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Review of Taming Globalization: International Law, the U.S. Constitution, and the New World Order

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consequences. For instance, glocalization *à la* Chander favors large companies that can afford to tailor their activities to each separate local market. Google can do it, but for the new start-up just put together in Bangalore, this endeavor is costly. In other words, applying the law of the service recipients may protect the consumers, but it raises new and high barriers of entry into the global market, favoring incumbent global companies, which are in most cases situated in developed countries. A related side effect is that the combination of the global economy and Chander's proposed glocalization principle incentivizes service providers to tailor their services to the laws and mores of the country of destination, often neglecting their own locality. For example, think of an Israeli start-up that develops a sophisticated filtering technology meant to prevent children from accessing pornography. The designers of the technology embed their understanding of the definition of pornography in the country where they intend to market their product. The designers in Kfar Saba in Israel may well attempt to imagine the community standards in, for example, faraway places like Alabama or California.[12] The local Israeli market is simply too small to bother about. Parents in liberal Tel Aviv will be offered the same filters, with its embedded values, as those in the more conservative U.S. Bible Belt, or perhaps the more permissive U.S. West Coast. In other words, complying with a foreign law might be at the expense of the local community. What matters is the size of the markets in the areas of the importer and exporter of information services.

Chander beautifully weaves together theory, practice, trade, culture, and politics into a complex yet clear argument, a sophisticated yet down-to-earth analysis, and a beautifully written text. While glocalization and harmonization are not perfect, the alternatives, as Chander elaborates, are probably worse. His discussion and arguments are timely and crucial for enabling a better global electronic environment. The book is a highly important contribution to the discussion about international trade, globalization studies, and the ongoing debate about the role of the law in a dynamic technological setting. Chander paves a new path in all these discourses. His analysis is informed by international law and conflict of laws, together with a deep understanding of the implications of globalization. He constantly reminds us of the human face of the net-work—to use the globalization studies lingo—and he is keenly sensitive to the human rights aspects of the topic at stake. *The Electronic Silk Road* opens up a new set of issues with which the global or local "we" are bound to engage in the near future.

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[12] U.S. courts follow a three-prong test to define obscene material, which is not protected by the First Amendment. *See* Miller v. California, 413 U.S. 15 (1973). The first prong is whether the average person, applying contemporary *community standards*, would find that the work, taken as a whole, appeals to the prurient interest. *Id.* at 30–31.

BOOK REVIEWS

Taming Globalization: International Law, the U.S. Constitution, and the New World Order. By Julian Ku and John Yoo. Oxford, New York: Oxford University Press, 2012. Pp. viii, 272. Index. $35.

According to Julian Ku of Hofstra University School of Law and John Yoo of the University of California, Berkeley, School of Law, globalization poses a significant threat to the U.S. constitutional system of governance. In their recent book, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order*, they seek to reassure readers that this threat can be deflected. If their prescriptions are followed, Ku and Yoo argue, the United States can avoid constitutional problems while continuing to reap the benefits of international cooperation. Ku and Yoo insist that they are neither trying to stop globalization (a hopeless endeavor in any event) nor categorically opposed to the international community's efforts to regulate globalization's effects. Instead, their approach is "accommodationist" (p. 13); they offer three proposals to alleviate the "tension" between international governance and the U.S. Constitution (p. 2). First, U.S. courts should presume that treaties are not self-executing

and should enforce them only if Congress has adopted implementing legislation. Second, customary international law (CIL) should have the status of federal law only if Congress has adopted legislation implementing the CIL norm. In the absence of such legislation, Congress and the courts should defer to both presidential interpretations of CIL and presidential decisions about compliance with CIL. Third, individual U.S. states ought to have more autonomy in deciding whether and how to implement international obligations, especially those that affect traditional state interests.

