

International Delegations and Administrative Law

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INTERNATIONAL DELEGATIONS AND ADMINISTRATIVE LAW

KRISTINA DAUGIRDAS*

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I. INTRODUCTION

Effective regulation in fields like the environment, consumer safety, and public health demands nimble responses to information, changing circumstances.¹ For this reason, the international

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1. Cf. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23–24 (1938) (“[T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures

treaties that address these fields are not designed to be static documents.² Like all treaties, they can be amended; in addition, these treaties frequently contain mechanisms to adjust parties' obligations over time with respect to a limited set of issues without going through the formal process of amendment and ratification.³ This feature of regulatory treaties—the possibility of elaborating or updating treaty norms through a subsidiary decisionmaking process—makes some commentators nervous, especially when this feature is combined with federal statutory provisions that direct administrative agencies to incorporate those subsidiary decisions into domestic law. Specifically, some scholars have suggested that this combination of treaties and implementing legislation is unconstitutional because it delegates to international institutions power that should be held exclusively by the federal government.⁴ This Article argues that legislation that pre-commits administrative agencies to implementing such subsidiary decisions survives constitutional scrutiny.

Facing multifaceted and evolving international regulatory challenges,⁵ treaty negotiators have embraced the same moves that Congress makes in the domestic regulatory arena. Congress doesn't usually take upon itself the task of writing detailed legislation because it generally lacks the requisite scientific and technical knowledge to flesh out completely the details of its regulatory agenda. Even if it could overcome this obstacle, it would face the risk that its legislation would quickly become obsolete, and enacting new legislation is a long and uncertain process. To mitigate these problems, Congress legislates in broad strokes, harnessing the capacity of expert administrative agencies such as the Environmental Protection Agency (EPA) to fill in gaps and update regulations over time.

upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.”).

2. See SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 92 (2006) (“Rules are promulgated at a global level in order to be effective and efficient. These rules need to change over time in response to technical advances; one-shot codification in a static treaty is inadequate. The area being regulated requires highly detailed rules . . . ; broad treaty language is insufficient.”).

3. CONG. RESEARCH SERV., LIBRARY OF CONG., *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 182–83* (Comm. Print 2001) [hereinafter *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*].

4. See, e.g., Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 98–99 (2000).

5. Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 106 (2005) (noting that the need for institutional specialization generally increases as global regulation increases).

While no treaties so far have created full-fledged analogs to U.S. administrative agencies, they have incorporated two features commonly associated with administrative law: reliance on expert bodies and subsidiary decisionmaking procedures. A number of recent treaties create expert bodies to help the parties elaborate or update treaty norms. Take, for example, the Stockholm Convention on Persistent Organic Pollutants⁶—a treaty that requires parties to regulate twelve chemicals defined in part by their resistance to degradation and their concomitant tendency to cross international boundaries when released.⁷ The Convention creates a Review Committee of “government-designated experts in chemical assessment or management”⁸ to aid treaty parties in evaluating proposals to regulate additional chemicals.⁹ Similarly, the Montreal Protocol on Substances that Deplete the Ozone Layer¹⁰ obliges the parties to convene panels of experts at least every four years to assess existing atmospheric control measures on the basis of available scientific, environmental, technical, and economic information.¹¹

With aid from these expert bodies, the parties can elaborate or update treaty norms by making subsidiary decisions through procedures laid out in the individual treaties that are distinct from—and less onerous than—the ordinary treaty-amendment process.¹² Some of these subsidiary decisions automatically bind all parties to the treaty, while others do not.¹³ To the extent that these subsidiary decisions are binding, parties to the treaty are obliged to incorporate them into domestic law.

6. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 (entered into force May 17, 2004) [hereinafter Stockholm Convention].

7. *Id.* (noting as a reason for negotiating the agreement “that persistent organic pollutants possess toxic properties, resist degradation, bioaccumulate and are transported, through air, water and migratory species, across international boundaries and deposited far from their place of release, where they accumulate in terrestrial and aquatic ecosystems”). The twelve chemicals are: aldrin, chlordane, dieldrin, endrin, heptachlor, hexachlorobenzene, mirex, toxaphene, polychlorinated biphenyls, DDT, polychlorinated dibenzo-p-dioxins, and polychlorinated dibenzofurans. *Id.* annexes A–C.

8. *Id.* art. 19, para. 6(a).

9. *See id.* art. 8 (describing the Review Committee’s role in screening proposals).

10. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol].

11. *Id.* art. 6.

12. *See* Stewart, *supra* note 5, at 90–91 (discussing treaties that permit conferences of the parties to create regulations without following formal ratification procedures required for treaty law).

13. *See infra* Part II.B–C.

This Article focuses on the constitutionality of implementing legislation that requires agencies like the EPA to take account of subsidiary decisionmaking on the international plane. Such implementing legislation might direct an agency to publicize the actions of international institutions by publishing notice in the Federal Register and soliciting comments in response. Or the legislation might direct an agency to adjust substantive regulations in response to certain decisions reached on the international stage. Indeed, regulatory agencies are likely to play an ever-greater role in assuring their countries' conformity to various international regulatory treaties¹⁴—unless, that is, arguments about the unconstitutionality of international delegations prevent them from doing so.

Commentators have used the term “international delegation” to describe a number of different arrangements that “vest continuing lawmaking authority in an international institution.”¹⁵ The idea is that by signing onto a treaty that contains mechanisms for elaborating the treaty norms, the United States transfers to an international institution powers that belong to the federal government.¹⁶ These transfers or grants of authority are constitutionally suspect because international institutions are exercising authority that is properly held exclusively by the federal government.

In an opinion issued last summer in *Natural Resources Defense Council v. EPA*,¹⁷ the United States Court of Appeals for the District of Columbia Circuit invoked these nondelegation arguments in an administrative law case. The D.C. Circuit refused to read legislation implementing the Montreal Protocol to require the EPA to promulgate regulations incorporating certain subsidiary decisions made by the parties to the treaty.¹⁸ As this Article will describe in greater detail, these subsidiary decisions govern exemptions to the Montreal Protocol's ban on the production or consumption of methyl bromide. The court concluded that the EPA's compliance with those subsidiary deci-

14. See generally Stewart, *supra* note 5 (suggesting that United States administrative law should be applied to global regulatory regimes to ensure greater accountability among international decisionmakers).

15. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494 n.3 (2004). Other commentators have defined the term more broadly. See, e.g., Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation* (Duke Law Sch. Working Paper Series, Paper No. 81, 2007), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1081&content=duke/fs> (defining international delegation as “a grant of authority by a state to an international body or another state to make decisions or take actions,” regardless of whether those decisions or actions are binding).

16. Ku, *supra* note 4, at 72.

17. 464 F.3d 1 (D.C. Cir. 2006) [hereinafter *NRDC v. EPA*].

18. *Id.* at 8–9.

sions could not be enforced in court.¹⁹ If those subsidiary decisions were binding on the EPA, the court wrote, there was a serious risk that Congress had acted unconstitutionally by “assigning lawmaking functions to [an] international bod[y].”²⁰ That is, by pre-committing the EPA to implement the subsidiary decisions regarding methyl bromide, Congress would have unconstitutionally delegated its legislative authority to an international institution.²¹

The consequences of giving less than full effect to treaty implementing legislation are significant. In the short term, it will shift to the executive branch authority over treaty implementation that is appropriately shared with Congress.²² In the long term, the approach taken by the D.C. Circuit could threaten the ability of the United States to commit to beneficial international regulatory treaties by eroding Congress’s willingness to pass implementing legislation and thereby, paradoxically, undermining the ability of the President to negotiate such treaties in the first place. Moreover, it could frustrate efforts to bolster the accountability of international regulatory bodies by limiting the availability of beneficial administrative procedures.

This Article argues that Congress can constitutionally enact legislation that pre-commits the United States to implementing the subsidiary decisions of international institutions. Nondelegation arguments do not—and should not—pose any obstacles to such legislation. When the admittedly lax test for violations of the domestic nondelegation doctrine is applied, every one of these implementing statutes passes muster. And, in spite of the serious challenges that have been raised regarding the accountability of international institutions—both as a general matter and to United States voters in particular—there are no compelling reasons for enforcing a more stringent version of the nondelegation doctrine where agencies’ obligations are in some way determined by or dependent on actions or decisions taken at the international level.

Nor does such legislation pose any broader separation of powers problems. Proposed implementing legislation for the Stockholm Convention has run into the objection that it interferes with the President’s exclusive negotiation authority,²³ and other provisions imple-

19. *Id.* at 10.

20. *Id.* at 9.

21. *Id.*

22. Nondelegation arguments would not preclude Congress from enacting legislation that permits, but doesn’t require, the executive branch to implement subsidiary decisions. But such legislation would eliminate Congress’s say in whether such decisions should be implemented or not.

23. See *infra* note 88 and accompanying text.

menting regulatory treaties are vulnerable to the same argument. But unlike statutory arrangements that the Supreme Court has found unconstitutional, the legislation implementing regulatory treaties comports with the separation of powers: by passing such legislation, Congress neither aggrandizes its own authority nor encroaches on executive authority.

By subjecting these constitutional arguments to systematic analysis, this Article seeks to dispel the notion that everything changes because Congress's legislation addresses actions taken on the international plane. To the contrary, the analytical approach that courts take in purely domestic contexts proves wholly adequate. Returning to the D.C. Circuit's recent *NRDC* case, this Article argues that the court erred in allowing inchoate nondelegation concerns to influence its analysis. The court should have analyzed the statute no differently from other statutes delegating the task of promulgating regulations to an administrative agency. Such an approach would make clear that Congress may pre-commit to domestic implementation of the contested decisions taken by the parties to the Montreal Protocol, but would require Congress to be explicit if it intends to require—rather than merely permit—the agency to implement the subsidiary decision.

In focusing on legislation that implements regulatory treaties, this Article addresses only one of the multiple targets of scholars who are troubled by international delegations.²⁴ In doing so, it highlights the importance of tailoring analyses to specific types of potentially problematic international delegations instead of lumping them together. And by establishing that international delegation concerns are of no moment in this area, this Article seeks to move the debate forward by restricting the plausible applications of the international nondelegation arguments.

II. KEY FEATURES OF REGULATORY TREATIES

To illustrate the stakes of this debate over international delegations, this Part describes in greater detail two examples of regulatory treaties that provide for subsidiary decisionmaking and the nondelegation disputes that have erupted over their implementing legislation. First, however, Section A identifies the features that such regulatory treaties have in common, and the features that their corresponding

24. See, e.g., Ku, *supra* note 4, at 93–113 (describing and categorizing examples of international delegations); Swaine, *supra* note 15, at 1502–35 (same); Bradley & Kelley, *supra* note 15, at 9–16 (same).

implementing statutes share. Section B sets out the first example, the Montreal Protocol, and Section C focuses on the second, the Stockholm Convention.

A. *Regulatory Treaties and Their Corresponding Implementing Legislation*

The Montreal Protocol and the Stockholm Convention illustrate the key attributes of the regulatory treaties on which this Article focuses. First, their subject matter is technical and complex. Second, the treaties oblige the United States to regulate intra-territorial conduct.²⁵ Third, and most importantly, these regulatory treaties include mechanisms for subsidiary decisionmaking—that is, mechanisms for elaborating on or updating the parties’ obligations that are less onerous than the ordinary process for amending the treaties.²⁶

Focusing on this last feature, commentators have described the subsidiary decisionmaking procedures set up by international regulatory treaties as having a “genuinely administrative character.”²⁷ The decisions are made “below the level of highly publicized diplomatic conferences and treaty-making.”²⁸ As might be expected given the treaties’ technical subject matter, these subsidiary decisions frequently rely on assessments by expert bodies.²⁹ Finally, they are typically restricted in scope and govern relatively uncontroversial technical matters³⁰—although, as the United States’ experience with administrative law over the last century clearly demonstrates, important policy judg-

25. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 23 (2005) (“Increasingly . . . regulatory programs agreed to at the international level . . . are effectuated through measures taken by governments at the domestic level to regulate private conduct. Coordinated regulation of private conduct is often the very purpose of the international scheme in fields such as regulation of pollution or financial practices.”).

26. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 3, at 181–83 (discussing various methods of treaty modification that do not require Senate advice and consent); Stewart, *supra* note 5, at 69 (“While treaties require ratification, treaty-based regimes increasingly adopt regulatory measures through subsidiary lawmaking authorities, including the conference of the parties, administrative bodies, and dispute settlement bodies.”).

27. Kingsbury, Krisch & Stewart, *supra* note 25, at 17.

28. *Id.*; see also Stewart, *supra* note 5, at 90 (suggesting that conferences of the parties are administrative in character because of their ability to create subsidiary norms without having to follow ratification procedures required for treaty law).

29. See *supra* text accompanying notes 8–11.

30. See MURPHY, *supra* note 2, at 92. (“The subject matter at issue is important, but is usually not politically sensitive nor characterized by significant policy differences among states (whether developed or developing).”).

ments are embedded in such technical decisions, which invariably have redistributive effects.³¹

Beyond the Montreal Protocol and the Stockholm Convention, treaties that share these features include the U.N. Convention on Psychotropic Substances,³² “an international agreement aimed at halting the distribution and use of abusable psychotropic substances for purposes other than legitimate medical and scientific ones.”³³ At the time that the Senate consented to it,³⁴ the agreement obliged parties to regulate thirty-two substances that were categorized into four schedules based on their extent and potential for abuse and their recognized therapeutic usefulness.³⁵ The Convention on Psychotic Substances includes procedures for adding new drugs, transferring drugs to other schedules, and deleting drugs from the schedules.³⁶ Another example is the Chicago Convention on International Civil Aviation, which not only prescribes general international aviation rights and obligations, but also creates a mechanism for developing and adopting more specific regulations to ensure the safety and facility of international aviation.³⁷

The legislation implementing these regulatory treaties in the United States likewise shares certain characteristics; it directs agencies to “abide by, or otherwise take into account, lawmaking by international institutions”³⁸ in one of two ways. First, there are content-assimilation provisions. Exemplified by the Montreal Protocol’s implementing legislation, these provisions reflect Congress’s desire to pre-commit to implementing the *substance* of subsidiary decisions of international institutions (e.g., a decision to regulate a particular

31. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1683–84 (1975) (observing that applying legislative directives often requires agencies to “reweigh and reconcile the often nebulous or conflicting policies behind the directives” and that this balancing of policies is inherently discretionary and political).

32. United Nations Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976; for the United States, July 15, 1980) [hereinafter Convention on Psychotropic Substances].

33. H.R. REP. NO. 95-1193, at 1 (1978). According to the House Committee on Interstate and Foreign Commerce, “[p]sychotropic substances exert an effect on the mind and thus are capable of modifying mental activity.” *Id.*

34. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (1978) (codified as amended in scattered sections of 21 U.S.C.)

35. Convention on Psychotropic Substances, *supra* note 32, Lists of Substances in the Schedules, 32 U.S.T. 734–737, 1019 U.N.T.S. 328–329.

36. See *id.* art. 2.

37. See MURPHY, *supra* note 2, at 92–95 (describing the creation of the International Civil Aviation Organization, an agency of the United Nations that is responsible for recommending international air safety standards).

38. Swaine, *supra* note 15, at 1519.

chemical more stringently).³⁹ Second, there are procedure-triggering provisions. Exemplified by the proposed implementing legislation for the Stockholm Convention, these provisions direct agencies to take certain *procedural* steps (e.g., supplying notice in the Federal Register and requesting comments) when certain events occur on the international plane.⁴⁰ Both content-assimilation and procedure-triggering provisions involve “international delegations” of Congress’s legislative power in the sense that, like a statute, subsidiary decisions create obligations for agencies to act. As a relative matter, the content-assimilation provisions pose a greater threat than do the procedure-triggering provisions because they concern the substance of regulations that can bind entities domestically. While the overall methodology for assessing the constitutionality of the two types of decisions is the same, and while both types of provisions are constitutional, Parts III and IV of this Article will demonstrate that the reasons they pass constitutional muster differ slightly.

First, however, the next two sections will highlight the stakes of the constitutional status of such implementing legislation. Both Section B, which focuses on the Montreal Protocol, and Section C, which focuses on the Stockholm Convention, start by laying out the relevant treaty framework and corresponding implementing legislation, then discuss the nondelegation arguments that have been leveled against the implementing legislation, and finally explain the consequences of accepting those arguments.

B. *The Montreal Protocol and NRDC v. EPA*

The heart of the Montreal Protocol consists of schedules to phase out the production and consumption of ozone-depleting substances.⁴¹ While the most significant modifications to the treaty, including broadening the list of regulated substances, require a formal amendment and the consent of the Senate to bind the United States, two other types of modifications do not. First, the parties can modify the phase-out schedules of substances that the parties have already agreed to regulate by “adjusting” rather than amending the treaty. Adjustments are made as follows: after an expert body reviews existing control measures on the basis of available scientific, environmental, technical, and economic information,⁴² parties can submit proposals

39. See *infra* Part II.B.

40. See *infra* Part II.C.

41. See Montreal Protocol, *supra* note 10, arts. 2A–2I (setting forth the required graduated reduction of certain chemicals by the parties).

42. *Id.* art. 6.

to revise assessments of the harmfulness of already regulated substances or to further reduce the permitted levels of their production or consumption.⁴³ While “the Parties shall make every effort to reach agreement by consensus,” adjustments can be adopted by a two-thirds majority of the parties.⁴⁴ Once adopted, adjustments are binding on all of the parties.⁴⁵ Second, the Montreal Protocol allows the parties to make certain other subsidiary decisions. Specifically, the Montreal Protocol requires the parties to “hold meetings at regular intervals”⁴⁶ where they will, among other things, “consider and undertake any additional action that may be required for the achievement of the purposes of this Protocol.”⁴⁷ The Protocol does not specify whether the decisions taken at such meetings (Article 11 decisions) are binding.⁴⁸ The *NRDC v. EPA* case concerns decisions made under this latter streamlined procedure.

