only two cases, both decided in 1935,¹⁹ and the doctrine has often been described as having little if any current vitality. Some scholars have noted, however, that the doctrine continues to play a role in how the Supreme Court construes statutory delegations.²⁰ The key point is that, despite a purported ban on delegating its legislative powers, Congress is allowed to delegate broad authority to administrative agencies to implement statutes, even when such implementation involves the exercise of substantial rulemaking authority.²¹

Are unratified treaty amendments like the changes to legislation at issue in *Chadha* and *Clinton*? Or are they more like changes to administrative regulations that are almost always allowed? As a matter of form, unratified treaty amendments involve changes to the document approved in the first instance in the Article II treaty process. This is true even when the changes relate to schedules and annexes, since those documents are part of the original treaty, and indeed are often referred to as an “integral part” of the treaty. In that sense, they may seem to be analogous to changes to legislation. This assumes, however, that one can transfer the domestic separation of powers regime to the context of treaty delegations. Decisions like *Clinton* and *Chadha*

¹⁷ See, e.g., *Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘all legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers . . .”); *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (“[W]e long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch”) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

¹⁸ See, e.g., *Whitman*, 531 U.S. at 472-76; *Loving v. United States*, 517 U.S. 748, 771 (1996); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

¹⁹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935). One scholar quipped a few years ago that the nondelegation doctrine “has had one good year, and 211 bad ones (and counting).” Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000). For debate over whether there should even be a nondelegation doctrine that limits the breadth of delegations, compare Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002), with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297 (2003).

²⁰ See John F. Manning, *The Nondelegation Canon as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223; Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000). See also *Mistretta*, 488 U.S. at 374 n.7 (“In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”).

²¹ Of course, Executive Branch agents must act within the scope of their delegation, and courts regularly assess whether they have done so. See, e.g., *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (concluding that Congress had not delegated authority to the Attorney General in the Controlled Substances Act to regulate physician-assisted suicide).

concerned the legislative process rather than the treaty process, and there are some potentially important differences between the two. For example, the President may have the constitutional power to unilaterally terminate a treaty, even though he cannot unilaterally terminate a statute.²² In addition, although there is only one process for making statutes, the United States, as noted above, regularly makes international agreements outside of the Article II process. It is possible, therefore, that the Supreme Court's emphasis in *Clinton* and *Chadha* on the "finely wrought process" for making statutes is inapplicable to the treaty power. As also discussed above, however, it is unlikely that the President has the unilateral authority to make (or amend) any treaty he wishes, so at least some international agreements are probably analogous to statutes in terms of the necessity of following a particular process. Moreover, treaties, like statutes, can have the status in the United States of supreme federal law and thereby override contrary state law and earlier in time federal legislation.

That said, unratified treaty amendments often are limited to technical or administrative matters, and the use of annexes and schedules can be seen as a formal way of distinguishing between fixed treaty commitments and regulatory implementation. To the extent that unratified treaty amendments resemble the exercise of regulatory authority by U.S. administrative agencies, they may seem unproblematic. The nondelegation doctrine, as noted above, has very limited force in modern constitutional law. Moreover, the Supreme Court has suggested that, with respect to delegations of authority from Congress to the Executive, constitutional delegation concerns are even lower in the area of foreign affairs than they are with respect to domestic matters. Thus, for example, in the famous *Curtiss-Wright* decision, the Supreme Court upheld a delegation of authority to the President to criminalize arms sales to countries engaged in a conflict in Latin America, reasoning that even if the breadth of this delegation would have been constitutionally problematic had it concerned a domestic matter, the fact that it concerned foreign affairs ensured that it was constitutional. The Court explained that "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."²³ Notably, the Court in *Clinton* quoted this language from *Curtiss-Wright* in distinguishing the Line Item Veto Act from arguably similar statutory schemes in the international trade area, such as in *Field v. Clark*, in which the Court upheld a statute directing the President to impose specified import duties on certain items otherwise exempt from such duties if he determined that the importing country had imposed "reciprocally unequal and unreasonable" duties on the agricultural products of the United States.²⁴

²² See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (termination of mutual defense treaty with Taiwan), vacated, 444 U.S. 996 (1979); see also *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002) (termination of Anti-Ballistic Missile Treaty with Russia).