Taking the position that academics have "battled to a stalemate" about whether these proposals are constitutionally required (p. 11), Ku and Yoo seek, instead, to defend them on functional grounds—that is, on the basis of their consequences for democracy and foreign-policy decision making within the United States. As explained below, the authors' functional analysis is curiously truncated. Adopting their proposals would make it harder for the United States to realize the benefits of international cooperation. Ku and Yoo ignore this consequence in their functional analysis, an omission that is particularly strange given the authors' acknowledgment that these benefits can be substantial.

When the omitted costs of Ku and Yoo's proposals are added back into the equation, it becomes clear that, despite their assurances, Ku and Yoo are not actually offering a prescription for "how the American constitutional system can embrace the intensive levels of cooperation required to tackle global problems" (p. 254). Instead, they are offering a prescription for hampering international cooperation in the service of a contested view of what the U.S. Constitution requires.

How exactly do Ku and Yoo frame the problems that their proposals would alleviate? In their view, globalization and global governance render two aspects of the U.S. constitutional order particularly vulnerable: federalism and the separation of powers. Federalism is imperiled because international agreements increasingly regulate subjects that used to be within individual U.S. states' control. As examples, Ku and Yoo cite not only human rights treaties but also treaties that govern wills and child custody. Separation of powers is threatened, in their view, by international regulatory responses that delegate authority *away* from Congress and the president *to* international institutions (p. 16). The North American Free Trade Agreement (NAFTA) exemplifies this concern. Under NAFTA, duties on goods from Canada or Mexico can be challenged only before binational arbitration panels, and the decisions of those panels cannot be appealed to any U.S. institution.[1] For this reason, Ku and Yoo maintain, NAFTA effects a "complete" transfer of "a sovereign power of the United States (the power to impose customs duties on imports)" to an international institution (p. 31).

Ku and Yoo hope to safeguard more than just federalism and the separation of powers, however. Their functional analysis specifies four additional goals. They seek to enhance democracy—"that is, a cluster of values, including popular representation, accountability, transparency, and deliberation, among others" (p. 104). They also want to ensure that U.S. foreign-policy decisions are coherent (that is, the United States speaks with one voice), well-informed (that is, based on comprehensive information that is collected and analyzed by foreign-relations experts), and nimble enough to keep pace with world events. Ku and Yoo build a functional case for their three proposals by comparing how well different branches of the federal and state governments are able to serve these four goals. The authors acknowledge that they "necessarily base [their] institutional assessment on certain generalizations and assumptions about how these institutions work, because it would be difficult to conduct a sufficiently rigorous empirical test of these functional claims" (p. 127).

In making the case for their first proposal, Ku and Yoo argue that non-self-execution enhances political accountability and deliberation by involving the House of Representatives in treaty implementation. The House is designed to be especially responsive to the electorate's demands

[1] North American Free Trade Agreement,, U.S.-Can.-Mex., Art. 1904(11), Dec. 8, 1992, 32 ILM 605, 683 (1993) [hereinafter NAFTA].

and includes members who hold a wide range of policy views. Requiring its participation in treaty implementation will "encourage the production of information, cause viewpoints on the extreme ends of legislator preferences to confront more moderate views, and result in the giving of public justifications and reasons for decisions" (p. 208). At the same time, non-self-execution prevents the courts—the most politically insulated branch of the federal government—from taking any steps at all to enforce treaties unless and until Congress as a whole has acted. The political branches' superior ability to collect and assess information supports this allocation of roles, Ku and Yoo argue. They claim that the need for timely policymaking does too, although their assertion that "Congress can enact nationwide rules more quickly than the courts" (p. 109) is certainly contestable.

Ku and Yoo undertake a similar analysis to justify their proposal regarding CIL. They maintain that the United States will be able to pursue its foreign-policy goals more effectively if compliance with CIL is discretionary rather than mandatory, at least when Congress has not adopted legislation requiring compliance. Based on a comparative institutional analysis, Ku and Yoo argue that the executive branch is better suited than the courts to decide when compliance is a wise policy choice for the following reasons. The executive branch is more politically accountable than the courts and has a greater capacity to collect and analyze relevant information. The executive branch can also reach a decision and can deploy other foreign-policy tools to support whatever decision it makes regarding CIL.

