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International Courts and American Courts

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INTERNATIONAL COURTS AND AMERICAN COURTS

A. Mark Weisburd*

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INTRODUCTION

Few aspects of life, it seems, are insulated from the effects of globalization. The cultural and economic consequences of this phenomenon attract considerable attention. This article addresses a question less frequently addressed: the interplay between court systems in the United States and international judicial institutions.

Such institutions are organized on what would appear to be a number of different patterns. The International Court of Justice (ICJ) hears only disputes between governments.¹ The European Court of Human Rights will address claims against governments brought by individuals as well as by other governments, but its judgments, at least formally, are not enforceable in the court systems of those countries which are subject to its jurisdiction.² The Inter-American Court of Human Rights will hear

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1. Statute of the International Court of Justice, June 26, 1945, art. 35, 59 Stat. 1055, <<http://www.icj-cij.org/iccjwww/ibasicdocuments.htm>> [hereinafter ICJ Statute].

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; Rudolf Bernhardt, *The Convention and Domestic Law, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 25, 37–38 (R. St. J. Macdonald et al. eds., 1993); NEVILLE MARCH HUNNINGS, *THE EUROPEAN COURTS* 36 (1996).

claims against countries only if brought either by other countries or by the Inter-American Commission on Human Rights, but its judgments awarding compensatory damages are enforceable in the domestic legal systems of those states which accept its jurisdiction.³

Each sentence in the foregoing paragraph is supported by a reference to a particular treaty. It might well seem, therefore, that the subject described in the first paragraph ought not call for a lengthy discussion. If the United States elects to adhere to the treaty establishing a particular international tribunal, it accepts whatever arrangement the treaty establishes. By refusing to adhere to a given treaty, the United States can avoid becoming subject to an international tribunal the organization of which the United States finds, for some reason, objectionable.

This conclusion, however, begs several questions. It assumes, first, that the obligations created by a given treaty are predictable, allowing the avoidance of obligations a country does not wish to assume. Second, the conclusion assumes that the United States is free to accept such obligations as might seem advisable. Finally, none of this discussion addresses the question of what obligations this country ought to accept.

But the answers to these begged or ignored questions cannot simply be assumed. An apparently straightforward treaty may have unexpected applications. While the United States certainly can avoid the effects of a given treaty by avoiding adherence to the treaty, the Constitution may preclude its adherence to a treaty seen, for some reason, as desirable. And the issue of the obligations the United States ought to accept cannot be addressed without considering a host of factors, most obviously, the extent to which the United States should permit itself to be constrained by international institutions it cannot necessarily control.

Each of these questions was presented, at least implicitly, by the case of *Breard v. Greene*,⁴ decided in the spring of 1998. Though the Supreme Court finessed the question whether the courts of the United States are obliged to give effect to ICJ judgments that are binding in international law, that issue—turning on the legal effects of American adherence to the Statute of the ICJ—at least lurked in the background of *Breard*. And that issue implies a second: if the Statute of the ICJ in fact requires the United States to give domestic effect to ICJ judgments, does the Constitution permit adherence to the Statute? Finally, and most fundamentally, would it make sense to subordinate, in some respect, American courts to international tribunals? What would be gained, and what lost, from such an arrangement?

3. American Convention on Human Rights, Nov. 22, 1969, arts. 61, 68, 1144 U.N.T.S. 123 [hereinafter American Convention].

4. *Breard v. Greene*, 523 U.S. 371 (1998).

For those who might consider these matters of more intellectual than practical import, certain points must be stressed. First, issues quite similar to those present in *Breard* have arisen subsequent to that decision,⁵ and may recur.⁶ Moreover, much (though not all⁷) academic commentary has been critical of the decision in *Breard*.⁸ There is thus a potential for a reappearance of the issue of the relationship between American courts and the ICJ (and, presumably, other international tribunals) coupled with marked disagreement within the American legal community as to how this issue should properly be analyzed. Most fundamentally, the depth and range of international interactions seem to be expanding almost daily; it requires an extraordinary lack of imagination to assume that this trend will somehow fail to impact the American

5. In *Vienna Convention on Consular Relations (Germany v. United States)*, 38 I.L.M. 308 (I.C.J. 1999), Germany obtained an ex parte order indicating provisional measures in a case involving the failure of Arizona authorities to follow the Vienna Convention upon arresting a German national, Walter LaGrand. LaGrand had been convicted of murder and was scheduled to be executed on March 3, 1999, the day after Germany filed its application for provisional measures. *Id.* at 310. The Court's March 3 order called for the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings . . ." However, the Court's opinion stated its understanding that stopping the execution was within the authority of the governor of Arizona, and characterized the responsibilities of the United States Government as transmitting the order to the Governor. *Id.* at 313. On March 3, Germany sought leave to file a bill of complaint in the original jurisdiction of the Supreme Court, seeking preliminary injunctions against both the United States and Governor Hull of Arizona which would have required staying LaGrand's execution. *Federal Republic of Germany v. United States*, 143 L. Ed. 2d 192, 194 (1999). The Court denied the petitions. Regarding the claim against the United States, the Court expressed doubt that the United States had waived its sovereign immunity or that Article III's grant of jurisdiction in cases involving ambassadors or consuls was applicable. *Id.* As for Arizona, the Court reiterated the doubts expressed in *Breard v. Greene* that the Vienna Convention conferred on foreign governments the right to sue in domestic courts for its violation. *Federal Republic of Germany v. United States*, 143 L. Ed. at 194. The Court also noted the "probable contravention of Eleventh Amendment principles." *Id.* In addition, it stressed the ex parte character of the ICJ's order, and the tardiness of Germany's action, as Germany learned of the matter in 1992 and the execution was scheduled on January 15, 1999. *Id.*

6. Other states whose nationals were denied rights under the Vienna Convention could seek relief from the ICJ; individuals denied that relief have done so. *See, e.g., Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996), *cert. denied*, 136 L. Ed. 2d 380 (1996).

7. Curtis A. Bradley and Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 Am. J. Int'l L. 675 (1998).

8. *See, e.g.,* Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 AM. J. INT'L L. 697 (1998); Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, *id.* at 679; Frederic L. Kirgis, *Zschernig v. Miller and the Breard Matter*, *id.* at 704; Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, *id.* at 691; Henry J. Richardson III, *The Execution of Angel Breard by the United States: Violating an Order of the International Court of Justice*, 12 TEMPLE INT'L & COMP. L.J. 121 (1998); Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998); Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, *id.* at 683.

judicial system in some way or other, quite possibly in circumstances quite different from those raised by *Breard*.

This article seeks to deal systematically with a number of issues necessarily raised in any consideration of the relationships between American courts and international tribunals. The first section sets out the facts of *Breard*. The next discusses the scope of the obligations imposed by the Statute of the ICJ. The third section considers the constitutional questions at least implicit in *Breard*; in particular, it seeks to address the tantalizing question left open by Holmes in *Missouri v. Holland*:⁹ what is the "different way" in which "qualifications to the treaty-making power" are to be determined? The final substantive section seeks to identify the costs and benefits that would be created if the courts in the United States deferred to the ICJ or to other international tribunals to a greater extent than took place in *Breard*.

I. THE FACTS

In 1992, Virginia authorities arrested a Paraguayan national, Angel Francisco Breard, for murder.¹⁰ Those authorities were required by the Vienna Convention on Consular Relations¹¹ (Vienna Convention) to inform Breard of his rights to have the Paraguayan consul notified of his arrest and to consult with the consul; they did not do so.¹² Breard was subsequently convicted of murder and sentenced to death, and was scheduled to be executed on April 14, 1998.¹³ On April 3, 1998, Paraguay brought an action against the United States in the ICJ grounded on the breach of the Vienna Convention in Breard's case.¹⁴ In light of the imminence of Breard's execution, Paraguay sought from the Court an order indicating that, as a provisional measure, the United States should act to ensure that Breard was not executed pending the disposition of the case by the ICJ.¹⁵

The ICJ responded to Paraguay's request with an order dated April 9, 1998.¹⁶ In this order, after observing that the United States had acknowledged that Breard had not been informed of his rights under the

9. 252 U.S. 416, 433 (1920).

10. Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 812, 813 (I.C.J. 1998).

11. Vienna Convention on Consular Relations, April 24, 1963, art. 36, 21 U.S.T. 78, 101; 596 U.N.T.S. 261, 292 [hereinafter Vienna Convention].

12. Para. v. U.S., 37 I.L.M. at 813.

13. *Id.* at 814.

14. *Id.* at 812-13.

15. *Id.* at 814.

16. *Id.* at 812.

Vienna Convention as required by that instrument, satisfying itself that it had jurisdiction over the case, and observing that Breard's execution would cause irreparable harm to the rights Paraguay was asserting,¹⁷ the Court indicated the following provisional measures:¹⁸

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order¹⁹

Earlier, prior to the initiation of the ICJ action, Breard had sought relief unsuccessfully in the lower federal courts, as had Paraguay and its ambassador to and consul-general in the United States. All had subsequently petitioned for writs of certiorari from the United States Supreme Court.²⁰ Once the ICJ had issued its order, Breard petitioned the Supreme Court for an original writ of habeas corpus and a stay of execution in order to enforce the ICJ's order.²¹ Paraguay and the Paraguayan officials likewise sought to bring an original action before the Supreme Court.²²

The Supreme Court dealt with all of these requests for relief in its decision in *Breard v. Greene*.²³ Regarding both the petition in the original jurisdiction and the certiorari petition sought by Paraguay and its officials, the Court held that Paraguay had no private right of action under the Vienna Convention and was in any case barred from seeking relief against Virginia in a federal court by the Eleventh Amendment; it also held that 42 U.S.C. § 1983, urged as an additional basis for his claim by the consul-general, was inapplicable.²⁴ The Court likewise denied the relief Breard sought personally, holding that his failure to raise

17. *Para. v. U.S.*, 37 I.L.M. at 816–19.

18. There is some disagreement as to whether an ICJ order indicating provisional measures is binding as a matter of international law. The United States, appearing in Breard as *amicus curiae*, took the position that such orders are not binding as a matter of international law, Brief of Amicus Curiae United States at 49–51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390 (A-738) and 97-8214 (A-732)) [hereinafter Brief for the United States], *citing* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 reporter's note 6 (1987), for the proposition that the question is at least debatable. This article assumes that such orders are binding as a matter of international law in order to sharpen the focus of the discussion. Indeed, if such orders are not binding, it would seem that the Supreme Court's action in *Breard* could hardly be characterized as legally incorrect, whatever one's views of its wisdom.

19. *Para. v. U.S.*, 37 I.L.M. at 819.

20. *Breard*, 523 U.S. at 373–74.

21. *Id.* at 374.

22. *Id.* at 374–75.

23. *Id.* at 371.

24. *Id.* at 377–78.

the Vienna Convention defense in the Virginia state courts barred him from raising it in subsequent collateral federal proceedings. The Court added that, even if Breard were permitted to raise the argument, he would lose on it, since relief could not be granted in such circumstances absent a showing that the violation of the Vienna Convention had somehow negatively affected Breard's situation at trial, and the admitted facts of the case were inconsistent with any such showing.²⁵

Conspicuous by its absence from the Court's opinion was any discussion of the legal effect of the ICJ's order on the matter. The Court referred to the order only in passing, characterizing it as a "request" that the United States "take all measures at its disposal" to prevent Breard's execution.²⁶ Also, the Court described Breard's petition as seeking to enforce the ICJ's order, placing the word "enforce" in quotation marks.²⁷ And of course, in denying the petitions, the Court necessarily, if implicitly, held that it did not see itself as constrained by the order. Nonetheless, there was no discussion of the reasoning which supported this result.

II. ICJ DECISIONS AND DOMESTIC LAW

This article proceeds on the assumption that the ICJ order involved in the *Breard* case was binding as a matter of international law. Based on this assumption, the United States as an entity was obliged to obey the ICJ order, incurring international responsibility if it failed to do so.²⁸

It does not follow, however, that this international legal obligation required American courts to carry out the ICJ's order. The fact that the United States had an obligation does not indicate which officials within the federal and state governments had the responsibility of implementing the obligation. Rather, the issue turns on the proper interpretation of the international instruments which create the obligation in question.

The Statute of the ICJ provides that its judgments are "final and without appeal."²⁹ The Statute does not address the effect of ICJ judgments in other legal proceedings. The only instrument addressing the carrying out of those judgments is the Charter of the United Nations. Article 94 of the Charter provides:

25. *Id.* at 375-79.

26. *Id.* at 374.

27. *Id.*

28. I SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996*, at 221-26 (3d ed. 1997).

29. ICJ Statute, *supra* note 1, art. 60.

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.³⁰

The absence from Article 94 of any mention of enforcement of ICJ judgments by domestic judiciaries suggests that Security Council action was intended to be the sole mechanism by which those judgments could be carried out. Further, it is important to note that Article 94 confers on the Security Council a high degree of discretion regarding enforcement of ICJ judgments. The Council is not obliged to give effect to those judgments; rather, it is permitted to do so, if it thinks the step necessary. Also, if it acts, the means it chooses to employ are also matters of its discretion. If there were an absolute obligation on the judiciaries of nations litigating matters before the ICJ to enforce ICJ judgments, the discretion which Article 94 explicitly confers on the Security Council might well be compromised. After all, if a state had the option to seek domestic court enforcement of an ICJ judgment, the actual discretion of the Security Council would be limited, since the Council's members would be aware that their ability to control the enforcement process was less than complete. Such a *de facto* limitation on the Security Council is difficult to square with the scope that Article 94 clearly leaves for the exercise of the judgment of the Council.

This argument for the lack of direct domestic effect of ICJ judgments is reinforced by a consideration of the General Act on Pacific Settlement of International Disputes³¹ (General Act) and its successor, the Revised General Act for the Pacific Settlement of International Disputes³² (Revised General Act). These instruments require submission of disputes between nations who are parties to them either to arbitration or to the Permanent Court of International Justice (PCIJ), in the case of the General Act,³³ or the International Court of Justice, in the case of the Revised General Act.³⁴ Each contains the following article:

30. U.N. CHARTER art. 94.

31. Sept. 26, 1928, 93 L.N.T.S. 343 [hereinafter General Act].

32. Apr. 28, 1949, 71 U.N.T.S. 101 [hereinafter Revised General Act].

33. General Act, *supra* note 31, art. 17 at 351.

34. Revised General Act, *supra* note 32, art. 17 at 110.

If, in a judicial sentence or arbitral award, it is declared that a judgment, or a measure enjoined by a court of law or other authority of one of the parties to the dispute, is wholly or in part contrary to international law, and if the constitutional law of that party does not permit or only partially permits the consequences of the judgment or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall grant the injured party equitable satisfaction.³⁵

This language in essence requires the international courts to take account, in their judgments, of the possibility that the court systems of governments litigating before them would be forbidden by domestic law from giving effect to those judgments. The language makes sense only if the drafters of these treaties and the parties to them assumed that judgments of the Permanent Court and the ICJ did not necessarily have domestic legal effects. If those judgments did necessarily have such effects, according to their founding instruments, it would violate those treaties to require the courts to tailor their judgments to the domestic legal systems of the litigants; rather, the international legal obligation assumed by submitting to the courts' jurisdiction would perforce include the obligation to alter the domestic legal system to accommodate a judgment from one of the international courts.

Of course, the article cited above is of little help in determining domestic courts' obligations regarding ICJ judgments if states were unwilling to subscribe to a treaty containing it. That was not the case with respect to the language in question, however. Nineteen states are parties to the General Act;³⁶ eight, including three which are not parties to the General Act, are parties to the Revised General Act.³⁷ Furthermore, similar language is contained in a number of bilateral treaties,³⁸ and in the European Convention for the Peaceful Settlement of Disputes.³⁹ When the parties to all of these instruments are totaled, it

35. General Act, *supra* note 31, art. 32 at 357; Revised General Act, *supra* note 32, art. 32 at 118.

36. 2 PETER H. ROHN, *WORLD TREATY INDEX* 165 (2d ed. 1983).