²³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

²⁴ See 143 U.S. 649 (1892).

The above case law concerns horizontal delegations from Congress to the Executive, another electorally accountable part of the government. Unratified treaty amendments, however, may involve a vertical delegation of authority to an international body rather than to the Executive, especially for amendments that can take effect over an Executive objection. A closer analogy therefore may be to the case law that has addressed delegations of authority by the federal government to *private* parties, which, like international bodies, will not be directly accountable to U.S. voters. These delegations have often been permitted, especially when they have involved only the exercise of advisory authority subject to the approval of the regulated parties or a government body, or when the outcome triggered by the private action has been specified in advance by the government.²⁵ Courts have indicated, however, that these delegations raise greater constitutional concerns than delegations to the Executive Branch.²⁶ One court recently summarized the case law in this area as standing for the proposition that “Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others.”²⁷ Even if this overstates the limits on private delegations, there appears to be greater constitutional restraint on such delegations than on delegations to the Executive.

This issue of private delegations implicates a broader point. Even if constitutional law does not impose much restraint on the *breadth* of delegations, it almost certainly imposes restraints on the *recipients* of delegations, and these restraints are not cured by advance consent. Some of these restraints stem from textual provisions that have been interpreted to require that certain functions be performed by certain actors, such as the Appointments Clause and the Take Care Clause in Article II, the Judicial Power Clause in Article III, and the Due Process Clauses of the Fifth and Fourteenth Amendments. Thus, for example, although broad delegations of interpretive authority are routinely upheld when directed at the federal courts (consider, for example, the Sherman Antitrust

²⁵ See, e.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (upholding statute allowing a private entity, made up of coal producers, to propose minimum coal prices to a federal commission, which could approve, disapprove, or modify the proposal, emphasizing that “members of the [private entity] functioned subordinately to the Commission”); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577-78 (1939) (upholding statute that provided that certain regulatory orders concerning the pricing of milk would take effect if supported by a specified percentage of the interested milk producers, reasoning that Congress could have mandated that the orders take effect without anyone’s agreement, and thus adding a requirement of such agreement did not create an unconstitutional delegation).

²⁶ See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936) (noting that the delegation in question “is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business”); see also *Texas Boll Weevil Eradication Foundation v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997) (“[P]rivate delegations clearly raise even more troubling constitutional issues than their public counterparts. . . . [T]he basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.”); *Tribe*, *supra* note 9, at 992 (“The judicial hostility to private lawmaking – pursuant to explicit or implicit delegations of authority by Congress or by the states – thus represents a persistent theme in American constitutional law.”).

²⁷ *The Pittston Co. v. United States*, 2004 U.S. App. LEXIS 16730 (4th Cir. 2004); see also *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989).

Act), the Supreme Court has long held that there are limits on Congress's ability to delegate adjudicative functions to judges who not subject to the appointment and salary protection provisions specified in Article III of the Constitution.²⁸ Similarly, although Congress is allowed to delegate broad discretion to the Executive to prosecute violations of federal criminal statutes, even small delegations of that authority to non-federal actors would likely be constitutionally problematic.²⁹ And delegations of regulatory authority to private entities may be problematic in part because of due process concerns.³⁰

Focusing on the recipient of delegation suggests that unratified treaty amendments raise greater constitutional concerns than delegations of regulatory authority to the Executive Branch. Functional concerns about delegation, such as diminished accountability and transparency, appear to be higher with respect to delegations to international bodies than to the Executive Branch, since international bodies have no direct electoral connection to U.S. voters and their processes are less amenable to public notice and comment by the U.S. public. Furthermore, it is likely to be more difficult for Congress to formally amend a treaty in order to overturn rulemaking by an international body than it is for Congress to amend a statute in order to overturn rulemaking by an Executive Branch agency.³¹ Formal arguments against delegation also appear to be stronger with respect to these delegations because international bodies, unlike the Executive, have not been assigned the constitutional authority to execute the laws of the United States.