These first two proposals have been much debated in the academic literature. Ku and Yoo's third proposal—enhancing the role of state governments in implementing international norms—is more novel: they describe it as "perhaps [the] most radical" of the three (p. 14). To shore up state autonomy, Ku and Yoo encourage the federal political branches to exercise two kinds of self-restraint. First, they endorse reservations to preclude the United States from taking on new international obligations that affect matters that are traditionally governed by state law, including criminal law, public morals, contracts, torts, property, trusts and estates, and family law. In the absence of international obligations, Congress has no reason and no authority under the U.S. Constitution to displace state laws on these subjects. Second, where the United States does enter into treaties that address matters that have traditionally been regulated by states, the authors encourage the federal government to forgo implementing legislation. Instead, they encourage relying on individual U.S. states to implement the United States' treaty obligations. Finally, Ku and Yoo emphasize that any decision to preempt state laws ought to be made by the political branches rather than the courts.

Ku and Yoo justify their third proposal on the grounds that the U.S. state political branches not only surpass the federal courts in foreign-policy competence but sometimes even surpass the federal political branches. In particular, they describe the U.S. states' expertise and access to information in those areas of law and policy within their traditional control as superior. Ku and Yoo concede that the U.S. states are less capable of achieving a uniform and coherent foreign policy. But Ku and Yoo are untroubled by this prospect: in their view, maintaining U.S. state autonomy will often be more important than ensuring either coherence or compliance with international obligations (p. 165).

The authors frame their functional analysis as addressing the question of *who* decides whether the United States will comply with its international obligations rather than *whether* the United States should comply (p. 92). But their proposals are not neutral when it comes to the question of whether to comply. Every one of their recommendations reduces the probability that the United States will comply with its international obligations. Ku and Yoo's first two proposals would render the courts unavailable to ensure compliance in the absence of congressional legislation. Similarly, if the United States relies exclusively on its states to implement its international obligations, the probability is high that at least one state would decline to do so, thereby putting the United States in breach of its obligations.

Nor are Ku and Yoo's proposals neutral on the question of whether the United States should

participate in international efforts either to secure the benefits of globalization or to mitigate its harms. A presumption of non-self-execution is especially likely to impede U.S. participation.[2] To avoid violating its international obligations, the United States generally does not ratify non-self-executing treaties unless and until implementing legislation is in place.[3] Enacting implementing legislation is not easy; many treaties that have been approved by the Senate remain unratified because Congress has not approved implementing legislation.[4] The more that treaties require implementing legislation, the more significant this roadblock becomes.

A set of proposals that encumber the United States' ability to secure the benefits of international cooperation might be justified on functional grounds if those benefits were trivial or nonexistent. But at no point do Ku and Yoo suggest that the benefits of international cooperation are so trivial that they can be ignored.

To the contrary, the authors acknowledge that successful international cooperation can and does yield substantial benefits. Indeed, they appreciate that some problems, such as transboundary pollution or chemical weapons, can *only* be solved through international cooperation (pp. 52, 253–54). At one point, Ku and Yoo even invoke the development of the administrative state during the New Deal to explain the appeal of international regulation and international institutions. "As the scope of economic activity had become national," Ku and Yoo observe, "effective government regulation had to extend its reach to keep pace" (p. 61). Simultaneously, "government institutions had to change in order to come to grips with the complexity and speed of the new markets" (p. 62), and so Congress began delegating regulatory authority to administrative agencies. As the scope of economic and other interactions becomes global, the authors acknowledge, a parallel dynamic drives the development of international regulations and international institutions (pp. 28, 63–64).