37. United Nations, *MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 30 APRIL 1999*, at 35, U.N. Doc. ST/LEG/SER.E/17, U.N. Sales No. E.99.V.5 (1999).

38. Treaty of Friendship Conciliation and Judicial Settlement, Mar. 24, 1950, Turk.-Italy, art. 20, 96 U.N.T.S. 207, 219; Agreement Concerning Conciliation and Judicial Settlement, Nov. 24, 1954, Italy-Braz., art. 18, 284 U.N.T.S. 325, 334; *see also* treaties listed in UNITED NATIONS, *SYSTEMATIC SURVEY OF TREATIES FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES 1928-1948* at 291-94, U.N. Sales No. 1949.V.3 (1949).

39. April 29, 1957, art. 30, 320 U.N.T.S. 243, 256.

develops that forty-one countries⁴⁰ have seen no conflict between agreeing to subject themselves to the jurisdiction of an international tribunal and the possibility that the judgments of that tribunal could not be applied within the domestic legal system of an opposing litigant. It is also relevant that the General Assembly resolution revising the General Act⁴¹ was adopted by a vote of 45-6-1.⁴² In short, at least a significant minority of states have assumed that the judgments of the ICJ and its predecessor did not necessarily have domestic legal effects.

While court decisions addressing the domestic legal effects of judgments by either the Permanent Court or the ICJ could also prove enlightening, there are too few to provide much guidance. In considering such of these cases as there are,⁴³ it is helpful to reflect on the ways in which a judicial decision can bear on a subsequent judicial decision. First, the earlier decision can be seen by the court in a later, factually unrelated case as persuasive with respect to a legal issue common to the two cases; the later court is inclined to reach a result similar to that reached in the earlier case because of the cogency of the reasoning supporting the earlier decision, rather than because the later court sees itself as legally bound to follow the legal rule laid down in the earlier case. Second, the earlier case can be seen as establishing a legal precedent binding on the court in a later, factually unrelated case raising a legal issue decided by the earlier court. Third, the later case may be factually related to an earlier, separate case decided by a different court; the court in the later case may apply the doctrines of claim or issue preclusion so as to bar relitigation either of factual issues or of issues involving the application of law to fact. Finally, a later case may be, not merely factually related to an earlier case, but an aspect of that case, as proceedings in one court to enforce a judgment rendered by a different court may be seen as addressing aspects of the same case decided by the earlier judgment. In this situation as well—the one most closely fitting the facts of *Breard*—the later court might see itself as constrained to deal with the matter before it in a manner consistent with the earlier disposition of the case.

40. See authorities cited in notes 36–38, *supra* and DIRECTORATE OF LEGAL AFFAIRS, COUNCIL OF EUROPE, CHART SHOWING SIGNATURES AND RATIFICATIONS OF CONVENTIONS AND AGREEMENTS CONCLUDED WITHIN THE COUNCIL OF EUROPE at 53–54 (1999).

41. G.A. Res. 268 (III), U.N. G.A.O.R., 3d Sess., pt. 2, at 10, U.N. Doc. A/900 at 10 (1949).

42. UNITED NATIONS, YEARBOOK OF THE UNITED NATIONS 1948–49 at 415, U.N. Sales No. 1950.I.II (1950).

43. The cases discussed were collected in Rosenne, *supra* note 28, at 223–24, 225 n. 47, 226–27 n. 48.

When one turns to cases dealing with the effects in domestic legal system of judgments of international tribunals, one finds only one in which a litigant sought to treat a municipal case as falling in this last category—that is, as simply an aspect of a matter earlier decided by an international court. In “*Socobel*” v. *Greek State*,⁴⁴ a Belgian corporation sought to execute, in the Belgian courts, on a judgment against Greece rendered decision twelve years earlier by the Permanent Court of International Justice.⁴⁵ The case could not proceed in the Belgian courts, however, unless the judgment of the Permanent Court was seen as that of a tribunal superior to those of Belgium, as opposed to being simply a foreign judgment. The Belgian court held that the Permanent Court’s judgments were those of a foreign tribunal, and therefore not subject to execution in Belgium until a claimant went through the procedures generally required for executing foreign judgments. The court further held, that, in any event, the corporation had not been a party to the dispute before the Permanent Court, in which the litigants were Belgium and Greece.⁴⁶ In other words, the court in this case rejected the argument that a decision of the Permanent Court could have a direct domestic legal effect with respect to an aspect of the matter litigated before the Permanent Court.

Only one case, *Administration des Habous v. Deal*,⁴⁷ treats an ICJ decision as binding precedent. The ICJ had held in an earlier case that Americans were generally not exempt from the jurisdiction of French courts in Morocco.⁴⁸ In *Deal*, a French lower court in Morocco had held itself without jurisdiction to hear an eviction suit brought against an American national. The Court of Appeal of Rabat reversed, apparently relying on the ICJ judgment as binding precedent.⁴⁹ However the Court of Appeal of the International Tribunal at Tangier refused to follow the same I.C.J. decision in *Mackay Radio and Telegraph Company v. Lalla Fatma Bent si Mohamed el Khadar and Others*.⁵⁰ The court relied in part on the fact that the ICJ had expressly limited its consideration to the rights of American citizens in the French zone of Morocco, of which Tangier was not a part. It also held, however, that ICJ judgments, not

44. 18 I.L.R. 3 (Belg., Trib. Civ. de Bruxelles 1951).

45. The PCIJ had held that an earlier arbitration between the corporation and Greece was valid. *Société Commerciale de Belgique (Belg. v. Greece)* 1939 P.C.I.J. (Ser. A/B) No. 78 (June 15).

46. *Socobel*, 18 I.L.R. at 4–5.

47. 19 I.L.R. 342 (Morocco, Ct. App. Rabat 1952).

48. *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)* 1952 I.C.J. 175 (Aug. 27).

49. *Deal*, 19 I.L.R. at 343–44.

50. 21 I.L.R. 136 (Tangier, Ct. App. Int’l Trib. 1954).

being binding in domestic courts, could have at most persuasive force, and that in any case such judgments bound only the governments who were parties to them, not individuals litigating similar matters.

No other domestic case accords ICJ decisions more than persuasive force.⁵¹ Thus, the courts in *Anglo-Iranian Oil Company v. Idimitsu Kosan Kabushiki Kaisha*⁵² and *Anglo-Iranian Oil Company v. S.U.P.O.R. Company*⁵³ cited the ICJ's decision in *Anglo-Iranian Oil Company (U.K. v. Iran)*⁵⁴ in holding that the oil company was not entitled to recover from third parties oil produced by the oil company in Iran and subsequently nationalized; in neither case, however, was the ICJ's decision treated as determining. Rather, that case was cited along with a number of other authorities. And the United States District Court for the District of Columbia ignored the thrust of the ICJ's opinion in *Anglo-Iranian Oil Company* by holding that the oil company was essentially an alter ego of the government of the United Kingdom and therefore entitled to rely on sovereign immunity in defense to a subpoena.⁵⁵

Other cases cite ICJ decisions favorably in contexts irrelevant to issues before the court⁵⁶ or for issues presented but not contested.⁵⁷ Also, the court in *Anglo-Iranian Oil Co., Ltd. v. Jaffrate*⁵⁸ relied on, among other things, the ICJ's indication of provisional measures in

51. According to a summary at 49 AM. J. INT'L L. 267 (1955), the French Court of Cassation cited the *Rights of Nationals* case in *Bendayan*, Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle, 1954 at 182 (March 4, 1954), upholding the jurisdiction of French courts in Morocco over criminal cases brought against American citizens. The summary does not make clear, however, exactly what force the French court attributed to the ICJ decision.

52. 20 I.L.R. 305 (Japan, High Ct. Tokyo 1953).

53. 22 I.L.R. 23 (Italy, Civ. Ct. Rome 1954).

54. 1952 I.C.J. 92 (July 22).

55. *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum in Possible Violation of Title 15 U.S. Code, Sections 1-23, 1952-3 Trade Cas. (CCH) ¶ 67,385 at 68,001-02 (D.D.C. Dec. 15, 1952)*. The ICJ had held itself without jurisdiction to hear the United Kingdom's claim on behalf of the company seeking relief for the Iranian nationalization of the company's concession on the ground that Iran's consent to the Court's jurisdiction was limited to questions involving treaties and that the contract between the company and Iran was simply a private contract, not a treaty. *Anglo-Iranian Oil Co.*, 1952 I.C.J. at 112. In so holding, the ICJ distinguished between the company and the United Kingdom, a distinction inconsistent with the equation of the two by the District Court for the District of Columbia.

56. *Rex v. Cooper*, 20 I.L.R. 166 (Sup. Ct. Nor. 1953); *Rex v. Martin*, 20 I.L.R. 167 (Sup. Ct. Nor. 1953).

57. *In re Krüger*, 18 I.L.R. 258 (Neth., Council for the Restoration of Legal Rights, Jud. Div. 1951).

58. [1953] 1. W.L.R. 246 (U.K.).

*Anglo-Iranian Oil Company*⁵⁹ to hold that a purchaser from Iran of oil claimed by the company must have known of the company's claims and therefore could not be considered a good faith purchaser.⁶⁰

Doubts as to the direct domestic effects of ICJ judgments are reinforced by a consideration of international agreements establishing other international tribunals. A number of such agreements provide for the final and binding character of the judgments of such tribunals in language similar to that of the ICJ Statute, but have been interpreted as having no direct effect in the legal systems of those countries which are parties to the treaties. Thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶¹ provides that the judgments of the European Court of Human Rights are final.⁶² The judgments of that court, however, are not directly enforceable in the nations which are parties to the Convention unless domestic law provides for their enforcement.⁶³ Similarly, the instrument providing for the establishment of the Iran-United States Claims Tribunal⁶⁴ states that "[a]ll decisions and awards of the Tribunal shall be final and binding."⁶⁵ The tribunal has described the nature of this obligations as follows:

This good faith obligation leaves a considerable latitude to the States Parties as to the nature of the procedures and mechanisms by which Tribunal awards rendered against their nationals may be enforced. The Tribunal has no authority under the Algiers Declarations to prescribe the means by which each of the States provides for such enforcement. Certainly, if no enforcement procedure were available in a State Party, or if recourse to such procedure were eventually to result in a refusal to implement Tribunal awards, or unduly delay their enforcement, this would violate the State's obligations under the Algiers Declarations. It is therefore incumbent on each State Party to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto. If procedures did not already exist as

59. *Anglo-Iranian Oil Co. (U.K. v. Iran)*, 1951 I.C.J. 88 (July 5) (Request for Indication of Interim Measures of Protection).

60. *Jaffrate*, 1 W.L.R. at 261-62.

61. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 2.

62. *Id.* art. 44.

63. BERNHARDT, *supra* note 2; see also HUNNINGS, *supra* note 2.

64. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 81 DEP'T ST. BULL. 2047, at 3 (1981); 20 I.L.M. 230 (1981).

65. *Id.* art. IV.1, 81 DEP'T ST. BULL. at 4; 20 I.L.M. at 232.

part of the State's legal system they would have to be established, by means of legislation or other appropriate measures. Such procedures must be available on a basis at least as favorable as that allowed to parties who seek recognition or enforcement of foreign arbitral awards.⁶⁶

This language clearly indicates that the Tribunal did not believe its awards' status as "final and binding" made those awards directly enforceable in domestic tribunals. Rather, the Tribunal assumed that changes in domestic law might be necessary to render those awards enforceable. Further, the Tribunal did not see the parties to the agreement as obliged to accord full *res judicata* effect to awards; rather, treatment as favorable as that accorded foreign arbitral awards was adequate. The court in *Iran Aircraft Industries v. Avco Corp.*⁶⁷ relied on this language in denying full *res judicata* effect to an award of the Tribunal, refusing to enforce one such award⁶⁸ on the basis of a defense made available under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁶⁹

To be sure, there are international tribunals whose judgments are directly enforceable in the courts of nations who are parties to the treaties establishing the tribunals. Those treaties, however, make express provision for such domestic enforcement.⁷⁰ There is no similar language in the Statute of the International Court of Justice or in the Charter of the United Nations.

In summary, it seems that ICJ judgments were not intended to be directly enforceable in domestic courts. The instruments establishing the ICJ envisage a form of enforcement of that tribunal's judgments quite different from, and in some respects antithetical to, enforcement in domestic courts. Treaties that involve a significant number of nations and provide for referring matters to the ICJ explicitly assume that ICJ judgments will not be enforceable domestically in at least some countries. The only domestic court in which a litigant sought enforcement of a Permanent Court judgment denied enforcement, and a number of other domestic court decisions contain language inconsistent with such enforcement. The judgments of other international tribunals, established by international agreements describing the judgments of those tribunals

66. Islamic Republic of Iran v. United States, Case No. A/21, 14 Iran-U.S. Cl. Trib. Rep. 324, 331-32 (1987).

67. 980 F.2d 141 (2d Cir. 1992).

68. *Id.* at 145-46.

69. June 10, 1958, 21 U.S.T. 2517; 330 U.N.T.S. 38.

70. Treaty Establishing the European Economic Community, March 25, 1957, arts. 187, 192, 298 U.N.T.S. 3, 78, 79 (1957); American Convention, *supra* note 3, art. 68, at 119.

in language similar to that in the ICJ Statute, have been held not to be directly enforceable in domestic courts. Where the judgments of international tribunals are directly enforceable domestically, the founding instruments of those tribunals contain express language to that effect. And, it might be added, considerable scholarly authority supports the proposition that ICJ judgments do not bind national courts.⁷¹

Finally, it should be pointed out that any other interpretation of the effect of the ICJ's judgments could be quite awkward. Only countries may be parties to contested cases brought before the ICJ,⁷² and those cases can, at minimum, involve any type of international law issue, including issues arising under any type of treaty.⁷³ This jurisdiction can encompass issues of great political complexity, such as questions regarding the use of force. Attempts to enforce ICJ judgments in the courts of a country against which a judgment was rendered could thus force that country's courts to address issues those courts are neither intended nor able to address.⁷⁴ Enforcement of such judgments against another country would raise different, if equally difficult problems. As Rosenne has observed,

The fact that [the problem of governments' failure to comply with binding ICJ decisions] is essentially a political one cannot be disguised by placing emphasis upon an alleged basic norm which States must observe, such as *pacta servanda sunt*, and building on that a logical structure explaining why in law States are under certain duties. An approach to the problem of the post-adjudication phase of judicial settlement cannot be based on any presumption of law that States observe their treaty obligations, because the real problem arises when the conduct of States differs from the pattern of conduct prescribed for them in the binding statement of what their legal obligations are. In the nature of things States never condition their conduct solely by reference to legal considerations nor are they asked to do so. This explains why the problem is essentially political, using the word *political* in its broadest sense.⁷⁵

Given the unavoidably political character of the problem of enforcing ICJ decisions, it would have been unwise for governments, when

71. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 53 (5th ed. 1998) and sources therein cited.

72. ICJ Statute, *supra* note 1, art. 34.

73. *Id.* art. 36.

74. See *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 933-42 (D.C. Cir. 1988).

75. Rosenne, *supra* note 28, at 208.

establishing the ICJ, to permit enforcement of the ICJ's judgments by domestic courts. In other words, the conclusion suggested by an examination of conventional legal sources is also the conclusion that makes the most sense from a policy perspective. Therefore, to the extent that criticism of the *Breard* decision rests on the argument that domestic courts are legally obliged to directly enforce ICJ decisions, that criticism is misplaced.