As of January 1, 2005, the Montreal Protocol prohibits all consumption and production of methyl bromide,⁴⁹ an ozone-depleting chemical that is used to sterilize fields before planting certain crops and to fumigate structures such as grain mills.⁵⁰ There is a significant exception to this ban: it does not apply “to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.”⁵¹ The Protocol itself doesn’t define “critical use,” so in 1997, the parties issued an Article 11 decision defining the term.⁵² (This decision is known as “Decision IX/6,” so named for being the sixth decision made at the ninth annual meeting of the parties.) Decision IX/6 also permits the

43. *Id.* art. 2, para. 9.

44. *Id.* art. 2, para. 9(c).

45. *Id.* art. 2, para. 9(d).

46. *Id.* art. 11, para. 1.

47. *Id.* art. 11, para. 4(j).

48. *Id.* art. 11.

49. *Id.* art. 2H, para. 5.

50. Protection of Stratospheric Ozone, 40 C.F.R. §§ 82.1, .3, subpt. A, app. L (2006); *see also* Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide, 69 Fed. Reg. 76,982, 76,983 (Dec. 23, 2004) (codified at 40 C.F.R. pt. 82) [hereinafter Methyl Bromide Final Rules].

51. Montreal Protocol, *supra* note 10, art. 2H, para. 5.

52. *See* U.N. Env’t Programme, *Report of the Ninth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Decision IX/6, para. 1(a), U.N. Doc. UNEP/OzL.Pro.9/12 (Sept. 25, 1997) [hereinafter Decision IX/6], available at http://ozone.unep.org/Meeting_Documents/mop/09mop/9mop_12.e.pdf (defining a use as critical if “the lack of availability of methyl bromide for that use would result in a significant market disruption” and “[t]here are no technically and economically feasible alternatives or substitutes”).

production and consumption of methyl bromide for critical uses only if:

- (i) All technically and economically feasible steps have been taken to minimize the critical use and any associated emission of methyl bromide;
- (ii) Methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide . . . ;
- (iii) It is demonstrated that an appropriate effort is being made to evaluate, commercialize and secure national regulatory approval of alternatives and substitutes⁵³

In a subsequent 2004 meeting, the parties issued another decision—Decision Ex. I/3—regarding methyl bromide.⁵⁴ This decision set out quantitative limits on use,⁵⁵ and in addition provided that each party “should ensure that the criteria in paragraph 1 of decision IX/6 are applied when licensing, permitting or authorizing the use of methyl bromide and that such procedures take into account available stocks.”⁵⁶

The key disputes in NRDC’s lawsuit against the EPA are whether Article 11 decisions bind the United States as a matter of international law and whether they bind the EPA as a matter of statutory law.⁵⁷ There are three relevant provisions in the Montreal Protocol implementing legislation. The first, passed in 1998, provides: “To the extent consistent with the Montreal Protocol, the Administrator, after notice and the opportunity for public comment, . . . may exempt the production, importation, and consumption of methyl bromide for

53. *Id.* para. 1(b).

54. U.N. Env’t Programme, *Report of the First Extraordinary Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Decision Ex. I/3, U.N. Doc. UNEP/OzL.Pro.ExMP/1/3 (Mar. 27, 2004) [hereinafter Decision Ex. I/3], available at http://ozone.unep.org/Meeting_Documents/mop/Ex_mop/1ex_mop_3.e.pdf.

55. First, Decision Ex. I/3 specified permitted levels of production and consumption of methyl bromide necessary to meet critical uses in 2005. *Id.* para. 1. The limit for the United States was 7,659 metric tons. *Id.* annex II.B. Second, in a complicated set of interlocking provisions, Decision Ex. I/3 permitted a level of critical use that exceeded the consumption and production limit of 7,659 metric tons so long as the additional quantity of methyl bromide came from existing stocks rather than new production. *Id.* paras. 2–3. This last provision allowed the United States to use an additional 1,283 metric tons of methyl bromide, for a total of 8,942 metric tons. *Id.* annex IIA. This provision modifies Decision IX/6, which provides that the production and consumption of methyl bromide for critical uses is permissible only if “[m]ethyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide.” Decision IX/6, *supra* note 52, para. 1(b)(ii).

56. Decision Ex. I/3, *supra* note 54, para. 5.

57. *NRDC v. EPA*, 464 F.3d 1, 7–8 (D.C. Cir. 2006).

critical uses.”⁵⁸ The second provision, passed in 1990 and closely following the United States’ ratification of the Montreal Protocol, Congress amended the Clean Air Act and defined the term “Montreal Protocol” to mean the “Montreal Protocol on Substances that Deplete the Ozone Layer” and “adjustments adopted by Parties thereto and amendments that have entered into force.”⁵⁹ (Neither party argued that Decisions IX/6 or Ex. I/3 constitute adjustments to the Montreal Protocol.⁶⁰) The third provision, also from the 1990 legislation, provides that

[the legislation] shall not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol. In the case of conflict between any provision of this subchapter and any provision of the Montreal Protocol, the more stringent provision shall govern.⁶¹

The EPA promulgated regulations that incorporated the quantitative limits set out in Decision Ex. I/3,⁶² arguing that these were the only binding aspects of the Article 11 decisions.⁶³ NRDC disagreed. It argued that the Article 11 decisions were binding on the United States and on the EPA in their entirety, and that the production and consumption of methyl bromide must be consistent both with the quantitative limits written into Decision Ex. I/3 and the conditions adopted in Decision IX/6.⁶⁴ Thus, for example, notwithstanding the quantitative limit on production, no new production would be permitted if a sufficient quantity of methyl bromide were available from existing stocks. The Methyl Bromide Industry Panel of the American

58. 42 U.S.C. § 7671c(d)(6) (2000). These amendments to the Clean Air Act were contained in section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681, 2681-36, -37 (1998).