Since the benefits of international cooperation are substantial, as Ku and Yoo recognize, a complete functional analysis would need to explain why the authors' proposals remain desirable even though they make these benefits harder to realize.[5] It is not obvious how this functional analysis would come out: there is no common currency for

[2] Ku and Yoo acknowledge this consequence: "It is true that non-self-execution raises the transaction costs of making international agreements with domestic effect" (p. 107). And they further note: "It seems undeniable that following the basic forms of domestic lawmaking—congressional control over legislation, presidential leadership in interpretation, or maintaining the interstitial nature of federal law against a background of state lawmaking—creates more arduous requirements for creating international law and organizations" (p. 258). But their functional analysis disregards these costs entirely.

[3] Robert E. Dalton, *United States*, *in* NATIONAL TREATY LAW AND PRACTICE 765, 789 (Duncan B. Hollis, Merritt R. Blakeslee & L. Benjamin Ederington eds., 2005).

[4] *E.g.*, Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, S. TREATY DOC. No. 99-29 (1986), 12 ILM 1298 (1973), *available at* http://www.unidroit.org/instruments/succession [hereinafter Washington Convention]; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 UNTS 57, 28 ILM 657 (1989); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States Relating to International Law, 108 AJIL 532, 533 (2014); *see also* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1313 n.225 (2008); STAFF OF S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 20 (Comm. Print 2001), *available at* http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf ("Treaties approved by the Senate have sometimes remained unfulfilled for long periods because implementing legislation was not passed.").

[5] In their conclusion, Ku and Yoo briefly suggest that their proposals may facilitate international cooperation by making the United States' international commitments more credible and sustainable by involving more political actors (specifically Congress and state governments) in implementing the U.S. obligations. Ku and Yoo's proposals are at best only partially aimed at making the United States' international obligations harder to breach, however. Their proposals regarding CIL and state autonomy facilitate violations of international law, rather than deter them. Moreover, it is not clear that a non-self-executing treaty coupled with implementing legislation is harder to breach than a self-executing treaty. Because of the last-in-time rule, ordinary legislation can override both kinds of treaties.

comparing the benefits of international cooperation against the benefits of state autonomy or additional deliberation by Congress. But Ku and Yoo cannot dodge the inquiry while sustaining the claim that a functional analysis favors their proposals.

The authors' comparison to the New Deal reinforces this point. The important question, they argue, is whether the New Deal "effectively responded to the nationalization of the economy and society with regulation of similar scope. It seems apparent that it did" (p. 63). Had the federal government been unable to adopt national regulation and delegate to administrative agencies, it is difficult to see how the federal government could have achieved a comparably effective response. Any functional analysis of alternative constitutional rules regarding the Commerce Clause or the nondelegation doctrine would have to account for the (in)ability of the United States to respond effectively to the economic and societal changes that the country faced in the early decades of the twentieth century.

Returning to the international context, consider two examples that Ku and Yoo address at some length. The first involves the Vienna Convention on Consular Relations[6] (VCCR) and the fallout of the Supreme Court's well-known decision in *Medellín v. Texas*.[7] José Medellín was a Mexican national who was arrested and ultimately convicted in the Texas state courts of raping and murdering two teenage girls. The VCCR provides that when foreign nationals like Medellín are arrested or detained they shall be informed of their rights to communicate with a consular official.[8] Like many foreign nationals arrested and later convicted in U.S. courts, Medellín was not so informed. The International Court of Justice (ICJ) issued a series of decisions related to the United States' obligations under the VCCR, ultimately concluding in the *Avena* case that the United States had an obligation to provide review and reconsideration to ascertain whether the VCCR violations caused actual prejudice to each individual defendant.[9] In a decision that Ku and Yoo applaud, the Supreme Court held in *Medellín* that the *Avena* decision was not self-executing.[10]

The government's brief in *Medellín* explicitly stated that President George W. Bush had determined that compliance with the ICJ decision was in the United States' interests.[11] Bush therefore sought to comply with the ICJ's decision by issuing a memorandum to the attorney general asserting that "the United States will discharge its international obligations . . . by having state courts give effect to the [ICJ] decision in accordance with general principles of comity . . . ."[12] The Supreme Court held, however, that the president lacked authority to require the Texas courts to comply with the ICJ's decision.[13] Texas state officials were unmoved by arguments that they should implement the ICJ's judgment, and Medellín was executed without receiving the review and reconsideration that the United States was obliged to provide.