III. INTERNATIONAL OVERSIGHT OF AMERICAN COURTS—CONSTITUTIONALITY

It seems clear, then, that the Supreme Court's failure to carry out the ICJ order at issue in *Breard* cannot be seen as contrary to any legal obligation imposed on the United States court system by existing international instruments. Suppose, however, that a different instrument were at issue. As mentioned in the foregoing discussion, some treaties establishing international tribunals clearly provide for domestic court enforcement of their judgments.⁷⁶ While it is unlikely as a matter of political reality that the ICJ Statute would be amended to provide for domestic enforcement, such a development certainly is not impossible as a matter of international law, and political realities can change. Suppose, then, that the United States elected to become a party to a treaty permitting an international tribunal to review the actions of American courts in individual cases with respect to alleged errors on matters of international law. This tribunal would be empowered to overturn the determinations of those courts. It could, for example, require dismissals or new trials in criminal matters in cases in which American courts had affirmed a conviction. Does the Constitution permit the United States to enter into such a treaty? Or suppose a situation like that in *Breard*, in which there is no treaty obliging American courts to implement the judgment of an international tribunal. Could the Supreme Court require a state court to enforce such a judgment anyway? Could the president, in the exercise of his foreign affairs power, at least require state courts to stay their proceedings pending the decision of an international tribunal?

This section of the article addresses these issues. The first portion of the discussion concludes that Article III of the Constitution precludes the United States from entering into a treaty permitting what amounts to review of the judgments of federal courts by international tribunals. The second portion sees principles of constitutional federalism as developed

76. Treaty Establishing the European Economic Community, *supra* note 70, arts. 187, 192 at 78-79; American Convention, *supra* note 3, art. 68, at 119.

in a long line of Supreme Court decisions as forbidding the federal government to subject state courts to international review. The last part of this section concludes that the authority of the Supreme Court does not extend to compelling state courts to defer to international tribunals in the absence of a treaty obligation, and that the president's foreign affairs power likewise provides no basis for forcing such deference on the states.

A. *International Review of Federal Courts*

Suppose that Angel Breard had been arrested by the FBI for violation of a federal criminal statute and subsequently tried and convicted in federal court, but never informed of his rights under the Vienna Convention. Suppose that Breard appealed his conviction on the ground of the breach of his rights under the Vienna Convention, but the Court of Appeals affirmed his conviction and the Supreme Court denied his petition for certiorari. Suppose, finally, that a treaty purported to permit an international tribunal to review the actions of the American federal courts in this matter and to grant whatever relief those courts themselves could grant on an appeal, and that this tribunal ordered a new trial in federal court for Breard because of the Vienna Convention violation. That is, this hypothetical tribunal granted relief analogous to that sought by Paraguay before the ICJ in the actual *Breard* case, with the domestic courts of parties to the treaty establishing the tribunal required by that treaty to enforce the tribunal's orders. Could the federal courts give effect to the tribunal's ruling consistent with the Constitution?

Consideration of this question starts with the language of Article III. That Article provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁷⁷ The decisions of the Supreme Court applying this language appear to read it as forbidding modification by anyone of any final decision of the judicial department.

This view of the law is first made clear by statements appended to *Hayburn's Case*.⁷⁸ The case involved a federal pension statute which required the Circuit Courts of the United States to determine applicants' qualifications for pensions and to recommend the amount a given applicant should receive. Such recommendations, however, were subject to the power of the Secretary of War to refuse to place an applicant on the pension list, despite a favorable recommendation from the court, if the

77. U.S. CONST. art. III, § 1, cl. 1.

78. 2 U.S. (2 Dall.) 409 (1792).

Secretary had "cause to suspect imposition or mistake."⁷⁹ The suit had been brought by the Attorney-General, seeking a writ of mandamus to compel the Circuit Court for the District of Pennsylvania to perform its duties under the Act with respect to a particular pensioner.⁸⁰ The Supreme Court never ruled on the matter, as the statute was amended to eliminate the judicial role in the pension process prior to the Court's announcement of its judgment in the case.⁸¹ However, the reporter appended to the opinion statements by the judges of three of the Circuit Courts asserting that they felt bound not to carry out the act on the grounds of its unconstitutionality. Each of the three courts quoted asserted the unconstitutionality of any review of any decision by a federal court by either of the other two departments of the federal government, insisting that such review was inconsistent with the vesting of judicial power exclusively in the judiciary.⁸²

On related grounds, the Court held itself without jurisdiction to hear an appeal from the Court of Claims in *Gordon v. United States*.⁸³ Although the Court in that case stated only that it saw such jurisdiction as unconstitutional, without explaining that conclusion,⁸⁴ *United States v. O'Grady*⁸⁵ is helpful in understanding *Gordon*. According to the Court in *O'Grady*, the problem in *Gordon* was that the statute governing payments of judgments on matters adjudicated by the Court of Claims, including judgments subsequently affirmed by the Supreme Court, in essence subjected such judgments to the revision of the Secretary of the Treasury.⁸⁶ The Court went on to state:

Judicial jurisdiction implies the power to hear and determine a cause, and inasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government.⁸⁷

79. Act of Mar. 23, 1792, ch. 11, §§ 2-4, 2d Cong., 1 Stat. 243, 244 (1st Sess. 1792) (expired).

80. *Hayburn*, 2 U.S. at 409.

81. *Id.* at 409-10.

82. *Id.* at 410-12.

83. 69 U.S. (2 Wall.) 561 (1864).

84. *Id.*

85. 89 U.S. (22 Wall.) 641 (1874).

86. *Id.* at 647.

87. *Id.* at 647-48. This reading of *Gordon* receives some support from a draft opinion in *Gordon* written by Chief Justice Taney and found in his papers after his death. After this draft was discovered, it was, at the request of members of the Supreme Court, printed as an appendix to 117 U.S. at 697. Those justices who had been on the Court at the time of the

The court applied the same reasoning in *Plaut v. Spendthrift Farm, Inc.*⁸⁸ Plaintiff's suit in that case, claiming damages for fraud under the federal securities laws, had originally been dismissed as time-barred, following a Supreme Court decision determining the limitations periods applicable to such claims. Subsequently, Congress enacted a statute purporting to re-open cases dismissed as time-barred by reason of the Court's decision on the limitations issue.⁸⁹ The Court in *Plaut* held that the attempt by Congress to revive these cases was unconstitutional as a violation of separation of powers principles.⁹⁰ In particular, the Court stated:

Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."⁹¹

The opinion goes on:

Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by

Gordon case recalled that the Taney draft was intended to be the basis for any opinion in that case. *Id.* In his draft, Taney first states:

[N]or can Congress authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect.

Id. at 702. He then stresses that a judgment which is not conclusive on the rights of the parties is in fact no judgment at all, and thus not in fact an exercise of the judicial power established by the Constitution. *Id.* at 702–03. Taney then notes the limited effect of any judgment rendered by the Supreme Court on an appeal from the Court of Claims, in light of the power of the Secretary of the Treasury to effectively nullify that judgment by refusing to seek from Congress an appropriation to pay it, and of Congress likewise to nullify the judgment by refusing to vote such an appropriation. *Id.* at 702–03. After more illustrations of the unconstitutionality of such an arrangement, he concludes that the Court could not exercise appellate jurisdiction on these facts. *Id.* at 703–06.

88. 514 U.S. 211 (1995).

89. *See id.* at 213–15.

90. *Id.* at 217–19.

91. *Id.* at 218–19 (emphasis in the original)(citation omitted).

retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes.⁹²

These cases all deal with acts purporting to subject the federal courts to control either by Congress or by the federal executive. However, the language of the opinions seems to indicate that the vice of the measures held unconstitutional does not arise simply from the involvement of those departments of government in particular matters before the courts. Rather, the Court holds these measures unconstitutional because they see the courts as limited to the exercise of *judicial* power, and they see situations in which the federal judiciary, taken collectively, does not have the last word in a given case as the exercise of something other than judicial power and thus outside the scope of Article III.

There would thus appear to be three related reasons to question the constitutionality of any treaty which permitted an international tribunal to overturn a judgment by an American federal court. First, the foregoing opinions make clear that neither the Congress nor the federal executive may exercise what amounts to a power to revise the opinions of the federal courts. Given this, it is hard to see how one house of Congress could combine with the president to confer such a power upon an international tribunal. The second apparent problem with such a treaty is perhaps more fundamental. Clearly, if the decision of an Article III court is to be reviewed by some non-Article III tribunal, that decision is not the last word on the particular case before the court. For the federal courts to address a matter which is subject to such review, therefore, would not be an exercise of judicial power, according to the foregoing cases, and thus would violate Article III. Finally, and perhaps fancifully, if the judicial power is the power to have the last word in a given case, our hypothetical treaty, by giving the power to say the last word in a class of cases to an international tribunal, could be seen as creating a second Supreme Court, since this tribunal would by hypothesis have authority over all federal courts. It would thus violate Article III's requirements that, first, the judges of the Supreme Court be Article III judges,⁹³ and second, there be only one Supreme Court,⁹⁴ since the

92. *Id.* at 227 (emphasis in the original).

93. U.S. CONST., art. II, § 2, cl. 2; *id.* art. III, § 1, cl. 1.

94. *Cf.* U.S. v. O'Grady, 89 U.S. (22 Wall.) 641, 647-48 (1874) (showing that the Constitution probably does not envision more than one Supreme Court).

existing Supreme Court would presumably remain supreme for cases lacking an international law component. Thus it appears, for example, that a treaty permitting the ICJ to overturn determinations of the federal courts would be unconstitutional.

One immediate response to the foregoing is to point to the famous case of *Missouri v. Holland*.⁹⁵ That case appears to uphold a very broad authority in the federal government to make treaties. It does not, however, support an argument for a complete absence of restrictions on the treaty power. First, it certainly did not hold that the treaty-making power was unlimited; on the contrary, the Court stated in that case:

We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.⁹⁶

Moreover, that case dealt with an alleged interference with the power of the states, rather than an issue of the separation of the powers of the branches of the federal government.⁹⁷ Again, the Court in *Holland* stressed that the treaty there in question did "not contravene any prohibitory words to be found in the Constitution."⁹⁸ At issue here, however, is constitutional language that is at least implicitly prohibitory: Article III's language regarding the allocation of the judicial power of the United States, as "judicial power" has come to be understood by the courts. Finally and most fundamentally, *Holland* addressed only an issue of whether a treaty could be the vehicle for the adoption of a particular rule of substantive law; the issue under consideration here, however, goes to actions amounting to alterations in the structure of government, not simply to the rules to be applied by existing structures. *Holland*, then, does not bear on this discussion.

There are two further lines of argument that might seem to support the constitutionality of our hypothetical treaty. First, a nineteenth century international claims settlement procedure, in which the United States participated, led to an award against the United States based in part on decisions by the Supreme Court which the claims commission

95. 252 U.S. 416 (1920).

96. *Id.* at 433.

97. *See id.* at 432-35.

98. *Id.* at 433.

saw as erroneous.⁹⁹ At first blush, this looks like a reversal of the Supreme Court by the claims commission, contradicting the argument that such an arrangement would violate Article III. As will be shown below, however, this conclusion depends on a mischaracterization of the results of the procedure, and is therefore mistaken.¹⁰⁰ The second line of argument looks to arrangements concluded under certain trade agreements which vest in international arbitral panels the authority to decide certain claims alleging violations of federal statutes relating to international trade.¹⁰¹ This would seem to be a very direct delegation of federal judicial authority to an international tribunal, and could lead one to wonder why, if such a delegation is lawful, the sort of delegation to the ICJ that would be involved in our hypothetical treaty would be unlawful. As will be shown below, however, the two situations are not, in fact, comparable.¹⁰²

The first line of argument derives from the actions of a commission established by the Treaty of Washington of 1871.¹⁰³ The commission was intended, among other things, to address claims of certain British subjects against the United States for actions taken by United States forces during the Civil War.¹⁰⁴ Among the claims as to which the commissioners made awards to claimants were several deriving from the capture of British merchant vessels as prizes of war by American naval vessels enforcing the blockade of the ports of the Confederacy.¹⁰⁵ These awards were made despite the fact that, in several cases, the Supreme Court had affirmed judgments which had either condemned the vessels as prizes or, though restoring the vessels to those claiming them, had denied the claimants damages sought on the ground that the captures of the vessels had been illegal.¹⁰⁶ In each of these cases, the commissioners

99. See *infra* notes 103–09 and accompanying text.

100. *Id.*

101. See *infra* notes 110–19 and accompanying text.

102. *Id.*

103. Treaty of Washington, May 8, 1871, U.S.-U.K., arts. XII–XVII, 17 Stat. 863, 867–89.

104. *Id.* art. XII, 17 Stat. at 867.

105. Robert S. Hale, Report of Robert S. Hale, Esq., in U.S. DEP'T OF STATE, 3 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1, 110–48 (Kraus Reprint Corp. 1966) (1873).

106. The commissioners held that the claimants were entitled to awards on the grounds of the illegal captures of the vessels *Sir William Peel* and *Science*, even though those vessels were not subsequently condemned as prizes. *Id.* at 100–10, 112–14. They further made awards to claimants in respect of the *Hiawatha* and the *Circassian* on the grounds of the illegality of the captures and subsequent condemnations as prizes of those vessels. *Id.* at 130–36, 142–48. The Supreme Court had upheld decrees of lower courts denying damages for illegal captures in the cases of the *Sir William Peel* and the *Science*. The *Sir William Peel*, 72 U.S. (5 Wall.) 517 (1866); The *Science*, 72 U.S. (5 Wall.) 178 (1866). It had upheld decrees of condemnation, which necessarily denied damages, in the cases of the *Hiawatha*

reached conclusions different from those of the Supreme Court, basing awards on the illegality of captures and condemnations which the Court had upheld. It would seem, therefore, that these awards amounted to revisions of judgments of the Supreme Court.

Such a description of the commission's actions, however, would be mistaken. First, under prize law, naval personnel responsible for an illegal capture were personally liable for damages caused by that capture and suffered by those with interests in the vessel.¹⁰⁷ Further, those same personnel were entitled to share in proceeds from the sales of lawfully condemned vessels.¹⁰⁸ Thus, the judgments of the Supreme Court did not merely deny damages to, and in some cases take property from, those originally interested in the vessels in question. They also, in the case of condemnation, transferred property to private individuals, and, in those cases in which damages for illegal captures were denied, protected private individuals from damage judgments.

The awards of the claims commission, however, did not disturb these effects of the Supreme Court judgments at issue. Rather, according to the Treaty of Washington, the governments which had established the claims commission assumed the sole obligation of paying awards made to claimants.¹⁰⁹ That is, the actual results of the Supreme Court's judgments were not disturbed; persons originally held not liable for damages were not obliged to pay those damages, and persons who had received shares of prize money were not compelled to disgorge that money. The claims commission did not presume to alter the legal relations created by the American judgments. In contrast, in cases like *Breard*, making the determinations of international tribunals binding on American courts would necessarily mean that the legal relationships determined by those courts could be disturbed by the tribunal's determinations. The claims commission established by the Treaty of Washington provides no precedent for such an arrangement.

The second line of argument supporting exercise of Article III judicial power by an international tribunal derives from certain statutory provisions implementing the United States—Canada Free Trade Agreement¹¹⁰ and the North American Free Trade

and the *Circassian*. The Brig Amy Warwick, 67 U.S. (2 Black) 635 (1862); The *Circassian*, 69 U.S. (2 Wall.) 135 (1864).

107. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–24 (1804); 15 U.S. (2 Wheat.) app. at 10, 11–12 (1847).

108. Act of Apr. 23, 1800, § 5, 2 Stat. 45, 52 (repealed 1862); Act of Jul. 17, 1862, § 2, 12 Stat. 600, 606 (repealed 1864); R.S. § 4630, 30 Stat. 1007 (1899).

109. Treaty of Washington, *supra* note 103, art. XV, at 869.

110. Free Trade Agreement, Jan. 2, 1988, U.S.—Can., 27 I.L.M. 293 [hereinafter FTA].

Agreement¹¹¹ (the Agreements). Under certain circumstances, administrative agencies of the United States government are authorized to impose countervailing duties on products imported from other countries, and to impose antidumping duties on products from other countries sold in the United States at less than fair market value.¹¹² The Court of International Trade has jurisdiction to review administrative actions regarding these matters.¹¹³ However, such administrative determinations regarding goods from the countries who are parties to the Agreements may not be reviewed by the Court of International Trade, but are instead reviewed by binational panels¹¹⁴ composed of persons selected by the United States and by the other country involved from rosters of persons selected by the parties to the treaty at issue.¹¹⁵ That is, the persons reviewing decisions by American administrative agencies applying American statutes are at least in part chosen by the government of a country other than the United States, rather than according to the process required for selection of judges in Article III. It might thus appear that this amounts to the exercise of power under Article III by a non-Article III tribunal.

