The New Internationalism: Ceding Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany

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V. DEVELOPING CONSTITUTIONAL STANDARDS FOR SUPRANATIONAL ORGANIZATIONS: LESSONS

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I. INTRODUCTION

The United States has historically oscillated between periods of isolationism and internationalism. Typically, periods of internationalism have accompanied American engagement in wars and military alliances outside the United States. Such military engagement has often involved the United States acting ostensibly as part of an international coalition, and has been followed frequently by economic engagement. The period since World War II has featured both a continued military internationalism in the form of several active military campaigns and protective pacts and a sustained U.S. interest in increased international trade. This outward-looking tendency is illustrated by the United States’ strong interest in pursuing trade liberalization through accords such as the General Agreement on Tariffs and Trade (GATT) as well as by its interest in international security organizations such as the United Nations and the North Atlantic Treaty Organization (NATO). Since the Soviet Union’s collapse as a credible military threat, the focus of American internationalism has shifted further to the economic arena. The past few years have witnessed the United States accession to the North American Free Trade Agreement (NAFTA), the creation of the Asia Pacific Economic Forum (APEC), and, in January 1995, the creation of the World Trade Organization (WTO).

As the pace of U.S. involvement in international affairs quickens, so has U.S. integration into international organizations. In the politico-military arena, the United States has participated both theoretically and formally in a series of multilateral military actions under the aegis of the United Nations.¹ This trend is noticeable also in the politico-economic arena. For example, under the Canada–United States Free Trade Agreement, decisions of bilateral trade dispute panels are binding on both governments and are not subject to judicial review on the merits.² NAFTA established a similar dispute resolution process.³ In addition, the WTO, which came into existence in January 1995, enjoys exclusive jurisdiction over disputes under the GATT and may enforce its decisions through sanctions.

While the United States has cooperated frequently with other states in its forays in the international arena, these coalitions have in the past conformed

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¹ Recent examples of such actions include the operations in the Gulf War and Somalia.
² The constitutionality of the bilateral panel itself is subject to review under the exclusive jurisdiction of the D.C. Circuit. See discussion infra Parts IV.D.3, IV.E.
to the traditional precepts of international public law: sovereign states acting together voluntarily, theoretically not bound by group decisions, and free to withdraw at any time. Unnoticed by the United States until recently, a new internationalism is now gradually emerging, an internationalism characterized by a marked trend towards supranationalism. Unlike international organizations of old, which relied on member states to accept rules and decisions voluntarily, the new international institutions are increasingly supranational: "international judicial persons" whose decisions and rules can be practically enforced.

Integration into international organizations increasingly means ceding sovereign competences to these organizations. The benefits of U.S. involvement in such organizations come only at the price of acceding to multilateral decisionmaking structures whose decisions do not necessarily reflect the short term preferences of Congress or the President and cannot be reviewed by American courts on the merits.

Ceding sovereign competences to international organizations raises constitutional questions that the U.S. judiciary is beginning to confront. For example, what is "sovereignty" and may the United States cede it? If so, under what circumstances? Must international organizations be held to the standards of the U.S. Constitution, particularly with regard to fundamental rights? What is the appropriate role of the U.S. judiciary in deciding these questions?

Perhaps most important, one must consider what impact the cession of sovereign competences has upon the existing procedural and substantive values of American constitutionalism, particularly those concerning separation of powers and federalism. Cession may have profound effects not only by shifting competences away from the constitutional organs of the United States, but also the existing constitutional structure. Shifting sovereignty is likely, for example, to strengthen the executive branch at the expense of both the legislative and judicial branches. Furthermore, it may threaten the traditional role of Article III courts as guarantors of constitutional protections by excluding certain classes of cases from their review.

Ultimately, the judiciary is the final bulwark against fundamental revisions of the Constitution outside the amendment process. The judiciary ensures that separation of powers is protected and that no competences necessary for the judiciary and legislature to perform their constitutional roles are delegated. Given the gravity of constitutional issues raised by the new supranationalism and the extent of the court's responsibility, the judiciary may, therefore, have to reconsider long held doctrines such as deference to foreign policymaking by the executive branch, and review cessions of sovereign competences continually rather than subjecting them to a single adjudication without subsequent reconsideration.

Defining the respective roles of the executive, legislative, and judicial

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branches in this new environment would prove difficult even given a coherent set of principles underlying American involvement in global affairs. It is next to impossible in the present environment in which there are no such principles. Basic constitutional values such as the distribution of foreign affairs powers are hidden in a "zone of twilight" where judges scarcely dare tread.\(^6\)

The lack of clear articulation of the distribution of power in the area of foreign affairs means that some constitutional values are already defined to some extent extrajudicially; the judiciary has essentially abdicated its role as constitutional interpreter to the other two branches in this area, in particular to the executive. As the United States confronts cessions of sovereign competences to supranational institutions, the definition of constitutional values threatens to become an increasingly extrajudicial activity. Faced with this prospect, it seems prudent for the judiciary to define more precisely the limits on the delegation of sovereign competences to international organizations.\(^7\)

In many respects, the distinction between "foreign" and "domestic" affairs has become moot as problems are increasingly transnational in nature and supranational institutions play a greater role. The judiciary should acknowledge this change by reformulating its traditional deference to executive branch foreign policymaking\(^8\) and considering the merits of cases alleging cession of sovereign competences to international or supranational bodies. These issues have already been addressed to a large extent by the countries of the European Union. Germany in particular, given its strong Constitutional Court, federal structure, and analogous separation of powers, provides a useful example for the United States.

This Article addresses some of these critical issues. Part II introduces the basic elements of the new internationalism which involve the ongoing shift from traditional international law to supranational law. It outlines some of the threats the shift poses to a federal Constitution and establishes the relevance of Germany as a predictive model for the United States.

Part III considers the constitutional law of German internationalism. This part focuses on the constitutional treatment of German integration into the

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European Community (EC) and the European Union (EU). As Germany has ceded sovereign powers, its Constitutional Court has been forced to consider the minimal levels of collective, systemic rights and individual rights it is willing to accept and how these limits may be enforced.

Part IV considers the constitutional law of American internationalism. Part IV begins by showing how our current constitutional order inadvertently increases the risks associated with ceding sovereign competences. In addition to exploring some of the hypothetical challenges that our constitutional order may face in the future, Part IV examines American experiences with recent delegations of sovereign competences to international trade organizations with supranational characteristics, such as NAFTA and the WTO.

Part V highlights some of the lessons from the German experience and suggests some possible constitutional approaches for future judicial review. This part discusses the important issues the judiciary must face. In particular, the judiciary should prepare to consider the extent to which supranational or international entities must conform to American constitutional principles before the United States will cede or share sovereign competences. Most discussions of these issues have focused on narrow questions. Given the pace at which international organizations with supranational and coequal competences are developing, however, it is time to address the larger constitutional issues: Which constitutional values need to be protected and how can they be protected? This Article provides some initial ideas for approaching these issues.

II. THE NEW INTERNATIONALISM: SUPRANATIONAL INSTITUTIONS AND THE CHALLENGE TO CONSTITUTIONAL LAW

Since World War II, much of international law has evolved into supranational law. International law is deferential to the absolute sovereignty of nation-states, while supranational law is law promulgated by institutions whose institutional decisions are binding and enforceable against nation-states.

Traditionally, international organizations were reliant on voluntarism for enforcement of rules and decisions. In the international realm an affected state had to agree to follow a rule or decision. Ignoring a decision could at most only result in political repercussions. The new internationalism is marked by the advent of supranational organizations. Sanctioned by the supranational organization, enforcement occurs in one of three ways: through multilateral member state action against an offending party; through action of one member

9. The term “European Community” refers to three Communities: the European Coal and Steel Community (ECSC), created and coming into effect under the eponymous treaty of 1951, TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY]; the European Economic Community (EEC), created under the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] (commonly referred to as the Treaty of Rome); and the European Atomic Energy Community (Euratom), created under the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY]. The term “European Union” refers to the entity created by the Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 [hereinafter Maastricht Treaty], which came into force in 1993, subsuming the earlier Communities with some voting and institutional modifications and adding foreign and security policy pillars. References to events before 1993 use the former term. References to events after that date use the two terms interchangeably.
state against another; or through the voluntarism characteristic of earlier international organizations. The first two are the most important because they transform the character of enforcement from predominantly voluntaristic and political to predominantly mandatory and judicial.

The advent of supranational law, which I call the new internationalism, challenges the traditional way in which nation-states create and are affected by “international” law. At the same time that supranational institutions have developed, there has been an increasing recognition that many “domestic” problems can only be solved on the international level, including such diverse issues as nuclear proliferation; pollution and other global environmental issues; financial flows; refugees; transfers of technology; the trade, labor, consumer, and tax consequences of globalized production patterns; and criminal law problems including drug trafficking and gun control. Because effective resolution of the legal issues that arise from these activities can only occur at the international level, there is a growing body of international law that seeks either to regulate the activities or to coordinate national regulation efforts.\(^1\)

With the birth of supranationalism and the increasingly transnational nature of legal problems, the very distinction between domestic and international sources of law breaks down. International and domestic have become so intertwined that it is now inaccurate to address law as “international” or “domestic.” While international law scholars have grasped this development\(^2\) and started to grapple with redefining the term international law,\(^3\) scholars of national constitutional law have failed to

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10. For the sake of simplicity, I juxtapose international organizations with supranational organizations. Less simply, one can imagine a continuum with purely international organizations at one end and purely supranational organizations at the other end. Clearly, while there are purely international organizations, i.e., organizations whose decisions are unanimous and whose enforcement is entirely reliant on voluntaristic accession to decisions by member states there are no purely supranational organizations at the current time. Not even the European Union is completely independent of the will of its member states in enforcing decisions. A more nuanced appreciation of supranationalism would require me to differentiate between institutions I identify as supranational. Given space constraints, I have chosen to embrace simplicity. “Supranational organization,” as used here, simply describes an organization nearer the supranational end of the continuum than the international end.

11. A detailed discussion of the growing body of international law is beyond the scope of this Article. It suffices to mention that the U.S. is party to approximately one thousand treaties. See 2 Igor I. Kavass, A Guide to the United States Treaties in Force (1992).


address the implications for domestic law and legal structures. As international law becomes supranational (i.e., directly binds nation-states), national courts will have to address the structure of relationships between states and international organizations. The following section explores the shift from international law to supranational law.

A. Traditional Notions of International Law and Sovereign Competence

Prior to World War II, no institution existed that could legally bind nation-states. Precepts of international law were "binding" only insofar as they were willingly accepted by individual nation-states. Given that nation-states could end such obligations at will, the obligations were not binding in the true sense of the word. In order to be binding, an obligation must continue in force, and be capable of enforcement, regardless of the will of the bound party. Furthermore, all legal relations arising between a nation-state and its citizens were defined as domestic law, outside of the scope of "international" law.

The dominant view of international law from at least the eighteenth century on was law as a set of voluntary rules found in treaties and derived from custom. In the early twentieth century, the Permanent Court of International Justice expressed this view in the widely quoted Lotus decision when it wrote that "[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . ." A later international court, the International Court of Justice (ICJ), adopted the same view. Article 38(1) of the Statute of the International Court of Justice, widely treated as an exhaustive list of sources of international law, reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

do "International" Law, 42 KAN. L. REV. 605 (1994) (arguing that multilateralization has transformed international law).

14. This section relies heavily on Head, supra note 13.

15. See MALCOLM N. SHAW, INTERNATIONAL LAW 24-27 (2d ed. 1986). "Since law was ultimately dependent upon the will of the sovereign in national systems, it seemed to follow that international law depended upon the will of the sovereign states." Id. at 27. For a comprehensive discussion of the development of international law in the eighteenth and nineteenth centuries, see ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 126-237 (1947).

16. The Permanent Court was established after World War I. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 689-90 (2d ed. 1973).

17. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

18. Id. at 18.


d. . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.21

The Statute of the ICJ, then, has established as sources of international law not only general principles "recognized" by nation-states, but also voluntarily accepted international agreements, such as treaties. Moreover, in accordance with this view of international law as voluntarist, the ICJ was not endowed with any power to enforce its decisions.

By the mid-twentieth century, "international law" clearly meant a body of rules voluntarily adopted by nation-states, susceptible to future abrogation. Furthermore, these rules themselves supported the nation-state as sovereign, thereby establishing the international legal context in which "sovereignty" had to be understood. When international law scholars wrote that "except as limited by international law or treaty, each state is master of its own territory,"22 they did not use the word "limited" as conventionally understood. Voluntarily accepted obligations, which can be rescinded at any time, are not true limits. Sovereignty was understood to be a set of claims individual nation-states made about their own power, claims "limited" only by the existence of other nation-states making similar claims.23 Accordingly, international law consisted of the voluntary agreements between sovereigns.

This definition of international law is beginning to break down. Increasingly, "international" law is supranational: it emanates from institutions whose decisions have binding force on nation-states and who can enforce their decisions. They are supranational rather than international because they are superior to nation-states in matters coming under their jurisdiction.

B. The New Internationalism: The Development of Supranational Organizations

Examples of early international organizations include the League of Nations, the International Labor Organization, the International Telegraphic Union, and the Universal Postal Union. These organizations, some of which were founded as early as the mid-1800s,24 served as fora where sovereign states could gather to discuss issues of transnational concern and to coordinate group action. None of these organizations had the power to enforce their rules and decisions because they were conceived of, and acted as, gatherings of

23. For an excellent discussion of the development of sovereignty as a concept and its role in international law, see Head, supra note 13. For a survey and criticism of some of those theories of sovereignty, see J.L. BRIEFLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 7-16 (Sir Humphrey Waldock ed., 6th ed. 1963); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMODATION OF CONFLICTING RIGHTS 14-26 (1990); Reisman, supra note 13.
24. The International Telegraph Union and the Universal Postal Union were founded in 1865 and 1874, respectively. See ALFONS NOLL, INTERNATIONAL TELECOMMUNICATION UNION 177-83; LUDWIG WEBER, POSTAL COMMUNICATIONS INTERNATIONAL REGULATION 238-42; 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolph Bernhardt ed., 1983); see also LEAGUE OF NATIONS COVENANT (ratified June 28, 1919); CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION, 62 Stat. 3490 (1946) [hereinafter CONST. OF THE ILO].
The twentieth century has witnessed the exponential growth of contacts between people of different countries and between countries as political and military entities. As contacts have increased in such diverse areas as trade, security, and culture, so has the number of attendant international problems. The increase in activities whose origins or effects transcend national boundaries has led to greater interdependence as nation-states have sought to create suitable instruments to regulate newly emerging international issues. International organizations have become these instruments. The limitations and failures of absolutely sovereign states in World Wars I and II allowed international law to move toward supranational law, that is, toward a system of laws that could pierce the veil of sovereignty and influence the internal affairs of states.

After World War II, a group of important organizations emerged, including the United Nations (U.N.), the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD or World Bank), and the General Agreement on Tariffs and Trade (GATT). These institutions often had supranational characteristics, such as mechanisms to enforce their decisions. The power of each organization to enforce its rules and decisions was often more theoretical than practical, but the institutional procedures did exist.

In addition to specific enumerated powers, these organizations had more general writs that endowed them with quasi-legislative functions and provided bases for the development of new forms of international law that were intended to be binding on states. The U.N., for example, was created to maintain international peace and security. Although the U.N. Charter mentions human rights only as a general idea, it at least recognizes that international standards of human rights exist and it seeks to promote and

25. See, e.g., CONST. OF THE ILO arts. 19-20, 62 Stat. at 3518-33 (describing procedures for adopting conventions); id. arts. 24-25, 62 Stat. at 3534-37 (describing procedures invoked if conventions not followed); id. arts. 26-34, 62 Stat. at 3536-44 (describing how members can react when other members fail to follow conventions).

26. For example, the U.N., founded in 1945, could require members to obey the decisions of the Security Council. See U.N. CHARTER art. 25. The IMF was created to regulate the international monetary order through the stabilization of convertible exchange rates; RICHARD W. EDWARDS, JR., INTERNATIONAL MONETARY COLLABORATION 491-92 (1985) (noting original IMF requirement of convertibility at set par value in terms of gold or U.S. dollars and restriction on changing par values). A subsequent amendment to the Articles of Agreement of the IMF altered this requirement to allow floating rates. 1 MARGARET GARritsen de VRIES, THE INTERNATIONAL MONETARY FUND 1972-1978, at 3-4 (1985); see also Second Amendment to the Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, 29 U.S.T. 2203 (entered into force Apr. 1, 1978). The IMF can condition the use of its funds, normally provided as structural adjustment loans, on fulfillment of its own requirements and can restrict later grants of funds if states have failed to satisfy earlier requirements. The World Bank was created to supplement private capital markets by providing funds to war-torn European governments for reconstruction and by providing funds to developing countries. See Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, art. I, 60 Stat. 1440, 2 U.N.T.S. 134 [hereinafter World Bank Articles of Agreement]. But see EDWARD S. Mason & ROBERT E. Asher, THE WORLD BANK SINCE BRETTON WOODS 150 (1973) (noting that World Bank did not play major development role during its early stages). Since its foundation, the World Bank has had powers of enforcement similar to those of its sister institution, the IMF. See World Bank Articles of Agreement, supra, art. I, 60 Stat. at 1440, 2 U.N.T.S. at 134.
encourage respect for them.\textsuperscript{27} The recognition of binding standards of human rights fostered the development of human rights law and the supervision of those rights by international and supranational organizations.\textsuperscript{28} During their nascence, the new areas of international law were not supranational because there were no adequate enforcement mechanisms. Yet even such areas as the regulation and prosecution of war crimes have gradually developed supranational characteristics as the end of the Cold War has allowed the Security Council to take a more active role.