Whether *Medellín* was rightly or wrongly decided, it is undeniable that the decision makes it harder for the United States to comply with its international obligations—and thus makes it harder to secure the benefits of international cooperation. On January 22, 2014, the state of Texas executed Edgar Arias Tamayo, another Mexican national who was not notified of his rights to communicate with a consular official when he was arrested.[14] A U.S. Department of State spokesperson thereafter emphasized that the benefits that

[6] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 UST 77, 596 UNTS 261 [hereinafter VCCR].

[7] Medellín v. Texas, 552 U.S. 491 (2008); *see also Agora*: Medellín, 102 AJIL 529 (2008).

[8] VCCR, *supra* note 6, Art. 36.

[9] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ REP. 12 (Mar. 31).

[10] *Medellín*, 552 U.S. at 532.

[11] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 8–9, Medellín v. Texas, 552 U.S. 491 (2008) (No. 06-984), *available at* http://www.justice.gov/osg/briefs/2006/2pet/5ami/2006-0984.pet.ami.pdf.

[12] *Id.* at 5.

[13] *Medellín*, 552 U.S. at 532.

[14] *See* Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 108 AJIL 322, 324 (2014).

the United States derives from international cooperation were threatened: "The United States' compliance with our international obligations under *Avena* is critical to our ability to ensure consular access and assistance for our own citizens who are arrested or detained by foreign governments, as well as to maintain cooperation from foreign governments on a broad range of law enforcement and other issues."[15]

How should we weigh the United States' reduced ability to protect its citizens abroad against the benefits that Ku and Yoo identify with non-self-execution? The authors do not say. They do acknowledge that non-self-execution has some costs, although they downplay them and suggest that these costs are not very high in the consular-notification context.[16] But in an era where Congress is often deadlocked and unable to pass legislation of any kind, these costs are significant. They threaten to convert a presumption of non-self-execution into a presumption of noncompliance with international obligations, even for treaties to which two thirds of the Senate have already consented.

The consular-notification issue also underscores that Ku and Yoo are not even clear about how the different goals that they consider in their functional analysis should be traded off against one another. Their case for non-self-execution compares how well the executive and legislative branches advance the goals of enhancing democracy and generating coherent, well-informed, and nimble foreign policy to how well the courts would do so. The comparative institutional analysis is easy for Ku and Yoo because, they argue, the political branches surpass the courts in furthering each of the authors' goals. But how would the analysis compare the executive branch alone to the political branches together? *Medellín*'s rejection of the U.S. president's efforts to achieve compliance with the VCCR by memorandum raises exactly this question. Would Ku and Yoo's functional analysis endorse the president's ability to unilaterally achieve compliance? The executive branch alone would fare better along the dimensions of coherence and speed. The two political branches together would provide more deliberation and, perhaps, more political accountability on the issue of implementation. Both the executive branch alone and the political branches together could generate decisions that are informed by expertise. Ku and Yoo provide no guidance about how to weigh these considerations against each other and do not reveal which outcome their functional analysis would favor.

The authors' divergent proposals for treaties and CIL raise the same question. Ku and Yoo maintain that the president should have discretion to implement CIL on his own, unless Congress has adopted legislation that sets a policy requiring (or prohibiting) such compliance. On their functional account, why should the president not have comparable authority to implement treaty obligations—including those at issue in *Medellín*? Indeed, promoting deliberation is arguably less important for treaties than CIL because two thirds of the Senate have explicitly consented to the former.