Again, this conclusion would be mistaken. The Supreme Court reaffirmed in *Granfinanciera, S.A. v. Nordberg*¹¹⁶ the rule that cases involving "public rights" may be assigned by Congress to tribunals not established under Article III.¹¹⁷ While the definition of a public right is a subject of some debate,¹¹⁸ the Supreme Court held as long ago as 1929 that disputes over actions by executive agencies regarding application by those agencies of the tariff laws in particular cases were matters that Congress could assign for decision however it saw fit.¹¹⁹ Thus binational panels operating under one or the other of the Agreements are not exercising power required by the Constitution to be exercised by an Article III court, and furnish no precedent for vesting such power in an international tribunal.

The hypothetical treaty described above, then, would be unconstitutional as applied to federal courts. It would divest those courts of

111. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

112. 19 U.S.C. §§ 1671-1671h, 1673-1673h (1999).

113. 19 U.S.C. § 1516a(a) (1999).

114. 19 U.S.C. § 1516a(g) (1999).

115. FTA, *supra* note 110, Annex 1901.2, at 393-94; NAFTA, *supra* note 111, Annex 1901.2, at 687-88.

116. 492 U.S. 33 (1989).

117. *Id.* at 53-55.

118. *Id.* at 54-55.

119. *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 457-60 (1929).

judicial power by rendering their judgments subject to revision by a tribunal outside the structure established pursuant to Article III.

B. *International Review of State Courts*

The preceding section hypothesized a treaty permitting an international tribunal to effectively reverse the judgments of federal courts in cases involving some question of international law and concluded that such a treaty would be unconstitutional. This section examines the constitutionality of a treaty resembling the one just discussed, but applying to the courts of the states rather than to federal courts.

To a certain extent, of course, the two types of treaties overlap. For example, if a state judgment has been affirmed by the United States Supreme Court, the hypothetical international tribunal would have to, as it were, go through the Supreme Court to reach the state judgment. In light of the conclusions of the preceding section, a treaty purporting to permit such a procedure could not survive constitutional scrutiny.

Suppose, however, a treaty that would permit cases to be taken directly from state courts to the international tribunal. Such a procedure would avoid the difficulty addressed in the preceding paragraph. Would this treaty raise constitutional questions?

Necessarily, the analysis of this question will take a form different from that employed in the preceding section. With respect to federal courts, the language of Article III, reinforced by the courts' interpretations of that language, bars external oversight of the federal courts' treatment of particular cases. No similar language in the Constitution applies to state courts. Further, two distinct lines of Supreme Court decisions point in somewhat different directions regarding this issue. Additional complications arise from the fact that, although some judicial language addresses situations analogous to that here hypothesized, that language is dictum.

The first line of cases relevant to this issue deals with the question of the scope of the authority of the federal government to enter into treaties that in some fashion impinge on the states. Some of those cases deal with treaty language purporting to address subjects that would, at the time the cases were decided, have been thought to have been clearly outside the authority of Congress to regulate by statute. Indeed, regulation of some of those subjects would even today be difficult to bring within the powers of Congress described in Article I of the Constitution. For example, *Chirac v. Chirac*¹²⁰ considered the effect of a treaty on Maryland's laws regarding the escheat of lands of persons dying intes-

120. 15 U.S. (2 Wheat.) 259 (1817).

tate. Under the Maryland statute in force at the time, alien heirs of Maryland landowners were, if French, permitted to inherit land in the state, provided that the land in question would escheat if the heirs neither became citizens of Maryland nor sold the land within ten years of becoming seised of the estate.¹²¹ *Chirac* arose when French heirs of a Marylander sued in federal court to obtain land which the state had escheated and sold to the defendant in the case.¹²² The heirs relied on a treaty between the United States and France in effect at the time they inherited the land.¹²³ That treaty provided that aliens who stood to inherit land in states that prohibited inheritance of land by aliens would be permitted an unlimited period within which to sell or otherwise dispose of the land.¹²⁴ The Court held that the French heirs were entitled to possession of the land. Further, its opinion makes clear that it saw the question as solely a matter of the proper construction of the treaty; the fact that the Maryland law conflicting with the treaty dealt with two subjects—land ownership and escheat of decedents' estates—at that time clearly within the exclusive control of the states was treated as irrelevant.¹²⁵

*Hauenstein v. Lynham*¹²⁶ also involved a question of the escheat of land of an intestate whose alien heirs would not have been permitted to inherit under the law of the state where the land was located.¹²⁷ The case turned on the construction of a provision of a treaty with Switzerland giving to alien heirs "such term as the laws of the State or canton will permit to sell such property."¹²⁸ The Court held that this language allowed states to establish a period within which such sales must take place, but that, in states fixing no such period, alien heirs were not required to effect the sale within any particular period.¹²⁹ The Court expressly rejected any suggestion that the laws of the state had any bearing on the matter, given its construction of the treaty. It also cited other cases to support its argument for the great scope of the treaty power, even in cases involving land titles and inheritance.¹³⁰

121. *Id.* at 272–73.

122. *Id.* at 261.

123. *Id.* at 262.

124. *Id.* at 274–76.

125. *Id.* at 271, 276–77.

126. 100 U.S. 483 (1879).

127. *Id.* at 483–85.

128. *Id.* at 486.

129. *Id.* at 485–87.

130. *Id.* at 488–90.

These cases, dealing with subjects among those least likely to be seen as subject to federal regulation prior to the New Deal,¹³¹ illustrate the striking breadth of the subjects which the Court saw as properly within the scope of the treaty power.¹³² This reading of federal authority regarding treaties draws support from a consideration of the circumstances within which the Constitution was drafted. During the period 1776–1787, the United States entered into a number of treaties. It seems reasonable to suppose that the “Treaties” which the Constitution empowered the president to conclude with the Senate’s advice and consent¹³³ were expected to address subjects similar to those covered by treaties that predated the Constitution. Further, the Constitution characterized the Confederation-period treaties as the “supreme Law of the Land.”¹³⁴ Yet those treaties included provisions whereby each treaty-partner guaranteed that, within its territory, nationals of the other party should enjoy rights to freedom of conscience and to pass personal or even real property by will or through the operation of the intestacy laws.¹³⁵ However, the Constitution and Bill of Rights gave the federal government no power to compel the states to respect freedom of conscience, and, as noted above, questions of land titles and decedents’ estates were seen as beyond the regulatory authority of the federal government in the late eighteenth century.¹³⁶

131. See *Blythe v. Hinckley*, 180 U.S. 333, 340–42 (1901) (stating that questions of inheritance by aliens are matters of state law); *Terrace v. Thompson*, 263 U.S. 197, 217 (1923) (states’ reserved power includes authority to determine whether aliens are permitted to hold land). For a post-New Deal case supporting these conclusions, see *U.S. v. Burnison*, 339 U.S. 87, 91–92 (1950).

132. For other examinations of this issue that reach similar conclusions and collect cases, see Richard B. Collins, *Nineteenth Century Orthodoxy*, 70 U. COLO. L. REV. 1157, 1162–63 (1999); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 24 (1999).

133. U.S. CONST. art. II, § 2, cl. 1.

134. *Id.* art. VI, cl. 2.

135. Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Neth., art. IV (liberty of conscience), art. VI (right to testate and intestate disposition of personality), 8 Stat. 32, 34, 36; Treaty of Amity and Commerce, Apr. 3, 1783, U.S.-Swed., art. V (freedom of conscience), art. VI (right to testate and intestate disposition of personality), 8 Stat. 60, 62, 64; Treaty of Amity and Commerce, Sept. 10, 1785, U.S.-Prussia, art. X (right to testate and intestate disposition of personality and right of heirs to sell realty), art. XI (freedom of conscience), 8 Stat. 84, 88, 90.

136. See cases cited *supra* note 131. Justice Chace’s opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 235–36, (1796), made clear that there was disagreement as to whether the effect of treaties concluded by the United States prior to the adoption and implementation of the Constitution superseded contrary state law of their own force. Further, whatever the legalities of the matter, state enactments during this period effectively blocked implementation of the undertakings made by the United States in various treaties. SAMUEL B. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 37–43 (1904). *Ware* held, however, that, whatever the situation prior to the adoption of the Constitution, the effect of the Supremacy

In light of recent Supreme Court decisions,¹³⁷ it should also be noted that these early treaties included topics that apparently required action by local executive officials. Several of them permitted the parties to appoint consuls or vice-consuls in one another's ports.¹³⁸ The terms of a consular convention between the United States and France, implementing the earlier treaty between the two countries, throw light on the undertaking the United States presumably saw itself as making when it agreed to exchanges of consuls. Under the terms of that convention, a party's "officials competent" were obliged to arrest deserters from merchant vessels of the other party, upon proof by that party's consul that a given individual was such a deserter.¹³⁹ Since there would have been no federal officials competent to effect such arrests in 1788, the officials upon whom these duties were imposed would necessarily have been state officials. The Convention also required that the consul be notified upon the release from confinement of any crew-members from such ships arrested for crimes.¹⁴⁰ In 1788, most if not all such crew-members would have been arrested and confined by officers of the state governments, not by federal officers. Although this convention was concluded after the ratification of the Constitution (but before the United States government had actually been organized)¹⁴¹ its terms suggest that the earlier treaties' authorization of exchanges of consuls implied a willingness to assume obligations which, among other things, would have required local law enforcement officials in ports to assist foreign consuls in their dealings with ships' crews. Assuming the Framers were aware of these implications of an agreement to exchange consuls, their conferral of the treaty power on the federal government not only authorized that government to address subjects on which Congress could not legislate, but also permitted the federal government, through the treaty power, to impose affirmative duties on non-judicial state officials.¹⁴²

Clause was that a treaty superseded contrary state law of its own force. 3 U.S. (3 Dall.) at 236–38, 249, 281, 282.

137. See *infra* notes 172–93 and accompanying text.

138. Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., art. XXIX, 8 Stat. 12, 28; Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Neth., *supra* note 135, art. XXI, at 44; Treaty of Amity and Commerce, Apr. 3, 1783, U.S.-Swed., *supra* note 135, art. XXVI, at 74; Treaty of Amity and Commerce, Sept. 10, 1785, U.S.-Prussia, *supra* note 135, art. XXV, at 98.

139. Consular Convention, Nov. 14, 1788, U.S.-Fr., art. IX, 8 Stat. 106, 112.

140. *Id.* art. XI at 112–13.

141. See CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION* xxi (Johnny H. Killian and George A. Costello eds., 1996).

142. This analysis would seem to address the concerns raised by Professor Vázquez regarding the effect of *Printz v. United States*, 521 U.S. 898 (1997) on treaties requiring that

This record suggests that the Framers assumed that the power to make treaties was the power to address, among other things, subjects which the federal government would not be able to regulate in a purely domestic context. It was also the power to impose at least limited duties on non-federal officials. Given all this, the statement in *Missouri v. Holland*¹⁴³ that “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . .”¹⁴⁴ seems to characterize fairly both the tenor of the Supreme Court’s decisions on this subject and the expectations of the Framers of the Constitution.¹⁴⁵

To be sure, the Supreme Court has asserted the existence of limits to the treaty power, albeit in dicta. In addition to the language from *Holland* quoted above, the following language appears in *DeGeofroy v. Riggs*,¹⁴⁶ in which the Court upheld the treaty-based right of French nationals to inherit realty in the District of Columbia.

foreign consuls be notified upon the arrest of any of their nationals, see Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317 (1999). Of course, it might be argued that it would be assumed that any duties imposed on state officials by treaties concluded during the period of the Articles of Confederation fell to the federal government after the Constitution went into effect. However, carrying out those some of those duties, e.g., arresting deserters from French merchant ships, would have required the establishment of a substantial federal police force in a good many port cities. While the power of the federal government to create such a force is clear—indeed, it has done something analogous by forming the Immigration and Naturalization Service—it seems most unlikely that the members of the Constitutional Convention would have expected that the Constitution would have *required* such a step. Such an intrusive federal presence would surely have seemed undesirable even to Federalists; the more reasonable assumption is that no such action was seen as compelled by the Constitution. And if that assumption is correct, the Constitution must have been understood to permit treaties concluded after its entry into force to impose on the states duties similar to those imposed under pre-constitutional treaties,

143. 252 U.S. 416 (1920).

144. *Id.* at 433.

145. These conclusions lead me to differ with Professor Bradley’s suggestion that the treaty power should be construed as coextensive with the power of Congress to legislate domestically, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 456–61 (1998). That approach seems to me inconsistent with both the likely intent of the Framers of the Constitution, given the context in which they worked, and certainly with the decisions of the Supreme Court. While Bradley is quite correct that understandings of the authority of Congress under the Commerce Clause have broadened since 1787, *id.* at 459, (and, one might add, since the authority of Congress was expressly expanded by the Fourteenth Amendment) this rule of thumb could lead to needless difficulties in treaty interpretation. To repeat an example from the text of this article, why should it be necessary to consider whether the Commerce Clause would permit Congress to regulate matters relating to decedents’ estates (e.g. the forms of wills) in order to uphold a treaty on this subject, when the authority of the United States to enter into such treaties has been recognized at least since the Constitution has been in force?

146. 133 U.S. 258 (1890).

The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.¹⁴⁷

In *Fort Leavenworth R.R. Co. v. Lowe*,¹⁴⁸ which addressed whether the owner of a railroad on a federal military reservation in Kansas was subject to local taxes,¹⁴⁹ the Court observed that “[t]he jurisdiction of the United States extends over all the territory within the States, and therefore their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country.”¹⁵⁰ The Court supported this assertion by referring to the association of officials of affected northeastern states in negotiations between the United States and Great Britain regarding the border between Canada and the United States.¹⁵¹

Yet the cases addressing the breadth of the treaty power, and those referring in dicta to the limits on that power, are not the only ones relevant to this discussion. Also important are the cases addressing the basic limitations of the authority of the federal government to affect the states. As will be seen, the language, if not necessarily the precise holdings, of the federalism cases are difficult to reconcile with an authority in the federal government to make treaties with no regard whatever for federalism considerations.

The Supreme Court was called upon to consider the nature of the authority of the states in *Texas v. White*.¹⁵² This case was brought by Texas in the original jurisdiction of the Supreme Court, seeking to compel certain individuals to return to the state certain bonds originally issued to it by the federal government.¹⁵³ The defendants challenged the jurisdiction of the Court, arguing that, by seceding, Texas had ceased to be a state of the union, and thus fell outside that element of the original

147. *Id.* at 267.

148. 114 U.S. 525 (1885).

149. *Id.* at 526.

150. *Id.* at 540–41.

151. *Id.* at 541.

152. 74 U.S. (7 Wall.) 700 (1868).

153. *Id.* at 717.

jurisdiction of the Court extending to suits by states against individual citizens of other states.¹⁵⁴ In considering this argument, and after stressing the indissoluble character of the union created by the Constitution,¹⁵⁵ the Court went on to observe:

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.¹⁵⁶

The Court went on to hold that Texas could not cease and had not ceased to be a state, notwithstanding its purported secession.¹⁵⁷

This idea that the Constitution protects the autonomy and sovereignty of the states to the extent that powers are not delegated to the federal government has provided the rationale for a number of the Court's decisions. In *Lane County v. Oregon*,¹⁵⁸ the Court was faced with a challenge to an Oregon statute requiring payment of state taxes in gold or silver coin. An Oregon county had paid its annual taxes in United States notes. The Oregon courts had held payment by this means to violate the statute, notwithstanding the county's argument that acts of

154. *Id.* at 719.

155. *Id.* at 725.

156. *Id.* (citation omitted).

157. *Id.* at 726.

158. 74 U.S. (7 Wall.) 71 (1868).