The institutional structures of the U.N., IMF, and World Bank opened the door to supranational law. The lack of supranational power distinguished the GATT from its sister institutions and marked a limit on states’ grant of supranational competences to international bodies. The transition from the GATT to the WTO quickened the transition of international trade to supranational structures. The transformation occurred in three stages, with different institutions involved at each stage. First, the less developed countries acceded to supranationalism. Second, the European industrialized countries adopted a supranational economic framework. Finally, the United States, without much conscious consideration, began not only to recognize supranational power through its participation in supranational security enforcement, but also to cede competences to supranational trade institutions.

1. Developing Countries: The Supranational Institutions of Bretton Woods

The IMF and the World Bank quickly came to play an important role in stabilizing and developing the economies of less developed countries (LDCs).\textsuperscript{29} As their importance grew, these supranational institutions began to exercise the power over states with which they had been legally endowed.\textsuperscript{30} Developing countries became increasingly dependent on the Bretton Woods institutions as sources of capital, allowing the institutions to play an important role in internal policymaking by conditioning financing on the acceptance of domestic policy prescriptions. By the mid-1980s, LDCs had ceded sovereign competences over exchange rate policy, monetary policy, and fiscal policy to both institutions so often that the IMF and the World Bank had secured a supranational role in these areas with respect to developing countries.

On a general level, states that joined the IMF agreed to cede some control over monetary policy and exchange rates by agreeing to be bound by the rules

\textsuperscript{27} See U.N. CHARTER art. 1, \S\ 3; see also U.N. CHARTER art. 55(c) ("[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.").

\textsuperscript{28} For supervisory mechanisms in the area of human rights, see FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 3-17 (1990); Shigeru Oda, The Individual in International Law, in MANUAL OF PUBLIC INTERNATIONAL LAW 469, 498-503 (Max Sorensen ed., 1968).

\textsuperscript{29} The IMF and the World Bank were created at a conference in Bretton Woods, New Hampshire and are often referred to as the Bretton Woods institutions. See MASON & ASHER, supra note 26, at 21-28.

The New Internationalism

specified at Bretton Woods and subsequently by the IMF. A procedure was created for regular meetings with states to allow the IMF to coordinate policies and to ensure that individual states complied with IMF rules. In particular, the IMF could condition financing of balance of payments crises on a state’s fulfillment of IMF-imposed obligations. The original IMF charter required member states to establish a par value in gold or U.S. dollars. Currencies could float only within narrow bands from the established par value, and changes to par values had to be approved by the IMF. To persuade states to cede some sovereign competences over monetary policy, the IMF created incentives such as a more reliable international payments system, financing for member states experiencing balance of payments problems, and membership in the World Bank.

The role of the IMF has changed over time. With the transition to floating exchange rates, the IMF began to function as an overseer of the international monetary system. During the international debt crisis of the early 1980s, the IMF cemented its role as a supranational body regulating the internal fiscal and monetary policies of developing countries by conditioning access to IMF funds on compliance with IMF policy demands.

Similarly, by providing financing in the form of loans, the World Bank played an important role in stabilizing and developing the economies of LDCs. Like the IMF, the World Bank conditions its structural adjustment

31. See generally GARRITSEN DE VRIES, supra note 26; Articles of Agreement of the International Monetary Fund, supra note 26, art. IV (limiting members’ exchange rate policies); see also id., art. VIII (prohibiting restrictions on current payments and discriminatory currency practices and requiring freely convertible currencies); id. art. V (limiting use of IMF’s general resources); see also DAv, supra note 30, at 88-101; HOoK, supra note 30, at 18-19.
33. EDWARDS, supra note 26, at 638-42. When the IMF was not providing finance, it had to rely on other member states to pressure prodigal members. Gold, supra note 32, at 520, 527-30.
35. See DAVID D. DRISCOLL, INT’L MONETARY FUND, WHAT IS THE INTERNATIONAL MONETARY FUND? 3-5 (1988); see also MARGARET GARRITSEN DE VRIES, THE IMF IN A CHANGING WORLD: 1945-85, at 6-7 (1986); EDWARDS, supra note 26, at 4-8.
36. Articles of Agreement of the International Bank for Reconstruction and Development, supra note 26, art. II, § 1(a). Membership is required in order to receive World Bank financing. The World Bank Articles of Agreement require that a member state be either guarantor or borrower on all loan agreements. World Bank Articles of Agreement, art. III, § 4; see also INTERNATIONAL BORROWING 47-87 (Daniel D. Bradlow ed., 1986) (providing sample loan agreement and general conditions applicable to development credit agreements). The World Bank is an important source of development aid.
37. On the transition from the par value-based system to floating exchange rates, see EDWARDS, supra note 26, at 491-501; GARRITSEN DE VRIES, supra note 26, at 3-4 (noting legalization of floating rates through Second Amendment of IMF Charter).
38. For a description of the debt crisis, see, e.g., GARRITSEN DE VRIES, supra note 26, at 182-86; BAHAR NOWZAD, LESSONS OF THE DEBT DECADE, FIN. & DEV., Mar. 1990, at 9, 9-12.
39. For a description of how the IMF came to play a preeminent role in providing finance to developing countries during this period and began to exercise supranational power, see John W. Head, ENVIRONMENTAL CONDITIONALITY IN THE OPERATIONS OF INTERNATIONAL DEVELOPMENT FINANCE INSTITUTIONS, 1 KAN. J.L. & PUB. POL’Y 15 (1991) (discussing use of performance criteria and conditionality); John W. Head, SUSPENSION OF DEBTOR COUNTRIES’ VOTING RIGHTS IN THE IMF: AN ASSESSMENT OF THE THIRD AMENDMENT TO THE IMF CHARTER, 33 VA. J. INT’L L. 591, 594 n.5, 599-600 (1993) (discussing how IMF financing approval affects later access to private capital markets).
loans on the satisfaction of certain monetary and fiscal policy criteria. Not only must these criteria be satisfied prior to the grant of a loan, but the policies must also be maintained after the loan has been granted. The World Bank attempts to ensure continuing compliance with its policy demands by incorporating detailed covenants, including reporting requirements, into its loans to developing countries. In addition, even when it is not practical to enforce these requirements for existing loans, the Bank may condition future loans on past performance.

Due to their dependence on the IMF and the World Bank, developing countries regularly have been obliged to cede traditional sovereign competences over exchange rate policy, monetary policy, and fiscal policy, thereby allowing the two institutions to become supranational. The delegation of authority over economic policy by developing countries therefore constituted the first stage of the development of supranational institutions.

2. The European Union as a Supranational Economic and Judicial Structure

While many developing countries have little choice but to cede sovereign competences to the IMF and World Bank, industrialized countries and major military powers have more leverage vis-à-vis international and supranational organizations. In addressing transnational legal problems or in fostering greater interdependence, industrialized countries must be willing to cede sovereign competences. The European Union marks perhaps the most ambitious effort of this sort. Since its inception, many Western European countries have opted to join the European Union. Currently, the EU can be characterized as a legal regime of supranational character. Policymaking in certain economic areas, such as external tariffs, is reserved to the EU and its principle legislative and executive bodies — the European Commission and the Council of Ministers. The Treaty of Rome and its successor, the Treaty of European Union (Maastricht Treaty), compose the EU “constitution” and impose certain obligations on the member states. These obligations are enforced by the European Court of Justice (ECJ), the judicial arm of the EU. The ECJ plays a prominent role in interpreting and enforcing the treaties. All member states accept that the laws of the EU, whether treaty provisions, ECJ opinions interpreting them, regulations, or directives, are supreme and trump any conflicting national legal provisions. The supremacy of the laws of the EU over those of member states approximates the supremacy of federal law

41. See INTERNATIONAL BORROWING, supra note 36, at 47-87 (providing sample loan agreement and general conditions applicable to development credit agreements).
42. Id.
over state law in the U.S. constitutional order.  

Just as the current development of supranationalism in the United States is driven by the desire to encourage trade, the European Union evolved from trade-related concerns. The current Union is rooted in the European Coal and Steel Community (ECSC), established in 1951 both for the economic purpose of regulating the coal and steel markets and for the political purpose of fostering interdependence between Germany and France in the aftermath of World War II. The Treaty of Rome, the backbone of the constitutional order of the European Union, was ratified in 1957 and broadened the reach of the original ECSC Treaty by creating the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The Treaty of Rome created an economic community committed to eliminating trade barriers and achieving a common market and customs union among the member states. The Treaty of Rome has been amended several times, resulting in the increase of the power of the institutions created by the treaty. In 1965, the Merger Treaty amended the Treaty of Rome to create a unified Council of Ministers and European Commission to oversee what had been three separately managed Communities, namely the ECSC, EEC, and Euratom. More recently, the Single European Act (SEA) of 1986 established 1992 as the deadline for realizing a single market by listing areas where Treaty of Rome goals had not been achieved and by modifying the voting structure of the Council of Ministers to allow qualified majority voting. Finally, the Maastricht Treaty moved the Union further toward majority voting, enhanced the institutional role of the European Parliament, and explicitly made political union a goal to be achieved through the addition of EU-level competences in foreign and security policy on the one hand and justice and interior on the other.


45. ECSC TREATY.

46. This was not necessarily the entire goal, though. The foreign ministers of the ECSC, when considering the formulation of the Treaty of Rome, hoped to achieve the beginning of a political union, too. See D. LASOK & J.W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 12 (D. Lasok & K.P.E. Lasok eds., 1994).


51. The three legally distinct Communities (ECSC, EEC, and Euratom) became subsets of the European Union through the Maastricht Treaty. Article A of the treaty provides: “By this Treaty, the High Contracting Parties establish among themselves a European Union, hereafter called ‘The Union.’” Maastricht Treaty art. A, 31 I.L.M. at 255. These three Communities constitute one of the three pillars of the EU; the other two are the Common Foreign and Security Policy, and Co-operation in Justice and Home Affairs. The Maastricht Treaty establishes mechanisms to realize the latter two pillars. See ANDREW CHARLESWORTH & HOLLY CULLEN, EUROPEAN COMMUNITY LAW §-10 (1994) (explaining legal implications of Union atop three Communities and defining terms).
The institutional infrastructure that developed under these broad legal initiatives functions, in many respects, as a supranational entity resting atop the individual member states of the European Union. This entity makes binding laws and has a judiciary to interpret them. The European Commission, theoretically the executive arm of the EU, proposes laws. The Council of Ministers, made up of ministerial representatives from the governments of the member states, legislates. The European Parliament, originally a powerless body, assumed co-legislative power under the Maastricht Treaty. The EU has three main legislative procedures that result in law binding on member states: regulation, directive, and decision.

Article 189 of the Treaty of Rome defines these procedures as follows:

In order to carry out their task the Council and the Commission shall [in accordance with the provisions of this treaty] make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.¹²

As is clear from the language used in article 189, regulations, directives, and decisions are not merely hortatory but are intended (and used) to create law binding on member states. Upon passage, regulations are automatically incorporated into the legal regimes of the individual member states and are immediately binding. Directives, on the other hand, must be incorporated into national law by an implementing statute. While individuals may rely upon regulations as a basis for legal actions upon passage, directives confer justiciable rights only if they have “direct effect.” Direct effect, a judicial doctrine developed by the ECJ, allows individuals to rely upon a directive that is unconditional and sufficiently precise if member states are required to incorporate the directive in question by a set date and that date has passed. If these conditions are met, the individual may invoke the directive as a binding source of law in a domestic law court of a member state.¹³ An individual may even be entitled to damages if the individual is prevented by national law from following the requirements of a nonimplemented directive because the directive conflicts with a provision of national law.¹⁴ The supranational character of the EU is evident in that it can override existing legislation of member states. This authority to override the laws of member states is analogous to that of the federal government of the United States with regard

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¹². EEC Treaty.


Indeed, the supranational character of the EU is widely acknowledged and much recent debate has been dominated by discussion of the principle of “subsidiarity.” “Subsidiarity” is similar to the American constitutional principle of federalism. The discussion of subsidiarity takes place, much as in the United States, as part of a broader constitutional discourse. The EU is so well established as a supranational entity that the foundational treaties have taken on the character of a constitution. In fact, the ECJ refers explicitly to the Treaty of Rome (and its successor, the Maastricht Treaty) as “the basic constitutional charter” of the EU. The ECJ has held that the legitimacy of the EU’s supranational power lies in the voluntary decisions of the member states to transfer sovereign competences. Even the British have accepted fundamental alterations of their constitutional order, such as the end of parliamentary sovereignty (the doctrine by which the parliament alone could overturn its own statutes).

With doctrines such as direct effect and supremacy anchored in its “constitutional” order, although it is not a state in any conventional sense the European Union has become an international organization with supranational power.

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55. A detailed discussion of preemption under EU law is beyond the scope of this Article. For further discussion, see generally Case 237/82, Jongeneel Kaas B.V. v. Netherlands, 1984 E.C.R. 483; Stephen Weatherill, Beyond Pre-emption? Shared Competence and Constitutional Change in the European Community, in LEGAL ISSUES OF THE MAASTRICHT TREATY 14, 16 (David O’Keeffe & Patrick M. Twomey eds., 1994).


59. When a statute passed by the British parliament conflicts with a directive or regulation of the EU, it is void. The supremacy of EU law was accepted as mooting parliamentary sovereignty in a case involving Spanish fishermen in British waters.

60. For a good discussion of the supranational character of the EU, see J.H.H. Weiler, The Transformation of Europe, 100 YALE L.J. 2403, 2413-22 (1991).
3. Accession of the United States to Supranational Institutions

The United States has been reluctant to cede sovereign competences to supranational institutions. However, the United States has participated in international security actions under the official auspices, and hence jurisdiction, of supranational organizations. Furthermore, United States participation in supranational peacekeeping efforts has increased dramatically since the end of the Cold War. Moreover, the character of U.S. participation in supranational structures has recently undergone a sea change. The United States not only voluntarily participates in actions on the part of supranational bodies such as the U.N., but the United States has also ceded sovereign competences over certain areas of international trade to bodies such as the WTO and NAFTA. This marks a profound shift in the definition of the United States' statehood for which it is not constitutionally prepared.

a. The United States and the United Nations

Given the United States' prominent role in World War II and the notorious failure of the United States to join the League of Nations, it was clear in the mid-1940s that a successful international organization would require U.S. participation. Ultimately, the United States did participate, and the San Francisco Conference of 1945 resulted in the creation of the United Nations.

The U.N. Charter marked a major change in international politics. Unlike membership in the League of Nations, membership in the United Nations required states (at least theoretically) to renounce the right to use force, except in self-defense. This crucial prerogative of sovereignty shifted, on paper, to the Security Council, which chapter VII of the U.N. Charter endows with the power to engage in collective security actions including "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."63

As a practical matter, however, the Security Council had little chance to exercise its supranational potential during the Cold War. The Security Council did act once during the Cold War period when it exercised its chapter VII

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61. The Covenant of the League of Nations mandated only a three-month "cooling-off period" before a declaration of war, with no enforcement mechanisms. See SHAW, supra note 15, at 542; see also AKEHURST, supra note 20, at 219; GERHARD VON GLAHN, LAW AMONG NATIONS 584 (5th ed. 1986). For accounts of attempts made both before and after the formation of the League of Nations to restrict the legal right of a state to use force, see AKEHURST, supra note 20, at 216-19; SHAW, supra note 15, at 539-43; VON GLAHN, supra, at 583-88; Edward Gordon, Article 2(4) in Historical Concept, 10 YALE J. INT'L L. 271 (1985).

62. "All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ." U.N. CHARTER art. 2, ¶ 4. A member facing "an armed attack" has the right to respond. U.N. CHARTER art. 51.

63. U.N. CHARTER art. 42. Under chapter VII, the Security Council may also make recommendations to restore international peace, call on members to adopt policies not involving armed force, and make arrangements with member states for the supply of armed forces to the Security Council. U.N. CHARTER arts. 39, 41, 43. Article 24(1) endows the Security Council with "primary responsibility for the maintenance of international peace and security," U.N. CHARTER art. 24, ¶ 1, which power the Security Council exercises on behalf of the members.
powers in the case of the Korean War. However, by and large, force was used repeatedly by member states without Security Council intervention.

With the end of the Cold War, the Security Council finally was ready to play an important role as a supranational guarantor of international security. Its first test came with the Iraqi invasion of Kuwait. On November 29, 1990, the Security Council adopted resolution 678, which called on member states to "use all necessary means" to restore peace to the Persian Gulf. An international force led by the United States, acting under the authority of the Security Council, forced the Iraqis out of Kuwait. The Security Council later applied sanctions against Iraq.

In more recent U.N.-sponsored actions in Somalia and Bosnia, the United States has also played a prominent role. Abstractly, one could argue that the United States acted on behalf of the United Nations and that the legitimacy of such actions derives from this sponsorship. More pragmatically, however, one must recognize that the unanimity rule within the Security Council assures that Security Council actions can take place only with U.S. approval, and hence, only in accord with U.S. policy goals. However, for countries such as Iraq and Somalia, which possess no vote in the Security Council, the U.N. has become a potent supranational security apparatus.

Like the United Nations, post–World War II international judicial tribunals have had very limited success in acting supranationally. The International Court of Justice has no enforcement mechanism, and the United States is famous for ignoring adverse ICJ decisions. Indeed, in 1984, the United States expressly stated that it would not submit to ICJ jurisdiction concerning disputes arising from events in Central America and later declared that it would not submit to the compulsory jurisdiction of the ICJ at

64. SHAW, supra note 15, at 561. Shaw takes the view that the forces deployed in Korea did not amount to U.N. forces in the sense envisioned under the Charter. Id. at 561-62; see also AKEHURST, supra note 20, at 223-24; VON GLAHN, supra note 61. Some commentators analyze the Security Council's actions in Korea as falling under article 39 of the Charter. See, e.g., JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE 52 (1982). Others consider those actions as falling under both article 39 and article 42. See, e.g., 2 ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 1946-1967, at 177 (1970).