Now consider a second example—one that has received considerably less attention than the consular notification issue—the Convention Providing a Uniform Law on the Form of an International Will (Washington Convention).[17] Ku and Yoo cite the Washington Convention to illustrate the kind of U.S. state autonomy that they hope to promote. But the Washington Convention is unusual along several dimensions, and these unusual features preclude it from providing meaningful support for general propositions about how to reconcile globalization with U.S. state autonomy.

A bit of background information is needed to understand why. One feature of globalization is the increasing likelihood that a person will live and accumulate property in two or more countries

[15] U.S. Dep't of State Press Statement, Execution of Mexican National Edgar Arias Tamayo, Statement of Marie Harf, Deputy Department Spokesperson (Jan. 23, 2014), *at* http://www.state.gov/r/pa/prs/ps/2014/01/220546.htm.

[16] As Ku and Yoo note, "Deliberation also has its potential costs, including delay in decision, but the context of setting domestic rules of general application on questions such as criminal procedure may not incur high costs in this area" (p. 208).

[17] Washington Convention, *supra* note 4.

during her lifetime as a result of travel, immigration, temporary work abroad, or retirement to a foreign country. This trend, in turn, increases the likelihood that the person will execute a will in one country and then die in another.[18] The Washington Convention addresses that eventuality. It establishes a new type of will—an "international will"—with specified formal criteria. The Washington Convention allows individuals to execute wills that will be recognized as valid as to form by other parties to the agreement.[19] Because U.S. states have traditionally regulated probate matters, the Washington Convention triggers Ku and Yoo's concerns about eroding federalism.

The United States signed the Washington Convention in 1973. A number of U.S. states subsequently adopted legislation to implement the Convention and establish the possibility of executing an "international will" consistent with the Convention. According to Ku and Yoo, these individual states have "essentially decided to enter into the Washington Convention themselves through their enactment of law implementing that convention" (p. 172). Thus, the authors claim that the Washington Convention "illustrates how states can play a central role in the fulfillment of international obligations" (p. 173).

But the Washington Convention is *not* an example of relying on states to fulfill international obligations because the United States has no obligations under the Washington Convention: the United States is not a party. When President Ronald Reagan submitted the Washington Convention to the Senate for its advice and consent, he set out a bifurcated plan for its implementation.[20] Individual U.S. states could choose whether to make the benefits of the Washington Convention available to their own residents: they would not be required to do so. But *all* U.S. states would be obliged to recognize the formal validity of international wills, whether or not they chose to adopt legislation permitting their own citizens to make international wills. Although the Senate consented to ratification in 1991,[21] Congress has not adopted such legislation. And in the absence of such legislation, the executive branch did not ratify the Convention—presumably because it judged the risk of noncompliance with the United States' obligations to be intolerably high.

The only reason that individual U.S. states can still secure the benefits of the Washington Convention for their own residents is that the Washington Convention is drafted in a very atypical way. Most treaties reflect a quid pro quo and make their benefits available only to parties. But the benefits of the Washington Convention do not depend on reciprocity. Instead, the Washington Convention requires parties to recognize *all* wills that meet the Convention's criteria.[22] This feature is the one that allows individual states to provide their residents the option of writing international wills that will be recognized as valid by parties to the Washington Convention without the United States itself being a party. To put it mildly, this peculiarity makes the Washington Convention a poor example for establishing the benefits of the authors' proposal for reconciling international cooperation and federalism.

The Washington Convention model is limited in still another way: the benefit that the Washington Convention confers is not a public good. We can give residents of Montana the option of drafting an international will without automatically providing that option to residents of Vermont. That is not the case when the benefit that a treaty confers is an intact ozone layer or a world that is free from chemical weapons. Indeed, Ku and Yoo acknowledge that achieving the goals of the Chemical Weapons Convention,[23] for example,

[18] John G. Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461, 483–84 (2012).

[19] Washington Convention, *supra* note 4.