Congress making such notes legal tender overrode the Oregon statute.¹⁵⁹ The Court held for the state, reading the federal statute as not intended to compel the states to accept tax payments in notes.¹⁶⁰ In reaching this conclusion, the Court relied on the proposition that “in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized,”¹⁶¹ and on the necessity of the taxing power to the states’ authority.

The Court was also forced to address the question of the existence of constitutional limits on federal authority over the states in *Collector v. Day*.¹⁶² That case arose from a challenge by a state judge to a federal income tax.¹⁶³ In considering the matter, the Court stated:

We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate . . . to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.¹⁶⁴

The Court went on to hold that federal taxation of the salary of a state judicial officer was unconstitutional, posing too great a risk of subjecting the existence of state judiciaries to the control of the federal government.¹⁶⁵ *Day* was subsequently qualified in *Helvering v.*

159. *Id.* at 72–73.

160. *Id.* at 76–78.

161. *Id.* at 76.

162. 78 U.S. (11 Wall.) 113 (1870).

163. *Id.* at 113–14.

164. *Id.* at 126.

165. *Id.* at 126–28. The Court cited the circumstances in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869) in support of its fears for the effects on state judiciaries of the tax in question. *Veazie* involved a federal tax imposed on the circulation of bank notes by state-chartered banks which was attacked as intended to destroy those banks. *Id.* at 533–34, 548. The Court sustained the constitutionality of the tax, notwithstanding this attack. *Id.* at 548. It also observed, however,

It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress.

Gerhardt,¹⁶⁶ which held that the earnings of employees at the Port of New York Authority were subject to income taxation by the federal government. *Gerhardt* was distinguished from *Day* as not involving employees who performed “an indispensable function of state government.”¹⁶⁷ But even while qualifying *Day*, the Court characterized that case as follows:

The question there presented to the Court was not one of interference with a granted power in a field in which the federal government is supreme, but a limitation by implication upon the granted federal power to tax. In recognizing that implication for the first time, the Court was concerned with the continued existence of the states as governmental entities, and their preservation from destruction by the national taxing power. The immunity which it implied was sustained only because it was one deemed necessary to protect the states from destruction by the federal taxation of those governmental functions which they were exercising when the Constitution was adopted and which were essential to their continued existence.

The Court went on to quote, with apparent approval, language from *Day* concerning the importance of avoiding federal infringement upon

those means and instrumentalities which are the creation of [the states’] sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it,’ the Court declared, ‘we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. . . .’¹⁶⁸

Day was finally overruled in *Graves v. New York ex rel. O’Keefe*.¹⁶⁹ Even *Graves*, however, was not based on a rejection of the assertion in *Day* of the unconstitutionality of actions threatening the autonomy of state government. Rather, it was based on the Court’s conclusion that taxes on the salaries of state government employees could not be seen either as taxes on the government or as imposing any sort of tangible

Id. at 547. The Court in *Day* cited this language in striking down the income tax there at issue. 78 U.S. at 128.

166. 304 U.S. 405 (1938).

167. *Id.* at 424.

168. *Id.* at 414–15.

169. 306 U.S. 466, 486 (1939).

burden on the government.¹⁷⁰ That is, while *Graves* rejects the conclusion drawn by *Day* from the principle that the constitution protects the autonomy of the states, it does not question the principle itself.

The Court has also had to address the status of the states in suits addressing what could be called structural aspects of the Constitution. Among the issues of this type which the Court has had to address is that of the sovereign immunity of the states. Its decisions have upheld the states' immunity from suit in a wide variety of contexts, generally because of the implications of the structure of the United States. Thus, the Court upheld the states' immunity to suits in admiralty, observing:

That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given: not one brought by citizens of another state, or by citizens or subjects of a foreign state, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification.¹⁷¹

The most recent sovereign immunity case relevant to this discussion is *Alden v. Maine*.¹⁷² *Alden*, in common with a number of other recent cases,¹⁷³ reads the sovereign immunity of the states quite broadly. The case was a suit by a group of probation officers employed by Maine alleging that the state had violated certain provisions of the federal labor laws pertaining to the plaintiffs. They originally sued in federal court, where their suit was dismissed on sovereign immunity grounds. They then brought their claim in the courts of Maine, where it was also dismissed on sovereign immunity grounds. They appealed this dismissal to the Supreme Court.¹⁷⁴

The Court held that Article I conferred on Congress no power to abrogate the sovereign immunity of the states in their own courts.¹⁷⁵ It

170. *Id.* at 483–86.

171. *Ex parte* State of N.Y., 256 U.S. 490, 497 (1921).

172. 67 U.S.L.W. 4601 (U.S. June 23, 1999).

173. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 67 U.S.L.W. 4580 (U.S. June 23, 1999); *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 67 U.S.L.W. 4590 (U.S. June 23, 1999).

174. *See Alden*, 67 U.S.L.W. at 4603.

175. *Id.* at 4615.

stressed the “constitutional role of the States as sovereign entities” and the federal system’s reservation to the states of “a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”¹⁷⁶ It concluded that the original understanding of the Constitution, early congressional practice, and the courts’ own cases all were inconsistent with the existence of any federal power under Article I to abrogate state sovereign immunity.¹⁷⁷ Its opinion stressed in particular the inconsistency of such a congressional power with the structure of the Constitution. The Court observed that, “[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”¹⁷⁸ Relying on that observation, the Court concluded that a congressional power to abrogate the immunity of states to suit in their own courts was inconsistent with the dignity of the states, threatened both their financial integrity and their ability to structure their public policy coherently, strained their ability to respond to their own citizens, and forced state judiciaries to deal with matters beyond their experience and jurisdiction.¹⁷⁹ Acknowledging that Article III strongly supports the inference that state courts may be obliged to hear suits involving federal law, the Court went on to state that “[t]he Article in no way suggests, however, that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States.”¹⁸⁰

A different type of structural issue arose in *New York v. United States*.¹⁸¹ There, the Court considered a state’s challenge to a federal statute requiring states either to regulate low-level nuclear waste or to take title to that waste.¹⁸² The Court ruled that the statute was unconstitutional, in that Congress lacked the authority under the Constitution to coerce state legislatures to adopt any particular legislation.¹⁸³ In doing so, it explicitly relied on the understanding expressed in *Lane County* and *Texas v. White*, among other cases, that states’ autonomy is consti-

176. *Id.* at 4603.

177. *Id.* at 4611–13.

178. *Id.* at 4613.

179. *Id.* at 4613–14.

180. *Id.* at 4614.

181. 505 U.S. 144 (1992).

182. *Id.* at 151–54.

183. *Id.* at 175–79, 188.

tutionally protected,¹⁸⁴ and stressed that “[s]tates are not mere political subdivisions of the United States.”¹⁸⁵

Just as *New York* dealt with what the Court saw as a federal effort to coerce state legislative action, *Printz v. United States*¹⁸⁶ addressed a federal statute purporting to impose duties on state executive officials. Specifically, the statute required state law enforcement officials to make certain investigations; in some circumstances, in connection with some transactions by firearms dealers.¹⁸⁷ Two state officials who were within the class charged with duties under the statute challenged its constitutionality.¹⁸⁸ The Court held the statute unconstitutional, stating:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, nor those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.¹⁸⁹

In resolving the case, the Court first stressed that, during the first years of the federal government’s operation, when persons then active in government would presumably have direct knowledge of the intended reach of the Constitution’s provisions, any statutes which Congress enacted imposing duties on state officials took effect only with the consent of the state involved.¹⁹⁰ In addition to its historical argument, the Court stressed as well the incompatibility of the challenged statute with the Constitution’s system of dual sovereignty, citing, among other cases, *Lane County, Texas v. White*, and *Gerhardt* to support its conclusion that the Constitution was intended to protect the residual sovereignty of the states. The Court also stressed the implications of various constitutional provisions and the rejection by the Constitutional Convention of a system of government under which federal authorities would use the

184. *Id.* at 162–63.

185. *Id.* at 187.

186. 521 U.S. 898 (1997).

187. *Id.* at 902–04.

188. *Id.* at 904.

189. *Id.* at 935.

190. *Id.* at 905–11.

states as instruments of federal governance. Likewise, the Court emphasized the importance of the state's accountability to its own citizens, and the safeguard to the liberty of the people afforded by such a system.¹⁹¹

Finally, the Court characterized the holdings of its earlier cases as clearly inconsistent with any power in the federal government to compel state executive officials to administer federal programs.¹⁹² It further asserted, after questioning the argument that the Constitution forbade only federal requirements that would force the states to make policy,

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by "reducing [them] to puppets of a ventriloquist Congress," . . . It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.¹⁹³

To be sure, the force of this language is somewhat compromised by Justice O'Connor's concurring opinion. Although she joined the majority opinion, she observed in concurrence that "[i]n addition, the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid."¹⁹⁴ Nonetheless, Justice O'Connor made clear her agreement with the conclusion that Congress could not constitutionally require state officials to make the investigations required by the statute.¹⁹⁵

The cases thus present a conundrum. Those construing the treaty power characterize that power in very broad terms, overriding limitations on federal authority applicable in domestic cases; none of these cases, however, address any exercise of the treaty power comparable to that in a treaty giving a hypothetical international tribunal authority to

191. *Id.* at 918–22.

192. *Id.* at 925–33.

193. *Id.* at 928 (citations omitted).

194. *Id.* at 936 (O'Connor, J., concurring).

195. *Id.* at 935–36.

review decisions of the states' courts. Dicta speak in quite general terms of limitations on the treaty power, but, even aside from their character as dicta, offer little guidance in determining the scope of those limitations. And the cases addressing structural restraints on federalism speak in broad terms in stressing the limitations on the authority of the federal government to interfere with the functioning of the states; none, however, deal with cases involving the treaty power, or any aspect of the federal government's authority over foreign relations.

One possible solution to the dilemma derives from *United States v. Curtiss-Wright Export Corp.*¹⁹⁶ In that case, individuals had been indicted for exporting prohibited weapons to a war in South America, an act made criminal by a joint resolution of Congress as implemented by a presidential proclamation; the lower court had quashed the indictment, and the government appealed.¹⁹⁷ The Supreme Court reversed the lower court.¹⁹⁸ In so doing, it stated as follows:

[S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the Colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, 'the Representatives of the United States of America' declared the United (not the several) Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.'

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. . . . When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it

196. 299 U.S. 304 (1936).

197. *Id.* at 312–14.

198. *Id.* at 333.

immediately passed to the Union. . . . That fact was given practical application almost at once. The treaty of peace, made on September 3, 1783, was concluded between his Britannic Majesty and the 'United States of America.' The Union existed before the Constitution, which was ordained and established among other things to form 'a more perfect Union.' Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be 'perpetual,' was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. . . .

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.¹⁹⁹

Justice Sutherland's opinion cited several cases in support of these conclusions.²⁰⁰ He also quoted a speech before the Constitutional Convention by Rufus King in which King had denied that the states had dealt with foreign sovereigns or raised military or naval forces.²⁰¹ While it is not clear that the opinion's discussion of any of these issues was necessary, or indeed relevant, to the resolution of the case before the Court, it remains the most extreme judicial assertion of the extra-constitutional nature of the federal foreign affairs power. If *Curtiss-Wright* accurately states the law, it provides powerful support for federal authority to make a treaty subjecting state courts to review by an international tribunal.

The difficulty in relying on this language, however, is that the argument it presents does not withstand examination. It will be noted that the argument is, in form, primarily a factual one: Justice Sutherland asserts that certain situations in fact existed, and derives legal conclusions from those facts. But the facts were not as Sutherland characterizes them. As pointed out by Van Tyne over ninety years ago, the Continental Congress, during the revolution, simply did not enjoy the status

199. *Id.* at 316–18 (footnotes and citations omitted).

200. *Penhallow v. Doane*, 3 U. S. (3 Dall.) 54 (1795); *Jones v. U.S.*, 137 U.S. 202 (1890); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893); *Altman & Co. v. U.S.*, 224 U.S. 583 (1912); *Burnet v. Brooks*, 288 U.S. 378 (1933).

201. *Curtiss-Wright*, 299 U.S. at 317.

Sutherland ascribes to it.²⁰² All of the actions of the Continental Congress which Sutherland lists were taken through the exercise of powers understood to be delegated by the states.²⁰³ In particular, the Congress did not adopt the Declaration of Independence until each state's delegation was authorized to do so; it was understood among the delegates that the declaration could not affect any colony unwilling to adhere to it.²⁰⁴ Further, while Sutherland is of course correct in asserting that the Continental Congress engaged in diplomatic exchanges and raised an army and navy, he ignores the facts that the states reserved the same powers to themselves, and, more importantly, exercised them.²⁰⁵ Similarly, Professor Lofgren has shown that, after the Revolution, the Congress established under the Articles of Confederation understood its powers over foreign affairs to have been expressly delegated by the states.²⁰⁶

Sutherland's reliance on the treaty of peace with Great Britain is both misplaced and misleading. While he is correct that the title of that treaty describes it as the "Definitive Treaty of Peace between the United States of America and his Britannic Majesty,"²⁰⁷ Article I of that treaty explains that language by providing:

His Britannic Majesty acknowledges the said United States, viz. New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia to be free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors, relinquishes all claims to the government, propriety and territorial rights of the same, and every part thereof.²⁰⁸

Contrary to Sutherland's analysis, this language seems to be best understood as a recognition of the independence and sovereignty of each of the states individually, rather than as an acknowledgment only of the independence of a corporate entity known as the United States.

202. Claude H. Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907).

203. *See id.* at 531-36.

204. *See id.* at 536-38.

205. *See id.* at 539-41.

206. *See* Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 16-17 (1973).

207. *Definitive Treaty of Peace*, Sept. 3, 1783, U.S.-U.K., 8 Stat. 80.

208. *Id.* art. I at 81. Other treaties concluded during the period of the Articles of Confederation likewise specified each of the states, as well as the United States, as a party. *See* Treaty of Amity and Commerce, U.S.-Neth., *supra* note 135 at 32; Treaty of Amity and Commerce, U.S.-Swed., *supra* note 135 at 60.

Aside from his reliance on factual assertions, Sutherland also relied on certain authorities. However, Lofgren demonstrated that Sutherland's characterization of King's speech at the Constitutional Convention was misleading and that, in any event, others at the Convention expressed different views.²⁰⁹ Further, as the preceding paragraph demonstrates, King in any case himself misstated the facts. Lofgren also shows that Sutherland's reading of the cases he cites do not bear the construction he gives them.²¹⁰ In short, the facts regarding the exercise of powers relating to foreign affairs were not as Sutherland represented them to be in *Curtiss-Wright*, nor did those living at the time the Constitution was framed understand the source of the new government's authority over dealings with other nations as Sutherland asserts that they did. *Curtiss-Wright*, then, can be of little help in addressing the issue under discussion. It is thus necessary to attempt to seek from still other cases principles that can reconcile the two arguably conflicting lines of cases discussed above.

A place to start is *Texas v. White*.²¹¹ Unlike the situation in most of the non-treaty federalism cases, the Court in that case was not interpreting Article I grants of power to Congress, but Article III's grant to the Supreme Court of original jurisdiction in cases to which states are parties. Its conclusions in that case, therefore, should be broadly applicable. The issue in *White* was fundamental: did an entity which had purported to secede from the Union retain its character as a state for purposes of the Court's original jurisdiction?²¹² And in that case, the Court observed that,

... the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.²¹³

This conclusion, read with the Constitution's "guarantee to every State in this Union a Republican form of Government,"²¹⁴ would seem to

209. See Lofgren, *supra* note 206 at 19–20.

210. Lofgren, *supra* note 206 at 20–21, 23–24.

211. 74 U.S. (7 Wall.) 700 (1868).

212. *Id.* at 719.

213. *Id.* at 725.