59. 42 U.S.C. § 7671(9) (2000) (added Nov. 15, 1990, Pub. L. No. 101-549, § 601, 104 Stat. 2399, 2650).

60. *NRDC*, 464 F.3d at 5.

61. 42 U.S.C. § 7671m(b) (2000) (added Nov. 15, 1990, § 614, 104 Stat. at 2668).

62. *See* Methyl Bromide Final Rules, 69 Fed. Reg. 76,982, 76,989 (Dec. 23, 2004) (codified at 40 C.F.R. pt. 82). These rules provide that

[w]ith today’s action, EPA is finalizing a determination that 8,942,214 kgs [8,942 metric tons] of methyl bromide are required to satisfy critical uses for 2005. . . . EPA is authorizing the full amount of new production/import allowable under Decision Ex[.] I/3, a total of 7,659,000 kgs [7,659 metric tons], and is authorizing those entities that hold inventories [or stocks] of methyl bromide to sell 1,283,214 kgs [1,283 metric tons] for approved critical uses during 2005.

Id.

63. Supplemental Brief for the Respondent at 5–11, *NRDC*, 464 F.3d 1 (No. 04-1438).

64. *NRDC*, 464 F.3d at 8; *see also* Supplemental Brief for Petitioner at 4, *NRDC*, 464 F.3d 1 (No. 04-1438).

Chemistry Council, as intervenor, made a more aggressive argument than did the EPA: the Industry Panel argued that under the implementing legislation *no* aspect of the Article 11 decisions was binding on the United States under the Montreal Protocol or on the EPA under the implementing legislation.⁶⁵

If the NRDC's interpretation is the correct one, these statutory provisions are an example of content-assimilation provisions—those where Congress pre-commits to implementing the substance of subsidiary decisions. Such provisions allow the United States to comply with its international obligations promptly without requiring additional legislative action from Congress. Such provisions also allow regulated entities or regulatory beneficiaries—like NRDC—to challenge how the agency goes about implementing the international decision to ensure that the agency is complying with both the international decision and other congressional directives and whether the agency has supported those choices with adequate explanations.

In the end, the D.C. Circuit reached the result for which the Industry Panel had advocated: the court concluded that no aspects of the Article 11 decisions bound either the United States or the EPA.⁶⁶ Instead of engaging the question of whether and to what extent Congress intended, by statute, to pre-commit the EPA to complying with Article 11 decisions, the D.C. Circuit invoked the doctrine of constitutional avoidance and held that the implementing legislation couldn't be interpreted to require the EPA to incorporate any aspect of Decisions IX/6 or Ex. I/3. If these subsidiary decisions were "enforceable in federal court like statutes or legislative rules," the D.C. Circuit wrote, Congress has unconstitutionally "delegated lawmaking authority to an international body."⁶⁷ The court found it "far more plausible to interpret the Clean Air Act and Montreal Protocol as creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties."⁶⁸ No party—not even the Industry Panel—had articulated any such constitutional argument or briefed the question at all.

As this Article will demonstrate, the D.C. Circuit's embrace of the international nondelegation argument in *NRDC v. EPA* sends a troubling signal to Congress that courts may not take its legislation seriously, and creates an inappropriate disincentive to Congress to assume a relatively larger role in implementing international regula-

65. Supplemental Brief for Intervenor at 8–12, *NRDC*, 464 F.3d 1 (No. 04-1438).

66. *NRDC*, 464 F.3d at 8, 10.

67. *Id.* at 8.

68. *Id.* at 9.

tory treaties. In deciding on the basis of the nondelegation doctrine, the D.C. Circuit not only deprived the legislation of its effectiveness, but it also shifted exclusively to the executive branch authority that, as Part III.C.3 will argue, is appropriately shared by all three branches. Paradoxically, these decisions also take away power from the executive branch by making it much more difficult for the United States to participate in international arrangements that are structured to address highly technical and quickly evolving problems like ozone depletion.

C. *The Stockholm Convention on Persistent Organic Pollutants*

The implementing legislation for the Stockholm Convention has also been attacked on nondelegation grounds. Although President Bush declared that he would sign the Stockholm Convention in 2001,⁶⁹ the United States is not yet a party to the Convention. The Senate will not ratify the treaty until Congress as a whole passes implementing legislation. That has yet to occur, in part because of the constitutional debates described in this Section.

As the Introduction noted, the Stockholm Convention regulates twelve different chemicals, and the Convention includes a mechanism for regulating additional chemicals that meet certain scientific and other criteria.⁷⁰ Any party to the Stockholm Convention can initiate the process of adding chemicals by submitting to the Secretariat a proposal for listing a chemical, together with information about the characteristics that qualify it as a Persistent Organic Pollutant (POP).⁷¹ The decision to list an additional chemical follows three stages of evaluation: (1) analyzing the proposal to ensure that the chemical is in fact a POP;⁷² (2) assessing the risks of the POP to human health and the environment;⁷³ and (3) evaluating options for managing the risks posed by the chemical while taking into account social and economic effects of any controls imposed.⁷⁴ At each stage, the Review Committee—a group of government-designated experts—makes an initial

69. Elizabeth Shogren, *Bush Announces U.S. to Sign Pact to Ban Chemicals*, L.A. TIMES, Apr. 20, 2001, at 17.

70. See *supra* notes 6–9 and accompanying text.

71. Stockholm Convention, *supra* note 6, art. 8, para. 1; see also *id.* annex D (requiring information relating to the chemical's identity, persistence, bio-accumulation, potential for long-range environmental transport, and adverse effects).

72. *Id.* art. 8, paras. 1–6.

73. *Id.* art. 8, para. 6; *id.* annex E. The risk profile is designed to evaluate “whether the chemical is likely, as a result of its long-range environmental transport, to lead to significant adverse human health and/or environmental effects, such that global action is warranted.” *Id.* annex E.