Yet, with the advent of supranational judicial bodies, the United States can no longer ignore international judicial decisions. The United States has been forced to give up domestic judicial review of the merits of decisions from international tribunals as an important part of ceding sovereign competences.

b. The United States and International Trade

Traditionally, the United States has been reluctant to cede sovereign competences to international organizations, partly because of the nature of international organizations and partly because of American refusal to be bound by the decisions of international organizations. Since the end of World War II, however, the United States has increased its international ties.

The GATT was originally intended as an agreement on tariff negotiations. The International Trade Organization (ITO) was to enforce the obligations arising under the GATT. The ITO was intended to regulate trade between member states in much the same way the IMF was to regulate the international financial system. The Havana Charter framework for the ITO was submitted to Congress for approval several times but was never ratified. In December 1950, the President withdrew the ITO from consideration. The GATT, which came to be the primary vehicle of international law for regulating international trade, was much narrower in scope than the proposed ITO because it was restricted to trade in goods.

More recently, through participation in such organizations as the North American Free Trade Agreement (NAFTA), the Canada-U.S. Free Trade Agreement, and the World Trade Organization (WTO), the United States has entered the arena of supranational power. By joining these organizations and acceding to their rulemaking and enforcement powers, the United States increasingly has ceded sovereign competences over multilateral trade to supranational organizations. The extensive U.S. involvement in these trade organizations provides a useful field of analysis of American constitutional law.

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70. These actions arose from a dispute between the United States and Nicaragua in which Nicaragua alleged that the United States had mined Nicaraguan harbors. The ICJ asserted jurisdiction by an overwhelming majority, see Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26) (Judgment on Jurisdiction and Admissibility), and most U.S. commentators decried the American refusal to submit to jurisdiction, see, e.g., Scorning the World Court, N.Y. TIMES, Jan. 20, 1985, at E22 (criticizing U.S. refusal to submit to ICJ jurisdiction); Carlos Andres Perez's Solution, WASH. POST, Jan. 22, 1985, at A18 (same). The United States refused to comply with the ICJ's verdict in favor of Nicaragua. See Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 169 (May 10) (Provisional Measures), Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 215 (Oct. 4) (Declaration of Intervention).


73. See HAVANA CHARTER, supra note 71, art. 12 (extending ITO coverage to foreign investment), art. 53 (extending ITO regulation to trade in services).
law and cession of sovereign competences.\textsuperscript{74}

4. \textit{The Challenge of Supranationalism for Federal Constitutions}

Integration into supranational institutions challenges federal constitutional orders in three broad areas: separation of powers, federalism, and due process requirements. In the area of separation of powers, there are three main concerns. The first concern involves the definition and control of the distribution of powers between supranational organizations and branches of the federal state. The second concern is the extent to which delegation of sovereign competences alters the distribution of powers among the main federal branches. The last concern is the extent to which delegation of sovereign competences alters the distribution of powers between the federation and the constituent states. The second category, alteration of the distribution of powers within the federal structure, can be broken down further into two threats: the threat that the executive will be strengthened at the expense of the other two branches and the threat that the executive and legislative branches will be strengthened at the expense of the judiciary.

Federalist concerns are basically subsumed within the above framework, although one can also envision powers reserved to the member states within a domestic framework being transferred to a supranational organization as an additional concern. Due process concerns are also linked to separation of powers, since they are intimately associated with the quality and placement of the judicial process to which citizens have access. In terms of quality, the jurisprudence, laws, and legal structure of a supranational organization may all inadequately safeguard due process. In terms of placement, the limited access of citizens to national courts that occurs when a supranational organization has its own independent judiciary may violate due process requirements.

The experience of Germany, a federal state that has undergone profound constitutional challenges to sovereignty through its integration into the European Union, provides a benchmark against which the constitutional challenges facing the United States as it integrates into supranational organizations may be measured. The German Constitutional Court (Bundesverfassungsgericht, or BVG) has directly addressed many of the issues described above. The BVG has particularly emphasized the preservation of existing separation of powers. The Court has held that any delegation of powers to the European Union, for instance, must take place through a statute of the German Bundestag (basic house of parliament),\textsuperscript{75} approved by the Bundesrat (representatives of state governments),\textsuperscript{76} which details the

\textsuperscript{74} Part V explores in greater detail the growing involvement of the United States in these three supranational trade organizations — NAFTA, the Canada–U.S. Free Trade Agreement, and the WTO — and the particular constitutional implications raised by each case.

\textsuperscript{75} The Bundestag is the lower house of the German parliament, equivalent to the House of Representatives. See \textit{GRUNDESSTZ}, arts. 38-48.

\textsuperscript{76} The Bundesrat is the upper house of the German parliament, equivalent to the early Senate. Ministers of state governments sit as representatives of the state governments. See \textit{GRUNDESSTZ}, arts. 50-53, 77.
competences being delegated,\textsuperscript{77} as required by the Treaty Power of article 23 of the Grundgesetz. At the same time, the BVG has not been entirely successful in preventing a redistribution of power from the legislative to the executive branch.\textsuperscript{78} The BVG has faced similar challenges concerning the redistribution of power from the states to the EU and has been even less successful at preserving state power as integration into the supranational EU proceeds.\textsuperscript{79}

The jurisprudence of the BVG also reveals the strains on the judiciary as competences are shifted to a supranational organization. One dominant strain of the BVG's jurisprudence on delegating sovereign competences has been the assertion that the BVG alone has the competence to define exactly which powers have been delegated to the EU.\textsuperscript{80} This position exists in tension with the position of the European Court of Justice, which has exclusive jurisdiction to interpret the constitutive treaties of the EU.\textsuperscript{81} As a practical matter, while the BVG has rattled its saber, it has never held that a competence claimed by the EU was not delegated by Germany. While this does not necessarily imply abdication of the role it claims as definer of delegated powers, it does cast some doubt upon the claims of the BVG in the area. Consequently, if open conflict ever arose, it is unclear that the BVG would win.

The BVG is also concerned with due process. As the primary arbiter on questions of EU law, the Court must consider both the quality of EU due process protections and the appropriateness of the EU judiciary. Here, too, the Court treads a line fraught with political hazards while addressing the issues related to the distribution of judicial powers. Accordingly the scope of delegated powers is difficult to determine. While the BVG has reserved the right to scrutinize the EU judiciary's protection of German constitutional rights, the BVG has never directly challenged an ECJ decision.

5. Potential Constitutional Strategies for the United States

If there is one lesson to take away from the German experience, it is that the judiciary must play an active role in policing delegations of sovereign competences to supranational organizations. The judiciary is uniquely positioned within the constitutional order to monitor the constitutional repercussions of policies originating in the executive and/or legislative branches. In fact, the preservation of the structure of government mandated by the U.S. Constitution is one of the central roles of the judicial branch. While the executive and legislative branches must ultimately decide whether to delegate competences, it is for the judiciary to decide the constitutionality of this delegation, although the courts are placed in the awkward role of examining the distribution and strength of judicial power. The judiciary has performed such an examination in the past when it evaluated the

\textsuperscript{77} See infra Part III (discussing \textit{Solange}, \textit{Solange II}, and \textit{Maastricht} decisions of BVG).
\textsuperscript{78} See infra Part III (discussing \textit{Maastricht} decision).
\textsuperscript{79} See infra Part III (discussing \textit{Bayerische Staatsreierung} case).
\textsuperscript{80} See infra Part III (discussing \textit{Maastricht} decision).
\textsuperscript{81} See infra Part III (discussing \textit{Maastricht} decision of BVG and \textit{van Gend en Loos} decision of ECJ).
constitutionality of Article I courts. In the present case, policy dictates even more sternly that the judiciary step in, since one of the fundamental threats of delegating sovereign competences has been, and will continue to be, that persons will lose recourse to Article III courts on the merits of a case.

Judicial activism in this area conflicts with a tradition of judicial deference to the executive branch. While there is much to be said for deference, it is extremely dangerous when cession of sovereign competences is under consideration because there is a strong likelihood of a weakened judiciary and a strengthened executive. Deferring to executive decisions in this area only reinforces the strengthening of the executive and the weakening of the judiciary when sovereign competences are ceded. Given the profound effects on the constitutional order, it is inappropriate for the judiciary to defer to executive decisions regarding cession of sovereign competences on the grounds that it is within the foreign affairs power of the President. The judiciary should reconsider application of the political question doctrine in regard to the cession of sovereign competences.

One simple way for the judiciary to rein in the broadening of executive power is to reconsider the treaty power and how it relates to executive agreements. When sovereign competences are ceded, an executive agreement cannot be procedurally sufficient as a constitutional matter. If the judiciary disagrees, it must offer an explicit rationale.

The lack of explicit (or even implicit) consideration of many of these issues by the judiciary is perhaps the greatest problem. For example, if, under the GATT subsidies code, the WTO were to declare illegal the subsidation policies of many American states, which give away land and tax abatements, it is impossible to know how the federal judiciary would respond. There are no established standards in this area and no caselaw of apparent relevance. Consequently, as a preliminary matter, the federal judiciary must develop federalism standards when sovereignty is delegated. One possible approach would be to extend current jurisprudence limiting federal regulation of the states to supranational organizations. Another approach would be to develop separate standards for the threats posed by supranationalism to American federalism.

Most difficult is the area of due process. As a point of departure, the German position is that the quality of supranational jurisprudence, particularly the extent to which it guards the basic protections of the Bill of Rights, is more important than the placement. At the same time, resort to Article III courts must be available not only to challenge the constitutionality of a delegation of sovereign competences as an initial matter, but to consider later challenges to protect against changing supranational standards.

Another area of concern is the ability of all three branches to limit supranational organizations. Congress may pass statutes withdrawing delegations of sovereign powers or altering such delegations. Nonetheless, as a practical matter, if supranational organizations possess enforcement powers, there is very little that any of the three branches can do once sovereign powers have been delegated, as unilateral attempts to alter the competences

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of a supranational organization by changing national law may result in sanctions issued by the organization. If the initial domestic law basis for delegating sovereign powers becomes critical, the ability of the judiciary to protect constitutional values may be extremely limited without fundamental changes to judicial processes. If prepassage consideration is critical, for example, some form of advisory opinion on constitutionality, which would not conform to the current “case or controversy” requirement of Article III, might be necessary. Whether such a major change is actually advisable requires serious deliberation, but it is necessary to begin considering such issues.

III. CONSTITUTIONAL LAW OF GERMAN INTERNATIONALISM:
CONSTITUTIONAL RESTRAINTS ON INTRATERRITORIAL ACTS OF THE
GERMAN GOVERNMENT RELATED TO FOREIGN AFFAIRS

The BVG does not avoid deciding political questions, yet it often shows great deference to the political branches. Accordingly, one must question whether Germany, like the United States, has a constructive version of the political question doctrine to which the BVG may resort. The deference shown by the BVG differs in that it is based on the fundamental claim that all issues are potentially justiciable. The BVG has staked this claim in a wide variety of areas, including foreign affairs. In fact, from an American perspective the BVG often seems to overstep the traditional boundary separating the political branches from the judicial. In any case, one may safely say that the BVG does not have an “active” political question doctrine.

Germany may be considered well ahead of the United States as a participant in the trend toward ceding sovereign power to international organizations. A founding member of the European Coal and Steel Community, Germany has been at the forefront of European integration, ceding competences to the original European Communities, the European Community, and the European Union. As Germany has become more integrated into the EC, and as the competences of the Community have grown, the BVG has had to face many of the questions that the judiciary of the United States will soon face concerning the constitutional implications of ceding sovereign competences to international organizations.

A. Procedural Restraints

The BVG willingly interprets procedural provisions of the German Constitution (Grundgesetz), including the limits placed upon the executive by the sections pertaining to military engagements abroad, treaties, and

83. See, e.g., Judgment of Feb. 16, 1983 (Helmut Kohl’s Dissolution of Bundestag), 62 BVerfGE 1; see also infra text accompanying notes 157-58 (discussing Solange and Maastricht decisions).
international organizations. In order to cede sovereign competences, the executive branch must receive the consent of the legislature in the form of a law implementing a treaty or agreement.

The exact competences that are being transferred to the international organization must be specified in the law enabling the transfer. The BVG retains the right to declare any such law unconstitutional if it is not sufficiently specific. Furthermore, the BVG retains and exercises the exclusive right to interpret the meaning of the enabling act. This means that the BVG decides the exact parameters of the powers that have been transferred. If the international organization has powers in excess of those delegated, Germany may not constitutionally participate in exercising such powers ultra vires. Alternatively, the BVG may declare any such excès de pouvoir a constructive amendment to the standing laws delegating powers. In accordance with the procedure laid out in the Grundgesetz governing amendments, any amendment, whether actual or constructive, requires the consent of the Bundestag and Bundesrat in the form of a law. The BVG, while recognizing that it has no jurisdiction to review exercises of power by the European Union in excess of those delegated by Germany, nonetheless maintains that it has jurisdiction arising from the constitutional requirements limiting German delegation of power. Consequently, the BVG has found that acts and declarations of the European Union that exceed the power delegated by Germany may be held unconstitutional and hence nonbinding within German territory.

Most EU acts are carried out by the member states. By restricting its review of EU actions, the BVG is able to avoid a potential conflict with the independent organs of the EU. Rather than directly reviewing EU acts, the BVG reviews the acts of German administrative agencies, albeit in furtherance of EU legal regulations and norms.

Like the U.S. Supreme Court, the BVG adheres to certain precepts of international comity such as sovereign immunity. For many years the BVG held that while it could review the acts of German agencies bound by the Grundgesetz, it would apply its equivalent of sovereign immunity to European institutions. Out of deference to the character of the EC as a league of sovereign states, the BVG explicitly held that German courts would not review the acts of European institutions.

In the Eurocontrol decision the BVG wrote,

[The BVG] will consider as “acts of the State”... only those acts which are exercises of power by German governmental institutions bound by the Grundgesetz. Acts of a special interstate entity created through international treaty, themselves separate from the powers of the component member states... do not fall within the term “acts of the State” as that term is used in the Grundgesetz.

86. See, e.g., Decision of June 6, 1967, 22 BVerfGE 91, 92; 6 BVerfGE 290, 295; 6 BVerfGE 15, 18; Decision of Oct. 11, 1951, 1 BVerfGE 10.
89. Id. at 27 (author’s translation); see also Decision of Oct. 18, 1967, 22 BVerfGE 293, 295; Decision of May 29, 1974 (Solange I), 37 BVerfGE 271, 283, 285 (holding constitutional complaint
Given the increasingly broad character of EC and EU powers as they developed over time, the BVG became concerned with the implications of judicial deference to EU acts within Germany. Generally, the BVG does not face the prospect of reviewing Community acts directly because government institutions of member states (rather than independent EU institutions) usually apply EU law. Solange was the first major case clarifying the role of German courts in evaluating EC directed actions that were alleged to have violated basic rights that the Grundgesetz protects. In its decision, the BVG held that it reserved for itself jurisdiction to review exercises of power in Germany by institutions of the German state. The BVG will retain jurisdiction if the Community directs Germany to act in violation of basic individual rights guaranteed by the Grundgesetz. In the Maastricht decision, the BVG overruled Solange I and held that it would review direct EU acts, in addition to retaining the power to review the extent to which any such acts go beyond the German delegated power. That is, the BVG will consider whether Community acts exceeded the power delegated and hence did not bind Germany.

Although the application of this position has resulted in some significant political changes, the BVG has retained the authority to review EU acts when exercised through German institutions. The BVG’s position is based largely on what it views as a meaningful formal distinction between a “supranational state,” to which the BVG would accord due deference through sovereign immunity, and a “league of sovereign states” forming an “international organization,” which the BVG asserts does not technically possess sovereignty. The EU therefore cannot formally receive “sovereign” immunity.

This position of the BVG stands in stark contrast to the literal interpretation of the Treaty of Rome, which confers on the ECJ the authority to review Community law and its application. The ECJ has held:

national courts . . . may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. . . . In contrast, national courts . . . themselves have no jurisdiction to declare that acts of Community institutions are invalid. . . . Article 173 gives the [ECJ] exclusive jurisdiction to declare void an act of a Community institution.

Tension exists between the power claimed by the BVG and the power claimed by the ECJ. However, the BVG went to great lengths in the Maastricht decision to elaborate the relevant roles of the two courts, forcefully maintaining that there is no real tension between the two courts.