214. U.S. CONST., art. IV, § 4.

make clear that there are limits on the federal authority to encroach on the states under any of its powers, including the treaty power.²¹⁵

But while this conclusion seems easy to support, it is also of little practical help. The question must be what counts as a forbidden encroachment. One could not resolve the problem by invoking the holding in *Texas v. White* that states are “indestructible,”²¹⁶ since subjecting state courts to review by an international tribunal could hardly be equated with destroying state governments; the governments of the countries comprising the European Union cannot very well be said to have been destroyed by reason of the scope of the jurisdiction of the European Court of Justice.²¹⁷ The issue thus becomes, what actions, not amounting to the literal destruction of the governments of the states, are precluded by the language of the Constitution and the structure of the Union?

While it is tempting to resolve this problem by simply applying the recent structural decisions by the Supreme Court in the treaty context, there is reason to hesitate to do so. Those decisions did not deal with the treaty power and at least the rule of *Printz v. United States*²¹⁸ seems doubtful in the treaty context. As discussed above, the United States has been entering into treaties imposing duties on state officials since before Washington was inaugurated.²¹⁹ Either a practice extending over more than two centuries turns out to have been forbidden by the Constitution, or *Printz*'s absolute prohibition of federal imposition of duties on state officials cannot be applied in the treaty context without modification.

But if the holdings of the recent cases cannot be applied mechanically in the treaty context, neither can they be completely ignored. It is

215. In this connection, it is interesting to consider the actions of the federal government in settling the dispute with Great Britain regarding the boundary between Canada and Maine (to which the Court made reference in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 541 (1885)). The treaty by which that dispute was resolved required Maine to surrender its claims to an extensive area. American authorities had assumed that such was the likely result prior to entering into negotiations on the subject. According to a letter sent by Secretary of State Daniel Webster to the Governor of Maine, the President saw the United States as unable to enter into such a treaty without Maine's agreement, and for that reason included commissioners from Maine in the treaty negotiation. Letter from Daniel Webster to Governor Fairfield (April 11, 1842) in DANIEL WEBSTER, 6 WORKS OF DANIEL WEBSTER 272, 273 (16th ed. 1872). In private correspondence, Webster claimed “not the slightest doubt” as to the authority of the United States to act without Maine's consent. See *Cessions of Territory*, 5 MOORE DIGEST § 737, at 174–75. The Department of State has subsequently taken a position claiming greater authority with respect to cessions of territory than asserted by Webster in his letter to Fairfield, see *United States–Mexican Boundary*, 3 WHITEMAN DIGEST § 30, at 697–99.

216. 74 U.S. (7 Wall.) 700, 725 (1868).

217. See *Treaty Establishing the European Economic Community*, *supra* note 70.

218. 521 U.S. 898 (1997).

219. See *supra* notes 137–42 and accompanying text. Obviously, the Vienna Convention, *supra* note 11, imposes duties on local officials, *id.* art. 36, ¶ 1.

crucial to keep in mind that the state sovereignty issues presented by the recent federalism cases are of a different order from those of the Supreme Court's treaty decisions. The federalism cases can be seen as addressing questions relating to the authority of the federal government to alter the structures of the governments of the states. Could Congress require a state legislature to act without regard to its collective determination as to the best policy for the state to follow? Could it require a state court to exercise jurisdiction denied to it by the state's own laws? In contrast, the duties imposed by treaties and the Supreme Court's treaty cases involve no more than a substitution of one legal rule (that prescribed by the treaty) for another (that prescribed by the state). The structure of state government is not at issue in those cases.

Furthermore, the dicta which purport to give examples of limits on the treaty power give particular emphasis to structural changes in state governments as instances of acts outside the capacity of the treaty makers to effect. Thus *Fort Leavenworth R.R. Co. v. Lowe* asserted that a state's consent must be obtained before any part of the state's territory may be subjected to the authority of a foreign country.²²⁰ *Geofroy v. Riggs* stated more generally that the treaty power did not extend to "a change in the character of the government . . . of one of the states."²²¹ Thus the treaties contemporaneous with the Constitution do not purport to bring about fundamental changes in state governmental structures, the treaty cases do not address treaties which have such an effect, and dicta relating to treaties deny that they can have such an effect. To the extent, then, that the issue is determining what counts as a structural change in state government which cannot be accomplished through conclusion of a treaty, nothing in the jurisprudence relative to treaties is inconsistent with addressing this issue by examining cases dealing with federalism-based limits on the authority of Congress.

Considering then what the federalism cases can contribute to analysis of a hypothetical treaty subjecting state courts to review by an international tribunal, we start with *Collector v. Day*.²²² That case was quoted in *Helvering v. Gerhardt*²²³ to support *Gerhardt*'s stress on the importance of the protection of the functions of the states' judiciaries in the maintenance of state sovereignty,²²⁴ although the Court in *Gerhardt* distinguishes the facts of *Day* from those of the case before it.²²⁵ *Gerhardt* was cited in *Printz* to support that case's invocation of the residual

220. 114 U.S. 525, 540-41.

221. 133 U.S. 258, 267.

222. 78 U.S. (11 Wall.) 113 (1871).

223. 304 U.S. 405 (1938).

224. 304 U.S. at 414-15.

225. *Id.* at 415-24.

sovereignty of the states as a constitutional principle;²²⁶ the language from *Gerhardt* which *Printz* cites, however, is *Gerhardt*'s quotation from *Day*. While the holding in *Day* has been overruled,²²⁷ what amounts to its indirect citation in *Printz* surely supports the proposition that *Day*'s characterization of the protection of the states' judiciaries as a crucial constitutional principle retains its validity.

What then can *Day* offer to this discussion? Most significant is the following language: "[Establishment and maintenance of a judiciary] is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States."²²⁸

Alden is to the same effect. Among its reasons for holding Congress powerless to eliminate states' sovereign immunity in their own courts was its determination that "[a] State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts."²²⁹ Indeed, in its language, at least, *Alden* goes still further. The Court in that case faced the argument that the Congressional power to require state courts to enforce federal law permits Congress to require state courts to hear cases from which states would be immune in federal court. In rejecting that argument, the Court stated that "[t]here can be no serious contention . . . that the Supremacy Clause imposes greater obligations on state-court judges than on the Judiciary of the United States itself."²³⁰ It also observed that Article III "in no way suggests . . . that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States."²³¹

These cases suggest two reasons why a treaty subjecting state courts to review by an international tribunal would be unconstitutional. First, if *Alden* means literally that there is a one-to-one correspondence between limitations which may not be imposed on the federal courts and those which may not be imposed on state judicial systems, then the discussion above²³² establishing that such review may not be imposed on the federal courts ends the matter.

Second, and more fundamentally, these cases clearly evince a determination that the Constitution requires the preservation of the states'

226. 521 U.S. at 919.

227. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466, 486 (1939).

228. *Collector v. Day*, 78 U.S. (11 Wall.) at 126.

229. 67 U.S.L.W. at 4614.

230. *Id.*

231. *Id.*

232. See *supra* notes 76–119 and accompanying text.

judiciaries and the states' freedom to determine how their judicial systems are to function. This conclusion suggests that the proper inquiry for determining the constitutionality of international review of state court decisions is whether such review would amount to a fundamental alteration in the operation of those courts. If so, such review would be unconstitutional.

While federal decisions construing the scope of the judicial power of the United States are of course not controlling with respect to the scope of the power of state judiciaries, they are certainly suggestive. And such cases strongly suggest that international review of state decisions would amount to a significant erosion, if not indeed the destruction, of the states' judicial authority. Thus *Plaut v. Spendthrift Farm, Inc.*²³³ holds that Congress encroaches on the judicial power when it subjects the decisions of courts to review or revision by some entity outside the structure established by Article III, since the judicial power is the power to *decide* cases, subject only to review within the Article III hierarchy.²³⁴ The opinions in *Hayburn's Case* and the holding in *Gordon v. United States* are to the same effect.²³⁵ Obviously, state courts would not be finally deciding cases, subject only to such federal review as contemplated by Article III, if their judgments were, in effect, reviewed by an international tribunal. Therefore, requiring that states' courts be reviewed by such a tribunal would be unconstitutional.²³⁶

A question remains. As noted above,²³⁷ in practice, treaties of the United States have imposed duties on local officials since the days of the Articles of Confederation. In light of the flat prohibition on such "commandeering" which, *Printz* held, limits Congress's powers under Article I,²³⁸ there is an obvious tension between United States practice regarding treaties and the rule of *Printz*. Therefore, either *Printz* was wrongly decided or there exists some principled ground of distinction between imposition of duties on state officials by the federal government in the Article I context, on the one hand, and in the treaty context, on the other.

233. 514 U.S. 211 (1995).

234. *Id.* at 218–19, 227.

235. See *supra* notes 77–87 and accompanying text.

236. It might be argued that the federal government could somehow delegate to an international tribunal at least the jurisdiction of the Supreme Court to hear appeals of state decisions involving treaties. But such "delegation" is simply another term for permitting some authority outside the hierarchy established by Article III to review state courts. As the text makes clear, such a proceeding would be unconstitutional.

237. See *supra* notes 218–19 and accompanying text.

238. 521 U.S. 898, 928 (1997).

Such a distinction exists. Understanding it requires consideration of the reasons which would impel the United States to enter into a treaty. Usually (aside from anomalous situations such as that in *Missouri v. Holland*) the United States takes such a step because it wants something from the other party or parties to the treaty, not because it seeks to use the treaty as a mechanism for domestic regulation. Domestic effects may be inevitable, however, since the treaty partner(s) of the United States typically will not provide what the United States wants without receiving something from the United States. Not infrequently, this exchange of obligations is reciprocal: Ruritania agrees to do X for the United States if the United States will do X for Ruritania. Thus, if what the United States wants from the other country would require that country to alter its domestic policy in some way, the quid pro quo demanded of the United States might well require a similar alteration in domestic policy.

When the United States enters into a treaty requiring the parties to alter their domestic legal arrangements, its objective is often the securing to individual American citizens of certain benefits available only upon the agreement of a foreign government. For example, the bilateral treaties into which the United States entered even before the Constitution took effect, discussed above,²³⁹ required both parties to the treaties to follow particular rules of law regarding decedents' estates in cases involving nationals of the other party to the treaty, and to respect the religious freedom of nationals of the same countries. These treaties thus protected both the property and religious interests of Americans entering the countries with which the treaties were concluded. The consular convention with France²⁴⁰ required each party's law enforcement officials both to arrest deserters from the other's merchant vessels, at the behest of the other party's consul, and to notify that same consul upon the release from confinement of merchant seamen of the consul's nationality who had been arrested for other reasons.²⁴¹ The convention thus assisted the captains of American merchant vessels fearful of losing crew members in foreign ports.

Since the treaty partners of the United States would provide these legal protections for American citizens abroad only if their nationals received similar protections within the United States, necessarily the United States could obtain the benefits of such treaties for its citizens only if it structured itself so as to be able both to negotiate such treaties and to comply with the obligations the treaties imposed. But there were

239. See *supra* notes 131–42 and accompanying text.

240. See *supra* notes 137–42 and accompanying text.

241. *Id.*

only a limited number of ways in which the United States could have been structured to obtain this result. The federal government could be permitted both to deal with foreign governments and to have general legislative authority, which would necessarily include authority to comply with treaty engagements. Alternatively, general legislative authority could be left to the states, the federal government being limited to certain delegated powers; the states could likewise be left to work out their own individual arrangements with foreign countries, which the states could then implement. Either of these possibilities raised obvious problem. The first effectively would have abolished the states. The second, by permitting the states to negotiate separately with foreign governments, would have posed obvious barriers for the coherent conduct of American foreign policy. To avoid both Scylla and Charybdis, the Constitution has been read to take a third approach: while forbidding the states to deal with foreign governments and limiting the legislative authority of the federal government, this reading permits the federal government to take actions through treaties involving changes in law in areas not subject to its legislative control, including imposing obligations on local officials which could not be imposed through statute.

Since this latter point seems in direct contradiction to *Printz*, it must be addressed expressly. Consider the issues of arresting foreign seamen who desert and keeping track of the release of those jailed for other reasons. Of course, the federal government did not in 1789 and does not today have general law enforcement authority throughout the United States. It does, however, have the authority to enforce such law as it is competent to enact, and has in fact in this century created large law enforcement organizations, including agencies whose responsibilities are closely related to foreign relations, for example, the Immigration and Naturalization Service. The question on these subjects, then, went not so much to legal limitations on the federal government as to the political legitimacy of the steps which federal assumption of these responsibilities would have required. Federal implementation of obligations of this type would as a practical matter have required the federal government to establish what would amount to dozens of local police forces solely for this purpose. Such a vast federal law enforcement apparatus would have been unthinkable in 1789. But if there could be no federal enforcement of obligations of the sort involved here, the only alternative was enforcement by state officials. That is, as a practical matter, guaranteeing to American shipowners the cooperation of foreign officials in dealing with the problem of defaulting seamen would have been impossible unless the federal government could oblige state authorities to extend similar cooperation to foreigners.

This approach to “commandeering” in the treaty context seems more consistent with federalism than any alternative. It preserves exclusive federal authority to deal with foreign governments, while avoiding both the intrusions on state authority which would be inevitable if a federal law enforcement agency had been created to arrest deserting foreign seamen and the difficulties that would have been faced by captains of American merchantmen if the United States had been unable to enter into engagements like those discussed.

But this arrangement was necessitated solely by the Framers’ decision to forbid the states to deal with foreign governments while effectively reserving to the states what in 1789 was, and in some respects still is, essentially exclusive legislative authority to deal with certain subjects that arose between the United States and foreign governments. The treaty power requires a broad construction, as the Supreme Court observed in *Hauenstein*, because “If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to ‘enter into any treaty, alliance, or confederation.’”²⁴² Domestic regulation not flowing from an agreement with a foreign government presents no similar problem. If the states wish to address a matter which does not fall within the exclusive legislative authority of the federal government, there is no barrier to their doing so equivalent to the prohibition on states entering into treaties with foreign powers. Since the situation regarding domestic regulation differs so fundamentally from that involving treaties, the justification for a broad construction of the treaty power simply does not exist with respect to the authority of Congress under Article I.

The foregoing analysis also suggests the character of the “qualifications to the treaty power” which, according to *Missouri v. Holland*²⁴³ “must be ascertained in a different way” from those used to determine the limits on the authority of Congress to legislate.²⁴⁴ Measures which alter state legal rules, or require state officials to assume duties, which, while additional to those required by state law, are nonetheless consistent with those officials’ functions in state law, can be justified as being the type of measures a completely independent sovereign might well assume in order to obtain similar concessions from other sovereigns for the benefits of their own citizens. Actions that alter the shape of the state in some fundamental way, however, as by effectively altering the structure of its government, are very hard to fit within the model of undertakings necessary to assure some reciprocal benefit to

242. 100 U.S. 483, 490 (1879) (citation omitted).

243. 252 U.S. 416 (1920).

244. *Id.* at 433.

Americans abroad. The federal treaty power, in short, is a power to obtain benefits for the citizens of all the states through measures necessarily affecting powers normally reserved to state governments. It is not a power to reshape those governments.

C. *Breard*: Other Issues

The foregoing discussions address the most important issues raised by *Breard*. Two other points, made by commentators who disagreed with the result in that case, nonetheless call for comment. Each appears to misstate the authority of particular federal institutions facing a situation such as *Breard* presented.

Professor Slaughter has argued as follows:

The Supreme Court was directly requested by the ICJ not to defer to its decision, but simply to *wait*. It was asked to take a measure that was within its power as a matter of federal law, to give the ICJ a chance to decide whether the case was properly before it and to weigh and consider the legal issues pending before both courts. A stay would have preserved the ultimate rights of all parties (other than a purported right of the state of Virginia to execute its death row inmates as quickly as possible), until the ICJ could at least express its views on the issue and have them considered not only by the Supreme Court, but by other U.S. and state officials. Such a step is the minimum respect required.²⁴⁵

Professor Slaughter characterized her position as one of urging the relevance of the concept of comity on the facts of *Breard*.²⁴⁶ Aside from the uncertain fit between Professor Slaughter's application of the comity concept on the facts of *Breard* and the Supreme Court's conditions on the concept's use,²⁴⁷ it is in any case not clear that federal law would have permitted the Supreme Court to issue a stay in *Breard*.