74. *Id.* annex F.

evaluation that is distributed to parties and observers for feedback.⁷⁵ The Review Committee then recommends whether a substance should be regulated, and submits its recommendation to the parties for a vote.⁷⁶ The Convention obliges the parties to make every effort to reach consensus, but allows amendments to be adopted by a three-fourths majority of the parties if they are unable to reach a consensus.⁷⁷

But parties are not automatically bound by this vote as a matter of international law. At the time that a country becomes a party to the treaty, it may choose either an opt-in or an opt-out approach with respect to new listings.⁷⁸ Under an opt-in approach, “a country would not be bound [by an amendment] until it formally submitted an instrument indicating its acceptance of [the] amendment.”⁷⁹ In contrast, under an opt-out approach, silence would be interpreted as binding the party.⁸⁰ That is, under opt-out, “a country would be bound by an amendment unless it explicitly opted out through notification under the convention.”⁸¹ During the 2002 Senate hearing on the Stockholm Convention, the State Department indicated that the United States would choose the opt-in approach so that it would not be bound until it positively affirmed that it had accepted the listing of that chemical.⁸²

Implementing legislation was introduced that required the EPA to publish notice in the Federal Register and solicit comments whenever proposals for listing new chemicals under the Stockholm Convention advanced through any of the three stages that were prerequisites

75. See *id.* art. 8, para. 4(a) (requiring the Review Committee to make the listing proposal and the Committee’s evaluation available to all parties and observers and to solicit additional information from them); *id.* art. 8, para. 6 (requiring the Review Committee to take into account additional information received by parties and observers, to make a draft risk profile available to all parties and observers, and to complete the risk profile after taking into account comments from parties and observers); *id.* art. 8, para. 7(a) (requiring the Review Committee to invite parties and observers to submit information relating to the socio-economic factors relevant to the risk management decision).

76. *Id.* art. 8, para. 9.

77. *Id.* art. 21, para. 3.

78. *Id.* art. 25, para. 4; see also Peter L. Lallas, *The Stockholm Convention on Persistent Organic Pollutants*, 95 AM. J. INT’L L. 692, 706 (2001) (explaining the difference between an opt-in or an opt-out approach).

79. Lallas, *supra* note 78, at 706.

80. *Id.*

81. *Id.*

82. *Protocol on Persistent Organic Pollutants (POPs) Implementation Act: Hearing on S. 2118 Before the S. Comm. on the Env’t & Pub. Works*, 107th Cong. 9–10 (2002) (statement of Jeffrey M. Burnam, Deputy Assistant Sec’y for Env’t, Bureau of Oceans & Int’l Env’t. & Scientific Affairs, Dep’t of State).

for regulating new chemicals.⁸³ As one environmental group explained it, these notice-and-comment provisions were designed to “give interested stakeholders a timely opportunity to learn of the various stages of the international listing procedure,” and to “allow those stakeholders to provide relevant information to EPA, which EPA might elect to consider through the course of the international negotiations.”⁸⁴ Industry groups also supported the provision.⁸⁵

As Section A indicated, these notice-and-comment provisions are a key example of procedure-triggering provisions: under these provisions, subsidiary decisions taken on the international plane trigger the agency’s obligation to take certain procedural steps, but have no substantive regulatory consequences. Both the implementing legislation for the Convention on Psychotropic Substances and the proposed implementing legislation for the Stockholm Convention require agencies to provide notice and solicit comments whenever proposals for regulating new substances progress through the stages that might culminate in treaty regulation.⁸⁶ These provisions “delegate” to the international institutions to the extent that the timing of the decision-making process on the international plane determines when the agency will be obliged to supply notice and request comment. But because the requirements these provisions impose are purely procedural, they don’t delegate any substantive policymaking authority to agencies.⁸⁷

83. S. 1486, 108th Cong. § 502(e)(2), (3)(A)–(C) (2004).

84. Memorandum from Glenn Wiser, Senior Attorney, Center for Int’l Env’tl. Law (Apr. 5, 2004), available at http://www.ciel.org/POPs/Memorandum_Stockholm_5Apr04.html.

85. See, e.g., Mary Beth Polley, *Treaty Implementation Language Held Up by Constitutional Debate*, PESTICIDE & TOXIC CHEMICAL NEWS, Apr. 12, 2004, at 15 (referring to positive comments of Pat Donnelly, Executive Vice President of CropLife America). CropLife America is “the national trade organization representing the nation’s developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the U.S.” CropLife America, About CropLife America, http://www.croplifeamerica.org/design_06/viewer.asp?pageid=30 (last visited Apr. 2, 2007).

86. See 21 U.S.C. § 811(d)(2) (2000) (requiring the Secretary of State to provide notice and comment for adding a substance to the Convention on Psychotropic Substances); S. 1486, 108th Cong. § 505(d)(3) (2004).

87. If the agency failed to undertake notice and comment, a challenging party would presumably file a suit to “compel agency action unlawfully withheld” under the Administrative Procedure Act. 5 U.S.C. § 706(1) (2000). This is the route that plaintiffs used in *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221, 230–31 n.4 (1986). The plaintiffs there sued the Secretary of Commerce for violating legislation passed by Congress to ensure the effectiveness of the International Convention for the Regulation of Whaling. *Id.* at 228–29. The Secretary argued that the plaintiffs lacked a cause of action, but the Court concluded that this provision of the Administrative Procedure Act supplied it. *Id.* at 230–31 n.4.

The executive branch nevertheless objected to the provisions in the proposed implementing legislation for the Stockholm Convention on nondelegation grounds. Assistant Attorney General William Moschella indicated that the proposed legislation was problematic in part because the timing of the notice-and-comment period was to be determined by the actions of an international body.⁸⁸ The argument in this letter parallels an objection that President George W. Bush articulated in his signing statement accompanying the Clean Diamond Trade Act. The Clean Diamond Trade Act implements an internationally developed certification process to exclude “conflict diamonds” from international trade.⁸⁹ The implementing legislation provides that the Act shall take effect on the date that the President certifies to Congress that either the World Trade Organization granted an applicable waiver or the United Nations Security Council adopted an applicable resolution.⁹⁰ In his signing statement, the President objected that if this statutory provision “imposed a mandatory duty on the President to certify to the Congress whether either of the two specified events has occurred and whether either remains in effect, a serious question would exist as to whether [that provision] unconstitutionally delegated legislative power to international bodies.”⁹¹ Like the notice-and-comment provisions that implement the Stockholm legislation, the decisions made by the international bodies in the Clean Diamond Trade Act do not shape the content of the domestic regulation, but rather simply determine the time that it takes effect. In comparison to the Montreal Protocol example above, the domestic impact of the international bodies’ decisions is relatively trivial: instead of determining some of the *content* of regulations issued by the EPA, the decision determined when the agency would publish notice in the Federal Register.