[20] *See* Letter of Transmittal, Convention Providing a Uniform Law on the Form of an International Will, S. TREATY DOC. No. 99-29, 1973 UST LEXIS 321 (July 2, 1986), *available at* http://www.cabinetchone.com/message.

[21] 137 CONG. REC. S12131 (daily ed. Aug. 2, 1991).

[22] Washington Convention, *supra* note 4, Art. I(1) & Annex Art. 1 (noting that "[a] will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter").

[23] Convention on the Prohibition, Production, Stockpiling and Use of Chemical Weapons and on

requires uniform implementation. Relying wholly on states to implement international obligations will, in almost every case, put the benefits of international cooperation beyond the reach of not only individual U.S. states but also the United States as a whole.

Ku and Yoo's three marquee proposals are thus more costly and less advantageous than the authors acknowledge. The book leaves the reader uncertain about one final point: whether the authors themselves view their three proposals as sufficient to remedy globalizations' threats to the American constitutional order. There are some suggestions that the three proposals are only the least controversial part of a more radical package.

Recall the NAFTA dispute settlement provisions that Ku and Yoo invoke to illustrate the threat that globalization poses to separation of powers.[24] How would NAFTA—or U.S. law relating to NAFTA—change if Ku and Yoo's three proposals were implemented? The answer appears to be not at all. Ku and Yoo's proposals regarding CIL and state autonomy do not apply to NAFTA. The presumption against self-execution would not change anything either. NAFTA was never considered to be self-executing; Congress approved NAFTA and adopted implementing legislation in a single action. That legislation included a provision that explicitly makes specified decisions of the NAFTA tribunals final and unreviewable.[25] If NAFTA's "transfer of a sovereign power of the United States" to an international institution (p. 31) is a real problem, their proposals would not address it. A presumption against self-execution does not preclude such transfers. As Ku and Yoo assert, that presumption "just ensures that before the United States undertakes a significant change in the nature of its international commitments, it uses the regular means of domestic policy-making to reach a decision" (p. 103).

Elsewhere in the book, however, Ku and Yoo seem to endorse or assume additional constitutional limits on international cooperation that would affect U.S. participation in NAFTA and other international institutions much more dramatically. They suggest that Article III, federalism principles, the Appointments Clause, and the nondelegation doctrine impose restrictions on the kinds of international arrangements in which the United States can participate and on the kinds of implementing legislation that Congress could approve. Ku and Yoo assert, for example, that Article III may prohibit U.S. participation in NAFTA's dispute settlement system and that the Appointments Clause may render the Chemical Weapons Convention's enforcement provisions unconstitutional (pp. 75–77). Whether and how these constitutional requirements constrain participation in international institutions is contested by scholars and is far from resolved by the courts.[26] The practical consequences of accepting such controversial constitutional limitations, however, would be far-reaching. Such limitations would do much more than Ku and Yoo's three proposals to curtail "transfers" of "the power to control and implement international legal obligations . . . to independent international institutions" (p. 16). But they would do so by imperiling U.S. participation in key international agreements. It is difficult to believe that any functional analysis that considers this consequence could support Ku and Yoo's interpretation.

Ku and Yoo are by no means alone in their anxiety about how globalization will affect governance within the United States. But there is considerable dissonance between the reassuring rhetoric that they use to describe their goals and the practical consequences of accepting their proposals. While Ku and Yoo's proposals may offer some advantages, they are accompanied by significant costs, and Ku and Yoo err in discounting them.

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Their Destruction, Jan. 13, 1993, S. TREATY DOC. No. 103-21 (1993), 32 ILM 800 (1993).

[24] *See* NAFTA, *supra* note 1 and accompanying text.

[25] 19 U.S.C. §1516a(g)(2).

[26] Joined by two other justices, Justice Antonin Scalia endorsed federalism limitations in his concurring opinion in *Bond v. United States*, 134 S.Ct. 2077, 2098–102 (2014) (Scalia, J., concurring); *see also, e.g.*, CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 97–137 (2013); Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707 (2007).