Aside from references to certain concurring and dissenting opinions,²⁴⁸ to private expressions of views by two justices of the Supreme Court,²⁴⁹ and to cases applying the doctrine of *forum non conveniens*,²⁵⁰ Professor Slaughter cites only three cases to support her argument. *Roby*

245. Slaughter, *supra* note 8, at 711.

246. *Id.* at 708.

247. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 543-46 (1987).

248. *See* Slaughter, *supra* note 8, at 709-11.

249. *Id.* at 710-11.

250. *Id.* at 709.

*v. Corporation of Lloyds*²⁵¹ affirmed a trial court decision applying a forum selection clause designating a foreign forum in a case involving alleged infringements of the federal securities laws, while *Omron Healthcare Inc. v. MacLaren Exports Ltd.*²⁵² affirmed a trial court's application of a similar clause in a case involving an alleged trademark infringement. As Professor Slaughter fails to note, however, the *Roby* court reached its result only after stating,

We believe that if the [plaintiffs] were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection and arbitration clauses as against public policy.²⁵³

It elected to enforce the forum selection clause only after concluding that English remedies were adequate to protect the interests of the American plaintiffs. Likewise, the *Omron* court stressed both the absence of any public policy against litigating cases of the sort before it in a foreign forum, and the entirely private nature of the dispute.²⁵⁴

In the third case, *Ingersoll Milling Machine Co. v. Granger*,²⁵⁵ the Court of Appeals for the Seventh Circuit upheld the decision of a district court to stay its proceedings after the trial court in a parallel Belgian action had rendered its judgment and pending the appeal of that judgment.²⁵⁶ As Professor Slaughter omits to mention, the federal district court had denied an initial motion to dismiss based on the doctrine of *forum non conveniens*, even though the Belgian action had been initiated some sixteen months prior to the commencement of the American suit; further, a statute in the state in which the district court sat rendered the Belgian judgment conclusive.²⁵⁷ On these facts, and noting that "there is no particularly strong federal interest in ensuring that this dispute be adjudicated in a federal district court or, indeed, in any American court,"²⁵⁸ and that the Belgian judgment had resolved the dispute,²⁵⁹ the Court of Appeals rejected the argument that the action of the

251. 996 F.2d 1353 (2d Cir. 1993).

252. 28 F.3d 600 (7th Cir. 1994).

253. *Roby*, 996 F.2d at 1365.

254. *Omron*, 28 F.3d at 603-04.

255. 833 F.2d 680 (7th Cir. 1987).

256. *Id.* at 683.

257. *Id.* at 682-83.

258. *Id.* at 685.

259. *Id.*

district court in staying its proceedings had amounted to an abuse of discretion.²⁶⁰

As Professor Bradley has previously noted,²⁶¹ these cases bear little resemblance to *Breard*. All were civil suits—that is, suits involving claims by private persons, a factor given particular weight in *Omron*. In no case did the appellate court compel a trial court to defer to a foreign forum. The courts in all three were at pains to consider, not simply the virtues of comity, but also whether any interests protected by American law would be put at risk by foreign litigation. Furthermore, *Ingersoll Milling*, the one case not involving a forum selection clause in which the trial court had stayed its proceedings in deference to those abroad, also presented a situation in which relief had been denied until the foreign court had rendered its judgment, and granted only at the point when American proceedings would have simply duplicated those in Belgium.

In *Breard*, in contrast, public rather than private interests were at stake. Moreover, they were public interests of the most basic type: those represented by the criminal law. The Supreme Court was faced not with permitting a lower court to defer to foreign proceedings, but with a request to compel such deference in circumstances in which the ICJ had made clear that its order did *not* consider the merits of the case²⁶² and therefore did not reflect any attention to Virginia's interests. This case thus differs from those cited by Professor Slaughter, in which American courts enforced even forum selection clauses only after assuring themselves that the interests of American parties could be adequately protected by foreign courts. Certainly, the situation was not one in which deferring to the other court would have prevented the maintenance of duplicative legal proceedings, as was the case in *Ingersoll Milling*. Indeed, the *Ingersoll Milling* analysis would suggest that the ICJ violated obligations of comity to the courts of the United States, since the ICJ elected to address an issue making its way through the American court system, just as the case in *Ingersoll Milling* was making its way through the Belgian court system.

The cases which Professor Slaughter cites, in short, involved a court's determination that the interest of the *parties* could be protected substantially as well in a foreign as in a local court. The argument in favor of comity in *Breard*, however, cannot depend on a similar conclusion with respect to that case, since, as shown above, that conclusion

260. *Id.* at 684–86.

261. See Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 560, n. 190 (1999).

262. See Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 812, 818–19. (I.C.J. 1998).

cannot be justified. Rather, it seems to turn primarily, not on a consideration of the foreign court's ability to consider the local interests at stake, but on some notion that judges should place great weight on the sensibilities of judges in other court systems. It is as though a court's first loyalty is not to the law it is sworn to administer, but to some supra-national judicial fraternity.

Moreover, absent from Professor Slaughter's discussion is any consideration of relevant authority. She refers to no decisions addressing the circumstances in which the Supreme Court will stay the execution of a death sentence. Professor Slaughter's argument seems to depend on the assumption that the Supreme Court has unlimited discretion to block actions by the states when there is arguably some good reason to do so. Such an assumption, however, is quite mistaken.

As noted in the brief filed in *Breard* for the United States as *amicus curiae*²⁶³ and by the leading authority on procedure in the Supreme Court,²⁶⁴ the relative probability that the Court will accept a case for review and subsequently reverse it is a key determinant of the decision to grant a stay, even of death sentences.²⁶⁵ If there is no prospect of review, the Court has no basis for interfering with the judgment of the lower court. In *Breard*, the full Court decided to deny review, expressing strong doubt as to the strength on the merits of the claims brought by *Breard* and by Paraguay.²⁶⁶ If the Court's authority to grant a stay is limited to situations in which the sentence to be stayed was imposed in a judgment that the Court is likely to review, how could it grant a stay in a case in which it had determined that there would be no review? Professor Slaughter, then, errs in asserting that the stay which she thinks should have been granted was within the power of the Supreme Court to grant, once it had determined that it would refuse to hear *Breard*'s claim.

A final element of Professor Slaughter's article is her argument that a factor counting in favor of the issuance of a stay was that nothing was at stake beyond delay; a stay would simply permit the ICJ to give its views, while avoiding any irreparable change in the situation.²⁶⁷ This argument is disingenuous. There would be no point in granting a stay unless the ICJ's judgment in the matter would make some legal difference. But the Court decided in *Breard* all the questions at issue in that

263. Brief for the United States, *supra* note 18, at 47.

264. ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 693-96, 698 (6th ed. 1986).

265. *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (Scalia, J. 1991); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319-20 (Rehnquist, Ch. J. 1994).

266. *Breard*, 523 U.S. at 375-78.

267. Slaughter, *supra* note 8, at 711.

case. In terms of American law, any determination by the ICJ would have been irrelevant. Professor Slaughter does not assert that the Supreme Court would have been compelled, as a matter of American law, to implement an ICJ judgment requiring a new trial for Breard. Professor Slaughter would thus have the Commonwealth of Virginia arrest the operation of its justice system for the period of years that would presumably have been required for the ICJ to render its decision on the merits, even though the order indicating provisional measures was non-binding (applying Professor Slaughter's assumption) and even though she is unprepared to describe the ICJ's decision on the merits as having any legal bearing on the resolution of this case as a matter of American law. This seems a bit much.

In addition to Professor Slaughter's invocation of comity as a basis for a stay, Professor Vázquez has argued that, even if the ICJ's order was not binding, the president possessed the authority to compel Virginia, by executive order, to stay Breard's execution.²⁶⁸ Specifically, he argues that the Charter of the United Nations, read with the ICJ Statute, amounts to a delegation to the president of authority to comply even with non-binding ICJ orders if he believes them to be in the national interest. Professor Vázquez's reasoning is that these instruments, in permitting the ICJ to issue such non-mandatory orders, presupposes that governments will have the ability to comply with such orders if they choose to do so. That conclusion, in turn, leads Professor Vázquez to argue that, as a matter of American domestic law, it is reasonable to see adherence to the Charter and Statute as delegating to the president the authority to respond to such orders, since he is the only official in a position to respond with the speed required when faced with an order indicating provisional measures.²⁶⁹

This argument is shaky. Nothing in either the Charter or the Statute of the ICJ explicitly requires a party to these instruments to be in a position to respond to an order indicating provisional measures. And neither instrument contains any language whatever that could be read as a delegation to the president of any authority.

Indeed, the more one considers this "delegation" the more curious it becomes. What power, precisely, is being delegated? To the extent that compliance with an order indicting provisional measures would involve only acts clearly within the president's authority as Chief Executive, no delegation is required. Is the Senate then delegating legislative power, or judicial power, or both? Presumably both, since one can easily imagine ICJ orders which would implicate both types of power. *Breard*

268. Vázquez, *supra* note 8, at 689.

269. *Id.*

itself, involving as it did a matter of a stay of execution, involved power normally exercised by the judiciary in the United States.²⁷⁰ An order requiring suspension of the operation of a statute enacted subsequent to the entry into a treaty and contravening some aspect of that treaty, however, could not be obeyed without exercising legislative power. Are we then to suppose that the Senate conferred on the president the power to centralize in himself all the power of the federal government whenever he thought it necessary to obey a non-binding order of the ICJ—and all of this by implication? Professor Vázquez characterizes this reasoning as “plausible;” that characterization seems doubtful.²⁷¹

In any case, there is reason to doubt the constitutionality of such a delegation, in the unlikely event it was intended. Although the non-delegation doctrine is in dire straits,²⁷² it retains some force.²⁷³ Further, even the broadest delegations sustained by the Supreme Court, for example, that in *Curtiss-Wright*, included express words of delegation.²⁷⁴ None are present in this case.

Rather than seeing a non-existent delegation in the ratification of the Charter and the Statute, it would make more sense to see those instruments, collectively, as a non-self-executing treaty. This characterization follows from the fact that those treaties require future action—compliance with judgments and orders of the ICJ—without themselves working whatever changes in domestic law may be required to take that action.

But if these treaties are non-self-executing rather than delegatory, there would be no basis either in statute or in treaty for any presidential authority to issue an executive order requiring compliance with the ICJ order. That is, such authority would exist only if the president’s power over foreign affairs would permit him to take such action. In other words, the case most relevant to analyzing presidential power in this context is *Youngstown Sheet & Tube Co. v. Sawyer*.²⁷⁵ This follows because what would be involved here is not a delegation in a treaty, but an

270. The power to pardon is, of course, an executive power. A pardon, however, involves the complete forgiveness of some or all of the penalty imposed on a convicted person. *Ex parte Wells*, 59 U.S. (18 How.) 307, 309–15 (1856); *Knote v. U.S.*, 95 U.S. (5 Otto) 149, 153 (1877). A stay simply interrupts proceedings, with no necessary permanent effect. Further, the president may only pardon “Offenses against the United States,” U.S. CONST. art. II, § 2, cl. 1 (emphasis supplied); he may not pardon violations of state law, *In re Bocchiaro*, 49 F. Supp. 37, 38 (W.D.N.Y. 1943).

271. Vázquez, *supra* note 8, at 690.

272. *Printz v. U.S.*, 521 U.S. 898, 927 (1997).

273. *See Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (Stevens, J.), 671–76, 682–88 (Rehnquist, C.J.) (1980).

274. *See* 299 U.S. 304, 311–12 (1936).

275. 343 U.S. 579 (1952).

action that is occasioned by the existence of a treaty, and thus connected to, though not compelled by, the president's duty to execute the treaty. Indeed, at one point in his article, Professor Vázquez describes this putative presidential authority in terms very similar to those of the preceding sentence, relying as well on the president's authority over foreign affairs.²⁷⁶

As characterized, the executive order that Professor Vázquez would have had President Clinton issue encounters difficulties comparable to those of President Truman's seizure of the steel mills. Since, under Professor Vázquez's own assumption, no treaty requires the United States to obey the ICJ's order, such an executive order would not be executing the treaty. The order has a judicial character, rather than falling within the purview of the executive. Moreover, a more general executive authority to execute this non-self-executing treaty would involve elements of legislative authority, both because some provisional measures orders would, as noted above, require the use of such power, and because the power to carry out the undertaking embodied in a non-self-executing treaty is itself a legislative function.²⁷⁷ Just as the foreign affairs and war powers did not, according to the Court in *Youngstown*, permit the president to exercise what amounted to legislative authority,²⁷⁸ so a similar reliance on the foreign affairs power would not allow the exercise of both legislative and judicial authority. Indeed, if the argument in the preceding section of this article is correct, neither Congress nor the treaty makers could constitutionally compel Virginia to subordinate its judicial system to an international tribunal. That is, the power Professor Vázquez would ascribe to the president is not only beyond the authority of the federal executive; it is beyond the authority of the federal government as a whole.

It might be added that one of Professor Vázquez's argument for characterizing the power involved here as executive rings especially hollow. He asserts that the power to respond to provisional measures orders must exist in the executive, since the executive is the only branch of the federal government capable of responding to such orders with the speed required.²⁷⁹ This assertion is hard to square with the speed of the Supreme Court's action in *Breard*.

Professor Vázquez seeks to rely on *Dames & Moore v. Regan*,²⁸⁰ though he acknowledges that factors on which the court placed great

276. See Vázquez, *supra* note 8, at 689.

277. See *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

278. See 343 U.S. at 587-89.

279. Vázquez, *supra* note 8, at 689.

280. 453 U.S. 654 (1981).

weight in that case were absent in *Breard*.²⁸¹ The difficulty with his argument is that *Breard* lacks not merely some, but all of the factors deemed controlling in *Dames & Moore*. The Court in that case relied on a long history of Congressional acquiescence in the exercise of particular powers by the president, coupled with the enactment of legislation to facilitate such an exercise of powers and express approval of those powers in the legislative history of statutes dealing with related subjects.²⁸² In this case, in contrast, the president has never claimed any authority to stay proceedings in state judicial systems, so Congress has had no opportunity to acquiesce in such authority. Nor has Congress legislated in the assumption that such authority would be exercised.

Most fundamentally, a presidential power to unilaterally reshape state legal systems because of some connection between those systems and foreign affairs would create all the risks that Justice Jackson described in his opinion in *Youngstown*, as flowing from similar claims to unilateral presidential authority based on invocations of the war power.²⁸³ Professor Vázquez seems to assume that the president's power over foreign affairs suffices to overwhelm all other considerations when some situation presents itself that involves foreign affairs and arguably requires quick action. But the Supreme Court has simply been unwilling to confide such unchecked authority to the president.

In short, there is great reason to question the existence of any power in the president to stop the legal processes of the states through the issuance of executive orders solely to carry out ICJ orders which, on Professor Vázquez's assumption, are non-binding.

IV. AMERICAN COURTS AND INTERNATIONAL COURTS— REFLECTIONS ON THEIR RELATIONSHIP

This article has, to this point, explained why the Constitution would have forbidden any arrangement under which the Supreme Court was obliged to enforce a binding order from the ICJ to stay an execution. It also explains why comity considerations would not lead to a different result, and why the president lacks authority to issue an executive order compelling a state's courts to enforce an order from the ICJ.

As is clear from much of the discussion in this article, these conclusions are not shared by all academics addressing the issues posed by the *Breard* case. For example, a number of professors of international law

281. Vázquez, *supra* note 8, at 690.

282. *Dames & Moore*, 453 U.S. at 678–82.

283. *Youngstown*, 343 U.S. at 643–46 (Jackson, J., concurring).

filed a statement *amicus curiae* with the Supreme Court during its consideration of *Breard* in which they asserted that the court's failure to stay *Breard*'s execution would work "irreparable harm . . . to the national interest"²⁸⁴ and would risk "incalculable and irreparable damage on the international plane."²⁸⁵ Further, once the Supreme Court had rendered its decision, some scholars expressed disapproval in strikingly categorical language.²⁸⁶ Moreover, a number of critics took their positions even assuming that the ICJ order was not binding as a matter of international law.²⁸⁷ That is, they saw as seriously objectionable the failure of the Supreme Court to comply with an order which the United States had, under their assumptions, no legal duty to implement.