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90. Solange I, 37 BVerfGE 271, 280; see also Decision of Oct. 22, 1986 (Solange II), 73 BVerfGE 339, 376, 386.
91. See, e.g., Judgment of Oct. 12, 1993 (Maastricht), 89 BVerfGE 155, 156.
94. See Maastricht, 89 BVerfGE at 156, 174-75.
The BVG began that decision by conceding that the ECJ has exclusive jurisdiction to interpret matters of Community law. At the same time, the BVG reasserts its exclusive jurisdiction to interpret matters of German constitutional law, including both the elaboration of basic rights and the judicial review of federal statutes. This dual power allows the BVG to consider the ECJ's proffered legal interpretation of the European treaties to be binding and legitimate. The BVG merely compares the scope of the European Union powers, as lawfully interpreted by the ECJ, with the powers delegated in statutory form by the Bundestag. All delegations of power must be by statute, according to the constitutional provisions governing treatymaking. Powers inhering in the European Union that have not been delegated by the Bundestag (as interpreted by the BVG) necessitate supplemental legislation by the Bundestag that the BVG can review for constitutionality. If the BVG finds that the legislation does not sufficiently safeguard basic rights, it may declare the statute unconstitutional. In this manner, the BVG only declares German statutes unconstitutional. This approach functions similarly to the way in which the ECJ only theoretically interprets Community law, but practically reviews member state law. In its formulation of this theory of "constructive amendment," the BVG included a thinly veiled warning to the ECJ that the BVG would not necessarily tolerate what it saw as judicial overreaching on the part of the ECJ.\footnote{Cf. Judgment of Feb. 16, 1983 (Helmut Kohl's Dissolution of Bundestag), 62 BVerfGE 1 (allowing governmental action to stand but implying that court would not be so quick to allow second demonstration). Forewarning is a favored device of the BVG when pragmatism dictates that the disfavored act should be allowed to stand now but be deterred in the future.}

If a dynamic expansion of the existing Treaties has occurred in the past based on a generous use of Art. 235 of the [Treaty of Rome] as a 'competence for rounding off the Treaty', on the idea of inherent responsibilities of the Community (the American doctrine of ‘implied powers’), and on interpretation of the Treaty in the sense of defining the powers of the Community as broadly as possible (the ‘effet utile’ doctrine), then it will be necessary in the future to ensure, when institutions and organs of the Community [i.e., the ECJ] interpret the powers of the Community, that the [Maastricht] Treaty, fundamentally, differentiates between the exercise of limited, enumerated powers and Treaty amendments, such that interpretation of the Treaty cannot be allowed to equal an expansion of the Treaty; any interpretation of the powers of the Community which so functions would have no binding effect on Germany.\footnote{Maastricht, 89 BVerfGE at 210.}

Naturally, the effect of this ingenious formulation is to enable German courts to review European law, de facto if not de jure. According to this logic, the BVG must hold that any European Union powers falling between those powers that the ECJ appropriates and those powers that the BVG concedes it has delegated would be unconstitutional per se in Germany. The powers would be considered constructive amendments formed through an unconstitutional procedure. Such constructive amendments are not binding on Germany. Clearly, this creates the potential for a situation in which the ECJ may hold Germany in violation of EU law for failing to implement laws that the Union legitimately enacts while the BVG insists that Germany cannot enforce acts promulgated in this manner without violating the German
Recognizing this potential conflict from the outset, the BVG attempted to delineate the limits of ECJ jurisdiction, writing that “[the ECJ] does not, however, decide incidental questions of national law of the Federal Republic of Germany (or of any other member state) with binding force for this state.” Naturally, the BVG has no authority to delimit the ECJ’s jurisdiction. Should the BVG decide that the ECJ has overstepped its jurisdictional boundaries by implicitly or explicitly interpreting member state law, the BVG will have no way to “correct” this excès de pouvoir, as it is subordinate to the ECJ with regard to European law. The ECJ alone must decide the limits of European law.

B. Basic Rights

The BVG has been quite pragmatic in its recognition that the European Union, as an evolving intergovernmental organization, may not be held to German standards concerning fundamental individual and collective rights. As a result, the court has developed and consistently followed an evolutionary theory of review. The court has held that as long as the European Union fails to safeguard adequately either set of rights, the BVG will retain jurisdiction to review challenges to European actions, thereby ensuring protection of these rights. With regard to collective rights derived from the structure of government, the court has held that as the institutions of the EU are increasingly accorded competence and as the institutions deepen the competences they already possess, the strength of collective values must increase proportionately. This strengthening of collective values may come through incorporating those values into the evolving governmental architecture of the EU.

1. Individual Rights

European integration has occurred as an evolutionary process, with the member states ceding more and more competence to the institutions of the EU over time. Challenges to fundamental collective values derived from the structure of German governance, such as federalism and separation of powers, did not emerge very strongly until the Community amassed substantial powers. The challenges were voiced most clearly in the constitutional

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97. Solange I, 37 BVerfGE at 281. As the BVG noted: Certainly, the responsible Community organs can make law, which the responsible German constitutional organs cannot under the Grundgesetz, and which nonetheless is directly valid in the Federal Republic of Germany and is to be applied directly. But Art. 24 GG limits this possibility insofar as an amendment of the Treaty fails under Art. 24 if it would alter the identity of the current constitution of the Federal Republic by breaking into the structures which constitute the constitution ... and the same reasoning applies to secondary Community law. Id. at 279.

98. Naturally, any court engaged in judicial review will inevitably rule on laws outside its strict competence insofar as it delineates the limits within which such laws are constitutional. The BVG's warning here is somewhat hypocritical considering its own excursions into the legal territory reserved to the civil and criminal courts in Germany.
complaint arising from German ratification of the Maastricht Treaty. While the BVG certainly confronted the issue of collective rights, it was forced to face the constitutional implications of German implementation of Community law for individual rights. From its beginning, the Community addressed binding and enforceable decisions and regulations to German citizens. The BVG faced jurisdictional constraints limiting its ability to protect any individual rights affected by Community actions.

In Solange I and Solange II, the BVG attempted to clarify the limitations placed on German agencies implementing Community law established through the Grundgesetz protections that guard fundamental rights. The BVG also sought to clarify its own role in assuring the continued protection of these fundamental rights.

In Solange I, a divided BVG began its discussion of these limitations by noting that article 24 of the Grundgesetz, which governs the transfer of competences to intergovernmental institutions, "does not open the way to amending the basic structure of the Grundgesetz, which forms the basis of its identity, without a formal amendment to the Grundgesetz." The BVG declared in the first formulation of its evolutionary theory that article 24 of the Grundgesetz limits [the] possibility [of Community institutions making law directly applicable in Germany]. The part of the Grundgesetz dealing with fundamental rights is an inalienable, essential feature of the current constitution of the Federal Republic of Germany and one that forms part of the constitutional structure of the Grundgesetz. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favorable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from article 24 Grundgesetz applies.

In this conflict of norms, the guarantee of fundamental rights in the Grundgesetz prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the treaty mechanism.

article 24 of the Grundgesetz limits [the] possibility [of Community institutions making law directly applicable in Germany]. The part of the Grundgesetz dealing with fundamental rights is an inalienable, essential feature of the current constitution of the Federal Republic of Germany and one that forms part of the constitutional structure of the Grundgesetz. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favorable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from article 24 Grundgesetz applies. Provisionally, therefore, in the hypothetical case of a conflict between Community law and the guarantees of fundamental rights in the Grundgesetz, there arises the question of which system of law takes precedence.

In particular, the BVG initially held that Community institutions, including the ECJ, did not protect individual rights to the extent necessary under the Grundgesetz in that the institutional architecture for the protection of such rights, including case law and other legally binding norms, was not sufficiently developed. Accordingly, the BVG sanctioned Community law and its implementation by Germany. Through retaining its power to review acts taken at the direction of the Community, the BVG maintained the power to verify that the Community does not violate individual rights guaranteed by the Grundgesetz.

99. Maastricht, 89 BVerfGE at 165-70.
100. Maastricht, 89 BVerfGE at 175.
101. Solange I, 37 BVerfGE at 279.
102. Solange I, 37 BVerfGE at 279-81 (author's translation).
103. It is important to note that, under the evolutionary theory espoused, this critique in no way signified any lack of legitimacy on the part of the Community institutions. Rather, somewhat paternalistically, the BVG indicated that, until the Community grew up, the court would have to retain its role as overseer. See infra Part III.A.
The result is: As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Grundgesetz, a reference by a court in the Federal Republic of Germany to the BVG after having obtained a [preliminary] ruling of the European Court... is admissible and necessary if the German court regards the Community law that is relevant to its decision as inapplicable in the interpretation given by the European Court, because and insofar as it conflicts with one of the fundamental rights in the Grundgesetz.  

In a challenge to a commercially directed action brought a few years later, the BVG declared that the ECJ had developed sufficient institutional architecture through caselaw for the protection of individual rights to merit withdrawal of BVG review in practice.  

Since the ratification of the Treaty of Rome, the BVG has grappled with the effect of the expansion of European Union powers on systemic rights that are embodied in the Grundgesetz. The BVG cases evince a strong desire to protect these rights while minimizing discord with EU institutions. The BVG has emphasized several areas of systemic values in its jurisprudence, including separation of powers, governmental legitimacy as measured by the “democracy principle,” and rule of law, federalism, and the system of enumerated powers outlined by the Grundgesetz.

a. Separation of Powers

Preservation of the extant structure of separation of powers emerged as a primary concern of the Bundestag and Bundesrat before consideration of the Maastricht Treaty. In response to these concerns, the legislature amended article 23(1) of the Grundgesetz to ensure that the Bundestag and Bundesrat would retain their joint legislative role. Under article 23(1), “the Federation may transfer sovereign powers by statute with the concurrence of the Bundesrat.” Article 23(2) states that both bodies “shall participate in affairs of the European Union,” and also requires the executive to inform both bodies before and after consideration of legislation by the Council. Each body must be consulted when an action relates to the relevant body’s enumerated

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104. Solange I, 37 BVerfGE at 285 (author’s translation).
105. Solange II, 73 BVerfGE at 378 (holding that European Court had achieved certain minimum quantity of protection of basic rights).
106. Solange I, 73 BVerfGE at 378 (author’s translation).
108. Grundgesetz art. 23(1).
powers.109

As amended, article 23 went a long way toward preserving the existing separation of powers, and was cited approvingly by the BVG. The amendment, however, did not assuage the complainants, who argued that article 23 should itself be deemed unconstitutional because the structure of the EU legislative process gives the chancellor exclusive authority to decide whether to agree to EU lawmaking.110 The exclusive role of the chancellor introduces "in practice a principle of pure executive management into the Grundgesetz."111

The complaint went on to allege that:

the democracy principle and the separation of powers demanded by the principle of rule of law are injured if the Maastricht Treaty withdraws wide areas of lawmaking and the regulation of fundamental factual issues from the jurisdiction of the Bundestag and shifts them to the executive branch. The legislative process of the Community is a matter handled by the Council of Ministers and the European Commission, both parts of the executive; the European Parliament is no lawmaker. In contrast to the Bundestag, the 'EU lawmaker' has no direct, unmediated democratic legitimation at the Community level, but rather derives its democratic legitimacy in an indirect, mediated manner from the legitimacy of the individual member states.112

The BVG acknowledged the potency of this argument, but rejected the complainant’s further argument that the decisions of the Council could not be sufficiently legitimated through the aggregate contribution of the member state parliaments. As part of its evolutionary theory of EU legitimation, the BVG held that at its current stage, legitimation through the national parliaments was equivalent to legitimation through an empowered European Parliament. As the portfolios of the EU have increased, so too have the powers of the Strasbourg parliament. Because the evolution has been proportional, the BVG continues not to object to the institutional architecture of the EU, but retains jurisdiction to review the structure as necessary to ensure parliamentary legitimation. The BVG thus limited itself to warning that too much power on the part of the EU, without a concomitant increase in the power of the European Parliament, would be unconstitutional because an executive-dominated EU could no longer obtain legitimacy through the national parliaments.

Interestingly, the BVG rejected the central argument of the complaint. The petitioner argued that too much EU power is dangerous regardless of the institutional legitimacy of the EU, because increasing EU power necessarily weakens the national parliaments, endangering the sovereign nature and legitimacy of the member states.113 The complaint further alleged that the EU marked the beginning of a federal state, as opposed to a league of sovereign states, and that the "Federal Republic of Germany" would cease to exist per se.114 The complaint went on to argue that the demise of the

110. The Council of Ministers, which makes laws, is composed of members of the executive branches of the Member States.
111. Maastricht, 89 BVerfGE at 168.
112. Id. at 169.
113. Id. at 181.
114. Id. at 169.
Federal Republic would require a referendum in order to be legal. The BVG has consistently held that the EU is in no way sovereign, but is rather a "league of sovereign states," implicitly maintaining that the structure of separation of powers in the EU does not impinge upon the structure in Germany except insofar as discrete powers are shifted to the EU. This legal fiction allows the BVG to claim formally that the national parliaments, particularly the Bundestag, cannot lose power because of the development of the EU. The court maintains that the Bundestag still has considerable power because "the dynamic process of further European integration contains dependable limits that establish a balance between the structure of intergovernmental decisionmaking in the European league of states and the role played by the Bundestag as preliminary decisionmaker and codecisionmaker."

The BVG further attempted to refute the argument that too much EU power is inherently dangerous by outlining how the German parliament would remain influential in the specific area of economic and monetary union (EMU). The BVG's argument is twofold. First, the Bundestag must be consulted as part of the process by which the German government decides how to vote on EMU. This process, set forth in the Maastricht Treaty, demands that member states meet strict economic criteria. Second, the Bundestag must approve entry into the third stage of EMU even if the convergence criteria are modified. This is the case because the current text of the Maastricht Treaty, requiring "currency stability" as a goal and outlining specific criteria for national qualification, cannot be changed without qualified majority approval of the Council. Accordingly, unanimity requires German approval of the measures.

Both arguments are unpersuasive. The second is especially problematic because the Commission can interpret the criteria more liberally than the BVG, as it has already done. As to the first argument, the Bundestag theoretically retains power over this area inasmuch as the executive must have the approval of the Bundestag in the form of a law in order to vote to approve economic and monetary union. "The transition to the third stage of economic and monetary union also requires a judgment of the German Bundestag. Accordingly, the executive branch must receive a vote of approval from the Bundestag to determine how it votes for decisions of the Council concerning article 109(J)(3) and (4) of the Maastricht Treaty." The court indicated that the Bundestag has the right to review the materials presented to the Council of Ministers, after which the executive votes before any such vote.

115. See, e.g., Solange I, 37 BVerfGE 271, 278 ("[T]he Community is not a state, in particular not a federal state, but rather a 'Community of a unique type standing in the process of progressive integration,' a 'league of sovereign states' in the sense of Grundgesetz art. 24(I)."); Solange II, 73 BVerfGE 339, 374 (referring to EU as "league of sovereign states"). Most commentary stands in opposition. The EU has exclusive competence that preempts the legislative purview of the member states over a wide variety of areas. See supra Part II.B.2.
116. Maastricht, 89 BVerfGE at 207 (author's translation).
117. Id. at 202.
118. Id. at 169 (quoting Session of Bundestag, Dec. 2, 1992, Decision Regarding to Economic and Currency Union, Bundestag Drucksache 12/3906) (author's translation).
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takes place under the amended article 23.119

But these restrictions are not really enforceable against the executive. In fact, these obligations are largely hortatory. Although it did not explicitly say so, the BVG appears to have interpreted the second sentence of article 23(2), which states that “the executive shall inform the Bundestag and the Bundesrat comprehensively and at the earliest time possible,” to mean that the legislature will have access to the same materials as the executive and that the BVG will enforce such information as a constitutional requirement under article 23. Aside from the practical difficulties of such a requirement, the Bundestag itself recognized that the executive does not have to follow the vote, writing that “the German Bundestag demands that the executive declare that this vote of the Bundestag will be respected.” Finance Minister Waigel wrote a letter indicating that the executive had every intention of following the vote of the Bundestag. Of course, the letter is not binding on Finance Minister Waigel or his successors. Recognizing the nature of the letter, the BVG held that it would enforce the process agreed upon in the exchange of resolutions as the appropriate means to ensure an adequate separation of powers.

Perhaps most important, in its discussion of constructive amendments the BVG held that any change or expansion of the powers of the EU not encompassed by the BVG’s interpretation of the Maastricht Treaty would require a law passed by the Bundestag to bind Germany. As a summary point, the BVG also warned that “duties and power of substantial weight must remain in the hands of the Bundestag.” Strikingly, the court based this conclusion largely on its view of the dichotomy between the EU as a league of states and the member states as sovereign nations:

The Member States need a sufficiently meaningful set of tasks through which their citizens, as peoples, can develop and articulate themselves, in a process of building the political will of the citizenry legitimated and steered by the citizens of the relevant State, in order to give legal expression in the process to that which binds the — relatively homogeneous — people spiritually, socially and politically.124

This philosophy, in which nationality is paramount, does not bode well for German recognition of an EU federal state; such a state cannot exist because there is no European nation. Consequently, the BVG remains cautious as it questions the legitimacy of the EU’s growth to a full federalist state.

b. The “Democracy Principle” and Rule of Law

Consistent with the discussion about separation of powers is the BVG’s

119. “The vote of the German Bundestag is based on the same material as the evaluation of the Council of Ministers when comprised of the Economic and Finance Ministers, and the decision of the Council of Ministers when comprised of the heads of state and government.” Id. at 163-66 (author’s translation).
120. GRUNDEGESETZ art. 23(2).
121. Maastricht, 89 BVerfGE at 163 (author’s translation).
122. Id. at 156, 187-88.
123. Id. at 186.
profound concern regarding the legitimacy of German governmental structures. Because Germany has been shifting many traditional governmental functions to the EU, the BVG perspicaciously has monitored the institutional architecture of the EU, elaborating conditions for EU legitimacy.

The German trend toward shifting powers to the EU affects German separation of powers and the legitimacy of German governmental institutions while simultaneously affecting the EU distribution of powers and the legitimacy of the EU. Following the BVG’s evolutionary theory, increased EU executive powers necessitate increased legislative oversight through a popularly elected legislature. Legitimacy is the underlying concern of the BVG in addressing both of these political systems and the tension between them. In its discussions of legitimacy, the BVG has often focused on what it calls the “democracy principle.”

Two main ideas contribute to the principle:

(1) state power must be traceable to voters, since the exercise of state power is legitimated through the formation of the political will by elected representatives;
(2) given that the EU is not a state and accurs new functions over time, forging an identity in an evolutionary process, the level of democratic legitimacy may similarly evolve.125

Addressing the claim that all state power must be traced back to popular delegation, the BVG holds that this principle can be achieved in a variety of ways. Legitimation does not necessarily require direct elections. Complex governmental bodies may achieve legitimation through appointment or oversight by elected officials.126 Such oversight represents a minimum requirement without which a governmental entity is illegitimate.127 The BVG has held, in an adjunct to its evolutionary theory, that the EU has achieved that minimum level of legitimation through its character as a league of states that individually are sufficiently democratic.128

The BVG’s reliance on the character of member states’ governments goes further. In response to the complaint’s charge that the majority rule principle in the Council would preclude the transfer of legitimacy from the legislature to the EU, the BVG noted that “constitutional principles and elementary interests of the member states limit the use of the majority rule principle.”129 While the BVG asserts both points, it is unclear exactly how these limitations would function. The United Kingdom has no written constitution. France does not have a constitutional court with judicial review. The divergent practices in the member states lend some credence to the complainant’s fears. One wonders whether the BVG’s assertions are really legal principles or recognitions of political expediency.