Another consideration here is the relevance of historical practice to constitutional interpretation. The Supreme Court sometimes gives weight to longstanding historical practice in interpreting the Constitution, especially with respect to separation of powers. This is one reason why many scholars believe that the Court would be unlikely to hold the practice of congressional-executive agreements to be unconstitutional.³² Although no

²⁸ See, e.g., *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In evaluating whether such a delegation is permissible, the Supreme Court considers, among other things, "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 851 (1986).

²⁹ Cf. *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999) (holding that qui tam provisions of False Claim Act, by allowing private parties to bring public civil claims when the government does not intervene, violate the Take Care Clause). I am referring here to violations of federal criminal statutes, not international criminal law.

³⁰ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding unconstitutional, on due process grounds, statutes permitting a private party summarily to obtain a prejudgment writ of replevin and to compel the sheriff to seize property in execution of the writ).

³¹ Executive Branch agreement is required in order for the United States to formally ratify changes to a treaty, whereas Congress has the authority to enact legislation over a presidential veto (or threaten to do so). More importantly, the United States cannot amend a treaty without the agreement of at least many of the other parties to the treaty.

³² See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *Tex. L. Rev.* 961 (2001); John C. Yoo, *The Constitutionality of Congressional-Executive Agreements*, 99 *Mich. L. Rev.* 757 (2001).

one has yet documented the precise number of unratified treaty amendment procedures or the extent of U.S. acceptance of them, it appears that the United States has committed itself to these procedures in dozens of treaties, dating back to the 1940s.³³ It is possible that the extent and longstanding nature of this practice is itself an argument in support of its constitutionality, especially since the institution with the most to lose – the Senate – has been a party to it. It is worth noting, however, that the Senate has at times expressed concerns about tacit amendments,³⁴ as has the Executive Branch during some administrations.³⁵ As a result, it is not clear that the practice is sufficiently settled to play a significant role in the constitutional analysis. In any event, the Supreme Court has at times found unconstitutionality in the separation of powers area notwithstanding longstanding practice, most notably in *Chadha*.

The above discussion raises a number of questions that may be appropriate for consideration at the workshop. If there are potential constitutional difficulties here, to what extent can they be alleviated by limitations on U.S. delegations of unratified amendment authority? For example, is the difficulty reduced if the amendments do not have self-executing effect in the U.S. legal system (since this would prevent them from directly applying to private parties in the United States)?³⁶ If the United States can freely exit from the treaty regime?³⁷ If the Senate is notified of the proposed amendment before it takes effect and given an opportunity to advise the President whether to object?³⁸ If Congress is advised of the proposed amendment and given the opportunity to enact contrary legislation?³⁹ Also, if there are constitutional limitations on the U.S. ability to agree to unratified treaty amendment procedures, how are these limits to be enforced? To what extent, if at all, should courts play a role? Are there interpretive principles that courts can use in order to play a role without invalidating delegations? In thinking through these issues, what lessons can be drawn from the U.S. experience with regulating the rise of its administrative state? To what extent can political science scholarship and empirical work help address these issues?

³³ I plan to compile data on this practice, but probably not until after the workshop.

³⁴ See CRS Study, *supra* note 5, at 183 (noting that “the tacit amendment process has given the Senate some concern, and it has at times requested or required the executive branch to advise the Senate of such amendments prior to their entry into force”).

³⁵ For example, President Reagan objected to the tacit amendment procedure in the UN Convention on the Law of the Sea (which the United States still has not ratified). See Statement by the President on the Third United Nations Conference on the Law of the Sea, 1982 Pub. Papers 92 (Jan. 29, 1982).

³⁶ See Bradley, *supra* note 12.

³⁷ See generally Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579 (2005).

³⁸ Although nations were not allowed to attach reservations to their ratification of the Chemical Weapons Convention, the United States attached 28 “conditions” to its ratification. Condition 23 provided that the President would report to, and consult with, the Senate Foreign Relations Committee on proposed additions of substance to the Annex on Chemicals.

³⁹ It is well settled that, for purposes of U.S. law, Congress can override earlier-in-time treaty obligations. Absent a valid withdrawal from the treaty, however, these obligations would continue to bind the United States on the international plane.