Some of this reaction could simply be labeled questionable legal analysis. Thus some of the critics seem to base their criticisms on a broader reading of the legal obligations of the United States than is justified.²⁸⁸ Other

284. Statement Amicus Curiae of International Law Professors George A. Bermann, David D. Caron, Abram Chayes, Lori Fisler Damrosch, Richard N. Gardner, Louis Henkin, Harold Hongju Koh, Andreas F. Lowenfeld, W. Michael Reisman, Oscar Schachter, Anne-Marie Slaughter, and Edith Brown Weiss at 7, *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-1390) [hereinafter Law Professors' Statement].

285. *Id.* at 9.

286. Professor Richardson, in strongly disagreeing with the outcome in *Breard*, asserted "the essential indivisibility of U.S. and international law under any notion or obligation to uphold the rule of law." Richardson, *supra* note 8, at 131. Professor Damrosch argued that the United States should "have encouraged the two courts to accord due respect to each other's treatment of matters falling within their respective spheres of competence." Damrosch, *supra* note 8, at 704. She went on to imply that the actual result in *Breard* may well have left doubts as to whether "the rule of law had been honored." *Id.* at 704. Professor Henkin criticized the refusal to stay *Breard*'s execution because it "did not contribute to the rule of law in international affairs" and "did not strengthen the place of international law in the law of the United States." Henkin, *supra* note 8, at 683. Professor Slaughter characterized the granting of a stay by the Supreme Court as "the minimum respect required" for the ICJ's order, in light of the concept of comity. Slaughter, *supra* note 8, at 708, 711. As noted, Professor Vázquez stated:

If there were merit to the claim that our Constitution and statutes, as they currently exist, leave the final decision about whether or not to comply with ICJ orders of provisional measures to state Governors, then we should all be able to agree that our Constitution and statutes are deficient . . .

Vázquez, *supra* note 8, at 690.

287. Damrosch, *supra* note 8, at 702; Slaughter, *supra* note 8, at 708; Vázquez, *supra* note 8, at 686.

288. For example, Professor Vázquez took the position that, if the ICJ order in *Breard* was legally binding as a matter of international law, then American courts had the obligation to give effect to that order. Vázquez, *supra* note 8, at 685. As this article has sought to demonstrate, there is at least some reason to doubt that the instruments establishing the ICJ create any obligation in domestic courts to implement its judgments. See *supra* notes 28-75 and accompanying text. Professor Vázquez, however, gives no hint in his analysis that there might be some basis for reaching a conclusion different from his.

aspects of similar analysis of related questions have been considered and found wanting by several writers.²⁸⁹

But surely more is going on here than analytical problems. Rather, the reaction against *Breard* seems to be based on assumptions that international law ought always to trump domestic law in cases of conflict, and that domestic institutions should likewise consistently defer to international institutions.²⁹⁰ But what are the justifications for these assumptions?

Justification is hardly likely to derive from some belief that international institutions, and the ICJ in particular, are functionally superior to domestic institutions—that is, are more likely to be fair and efficient. On the contrary, the *Breard* case itself illustrates serious deficiencies in the ICJ's procedure. The ICJ granted the provisional measures sought by Paraguay without considering the merits of Paraguay's claim.²⁹¹ It is well known that the ICJ does not resolve cases with any great dispatch. In other words, the ICJ was in essence proposing to delay *Breard's* execution for a period likely to last at least many months without establishing any basis for believing that Paraguay was entitled to the relief it sought, or to any relief. Particularly for an American lawyer, such a mode of proceeding seems grossly unfair. Federal courts in this country grant preliminary injunctions only upon a showing that a plaintiff is likely to succeed on the merits of his claim.²⁹² Indeed, for an American court to grant at least some types of prejudgment relief without an assessment of the strength of a plaintiff's claim has been held to be a denial of due process of law.²⁹³ As noted above, even in cases involving the death penalty, the Supreme Court will not stay an execution without some basis for believing that the situation of a particular

289. See Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); A. M. Weisburd, *State Courts, Federal Courts and International Cases*, 20 YALE J. INT'L L. 1 (1995).

290. For example, Professor Henkin gives as reasons for criticizing the outcome in *Breard* the fact that the decision "did not contribute to the rule of law in international affairs" and "did not strengthen the place of international law in the law of the United States." Henkin, *supra* note 8, at 683. But the proposition that legal considerations outweigh all other considerations affecting international affairs is hardly obvious. Cf. Rosenne, *supra* note 28, at 208. "In the nature of things States never condition their conduct solely by reference to legal considerations nor are they asked to do so." *Id.*

291. Vienna Convention on Consular Relations (Para. v. U.S.), Apr. 9, 1998, 37 I.L.M. 812, 818.

292. See, e.g., *San Antonio Cmty Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1234 (9th Cir. 1997).

293. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1 (1991).

petitioner is one that, as a matter of substantive law, calls for appellate review.²⁹⁴

Deficiencies in the ICJ's procedures might be of less moment if deference to international proceedings were necessary to protect the rights of individual foreign nationals enmeshed in the American criminal justice system. But it is hardly obvious that resort to international tribunals is necessary on this count. To be sure, the American courts were unable to ensure that Angel Breard received the rights to which he was entitled under the Vienna Convention, but these rights were created to ensure that foreign nationals were not disadvantaged in criminal proceedings. There seems little reason to believe that the loss of those procedural rights prejudiced Breard in his trial, given the procedural protections available to American criminal defendants generally, and indeed the Supreme Court stressed the highly speculative character of an argument that denying Breard an opportunity to meet with the Paraguayan consul had an effect on his trial.²⁹⁵ In other words, the ICJ's functioning seems less efficient and less fair than that of American courts, while there seems little reason to see it as a needed protection for criminal defendants, at least on the strength of the *Breard* case.

Indeed, it might be said that consideration of the functional aspect of this matter makes the justification for opposing the *Breard* result harder to determine, since—had the views of those opposing that holding prevailed—an institution of doubtful fairness and efficiency would be permitted to control better managed systems. To be sure, such a result can make sense if deference to the less efficient institution advances some value more important than mere efficiency. The difficulty in this case is determining what that higher value might be. Certainly, if it could be shown that legal obligations required deference to the ICJ, it could easily be argued that such obligations trump efficiency considerations. However, as demonstrated above,²⁹⁶ the argument that some legal obligation compels deference to the ICJ is probably wrong and at least is not obviously correct. More fundamentally, and again as noted above, a number of those calling for deference to the ICJ do so even while making the assumption that such deference is not legally obligatory. Necessarily, therefore, such scholars cannot urge such a course in the name of fidelity to legal obligation if they are prepared to assert their position even while assuming the non-existence of such an obligation.

If functional considerations do not support a rule of deference to international institutions, but rather suggest avoidance of such institu-

294. See *supra* notes 263–66 and accompanying text.

295. *Breard v. Greene*, 523 U.S. 371, 377 (1998).

296. See *supra* notes 28–75 and accompanying text.

tions, and if a preference for international judicial institutions is maintained despite these considerations and in the absence of legal obligation, it begins to appear that the justification for this preference derives from some idea that judicial settlement of international disputes is inherently good. On this view, since this process is inherently good, the desirability of using it is quite unrelated either to the efficiency of the process or to the existence *vel non* of any legal obligation to use the process.

If this view underlies the opposition to the result in *Breard*, that opposition must be scrutinized with caution. International tribunals are mechanisms of government, and their utility is no more self-evident than is that of any other governmental institution. How then could one defend a belief in the inherent rightness of American courts deferring to international judicial institutions?

It might be argued that such deference can advance a number of goals, the desirability of which would be difficult to dispute. First, by providing a neutral forum for resolving disputes, institutions such as the ICJ offer an alternative to resolving international disputes through coercive methods which impose costs on persons unable to directly affect the matters at issue—for example, methods such as the use of force or harsh economic sanctions. Second, judicial dispute resolution offers the possibility that the dispute will be resolved on the basis of a legal rule applied fairly to the strong and weak alike, rather than in the context of any power disparity between the parties. Finally, the more common the practice of deferring to international tribunals becomes, the more difficult it would be for states to seek to rely on power-based methods of dispute resolution. In particular, the example set by the United States, currently the most powerful state, can be very powerful; if it defers to the ICJ, it reinforces the argument that the tools of power ought not be employed in resolving disputes, while if it does not defer, it encourages similar behavior in other states unwilling to impose upon themselves burdens which the United States will not assume.

Beguiling as these arguments are, however, they do not withstand examination. First, judicial dispute resolution is an alternative to some other method of resolving an international controversy only when all parties to the dispute are willing to abide by the judges' determination. This follows, in part, because the jurisdiction of international tribunals is entirely voluntary.²⁹⁷ This also follows because, as noted above,²⁹⁸ the ICJ cannot enforce its own judgments. If the losing party does not comply voluntarily, the prevailing party has no means of benefitting from its

297. See, e.g., ICJ Statute, *supra* note 1, art. 36.

298. See *supra* notes 29–30 and accompanying text.

legal victory without resort either to the Security Council, or to the same tools of power for which the Court is intended to be a substitute. In other words, judicial protection of states' interests is available only against those other states which are open to such methods of dispute resolution. The idea that judicial resolution of disputes can avert harsher approaches makes sense only if it is assumed that states willing to resolve their disputes peacefully would, in the absence of a judicial forum, resort to harsher methods to address their differences. Surely, however, one may be skeptical of any assumption that states sufficiently peacefully inclined to take a dispute before a court would nonetheless resort to coercion if the court were not available.

The second argument for judicial resolution of disputes—the belief that judicial resolution is somehow more fair than alternatives—would seem to be clearly true only procedurally. Certainly, the neutrality of a judicial forum is an advantage to otherwise disadvantaged disputants (though this advantage can, presumably, be outweighed by procedural disadvantages, e.g., judicial delays in rendering judgment). But whether such methods are substantively fair obviously depends on the legal rules to be applied. Whether those rules are fair depends on a number of factors, but the existence of courts to enforce them would not seem to be crucial. In any case, the meaning of “fairness” in this context is not obvious. A state may regard a rule as unfair because it affects negatively an interest the state regards as both legitimate and vital, regardless of the genesis of the rule. To the extent that states perceive their interests on a particular subject as requiring differences in approach, it may be impossible to frame international legal rules on that subject that are both generally applicable and generally perceived as proper.

Finally, the argument for a “demonstration effect” of resort to judicial dispute settlement—the idea that states will be more inclined to rely on such settlements if they see other states doing the same thing—would seem to ignore the whole question of states' interests in the disputes. Presumably, the key issue for a state contemplating judicial resolution of a dispute is whether such a proceeding would advance the interests of the state in question. If the state concluded that judicial proceedings would not protect its interests, it is very difficult to believe that it would resort to such proceedings anyway out of a desire to emulate other states. Conversely, it is difficult to imagine why a state which saw its interests advanced by such proceedings would nonetheless refrain from using them solely because other states did not.

All in all, the argument that great deference to international judicial institutions would advance the goals described above seems to depend on an assumption that international law and international legal institu-

tions are adequate, *by themselves*, to protect states' crucial interests. And that assumption seems contradicted by the foregoing arguments, and by the obvious disbelief in that idea demonstrated by the day-to-day practices of states. As Rosenne has observed, "[i]n the nature of things States never condition their conduct solely by reference to legal considerations nor are they asked to do so."²⁹⁹

But if there are no obvious benefits from a policy of automatic deference to international tribunals, such an approach would clearly impose costs. Most obviously, important aspects of international law and the operation of international institutions such as the ICJ are not subject to the control of American political institutions, and thus cannot be responsive to the concerns of American electorates. To accord controlling weight to such a body of law and such institutions surely raises questions as a matter of democratic legitimacy. The same issue would be raised by the application of the principle of comity of courts which Professor Slaughter advocates,³⁰⁰ since it would apparently require American courts to accord the interests of other judiciaries very nearly as much weight as they give domestic laws and institutions. The American judiciary has traditionally not seen its duty in this light.³⁰¹ Furthermore, such an approach would likely run afoul of traditional American suspicion of government. After all, the "outstanding characteristic" of the American political system, according to comparative political scientists, is distrust of government.³⁰² If this is true, how likely is it that Americans would tolerate the conferral of significant authority on an international tribunal which is in no way accountable to American voters? Certainly, the anti-World Trade Organization demonstrations in Seattle in 1999 suggest that some segments of American society are deeply suspicious of international institutions of governance.³⁰³

One is forced to believe that support for the importance of international judicial institutions reflects, not so much a dispassionate analysis of the benefits of such institutions to the United States, as an almost

299. Rosenne, *supra* note 28, at 208.

300. Slaughter, *supra* note 8, at 708.

301. *See, e.g., Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 306-07 (1829), stating:

In a controversy between two nations concerning national boundary [*sic*], it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest.

302. ALAN NORTON, *INTERNATIONAL HANDBOOK OF LOCAL AND REGIONAL GOVERNMENT* 10 (1994). *See also* SAMUEL HUMES IV, *LOCAL GOVERNANCE AND NATIONAL POWER* 121 (1991).

303. *See* Michael Elliott, *The New Radicals*, *NEWSWEEK*, Dec. 13, 1999, at 36-39; Kenneth Klee et al., *The Siege of Seattle*, *id.* at 30-35.

faith-based conviction in the insignificance of national affiliations in the face of the common interests of humanity, and a corresponding desire to move authority from national governments to institutions not limited by national boundaries. However disinterested such beliefs may be, their correctness is not so obvious as to justify a fundamental change in the attitudes of American judges toward the ICJ.

CONCLUSION

The foregoing discussion establishes that the Statute of the ICJ and the U.N. Charter, taken together, are best interpreted as not creating an obligation in states parties to those instruments to implement even binding judgments of the ICJ in domestic courts. The article also demonstrates that the Constitution does not empower the federal government to subject either the federal courts or the state courts to review by an international tribunal. In addition, this paper makes clear that the *Breard* matter could not properly have been resolved either by the Supreme Court's staying *Breard*'s execution in the name of comity or by an executive order compelling Virginia not to execute *Breard*. Finally, this article has sought to show that much of the opposition to the result in *Breard* flows, not so much from convincing demonstrations of legal error, as from the conviction of the absolute primacy of international institutions which Professor Bradley has called the "internationalist conception."³⁰⁴

These conclusions have practical consequences. For example, if this analysis is correct, the United States is precluded by the Constitution from accepting the jurisdiction of the Inter-American Court of Human Rights. This follows because that court would not hear a case from the United States until any complainant had sought relief from American courts, and because countries accepting its jurisdiction are obliged to enforce its damage awards in their domestic courts.³⁰⁵ In cases where the American courts deny relief and the Inter-American Court subsequently makes an award of damages, the requirement of domestic enforcement means that, in effect, the American judgment denying relief has been

304. Bradley, *supra* note 261, at 539. This article analyzes the "internationalist conception" in considerable detail. *Id.* at 539-56.

305. The conclusion in the text follows from the fact that any complaints of rights violations must first go to the Inter-American Commission on Human Rights. American Convention, *supra* note 3, art. 61, at 117. The Commission can deal with a complaint only if domestic remedies have been exhausted with respect to the rights violation alleged. *Id.* art. 46 at 113. If the case reaches the Court, article 68 of the American Convention requires that any damage judgment it renders be enforced domestically by the state against which the judgment runs. *Id.* at 119.

nullified. As demonstrated in the foregoing pages, the federal government cannot constitutionally enter into a treaty creating such an effect.

But the issues raised by *Breard* go beyond the immediate practical implications of the case. They involve as well the question of whether American institutions should focus primarily on the interests of Americans as defined by Americans, or instead on facilitating the shift of increasing levels of authority to international bodies. In *Breard*, the Supreme Court has made clear that it does not see itself in the first instance as but one court in a supra-national judicial system, but rather as the Supreme Court *of the United States*.