While the character of the member states is a component of legitimacy,

125. *Maastricht*, 89 BVerfGE at 185-86.
126. Judgment of Oct. 31, 1990 (*Hamburg Law Concerning the Introduction of Voting Rights for Foreigners*), 83 BVerfGE 60, 72 (noting that while county and neighborhood elections may require personal legitimation of governing entities at that level, municipal committees, administrative agencies, and other more complex governmental vehicles are legitimate as long as they may trace their legitimacy back to local voters and elections).
127. *See Maastricht*, 89 BVerfGE at 182.
128. *See id.* at 184-88.
129. *Id.* at 184.
The BVG also requires that the EU, as an entity, have an independent base of legitimacy derived from the population of the entire EU. Such legitimation occurs primarily through the European Parliament. Accordingly, the BVG has held that as the EU grows in power, the European Parliament must also increase in power.\(^{130}\)

c. Federalism

The BVG has traditionally shown concern for preserving the role of the Länder in the Federal Republic. The BVG has been diligent in policing the federal government's use of article 75, which authorizes the federation to effect uniform national policies through the issuance of laws in areas traditionally assigned to the Länder.\(^{131}\) The court also has restricted federal leeway in areas in which the U.S. Supreme Court has been reluctant to tread, such as the spending power.\(^{132}\)

This concern has also been prevalent in the political branches, perhaps reflecting the role of the Bundesrat as more representative of the states than the modern U.S. Senate. The political branches alleviated many potential constitutional problems sounding in federalism through the enactment of articles 23 and 52(3). These enabling amendments allowed for ratification of the Maastricht Treaty. Article 23 provides for certain procedural safeguards to ensure the participation of the Bundestag and Bundesrat in the process of EU legislation and decisionmaking. Article 52(3) authorizes the Bundesrat to create an EU committee to coordinate and control Bundesrat deliberations on EU matters.

The amendments reduced any pressure on the BVG arising from federalism. Nonetheless, the BVG did address the issue. The court referred explicitly to article 79 as the appropriate mechanism for German authorization of expanded EU powers. Article 79 provides that "the Federation can, through a law, with the approval of the Bundesrat, transfer powers."\(^{133}\)

In the face of German integration into a nascent European federal state, the BVG has had considerable difficulty maintaining the federal-state balance of powers in Germany. These problems are at the heart of Bayerische Staatsregierung v. Bundesregierung,\(^{134}\) a case from the late 1980s. In Bayerische Staatsregierung, the BVG denied an interim injunction preventing the federal government from voting in favor of a directive harmonizing rules on television broadcast in the Council, despite the Länder's authority in the

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\(^{130}\) See id. at 184. Some of the other conditions the court listed for legitimation of the EU institutions by the peoples of the EU include:

1. transparent and comprehensible decisionmaking processes and policy goals in the Council, Commission, and EU organ[s];
2. the ability of voters to communicate with all of the organs of the EU and their representatives in their own languages;
3. formation of the political will in a marketplace of ideas.

Id. at 185 (author's translation).


\(^{132}\) See Judgment of Nov. 18, 1954 (Financial Subsidies Case), 39 BVerfGE 96 (1975).

\(^{133}\) GRUNDEGESETZ art. 79.

\(^{134}\) Judgment of Apr. 11, 1989, 80 BVerfGE 74.
matter. In defense of its holding the Court argued that:

[If the claim were well founded], the federal Government would have encroached on an area constitutionally reserved to the [Bavarian government]. . . . But in the Federal Government’s view the content [of the Community legislation eventually adopted] could be shaped in a way that takes more account of the jurisdiction of the Länder if the government can use the room to maneuver available to it [by participating]. 135

While this may be true as a practical matter, it confers a role on the executive otherwise forbidden in German domestic policymaking; it is an encroachment of the federal government into a sphere traditionally reserved to the Länder. The case stands in stark opposition to a German case involving the same policy issues. In the First Television Case, 136 the Court rejected Chancellor Konrad Adenauer’s attempt to create a national television channel, holding that “[t]he federal government has no authority to regulate broadcasting” beyond the technical aspects of transmission. 137

_Bayerische Staatsregierung_ can be understood as an expression of the difficult task of preserving federalism while seeking to recognize the traditional role of the executive in foreign affairs. Yet, the court’s jurisprudence in similar cases not involving the EU seems to belie that argument. In the _Concordat_ case, 138 the court held that although a treaty with the Vatican predating the foundation of the Federal Republic was valid and enforceable, those provisions of the treaty that contradicted the Grundgesetz were unenforceable. Specifically, the court held that provisions of the treaty guaranteeing publicly funded parochial schooling in Germany were unenforceable against Länder that chose to fund only nondenominational public schools. The court argued that traditional executive prerogatives in foreign affairs could not invade those policy areas, such as education, that the Grundgesetz specifically reserves to the Länder. While the case presents some unusual circumstances, including a treaty signed by the Nazi government rather than the Federal Republic, the court made it clear that the federalist concerns were paramount. It seems that _Bayerische Staatsregierung_ should be understood as arising partly from doubt and partly from deference to the EU.

**IV. CONSTITUTIONAL LAW OF AMERICAN INTERNATIONALISM**

Why should the United States be concerned with ceding sovereign competences to a supranational organization as a constitutional matter rather than simply as a policy matter? The primary reason for concern is that ceding sovereign competences threatens the existing separation of powers structure that plays a central role in our constitutional order. Ceding sovereign competences strengthens the executive branch at the expense of the legislative and judicial branches. How pronounced the shifts are depends in part on judicial doctrine; in part, the shifts are unavoidable.

This part does not purport to elaborate the entire constitutional structure

135. _Id._ at 80 (author’s translation).
137. _Id._ at 237 (author’s translation).
138. 6 BVerfGE 309.
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as it pertains to internationalism. Rather, this part has two aims: first, to examine some of the risks implicated in ceding sovereign competences and to examine the current weaknesses in the U.S. constitutional order that exacerbate the risks; second, to look at some recent cases and explore exactly which risks are actually emerging as important.

There are two main weaknesses in the existing constitutional framework regarding internationalism. The first involves a group of judicial doctrines and interpretations that limits judicial review of domestic acts. These include the jurisprudence surrounding the treaty power, the political question doctrine, and deference to executive decisions in foreign policy. The second weakness concerns a set of judicial doctrines that limits judicial review of the acts of foreign sovereigns and, by implication, supranational organizations.

The effects of these weaknesses are twofold. Most apparently, these doctrines strengthen the executive branch at the expense of the legislative and judicial branches. In response to an adverse decision of a supranational body such as the WTO, for instance, there is a spectrum of possible responses. There are four major points in this continuum: (1) ignoring the decision; (2) negotiating with the opposing state; (3) domestic judicial rejection of the WTO decision; (4) withdrawal from the WTO. The character of a supranational organization essentially eliminates the first and fourth options. Faced with a body such as the WTO that can enforce its decisions through fines levied by the injured states (rather than a body such as the ICJ dependent on the voluntaristic accession of member states to its rulings) the United States cannot ignore the decision. Similarly, the impact of withdrawing upon the domestic economy would be such that withdrawal is not feasible. Thus, the power of the legislative branch when confronting a supranational organization is transformed to a more theoretic power. At the very least, the congressional arsenal is restricted to the blunt instrument of withdrawal. Minor adjustments to the legal relationship are not possible.

This leaves two possible reactions: judicial review and negotiation carried out by the extreme branch. The breadth of judicial review is profoundly limited by doctrines granting deference to the executive. While the federal judiciary could play an active role in monitoring a supranational organization, it is likely to continue its current policy of deferring to the executive branch. Except in the exaggerated case in which the substance of a treaty delegating sovereign competences is unconstitutional on its face, the judiciary will probably refrain from acting. This leaves only negotiation by the executive branch as an available option.

The judicial role I will outline in this part stands in marked contrast to the role adopted by the BVG. The German court has played an active role in elaborating the procedural requirements of delegating sovereign competences and has monitored the actions of the European Union. In this latter role, the court has developed a highly nuanced doctrine of review that allows it to accept the constitutionality of a treaty delegating sovereign competences, such as the Maastricht Treaty, while rejecting actions of the EU that it perceives as beyond the powers delegated by Germany.

The second major weakness in the current American constitutional framework in this area is judicial reluctance to review the acts of foreign
sovereigns, and, by implication, supranational organizations. This second accumulation of jurisprudence determines the potential strength of supranational organizations vis-à-vis the United States as nation-state by determining the ability of the three branches to limit the actions of supranational organizations.

If the judiciary refuses to review the acts of supranationals, which seems likely, the ability of the judiciary to maintain the current constitutional order will be jeopardized. Unless the judiciary monitors supranationals and accepts domestic cases challenging supranationals, constructive constitutional amendment may occur. Some of the potential changes include reduction of the scope of cases that Article III courts may hear, of the extent to which Congress participates in delegating competences, and of the extent to which the judiciary reviews the actions of the executive branch. Unless the judiciary reacts to such shifts, they become a constructive part of the U.S. constitutional order.

This part first examines some of the judicial doctrines and interpretations limiting judicial review mentioned above, including the treaty power, the political question doctrine, deference to executive foreign affairs decisions, the act of state doctrine, and foreign sovereign immunity.

After outlining how these doctrines are relevant, I turn to examining some recent cases in which the United States has delegated competences to supranational organizations, including the WTO and the Canada–U.S. Free Trade Agreement. The discussion will serve to grapple more concretely with some of the threats to our current constitutional order.

A. Defending Constitutional Values When Sovereign Competences are Ceded: Treaties

As a threshold matter, it is clear that cessions of sovereign competences must find their basis in American law, whether in formal treaties or in executive agreements. Such instruments of domestic law may be reviewed by the Supreme Court to ensure that procedural strictures governing the lawmaking process as well as substantive restrictions based on individual rights are followed. The primary means at the disposal of the federal judiciary to defend constitutional values against unacceptable delegations of sovereign competences is the treaty power.\(^{139}\) Review of exercises of the treaty power can be used in two ways: to ensure that the process of treatymaking follows constitutionally defined procedures, which themselves serve to protect separation of powers goals; and to ensure that a treaty’s delegation of government functions is not so broad as to impinge unacceptably upon the present constitutional order.

The treaty power is contained in article II, section 2(2) of the U.S. Constitution. Section 2(2) contains some procedural requirements, notably that the President receive the advice and consent of two-thirds of the Senate in

\(^{139}\) Other possible means, including the Appointments Clause (Article II, Section 2(2)), will not be discussed here because there is no evidence they would be limiting. Part IV considers some additional areas that should be brought into the analysis based on recent experiences, including Article III.
order to enter into a treaty. As a theoretical matter, judicial review of the procedural requirements implied by the treaty power could be an important vehicle to blunt the threat to separation of power values created by the executive's cession of sovereign competences to supranational organizations. Some scholars argue that the advice and consent requirement is alive and well and that treaties cannot be formed without it.  

A more practical consideration of Supreme Court jurisprudence creates some doubt about the real procedural limits created by the treaty power. The rise of the executive agreement presents a real challenge to the claim that the apparent procedural requirements of the treaty power protect the separation of powers by ensuring congressional participation in agreements with foreign states or with international or supranational organizations. Some scholars, noting judicial acceptance of executive agreements, even describe the executive agreement as a constructive amendment of the treaty power—a new form of treatymaking procedure.  

In addition to procedural restraints, the treaty power can be interpreted to impose restraints on the substantive content of treaties. There are cases indicating that treaties cannot be used to expand the powers of a branch of government beyond those granted by the Constitution. Justice Black suggested in his dissent in *Reid v. Covert* that a treaty cannot authorize what the Constitution forbids, including "a change in the character of the government or in that of one of the States." As Black noted, "such construction would permit amendment of [the Constitution] in a manner not sanctioned by Article V."  

What Justice Black writes seems self-evident to some. However, it is far from self-evident. In order to achieve such a goal, the judiciary would have to interpret treaties willingly and monitor their execution to ensure compliance with Justice Black's stricture. Unfortunately, this does not occur. As noted above, the Supreme Court refuses to interpret the procedural requirements of the treaty power. Aside from such large questions of the legitimacy of executive agreements, the Court has been unwilling to decide apparently simple issues such as whether the President must obtain senatorial approval to terminate a treaty that has been approved through the advise and consent process. The Court has been even more reluctant to review the substance.


None of these cases, however, suggests that an expansion of the power of one branch, within constitutionally accepted limits, at the expense of another branch, would be unconstitutional.

143. * id. at 17.
of treaties. Although the constitutionality of some classes of treaties, such as arms control treaties, has been widely questioned by commentators, the Supreme Court has never actually held a treaty to be in violation of the treaty power.

Even if the federal judiciary did actively review treaties, it would still be exercising a limited power. Since the Court will review treaties only after they are enacted, it may be restricted in its ability to influence discrete treaty provisions. Moreover, the Court does not have a strong tradition of monitoring treaty execution. It may be unwilling to do more than review a treaty once, for procedural and substantive soundness. If a treaty is procedurally and substantively sound, could or would the Court review the operation of the treaty? The Court has not held that it would act as treaty overseer, monitoring the continuing operation of a treaty.

While there is some precedent for the judiciary to perform such a function, the Court would necessarily have to confront the supranational body in the case of a treaty ceding competences. In such a case, it would not be clear that the Court itself would have competence to review the acts of the supranational entity, and conflict would necessarily arise. The German constitutional court faced precisely these issues and found it difficult to make minor alterations to delegations of power or to confront the supranational body. In addition, the BVG had to fight to justify its jurisdiction over the issues. The United States Supreme Court would have to develop its own theories to support such review.

If Justice Black's argument in Reid represents an idealized version of constitutional protection, it is interesting to note what he thought were the risks inherent in internationalization and the limits to which the judiciary should be willing to go. Black argued that the protections and limitations on the exercise of governmental power cannot be discarded simply to facilitate American interaction with other countries. In a warning strikingly similar to that of the German constitutional court in its Maastricht judgment, he wrote that

[the concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read


148. The judiciary has performed a similar function in the school desegregation context.

149. See supra Part III.
exceptions into it which are not there.\textsuperscript{150}

B. Current Weaknesses: Lack of Judicial Review of Executive Action

In \textit{Dames & Moore v. Regan}, Chief Justice Rehnquist wrote that “a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.”\textsuperscript{151} While the Court later cast doubt on this particular formulation,\textsuperscript{152} it is clear that the Court is inclined to defer to executive action. This deference can also be seen in cases where the Court has engaged in active judicial review by ascribing limits to the legislative branch.\textsuperscript{153}

\textit{Dames & Moore} is part and parcel of an adjudicatory framework highly reliant on two important judicial strategies to accommodate the executive branch: the political question doctrine and judicial interpretation of the foreign affairs power of the President. While both strategies have important, justifiable defenses, they generate tremendous risk when sovereign powers are ceded.

Chief Justice John Marshall gave life to the political question doctrine in the case credited with the birth of judicial review, \textit{Marbury v. Madison}. In a famous dictum, Chief Justice Marshall wrote:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and his own conscience . . . The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs . . . The acts of such an officer, as an officer, can never be examinable by the courts.\textsuperscript{154}

Whether one accepts a public choice account\textsuperscript{155} of judicial abdication or efficiency-oriented explanations, it is clear that judges have been reluctant to review foreign affairs questions on the merits and have often resorted to the political question doctrine to justify this reluctance. Broadly defined, the political question doctrine, as described by Chief Justice Marshall, emerges from the assumption that policymaking should be left to the political branches with the Court delimiting those powers and should be judged by the electorate so long as the political branches operate within the scope of their enumerated powers. When they have applied it to foreign affairs, however, later judges

\begin{footnotes}
\textsuperscript{150} Reid v. Covert, 354 U.S. 1, 14 (1957).
\textsuperscript{153} See, e.g., \textit{id}.
\textsuperscript{154} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803).
\textsuperscript{155} See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962) (arguing that judicial intrusion into foreign affairs is unjustified because risk that political branches will not follow such decisions is augmented in foreign affairs); THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992) (arguing that beginning with \textit{Marbury}, courts have retreated from deciding foreign affairs questions as payment for judicial review of domestic questions).
\end{footnotes}
have built upon Marshall's point by assuming that the scope of judicial review should be proportional to the level of national security interest embodied in a particular policy area. On the basis of this further assumption, judges have used the doctrine to shield executive action related to foreign affairs from judicial review even when it is alleged that the President has acted ultra vires. Such a result has been achieved through both formal invocation of the doctrine and constructive use of the doctrine in cases in which judges decide the merits in favor of the executive in deference to such values as separation of powers and judicial restraint.

While the exact boundaries, not to mention the legitimacy, of the political question doctrine are subject to dispute, one may reasonably expect that situations such as cession of sovereign competences to international organizations will engage the same concerns, due to the reduced level of judicial review implied by the doctrine. All substantive defenses of the political question doctrine arise from the realization that the bulk of foreign policy relates in some way to national security, an area in which the President, as Commander-in-Chief, is particularly unfettered. Prudence dictates that a tactically aware country should speak with a single voice. Such a concern has led the Supreme Court to argue in dicta that the President is the "sole organ of the federal government in the field of international relations" and that executive power in this area is "plenary and exclusive." Many judges and commentators have asserted that foreign affairs questions present technical problems that the judiciary cannot resolve. Justice Brennan elaborated on this position in Baker v. Carr, where he wrote that judges are justified in refusing to decide cases without "judicially discoverable and manageable standards." This rubric covers cases in

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156. Some commentators have argued that this view is itself a radical change in Marshall's position, in that while Marshall's position affirms the Court's role as arbiter of the limits on the power of the political branches, the later adaptation allows the Court's interpretation to be merely one among equals, with the Court deferring to decisions on the part of the political branches as long as those branches believe they have acted intra vires. See, e.g., FRANCK, supra note 155, at 31.


158. In United States v. Lee, 106 U.S. 196 (1882), for example, a case often cited as limiting the political question doctrine, the Supreme Court held that the federal judiciary had jurisdiction to review domestic actions by the executive, even if under color of the war power, but that it could not review such actions if extraterritorial. Id. at 209.

159. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); see also United States v. Belmont, 301 U.S. 324 (1937).


161. Baker v. Carr, 369 U.S. 186 (1962) (holding that state electoral district reapportionment was not political question).

162. Id. at 217.
which the judiciary cannot find facts,\textsuperscript{163} confronts preexisting factual interpretations of other branches,\textsuperscript{164} or faces policy choices already made by other branches.\textsuperscript{165}

The prominence of the political question doctrine has meant that in practice the President has not had to adhere to the formal procedural limitations of such apparently clear constitutional provisions as the war power of Article I, Section 8, which reserves the power to declare war to the Congress, or the treaty power enumerated in Article II, Section 2, not least because the judiciary has not delimited the scope of the terms “declare war” and “make Treaties.” Courts have been extremely reluctant to declare military engagements sponsored by the executive to be illegal, constructive declarations of war without congressional consent. They most often have dismissed such challenges as political questions.\textsuperscript{166}

The judiciary “withdraws” deference to the executive branch most

\textsuperscript{163} Courts, for example, may find it difficult to provide answers that depend on deciding contested sovereignty. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (expropriation of assets by revolutionary Cuban government); Peary v. Stranahan, 205 U.S. 257 (1907) (U.S.-Cuban dispute over Isle of Pines); Williams v. Suffolk Ins., 38 U.S. (13 Pet.) 415 (1839) (Argentine-British dispute over Falkland Islands); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979) (British-Iranian dispute over Persian Gulf Island).

\textsuperscript{164} Justice Brennan warned explicitly against “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” Baker v. Carr, 369 U.S. at 217; see also Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (deportation of aliens); Jones v. United States, 137 U.S. 202, 212 (1890) (holding plaintiff countries entitled to sue U.S.); Panama v. Republic National Bank, 681 F. Supp. 1066 (S.D.N.Y. 1988) (concerning seizure of Panamanian assets following coup).


\textsuperscript{166} See, e.g., Mitchell, 488 F.2d 611 (Vietnam War); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (suit by members of Congress challenging military presence in El Salvador); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), dismissed as moot, 765 F.2d 1124 (D.C. Cir. 1985) (invasion of Grenada); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (suit by members of Congress challenging military presence in El Salvador), cert. denied, 467 U.S. 1251 (1984); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), aff’d sub nom. Atlee v. Richardson, 411 U.S. 911 (1973) (Vietnam War); The Prize Cases, 67 U.S. (2 Black) 635 (1862) (constitutionality of seizure of ships trading with Confederacy without official declaration of war); United States v. Baker, 24 F. Cas. 962 (C.C.S.D.N.Y. 1861) (No. 14,501) (constitutionality of presidential claim that act of piracy was naval engagement without official declaration of war). Unlike the treaty power, though, the Supreme Court has limited the war power when it conflicts with other constitutional values such as property rights. In Mitchell v. Harmony, the Supreme Court held that the seizure of property belonging to a civilian merchant working in an area of Mexico occupied by the United States could not be justified under the war power unless the government could prove to a trial court that the chances of his goods being seized by the enemy were “immediate and impending, and not remote or contingent... an immediate and pressing danger or urgent necessity existing at the time.” 54 U.S. (13 How.) 115, 133 (1851). The Court held that the executive branch held the burden of proving its contention. In the Steel Seizure Case, the Court held that the President could not nationalize an industry of vital military importance during ongoing hostilities even if the industry was hangered by a strike. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In the Pentagon Papers case, the Supreme Court held that the danger to national security caused by publication of classified military information during ongoing hostilities asserted by the executive was outweighed by the First Amendment principle guaranteeing freedom of speech. New York Times Co. v. United States, 403 U.S. 713 (1971).

Even when the courts have found for the executive, they have sometimes placed the burden of proving the severity of the ostensible threat to national security on the executive. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).
regularly when executive policy conflicts with civil rights. In such cases, judicial deference tends to take the form of constructive use of the political question doctrine rather than a simple statement that the issue is nonjusticiable. In cases where the petitioner claims a violation of due process, the Court tends to utilize the constructive version of the doctrine if it wishes to defer to the executive.¹⁶⁷

The Supreme Court has often adhered to a constructive version of the political question doctrine designed more to add legitimacy ex post to actions undertaken by the Executive than to limit its actions. By deciding cases on the merits in favor of the Executive, the Supreme Court actually expands the scope of the political question doctrine.¹⁶⁸ In cases in which lower courts have declared executive actions unconstitutional after reviewing them on the merits, the Supreme Court has stepped in to affirm that substantive review should be used as a formal legitimation device rather than as an actual test of the boundaries of executive power.¹⁶⁹

When they have not dismissed cases challenging executive action outright, courts have often employed the political question doctrine constructively by finding implicit congressional approval for executive action.¹⁷⁰ In a recent case, for example, the Sperry Corporation challenged a "user's fee" charged for partial adjudication before the Iran-U.S. Claims Tribunal. The fee was levied after the corporation had reached an independent settlement with Iran. The Sperry Corporation claimed that the fee represented an unconstitutional tax since it had not originated in the House of Representatives. The Court, theoretically deciding on the merits, found for the Executive.¹⁷¹

C. Current Weaknesses: Reviewing Acts of Foreign States and Supranationals

Courts have naturally been quite reluctant to review the acts of foreign states. The act of state doctrine effectively strips American courts of jurisdiction to review the actions of foreign sovereigns performed outside the territory of the court's state.¹⁷² Foreign sovereign immunity fulfills a similar function for acts performed within the United States. Under the act of state doctrine, American courts do not review such cases on the merits. The rule

¹⁶⁷. See, e.g., In re Yamashita, 327 U.S. 1 (1946); Korematsu v. United States, 323 U.S. 214 (1944). However, even the use of the constructive version is rare. Generally, the courts simply invoke the political question doctrine. See, e.g., Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Uhl, 137 F.2d 903 (2d Cir. 1943).

¹⁶⁸. Some commentators have argued that by reviewing Executive action, the Supreme Court reinforces separation of powers. See, e.g., FRANCK, supra note 155. This argument is faulty, though, in that it fails to consider whether the structural division of powers has changed after judicial review. By deciding cases in favor of the Executive, the judiciary concretizes a new division of powers, one that often reflects a strengthening of the Executive role vis-à-vis the other branches.


The New Internationalism

is informed by the rationale that American courts are not the most appropriate place to review the acts of foreign governments. Underlying this deference is respect for foreign sovereignty. The doctrine acts as a conflict of laws rule generating results similar to those of the political question doctrine. Common concerns underlie both doctrines, particularly the potential embarrassment associated with conflicting pronouncements.

In Sabbatino, plaintiffs argued that the Cuban government had violated international law by expropriating sugar that had belonged to their company after the overthrow of Batista. They claimed that this violation superseded the act of state doctrine by allowing an American court to transfer title to sugar that had been transported to the United States after the expropriation. The district and appeals courts sustained the plaintiffs' claim. The Supreme Court reversed, holding that American courts are not the appropriate forum for resolution of disputes with foreign governments. The Court noted that the plaintiff could petition the political branches for intercession with the foreign sovereign if an action in the courts of the foreign country proved impracticable. The Court held that the doctrine has

"constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and the community of nations as a whole in the international sphere.

The act of state doctrine, then, allows courts to defer to foreign sovereigns just as they defer to the political branches of the American government. The judiciary has determined that challenges by American citizens to acts of foreign sovereigns in their sovereign territory should be made through the political branches of the American government, if not through direct petition to the appropriate institutions of the foreign state. Thus, in practice, given the predominant role played by the executive branch in foreign policy, the doctrine serves as an additional mechanism that courts use to defer to the executive. In accordance with the judicial reasoning supporting the doctrine, limitations have been imposed on the doctrine not by the courts, but by the political branches.

Foreign sovereign immunity plays a similar role in actions within the United States against foreign sovereigns. The immunity granted by American courts arises not only from notions of comity and egalitarianism among sovereign states, but also from judicial concern about the appropriate forum


174. See id. at 705 n.18; see also Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).


177. 376 U.S. at 399.

178. Id. at 423.

for such claims. While it is recognized that the nexus with American interests is much stronger in such cases, the courts have held that such claims, because they implicate foreign affairs, should find their solution in the executive branch. Just as with the act of state doctrine, limitation of the sovereign immunity doctrine has originated with the political branches rather than the judiciary. The current state of the doctrine, in place since the adoption of the Foreign Sovereign Immunity Act of 1976, immunizes the public acts of foreign states while allowing adjudication of claims arising from commercial transactions involving foreign states or their instrumentalities. The Supreme Court has upheld and implemented the Act. Thus, in most of their noncommercial public acts foreign states enjoy immunity from judicial prosecution in the United States.

What about the case of supranational organizations? While Reid v. Covert indicates some of the potential pitfalls of a treaty that obviously goes beyond the scope of the Constitution, it does not address the role of the Constitution in limiting the actions of supranational bodies. In Hirota v. MacArthur, several members of the imperial Japanese government contested the adjudicatory rights of a military tribunal. The Court held that “the tribunal sentencing these petitioners is not a tribunal of the United States. . . . Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners.”

While the tribunal had not necessarily exercised or threatened to exercise any unconstitutional power, the Court’s determination that it lacked authority to review the legitimacy of the tribunal raises serious questions about the potential role of the judiciary in reviewing cessions of sovereign competences and the exercise of powers by supranational entities. Justice Douglas, in a concurring opinion, highlighted some of the difficulties created by the Court’s reasoning. Among his concerns were lack of access to constitutional protections limiting judicial review by international judicial entities, constructive sanction of extraconstitutional powers for American officials acting abroad, and refusal by the Court to review the constitutionality of the actions of American officials in authorizing American participation in the tribunal.

While Justice Douglas described the tribunal as “dominated by American influence,” he conceded that was “nonetheless international in character.” Justice Douglas seemed to recognize that the majority might be correct in holding that the Court had no authority to review the decisions of the tribunal.

181. See, e.g., DEPT OF STATE, CHANGED POLICY CONCERNING THE GRANTING OF SOVEREIGN IMMUNITY TO FOREIGN GOVERNMENTS, 26 DEPT ST. BULL. 984 (1952).
185. Id. at 198.
186. Id. at 207.
Nonetheless, as Douglas argued, some form of check was necessary; otherwise, the Court's reasoning would leave "practically no room for judicial scrutiny of this new type of military tribunal which is evolving." Just as the Court's reasoning left little room for review of the new type of military tribunal, the Court leaves no room for review of the new types of supranational entities and their adjudicative bodies.

D. Recent Cases and Their Implications

Many recently formed international organizations exhibit supranational characteristics, such as judiciaries with enforcement powers. Among recently formed organizations, the United States–Canada Free Trade Agreement features binational panels that serve as dispute resolution mechanisms. U.S. courts cannot review the decisions of these panels on the merits. The North American Free Trade Agreement (NAFTA) features similar panels, with additional scope to adjudicate labor and environmental disputes. In addition, NAFTA features a novel mechanism for responding to amendments to member states' trade law. This mechanism seeks, in part, to minimize the impact of postenactment statutory amendments to U.S. law affecting the character of NAFTA obligations. Under the system created within NAFTA, parties objecting to proposed amendments to existing domestic trade law have the right to obtain a declaratory judgment regarding the compatibility of any such amendment with existing trade regimes, such as the GATT antidumping code and NAFTA itself. If the panel declares the proposed amendment incompatible, the other parties may suspend their application of NAFTA, or amend their own domestic trade laws. Under both agreements, panels displace the jurisdiction previously exercised by Article III courts over antidumping and countervailing duties cases. Under the recently completed Uruguay Round, GATT members have agreed to the creation of a World Trade Organization (WTO) that has exclusive jurisdiction over trade disputes and the power to "fine" countries not complying with judgments by authorizing injured trade partners to raise tariffs. What are the implications of such powers and how do they function?

The major implication is a shift in power from the legislative and judicial branches to the executive. Once a treaty delegating competences to a supranational organization comes into effect, the legislative branch loses any meaningful role. Withdrawing from the organization remains as a technical
option, but not as a practical power. And Congress cannot change the character of the organization, since such changes require the approval of all member states. Negotiation becomes the major tool to effect change. The executive branch, which negotiates with foreign states, therefore plays a dominant role. In the case of adverse rulings by a supranational dispute panel, the executive can negotiate with the winning parties to mitigate the effects of a ruling. Similarly, the negotiating process associated with changing the character of a supranational organization lies with the executive.

Like the legislative branch, the judiciary has a potential power. Unlike the legislative branch, it may exercise the power fairly easily. Implementing laws that prevent the judiciary from reviewing decisions reached by supranational adjudicative mechanisms on the merits can be declared unconstitutional. The judiciary must only choose not to invoke the doctrines limiting judicial review. More importantly, the judiciary can monitor a supranational to ensure it is not exercising powers beyond those delegated by the United States. This, of course, would also require the judiciary to reject those doctrines it traditionally invokes to avoid review. Some recent cases illustrate the ramifications of these issues.

1. WTO Rejection of Clean Air Act

On January 17, 1996, a WTO panel reached an historic decision: that the United States Clean Air Act, which includes differing emissions standards for domestic and imported gasoline, violates the GATT rules enforced by the WTO because it discriminates against imported gasoline. Why should this be considered historic? After all, the GATT itself had reached a similar decision about the effects of the CAFE fuel economy requirements on imported automobiles. The decision marks the first time that the WTO has exercised its supranational power, and furthermore, exercised it against the world’s most powerful state.

Venezuela, one of the world’s largest gasoline exporters through its parastatal Petroleos de Venezuela S.A. and the locally based Citgo Petroleum Corp., joined by Brazil, complained that the Environmental Protection Agency (EPA) rule on reformulated gasoline applied different baseline standards for foreign and domestic refiners as dictated by the Clean Air Act Amendments of 1990 (CAAA). The CAAA contains two sets of requirements for refiners. The first, concerning benzene, oxygenate content, and vapor pressure, includes strict standards uniform to all refiners; the second, concerning sulfur, aromatics, and olefin content, allows domestic reformulated gas refiners to meet their own 1990 baseline averages for the period 1995–1997, while requiring imported reformulated gas refiners to meet the 1990 domestic industry average for nonattainment areas. After 1997, domestic producers will face the same standard regardless of their previous baselines.

193. The following description is derived largely from The Energy Report, Jan. 22, 1996.
When Venezuela complained to the EPA in 1994 and threatened to make a complaint to the GATT, the EPA proposed a rule change allowing foreign as well as domestic refiners to use individual baselines until 1997. Some members of Congress accused the Clinton Administration of caving in to foreign pressure to avoid a GATT challenge during the final considerations of the Uruguay Round. Exercising the spending power, Congress denied the EPA the funds necessary to implement the rule in August 1994. When Venezuela reacted by filing a GATT complaint, which was shifted to the WTO when it came into existence in January 1995. Venezuela alleged losses of $150 million per year. Brazil joined the petition, and Norway and the European Union were listed as interested third parties.

In its ruling, the WTO ordered the U.S. to change the Clean Air Act to eliminate the discrimination against imported gasoline. Theoretically, the United States can ignore the order, vitiating any legal effect. But if the United States does not accept the ruling by changing the Clean Air Act, the United States could face substantial fines set by the WTO of approximately $150 million in the form of retaliatory tariffs of injured countries, in this case Venezuela and Brazil.

If a country does not appeal a ruling, the decision comes into effect after sixty days. If a country appeals, the process can take up to eighteen months, but the country must then accept the appellate ruling as final and binding. The United States decided to appeal. If the United States loses the appeal, it will have to modify the Clean Air Act or face retaliatory sanctions. The process can only be stopped by a consensus of the one hundred twenty WTO members or by a settlement between the parties to the dispute.

Congress has a right to demand a domestic review of the case under the U.S. law implementing the final agreement of the Uruguay Round creating the WTO. This review, however, can only achieve two results besides acceptance of the WTO ruling: the political result of criticizing the executive branch or the legislative result of withdrawing from the WTO. Because of its extreme nature, the latter is unlikely to occur. The Clean Air ruling shows for the first time the United States' acceptance of being subject to supranational law.

2. United States–Mexico Tuna Dispute Under GATT

During the 1980s, the United States was embroiled in a dispute with Mexico and the GATT over a U.S. decision to ban tuna imports from Mexico. The American government issued the ban ostensibly to prevent Mexican fishermen from exporting to the United States tuna caught in drift nets that snare and kill thousands of dolphins. The United States, seeking as a policy matter to protect dolphins, had banned the domestic use of similar nets. Regardless of whether the United States should try to influence Mexican policy, allowing continued tuna imports from Mexico would constitute

environmental dumping, increasing pressures on American fishermen to revert to the less costly driftnet method while reducing the share of the American market enjoyed by American fishermen.

Mexico lodged a complaint with GATT. Two GATT panels held in Mexico's favor. Rancor between the United States, Mexico, and the GATT dissipated as the United States complied with the ruling after obtaining Mexican assurances that Mexican fishermen would replace driftnets with more expensive fishing methods compatible with dolphin preservation. But is this really practicable as a paradigm? GATT rules do not include provisions allowing import restrictions to compensate for environmental or social dumping. The GATT panel was justified in its decision. At the same time, the United States has legitimate policy concerns that may encompass areas outside of the multilateral GATT agreement, such as the prevention of environmental and social dumping.

Under GATT rules, American courts cannot review GATT panel decisions on the merits. As long as the GATT had no enforcement power, the United States could unilaterally refuse to comply with decisions with relatively minor consequences. Under the WTO the United States has less leeway to object to decisions.

3. Constitutionality of Binational Panels

In 1993, a group called National Council for Industrial Defense, Inc. filed suit in the District Court for the District of Columbia alleging that the binational panels established under chapter 19 of the United States–Canada Free Trade Agreement (FTA) were unconstitutional. The court dismissed the case due to lack of subject matter jurisdiction, refusing to rule on the merits.198

Although the court did not rule on the ultimate issue — the constitutionality of the panels — the FTA does raise a number of interesting constitutional issues. Under the Agreement, either national party may elect to opt out from judicial review in national courts and adjudicate claims before a panel of five members.199 Panel members are chosen from a list of fifty eligible panelists, with each country selecting half of the members. While only the two national parties may elect to invoke the panel procedure, panel decisions are binding on all affected parties, including private parties.

It is slightly misleading to suggest that Congress gave the judiciary complete jurisdiction to review the constitutionality of the panels. Aside from the restricted judicial venue available for such challenges (the D.C. Circuit) the Implementation Act contains provisions limiting judicial jurisdiction to

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199. The panel system of NAFTA is based in large part on this prior system. The discussion accordingly limits itself to the FTA panel structure in lieu of describing the NAFTA panel system in detail as well.
review the constitutionality of the panels. \footnote{Naturally, a court could review the jurisdictional limits independently of the constitutionality of the binational panels.} Possibly foreseeing that the judiciary might declare the panels unconstitutional, Congress authorized the President to issue Executive Order 12,662 by providing that

in such event, the President is authorized on behalf of the United States to accept, as a whole, the decision of a binational panel or extraordinary challenge committee remanding the determination to the administering authority or the Commission within the period specified by the panel or committee. \ldots and no court of the United States shall have power or jurisdiction to review such action. \ldots \footnote{19 U.S.C. § 1516a(g)(7)(B) (1994).}

Thus, the Implementation Act and the Executive Order attempt to preclude judicial review by proscribing any judicial opinion finding the binational panel structure unconstitutional.

In conjunction with this provision, chapter 19 provides that only interested parties may challenge panel decisions and requires that such challenges be filed within thirty days of the final decision. Absent claims concerning the constitutionality of decisions, for which limited judicial review is available, no judicial review is permitted.

E. Constitutional Implications: Article III

The powers of WTO and NAFTA panels may raise heated challenges on policy grounds. These panels also raise more fundamental questions about our constitutional order.

Private parties in the United States have recourse to American courts to enforce GATT provisions, in so far as Congress enacts into law GATT agreements such as the Uruguay Round. At the same time, private parties do not have recourse to American courts to challenge the actions of another country. Such actions must be measured by the laws of that country in its own courts. Under GATT (and WTO) rules, only a national party can bring such a complaint. At least one significant difficulty arises from this process. Private parties in the United States can legitimately rely on American statutes and their judicial interpretation. What would happen if a GATT/WTO panel interpreted some tariff provision more broadly than the political or judicial branches of the United States? If a private party had contracted to import certain goods in accordance with the preexisting American interpretation, the GATT/WTO ruling would result in a higher tariff, tantamount to a tax. The private party, however, would not be able to challenge the GATT/WTO ruling because private party challenges are not available within the GATT/WTO structure and United States courts would have no jurisdiction to review the GATT/WTO decision. The United States–Canada FTA raises similar difficulties of legitimate expectations created by law.

Clearly, “additional or substitute procedural safeguards” would go some way to alleviating this problem. Fiscal and administrative burdens on the government would be relatively small. Courts might not review such cases anyway, insofar as the government interest involved relates to foreign affairs.
Considerations of comity, however, are strange when national governments claim that international organizations are neither supranational nor sovereign and when alternative procedures may be built into the WTO at relatively little cost.

There are at least two important distinctions that cast graver doubts on the constitutionality of the FTA/NAFTA panels under Article III than on the constitutionality of the GATT/WTO panels. First, Congress and the President have only delegated jurisdiction to international tribunals to hear disputes between countries. Whether these disputes concerned national boundaries or conflicts over control of fisheries, the disputes have been inherently international. Despite being an international agreement, the FTA codifies import duties—an area entirely dependent on legislation of the importing country. Second, and directly underpinning the first distinction, the FTA directs panel members to decide disputes “in accordance with the countervailing duty law of the importing party.” Thus, panels necessarily apply and interpret American law. The delegation of such powers may disturb the balance of separated powers established by the Constitution.

Article III, § 1 provides that

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. The Judges . . . shall hold their Offices during good Behaviour . . .

These broad requirements must be met in order for a tribunal to qualify as an Article III court.203 Neither requirement is met by the FTA panels. Panel decisions may not be reviewed on the merits by the Supreme Court, nor do panel members enjoy life tenure “during good Behaviour.”204 The panels are not “inferior Courts” for purposes of Article III. Apparently, if the Constitution requires that the panels be constituted as Article III courts, they are per se structurally unconstitutional.

However, one cannot simply conclude that the panels are therefore unconstitutional. One must first determine whether the Constitution requires that the panels be constituted as Article III courts. If the Constitution does not so require, one must assess whether the panels are otherwise incompatible with Article III. Resolving the compatibility of the FTA panels with Article III is somewhat difficult given Supreme Court jurisprudence on the topic, which recognizes that under Article I Congress may form adjudicative bodies called legislative courts.205 The Supreme Court has upheld delegation of subject matter capable of adjudication by Article III tribunals to non–Article III tribunals in certain situations. In such situations, the Court has further suggested certain conditions that must be satisfied for delegation to occur.

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204. Lack of tenure impairs judicial independence, violating the “right to have claims decided before judges who are free from potential domination by other branches of government.” United States v. Will, 449 U.S. 200, 218 (1980).
1. Should the FTA panels be Article III courts?

The history of customs adjudication does not provide especially clear guidelines for determining whether customs law is a subject area properly within the exclusive jurisdiction of Article III courts. Until 1962, the Supreme Court explicitly held that the Court of Claims, the predecessor to the Court of International Trade exercising jurisdiction over customs claims, was a court created under the legislative power of Article I.206 Responding to legislative action declaring the court an Article III court, the Supreme Court held in 1962 that the Court of Claims was indeed an Article III court.207 As a result, FTA panels, in applying American customs law, act in the traditional province of an Article III court. This application of American customs law is not unconstitutional, as a non-Article III court may consider matters susceptible to resolution by Article III courts. Article III courts may discharge limited duties outside of their Article III writ.208 While distinctions between public rights and private privileges may no longer be wholly reliable,

If the analysis were limited to this reasoning, customs and international trade law might fit within the category of cases that may be adjudicated by non–Article III tribunals. Still, important private rights are clearly implicated, such as reliance on tariff levels under existing customs and trade law, as well as the legitimate expectation that decisions binding against private parties will be made in accordance with applicable law in a nonarbitrary fashion.

More recent Supreme Court opinions defining the boundaries of Article III jurisdiction are less supportive to those wishing to constitute FTA panels outside of Article III. In 1982, Justice Brennan argued in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that causes of action recognized at law or in equity during the preconstitutional period require adjudication only by Article III courts because they are at the “protected core” of the judicial power of Article III.210 In order for the panels to conform with the Constitution, current Supreme Court jurisprudence seems to mandate some review on the merits of FTA/NAFTA panel decisions by Article III courts.211


207. *Glidden Co.*, 370 U.S. at 530.

208. Certainly the status of a district court or court of appeals would not be altered by a mere congressional attempt to invest it with insignificant nonjudicial business; it would be equally perverse to make the status of these courts turn upon so minuscule a portion of their purported functions. *Glidden Co.*, 370 U.S. at 583.


211. The additional fact that these cases were often decided by juries raises the possibility that actions at common law involving customs matters would survive the elimination of statutory causes of action under Amendment VII to the Constitution which provides that in “[s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” *U.S.*
2. Conditions Attaching to Delegation to Non-Article III Tribunals

Some of the same opinions elaborating a protected core of actions residing exclusively within Article III also suggest that, regardless of whether the FTA panels constitutionally enjoy original jurisdiction, their decisions must be subject to at least some review by Article III courts.212 This position is supported by a growing number of scholars.213 The due process concerns previously discussed are reinforced by the systemic value of judicial review as a structural component of separation of powers.

The Thomas Court, after suggesting that "no unwilling defendant" was likely to become the subject of judicial enforcement of the legislation in question,214 upheld a mandatory arbitration scheme subject to very limited judicial review. The Court based this finding, at least in part, on the ability of private parties to challenge arbitral findings and determinations for fraud, misconduct, or misrepresentation, a right guaranteed by the legislation. The Court found that "[t]his provision protects against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law."215 In addition, the Court noted that "it is sufficient to note that [the Act] does provide for limited Article III review, including whatever review is independently required by due process considerations."216

While the Court has avoided formulaic treatment of these issues, it has elaborated several nonexclusive factors to consider. In Schor, the Court listed four factors to consider in judging the constitutionality of statutory delegation to non-Article III tribunals and the constitutionality of the adjudicative process itself:

the extent to which the essential attributes of judicial power are reserved to Article III courts, and the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the rights to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.217

In its application of these factors, the Court found that while the CFTC could hear ancillary counterclaims, which is uncommon in agency adjudication, the CFTC enjoyed jurisdiction only over a "particularized area of law"218 and its decisions were subject both to review on the facts and de novo review on questions of law.219

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212. This is not to suggest that the debate between those who think FTA decisions should be subject to Art. III review and those who think that it should not is necessarily of recent vintage. Some older cases are cited frequently for the same proposition, particularly Crowell v. Benson, 285 U.S. 22 (1932).
215. Id. at 592.
216. Id. at 593.
218. Id. (citing Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).
219. See id. at 853.
Based on this line of reasoning, the constitutionality of the FTA panels is highly questionable. Congress has delegated power over a broader area of law than was at issue in Schor, a case in which the Court emphasized the scope of delegated power as an important factor to consider. More importantly, within the jurisdiction of the panels as delegated by Congress, Article III courts have no power of judicial review. Whether Congress can completely exclude Article III courts from judicial review of customs law presents a question of first impression. Given the important private rights at issue, the delegation of power in this case, which excludes judicial review completely, seems overly broad and unconstitutional.

3. Actual Performance of the FTA Panels

Under chapter 19, the FTA panels are supposed to apply American law as interpreted by American courts. Although panel decisions are not binding legal precedent, the decisions have ramifications on private parties in the United States. Panel decisions that diverge from American legal standards may result in interpretations and applications of American law that differ from those rendered by the federal courts. This situation is particularly dangerous when American courts cannot review the legal conclusions of the panels.

In Fresh, Chilled and Frozen Pork from Canada, a panel overturned a decision by the International Trade Commission finding that American pork producers had been injured by imports of subsidized Canadian pork. After two remands, Commissioners Rohr and Newquist wrote that the panel had adopted a standard of review of agency decisions not applicable under American law, and that the panel had not applied standards required by relevant statutes, so that the decision acted sub silentio to overrule existing federal law and the FTA.

The United States National Pork Council brought a later case that resulted in an adverse decision. In dissent, the chairperson stated that, "[i]n overturning Commerce's interpretation of the law, the panel has produced a decision that is plainly wrong and remarkably insensitive to U.S. law." Moreover, the chairperson asserted that:

The panel shows no recognition of the limitations imposed by United States law on reviewing bodies confronted with a highly technical, fact-intensive record and no consideration of the impact of its decision on the binational process. While panel decisions are not binding on United States courts, they do influence other binational panels; if given precedential respect by other panels, this panel's decision would cause a fundamental change in the way United States countervailing duty law is administered in cases involving Canadian products.

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222. Id. at 6, 8-9.
224. Id. at 40 (footnote omitted).
The chairperson’s dissent, however, may be extreme. While the Extraordinary Challenge Committee (ECC), which convened on application of the United States Trade Representative and Department of Commerce, did suggest that it disagreed with the actual conclusion reached by the panel on the merits, the committee, unlike the chairperson, emphasized that the panel had employed the appropriate standard of review, namely the standard for review of agency decisions established by *Chevron* and its progeny.

Generally, panel decisions have been very sensitive to U.S. law. Most panel decisions have been transparent, beginning with recitation of statutory authority and moving on to case law establishing the appropriate standard for review based on statute. The panels have rigorously applied the standards developed by the Court of International Trade, the Court of Appeals for the Federal Circuit, and the Supreme Court.

4. Conclusion

Laying aside the issue of how well the panels have functioned, the structure of the panels and the lack of substantive review of panel decisions raise serious constitutional questions. The FTA’s experience with panel decisionmaking in *Live Swine* is troubling. As the ECC stated in that case: “[The ECC] . . . does not serve as an ordinary appellate court . . . . The ECC should address systemic problems and not mere legal issues that do not threaten the integrity of the FTA’s dispute resolution mechanism itself.”

The FTA crafted a reasonable role for the ECC. The lack of judicial review of the panels’ decisions, however, allows arbitrary and erroneous decisions to stand. Litigants may therefore be deprived of the equal protection of the laws, and denied legitimate expectations derived from applicable American statutes and jurisprudence.

It would appear that the jurisdiction of the panels, arising as it does from preexisting common law rights of action affecting private parties, properly belongs to an Article III court. Even if delegation to a non–Article III court is acceptable, the complete lack of judicial review that distinguishes the panels renders their constitutionality dubious. The unique character of the FTA panels reinforces these conclusions. As extragovernmental entities, the panels are subject to less rigorous oversight from the political and judicial branches, particularly since the Canadian government appoints half of the panelists. As part of an international agency outside the control of the American government, the panels may be subject to political pressures from the

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executive branch, especially because panelists serve a limited term and are
drawn from a large pool. Moreover, most of the potential panelists in the pool
have strong vested interests; they are often private attorneys who represent
foreign companies and importers of foreign products. 230

The political branch’s attempt to circumvent a judicial determination of
the unconstitutionality of the panel structure is itself an unconstitutional
aggrandizement of executive power. Executive Order 12,662 and the
Implementation Act itself, 231 which extend the scope of the political branch’s
powers at the expense of the judiciary, impair the ability of the judiciary to
enforce constitutional norms and to fulfill its coequal role as a check on the
powers of the other branches. 232

V. DEVELOPING CONSTITUTIONAL STANDARDS FOR SUPRANATIONAL
ORGANIZATIONS: LESSONS FROM GERMANY

Since World War II, a new set of supranational international institutions
has developed. Over time, more and more countries have found themselves
subject to the power of these organizations — some willingly, as in the case
of the members of the European Union, and others less willingly, as in the
case of developing countries with regard to the IMF. Until recently, the
United States had never been fully subject to the power of supranational
organizations. The United States has acted on behalf of, or in concert with,
supranational organizations, but rarely has been acted upon.

As the United States integrates into supranational trade bodies such as the
NAFTA and the WTO, however, that situation will continue to change. The
United States now finds itself subject to the authority of supranational
organizations with their own decisionmaking and enforcement powers.
Unfortunately, the American constitutional order has not adjusted to this new
reality. On the other hand, Germany has extensive experience with the
constitutional issues faced by a federal state integrating into a supranational
organization. For more than forty years, Germany has been a central player
in the development of what is now the European Union.

The primary concern of this Article is the extent to which branches of the
United States government can delegate their legal competences to international
or supranational organizations. One case examined was that of the WTO.
Given its broad enforcement powers, the WTO assumes judicial functions. Do
the political branches have the authority to delegate important judicial tasks
to an international organization like the WTO?

The absence of clear jurisprudential guidance on the delegation issue
makes this question difficult. Commentary on the issue mirrors in many
respects the concerns voiced by the BVG in its Maastricht decision. In
addition to concerns about separation of powers and individual rights, there

230. Telephone interview with Donald R. Dinan, counsel for National Council for Industrial
Defense, Inc. (on file with author).
is the question of whether such supranational bodies would enjoy legitimacy through compliance with the "democracy principle."

The BVG test of legitimacy requires that the EU’s legislative authority be derived either from the popularly elected parliaments of the member states or from the elected European Parliament. In discussing delegation of legislative functions to agencies, the following arguments echo the BVG test:

In general, limits on congressional capacity to delegate responsibility derive from the implicit constitutional requirements of consensual government under law. Under any theory that finds legitimacy in the supposed consent of the governed within a framework of constitutional limitations, the cooperative exercise of accountable power presupposes the possibility of tracing every such exercise to a choice made by one of the 'representative' branches, a choice for which someone can be held both politically and legally responsible.233

Are these requirements met when powers are delegated to international bodies largely outside the political and legal control of the United States and its citizens?

This part of the Article explores some of the issues faced by Germany — issues that already confront the United States or are likely to confront it in the future — and examines how Germany has addressed them. By comparing the German strategies with the ways in which the U.S. constitutional order currently reacts to these issues, we can develop a better understanding of the weaknesses in the present American approach, and suggest possible solutions to some of these problems.

A. Separation of Powers

How the three branches of government participate in a decision to cede sovereign competences to a supranational organization is an important threshold question. In Germany, each branch participates in the decision. First, the executive branch sets a policy goal of ceding a sovereign competence. The legislative branch must then draft a bill that would implement the delegation. At this stage, a party with standing, typically a legislator, may ask the constitutional court, the BVG, to examine the bill to determine its constitutionality. When the BVG is invoked, the parliament usually holds the bill pending decision by the BVG so that any necessary changes can be made or so that the bill may be stopped before passage if deemed unconstitutional.

In the United States, a similar process occurs. The executive negotiated a treaty, which is then usually implemented in the form of a statute passed with the advice and consent of the Senate. The judiciary may participate after passage of the implementing statute, but only if the statute is challenged as unconstitutional.

Thus, in the initial decisionmaking process, there is one obvious difference between the German and American systems. The German judiciary plays a much more active policy role by issuing declaratory judgments. The American judiciary, on the other hand, plays a more reactive role, stepping

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in only after a statute has been passed. Absent any additional information, it is difficult to weigh the relative merits of each. The German process maximizes legislative efficiency (the legislature does not perform unnecessary work) while the American process maximizes judicial efficiency (the judicial caseload is restricted).

One important piece of additional information is the extent to which the judiciary can monitor the effects of ceding competences to a supranational organization. In Germany, the BVG plays a critical role in both evaluating the process at its initial stages and monitoring the effects of ceding competences over time.

When evaluating a cession of sovereign competences, the BVG performs a comprehensive analysis of both procedural requirements and the likely effects on the German constitutional order. In the Maastricht decision, for example, the BVG stressed the importance of the legislative branch’s role in ceding sovereign competences. Not only must the legislature pass a statute, but the statute must set out in detail exactly what competences are being ceded. Absent such detail, the statute would fail to meet the minimum standard the German constitution requires. This requirement achieves two goals. First, both the legislature and judiciary participate in the process to the extent constitutionally mandated. Second, by requiring a detailed statute, the BVG ensures that it can monitor the actions of the supranational organization, thereby verifying that the supranational organization is acting within the limits of the competence delegated by Germany. Because the BVG itself interprets the domestic implementing statute, the BVG does not exceed the scope of its jurisdiction, while at the same time it ensures that its jurisdiction is unrestricted. Rather than demanding that the European Union or its institutions act in a particular way, the BVG is simply ordering the German government to comply with its decisions. If the European Union or its institutions exercise powers that the BVG determines to be beyond the scope of the powers Germany ceded, the German state is not bound by decisions of the European Union that are based on such powers. Thus, the BVG may order the members of the executive branch participating in EU governance structures to ignore or reject such decisions.

In practice, this means that the BVG has the authority to ensure that the competences held by the European Union do not expand without an amendment to the Maastricht Treaty. Such an amendment would have to be implemented through a domestic statute absent a treaty amendment. Through this doctrine, the BVG ensures the continued participation of all three branches in ceding sovereign powers, and especially that of the legislative and judicial branches.

When monitoring the effects of ceding sovereign competences to the European Union, the BVG also examines other constitutional values. In the Bayerische Staatsregierung case, for example, the BVG was called upon to examine whether the structure of German participation in the European Union, which is highly dependent on the executive branch, impinges upon values of federalism when the executive is called upon to participate in EU decisions.
regarding matters the German constitution reserves to the German states.\textsuperscript{234} In the Maastricht decision, the court went even further in its inquiry by examining the extent to which the states and the legislative branch could or should participate in EU institutions. While this inquiry is still inconclusive, the BVG has ordered or confirmed certain changes in government practice in this area, including stronger information rights for the states and legislature as well as legislative and state participation in EU decisionmaking structures in areas relevant to their constitutionally reserved powers.

The United States does not have the same long experience with ceding sovereign powers, making the isolation of constitutional doctrine relevant to the issues generated by ceding sovereign powers difficult. At the same time, the United States does have constitutional doctrines that will play a central role absent the development of new doctrine specific to the subject. Extrapolating from current practice, we can predict how well current U.S. jurisprudence is likely to protect values associated with the separation of powers.

The German experience points to two important goals: first, evaluating decisions to cede sovereign powers at an early stage to ensure that the process meets constitutional requirements; and second, monitoring supranational organizations over time to ensure that they do not act outside the scope of the powers ceded to them. United States constitutional law is gravely devoid in both areas. In Germany, the BVG requires that any cession of sovereign competences occur through a detailed statute passed by the legislature. In the United States, while most delegations of sovereign powers follow a similar path, the federal judiciary has not explicitly affirmed the process as mandatory. In fact, the existence of executive agreements, which come into force without congressional participation, suggests that the current U.S. constitutional order is weak in the area of ensuring that procedural requirements are met.

The existence in the United States of a set of doctrines that defer to the executive branch, especially regarding foreign affairs powers, compounds the problem.\textsuperscript{235} Because of the heightened deference in this area, the Supreme Court has never defined the exact procedural requirements that must be met. Consequently, the Court has already allowed the executive branch to become stronger at the expense of the legislative and judicial branches.

Given its limited experience in monitoring, the American judiciary has much to learn from the German experience. The weakness in the evaluation process could be remedied by abandoning the judiciary’s current practice of extreme deference to the executive in favor of more active engagement with the problems engendered by ceding sovereign powers. A necessary starting point is an explicit exposition of the process required by the Constitution, in addition to a coherent vision of the minimum sovereign competences the United States must maintain. The judiciary must also commit itself to

\textsuperscript{234} Judgment of Apr. 11, 1989, 80 BVerfGE 74 (1989).
monitoring supranational organizations to ensure that they exercise only those powers that have been delegated to them, and that they exercise those powers in a manner compatible with important constitutional protections and guarantees.

B. *Due process*

The BVG discovered relatively quickly that one area of critical importance in ceding sovereign competences would be divergences between the guarantees of the domestic constitutional order and the supranational constitutional order. To the extent that the supranational order exceeded the requirements of the domestic order, no problems would occur. But given the different developmental stages of the European Union as a supranational constitutional order and Germany as a domestic constitutional order, it was more likely that the guarantees of the EU constitutional order would fail to be as broad as the guarantees of the German order.

It is this difficulty that lies at the center of the line of cases including *Solange I*, *Solange II*, and the *Maastricht* decision. The BVG reacted by developing an evolutionary theory by which to judge the European Union. As long as the constitutional guarantees of the European Union were not as fully developed as those of Germany, including such broad elements as a democratic political structure and guarantees of basic human rights, the BVG would continue to monitor the European Union. But because the European Union was an evolving entity, the BVG determined that it would weigh the weaknesses of the EU constitutional order against the relative strength of the set of EU competences. As the European Union became stronger it would be required to augment its constitutional order accordingly, to approach more nearly the level of constitutional protections achieved in Germany. The United States has no similar doctrine. As the United States becomes increasingly integrated, such a doctrine may be highly attractive.

At the same time, the United States must make a more fundamental decision: To what extent does it desire to cede sovereign powers? The German doctrine outlined above emerges from a constitutional order that specifically supports ceding sovereign competences to the European Union. The U.S. constitutional order has no such predilection. Accordingly, the United States may need to set a higher standard for supranational organizations.

While the BVG has been deferential to the growth of the European Union, the court has always maintained the right to monitor that development. In the United States, the judiciary should ensure that it plays a similar role. The structure of the adjudicatory processes in the supranational trade organizations of which the United States is a member limits the role of federal courts. The BVG decided that the existence of two separate and exclusive jurisdictions was not problematic. It agreed to refrain from judging EU law on the merits, but insisted upon maintaining its jurisdiction over issues of domestic law, including the scope of powers delegated to the European Union by the German state.

At a minimum, the U.S. judiciary should follow the German doctrine. In
the case of the NAFTA and the Canada–United States Free Trade Agreement, areas of U.S. domestic law are applied by binational panels. While these rulings are not legally binding on U.S. courts, as a practical matter they are likely to have a profound effect on American jurisprudence. To the extent that such panels apply U.S. domestic law, federal courts should play a role in either interpreting the relevant law at the outset or in instances of appellate review. Currently, U.S. courts are limited to deciding only the constitutionality of the panels. If the federal judiciary cannot be invoked to decide issues of domestic law, the panels should be held unconstitutional. A better approach, however, would be to alter the adjudicative structure.

In addition to protecting individuals, an important systemic value is served by judicial review on the merits of decisions reached by supranational organizations when domestic law is applied. Such a review protects the judicial branch by ensuring that executive or joint executive-legislative decisions to cede competences do not weaken the judiciary. Domestic law includes constitutional values. The judiciary must monitor supranational organizations to ensure continuing protection of American constitutional values, regardless of whether areas of substantive domestic law are applied by the organization.

C. Federalism

While the experience of the BVG demonstrates how effective a constitutional court can be at protecting constitutional values while accommodating integration into a supranational organization, the experience also shows that such a process of integration cannot occur without placing tremendous stress on that constitutional order. In the German case, none of the three core areas examined here has been perfectly protected, and of the three, federalism has suffered the most.

As the Bayerische Staatsregierung case shows, there may be a fundamental conflict between a domestic constitutional order that divides powers between the national government and its constituent states and a supranational constitutional order whose powers include some areas domestically reserved to the federation and some reserved to the states. The fundamental conflict arises when the domestic states do not participate in the decisionmaking structures of the supranational entity.

In the Bayerische Staatsregierung case, the BVG erred.236 Faced with this conflict, the BVG allowed the existing structure to continue, accepting the argument that the states would be best protected if the executive represented their case. But the BVG did not force the executive to vote as a proxy for the states. By the time of the Maastricht decision, the BVG had considerably changed its stance. It held not only that the states and legislature must receive adequate information prior to decisions, but also that, where relevant, representatives of each body should be allowed to participate in EU decisionmaking structures. The court, however, has not been able to resolve the fundamental conflicts because the executive plays the constitutional role

of representing the state in foreign affairs and this role is difficult to reconcile with mandating participation by the states or legislature in EU decisionmaking structures.

One thing the BVG has refused to recognize is that in many respects the distinction between "foreign" and "domestic" affairs has become blurred. As problems become increasingly transnational in nature, supranational institutions play a greater role. The EU, NAFTA, and WTO are not foreign in any real sense. The judiciary should recognize this change and reformulate its traditional deference to executive branch foreign policymaking. In particular, the judiciary must consider, on the merits, cases alleging cession of sovereign powers to international or supranational bodies.

In the United States, federalism does not raise as many problems as in Germany. The United States is not a strong federal state compared to Germany where the states do not have any specific powers. At the same time, protecting the states may become relevant. For instance, the WTO might declare that the practice of many American states of giving land to new investors, providing loans on preferential terms, and giving large tax breaks, violates the GATT subsidies code and order the states to stop such practices. In such a case, the federal judiciary would have to evaluate whether the WTO had jurisdiction under the implementing legislation to order the states to act and whether the substance of such an order would be valid when the practice is legal in the United States. The U.S. Constitution may limit the federal government in its ability to order the states to act.237 By monitoring the supranational organization, the federal judiciary would be able to serve federalist values, and ensure adequate separation of powers and due process.

D. General Concerns

In the battle between the German constitutional emphasis on legislative efficiency and the American emphasis on judicial efficiency, which approach should prevail? When sovereign competences are ceded, the German approach is more effective. While the effectiveness of a constitutional court inevitably will depend on a wide range of factors, two elements of the BVG’s jurisprudence lie at the heart of Germany’s strength in this area: declaratory judgments and a willingness to confront the executive branch.

By issuing declaratory judgments on the constitutionality of a proposed cession of sovereign power, the BVG makes the legislature more efficient and maximizes judicial impact. While it may be forced to hear more cases, the BVG ensures that its voice will be heard and heeded early on, allowing it to suggest small changes that facilitate the constitutionality of a cession of sovereign competences. On the other hand, the American approach, which lacks these two advantages, generates two negative incentives. First, if a statute ceding sovereign competences has real, but minor flaws, the federal judiciary may be less likely to declare it unconstitutional. Because the role of U.S. courts is to decide cases rather than give advice, they are less likely to have as substantial an impact on crafting an acceptable alternative (even if the...

courts declare a statute unconstitutional). Accordingly, the German approach may result in a more flexible relationship with a supranational organization, one in which the courts play a supervisory role and accept the evolution of a supranational entity by applying different standards over time.

The second negative incentive stems from the extreme deference of the U.S. judiciary to the executive, virtually guaranteeing the continued strengthening of the executive at the expense of the legislative and judicial branches. Given that ceding sovereign competences tends to strengthen the executive anyway, current U.S. constitutional doctrine exacerbates the problem. Clearly, one obvious solution is to extend less deference to the executive when sovereign competences are ceded. In Germany, the BVG willingly confronts the executive. While the executive has been strengthened by the increasing integration into the EU, the BVG has sought to protect the powers of the legislature, judiciary, and the states.

VI. CONCLUSION

How willing are courts to address the challenges that delegation of competences and sharing of competences with supranational and international entities represent? Based on the judiciary's record when resolving "foreign affairs" cases, the answer seems clear: not very. The American judiciary has developed a set of doctrines designed explicitly to avoid reviewing both domestic laws related to international issues and the acts of foreign states. Ceding sovereign competences would seem to fall squarely within the set of doctrines the judiciary has developed to avoid judicial review. But judicial review is of paramount importance as the United States cedes sovereign competences. The process of ceding competences and the existence and acts of a supranational organization both serve to change the distribution of powers among the three branches, strengthening the executive at the expense of both the legislative and judiciary.

The nature of supranational organizations serves to dilute the role the legislative branch can play if the supranational acts in a way deemed inimical to American interests. The legislative branch retains only a theoretical power of withdrawal, a blunt policy instrument unlikely to be invoked in any but the most severe circumstances. The traditional role of the executive as negotiator with foreign states and international organizations is strengthened as the United States must increasingly rely on informal negotiations with other states to avoid acceding to the jurisdiction of supranational organizations.

The judiciary can also aggrandize its role, if it chooses. First, the judiciary can choose to review the procedural and substantive adequacy of laws implementing treaties that cede sovereign competences. Second, and more importantly, the judiciary can — and should — play an important role in monitoring supranational organizations on an ongoing basis to ensure that the supranational organization is exercising only those powers delegated by the United States. Accordingly, the judiciary can resist an unwanted accumulation of power in a supranational organization.

Regardless of how active a role the judiciary plays, however, ceding sovereign competences effects constructive amendments to our constitutional
order. No matter what the judiciary does, for example, short of declaring a
dlegation unconstitutional, the executive will be strengthened.

As a starting point in reacting to the risks associated with ceding
sovereign competences, the judiciary might adopt the position of the German
Constitutional Court. In its jurisprudence, the BVG has developed a highly
workable approach to German integration in the EU. The BVG accepts that
it has no jurisdiction to interpret the scope of EU powers. The ECJ retains
sole jurisdiction to interpret the Maastricht Treaty. However, the BVG has
held that all delegations of German competences to the EU must be made
through an act of parliament and that it has exclusive jurisdiction to interpret
the acts delegating competences. In other words, the BVG itself defines the
scope of powers delegated to the EU. If the ECJ interprets the powers of the
EU more broadly than the BVG, the BVG holds that such a construction
amounts to a constructive amendment of the relevant treaties as a matter of
German law and that EU acts based on the competences falling within this
expanded area are not binding on Germany. Further, in order for German
exercise of such powers to be constitutional, the formal treaty making
procedure, including an act of parliament, must be followed. By mandating
this process, the BVG ensures not only its own role as the arbiter of the
constitutionality of German delegations of competences, but also ensures the
participation of the Bundestag and the Bundesrat.

Nonetheless, it should be obvious that this technique of constitutional
interpretation has serious limitations. First and foremost, it may require the
BVG to intervene at a very high level. Given the limited resources of any
court, regular intervention would be impractical, so that the court would have
to restrict itself to "big" questions. Perhaps more problematic, this technique
rests on ex post rejection of EU actions. The court finds itself in the position
of closely monitoring supranational organization. Such a role increases
political pressure on the court and may reduce its effectiveness as a monitor.

Even more difficult in the United States is the lack of a judicial tradition
of declaratory judgments. In Germany, the BVG is normally invoked to
pronounce constitutional judgment on acts to cede sovereign competences
before they take effect, making minor modifications more feasible. The role
of the judiciary in the United States in deciding such issues of constitutional
importance would be greatly enhanced by either declaratory rulings or rulings
soon after the enactment of laws. To realize such a role, consideration should
be given to implementing special procedures, if necessary through
constitutional amendment. However, such a radical change would perhaps be
even more distressing than the changes which are likely to occur absent such
a new judicial role.

The experience of Germany shows that certain constitutional values are
jeopardized more than others when sovereign competences are ceded.
Individual rights can be protected most easily. The structure of a supranational
organization either has the necessary components to protect such rights —
such as an independent judiciary, a delineated Bill of Rights, and doctrines
based on case law — or it does not. The domestic constitutional structure, on
the other hand, is much more difficult to protect. The German experience
illustrates that integration into supranational entities strengthens the executive
branch at the expense of the legislative, the federal government at the expense of the states, and supranational dispute resolution structures at the expense of the domestic judiciary. This result is hardly surprising. The executive plays the primary role in representing the interests of the domestic state in the supranational organization. The federal government plays the primary role in all things “international,” including participation in supranational and international entities. Jurisdiction over particular types of cases shifts from the domestic judiciary to supranational or international judiciaries. In Germany, attempts have been made to limit this trend, through both constitutional amendment and BVG jurisprudence, by requiring direct representation of individual states in EU institutions. Because it would be impossible to guarantee such a role in every case, federal officials generally represent German interests — including competences restricted to the states by the Grundgesetz — in EU institutions. Currently, the participation of the legislative and the federal states is restricted almost entirely to the initial lawmaking process delegating a competence to the EU. The Bundestag and the Bundesrat play a restricted role. American courts must decide whether such a role is sufficient.

Similar questions arise concerning the judiciary. The question is not only whether an Article III court plays a role, but whether any American court, bound by the constitutional protections developed by Article III courts, plays a role. In the new supranational organizations, American courts play no role other than potentially deciding whether it is constitutional for the United States to participate in the organization. American courts must decide whether they can be excluded entirely (not just whether the role of Article III courts can be restricted) and whether a restriction of their role to judging the overall constitutionality of participation is acceptable. It is time for the American courts to address these questions it has so long sought to avoid.