If this nondelegation argument is correct, then agencies are precluded from a salutary measure that might mitigate the uneasiness that international decisionmaking can engender. Notice-and-

88. Letter from William Moschella, Assistant Attorney Gen., to Senator Tom Harkin (Mar. 25, 2004) [hereinafter Moschella Letter] (on file with author) (proposing an alternative notice-and-comment requirement that “is based on the calendar, relates to information that is publicly available, and is not linked to decisions in the international process”). The letter also argued that by requiring the administration, through the EPA, to report on the actions of an international body, the notice-and-comment provisions would interfere with the President’s sole authority over the United States’ negotiations with other countries. See *infra* Part IV.

89. 19 U.S.C. §§ 3901–3913 (Supp. 2005).

90. Pub. L. No. 108-19, § 15, 117 Stat. 631, 637 (2003).

91. Statement on Signing the Clean Diamond Trade Act, 39 WEEKLY COMP. PRES. DOC. 491 (Apr. 25, 2003).

comment procedures like the ones in the proposed implementing legislation can help make regulatory information easily accessible to all interested individuals in the United States, and broad participation is “likely to aid in the agencies’ policymaking by generating alternatives and documenting their impact on the various components of the collective social welfare.”⁹² Agencies will have less access to such information in the absence of such procedures.⁹³ While many of the groups that have participated in the debate about domestic implementation of the Stockholm Convention have sought observer status to attend the meetings of the parties,⁹⁴ it remains a very small circle. For starters, only those groups with resources to travel the globe can attend the meetings of the Stockholm Convention. Because the first such meeting took place in Punta del Este, Uruguay,⁹⁵ this is no small concern. The notice-and-comment proceedings would make available information about the Stockholm Convention to a wider group of industry representatives, public interest groups, journalists, academics, and scientists—many of whom have a stake or interest in the Stockholm Convention’s proceedings.⁹⁶

92. Stewart, *supra* note 31, at 1749; see also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 163 (1998) (“And while the process may not provide much opportunity for genuine deliberation about regulatory values, rulemaking does seem well-suited for the exchange of information about competing groups’ regulatory preferences and for agency-initiated compromise.”).

93. Richard Stewart has highlighted the difficulty public interests groups may have in having an effect on international policy:

[G]lobal regulatory decisionmaking often occurs in distant locations such as Basel or Geneva. Transnational “club” mechanisms in global regulatory regimes make it very difficult for concerned interests in the United States, and especially for less well-organized consumer, environmental, and other “public” interests, to acquire the information and to organize effectively in order to influence such decisions.

Stewart, *supra* note 5, at 82–83. Stewart also notes that “[p]rocess-based criticism[s]” of the domestic impact on international regulation focus on the “lack of adequate opportunity for effective access to information, participation and input in global regulatory decisionmaking on the part of affected global or domestic publics.” *Id.* at 71.

94. See Stockholm Convention, *supra* note 6, art. 19, para. 8 (authorizing any body or agency not a party to the Convention but qualified in matters covered by the Convention to be admitted to the Conference of the Parties as an observer).

95. Stockholm Convention on Persistent Organic Pollutants, Stockholm Convention COP-1, http://www.pops.int/documents/meetings/cop_1/meeting_info.htm.

96. Cf. David A. Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 COLO. J. INT’L ENVTL. L. & POL’Y 1, 17–22 (1996) (discussing the successful involvement of nongovernmental private sector advisors from industry groups and environmental organizations in the Organisation for Economic Co-operation and Development’s environmental activities).

III. UNCONSTITUTIONAL DELEGATIONS?

The textual hook for the nondelegation doctrine appears in Article I of the Constitution, which assigns “all legislative Powers herein granted [to the] Congress.”⁹⁷ Although skeptics of the doctrine point out that this language does not explicitly ban delegations of legislative power,⁹⁸ the Supreme Court has long insisted that a limit on legislative delegations exists.⁹⁹ Of course, the trick in policing delegations is drawing the line between those that are permissible and those that are not. After finding two violations in 1935, the Supreme Court soon gave up striking down statutes for excessive delegations.¹⁰⁰

The nondelegation doctrine does hold some intuitive appeal: it follows from the idea that Congress, as “the branch of our Government most responsive to the popular will,”¹⁰¹ ought to make the tough choices that passing legislation may require instead of passing them off to unelected bureaucrats.¹⁰² Moreover, many commentators see virtue in the way the nondelegation doctrine burdens legislation,

97. U.S. CONST. art. I, § 1.

98. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1729 (2002) (arguing that this clause offers no insight as to “whether an otherwise valid statutory grant of authority can ever ‘amount to’ a delegation of legislative authority”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“The Constitution does grant legislative power to Congress, but it does not in terms forbid delegation of that power . . .”).

99. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 38–40 (6th ed. 2006) (discussing the Court’s nondelegation decisions).

100. These two 1935 cases both arose out of the National Industrial Recovery Act (NIRA), a major piece of legislation designed to help ease the economic burdens imposed by the Depression. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (finding unconstitutional an executive order issued under the NIRA because it did not offer any intelligible standard for the Executive to follow); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (striking down a section of the NIRA as an impermissible delegation of legislative authority because it allowed the President “virtually unfettered” authority to change substantive legal rights under the guise of determining fair competition standards); see also BREYER ET AL., *supra* note 99, at 40–42 (discussing *Panama Refining* and *Schechter*). The Supreme Court hasn’t found any delegations unconstitutional since, but, as Cass Sunstein points out, a weaker form of the nondelegation doctrine survives in the form of interpretive canons. See Sunstein, *supra* note 98, at 329–37.

101. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

102. See Jack Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131, 145 (1985) (arguing that the nondelegation doctrine “remains our most effective barrier against massive, broad delegations of lawmaking power from the politically accountable legislature to unelected administrators”); see also Sunstein, *supra* note 98, at 319–20 (noting that enthusiasts of the nondelegation doctrine point to constitutional purpose and structure as well as the political accountability of Congress as support for the doctrine). But see Posner & Vermeule, *supra* note 98, at 1748 (arguing that even when Congress delegates power it still remains accountable: “citizens will hold Congress responsible for the poor design of the agency, or for giving it too much power or not enough, or

thereby protecting individual liberty by ensuring that “national governmental power may not be brought to bear against individuals without a consensus, established by legislative agreement on relatively specific words, that this step is desirable.”¹⁰³ Finally, “the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.”¹⁰⁴

Although some commentators have questioned the relevance of domestic nondelegation analysis in the international arena,¹⁰⁵ this Article argues that where the focus of the inquiry is the validity of implementing legislation, the domestic nondelegation doctrine—which measures whether Congress has failed to supply enough content in the legislation it passes—is exactly appropriate. Section A shows that, under current law, no delegation problems plague either content-assimilation or procedure-triggering provisions. Section B evaluates and ultimately rejects the normative argument that courts should employ a more stringent version of the domestic nondelegation doctrine to evaluate international delegations on account of the characteristics of international institutions to which Congress has “delegated” authority.

A. *Assessing Delegations Under Current Law*

Applying the nondelegation doctrine as it stands today, there is no support for the argument that Congress inappropriately surrenders its legislative authority by pre-committing agencies to implementing subsidiary decisions made by parties to a regulatory treaty. The fact that the implementing legislation depends on the decisions of a body that is not part of the federal government does not change this analysis—nor does the fact that the implementing legislation prospectively assimilates the decisions of international institutions. These conclusions are fairly straightforward based on the guideposts that existing case law supplies.

The most familiar type of nondelegation argument—and one that has reached the Supreme Court on multiple occasions—is that Congress has delegated too much discretion to the executive branch. As the doctrine stands today, Congress’s sole obligation is to supply

for giving it too much money or not enough, or for confirming bad appointments, or for creating the agency in the first place”).

103. Sunstein, *supra* note 98, at 320.

104. *Indus. Union Dep’t*, 448 U.S. at 686 (Rehnquist, J., concurring).

105. See, e.g., David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1701 (2003).

the executive branch to which it is delegating an “intelligible principle.”¹⁰⁶ The Court is explicit that “intelligible principle” means something less than supplying agencies with a determinate criterion for drawing lines between permissible and prohibited conduct.¹⁰⁷ The toothlessness of the nondelegation doctrine is perhaps best illustrated by the Supreme Court’s conclusion that the congressional directive to regulate in the “public interest” supplies the requisite intelligible principle.¹⁰⁸ Although the Court has not explicitly disavowed the possibility that it might find a delegation unconstitutional, the doctrine today allows Congress to legislate in rough sketches without providing agencies much guidance about how to make the tough choices that implementation will clearly require.

As between the legislative and executive branch, Congress has supplied the requisite intelligible principle in both the procedural provisions and the content-incorporation provisions described above. In *Mistretta v. United States*,¹⁰⁹ the Supreme Court concluded that Congress had more than satisfied the requirements of the nondelegation doctrine in legislation creating the United States Sentencing Commission, pointing out that Congress had charged the Commission with specific goals and specific tools for achieving them.¹¹⁰ Congress does the same when it directs an agency to implement a treaty: the underlying policy goals and tools for achieving them are clear—they are laid out in the corresponding treaty. The range of possible outcomes is fairly predictable at the time that Congress is passing its implementing legislation. Additionally, reviewing courts would have no difficulty ascertaining whether the will of Congress has been obeyed.¹¹¹

That said, this analysis does not identify what is troubling about the legislation—the role that it assigns to international institutions. The intelligible-principle analysis does not quite fit when evaluating a “delegation” to an international body. Looking for an intelligible principle makes sense when Congress is delegating to an agent. But when Congress passes treaty implementing legislation, the interna-

106. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“[W]hen Congress confers decisionmaking authority upon agencies *Congress* must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))).

107. *Id.* at 475.

108. *Id.* at 474.

109. 488 U.S. 361 (1989).

110. *Id.* at 374.

111. *See Indus. Union Dep’t, AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring).

tional body is not Congress's agent in the same way that an administrative agency is: unlike an administrative agency, an international body is under no obligation to pay any heed to Congress's instructions, no matter how detailed they are.¹¹² A different set of cases, following from two largely obscure Supreme Court cases, proves more helpful in assessing procedure-triggering and content-assimilation provisions. In these cases, Congress has attached some kind of legal significance to the decision of an entity outside of the federal government.

1. *Evaluating Procedure-Triggering Provisions*

The Supreme Court has explicitly upheld congressional legislation where the scope of the agency's regulatory authority depended in part upon the vote of a group of private individuals. In *Curran v. Wallace*,¹¹³ decided in 1939, the Supreme Court upheld against a nondelegation challenge a statute that conditioned the Secretary of Agriculture's authority to regulate on the consent of a supermajority of regulated entities.¹¹⁴ The challenged statute—the Tobacco Inspection Act—had authorized the Secretary of Agriculture to “designate” certain tobacco markets if two-thirds of the tobacco growers selling at that market consented.¹¹⁵ Once the Secretary designated a market, the Act required tobacco sold there to be inspected and certified according to standards set by the Secretary.¹¹⁶ The Court found that

the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market “unless two-thirds of the growers voting favor it.” . . . Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions.¹¹⁷

The Court affirmed this result later the same year when it relied on *Curran* to uphold an analogous provision regulating the dairy industry

112. Although they are not obliged to, decisionmakers on the international plane are likely to pay some attention to the preferences of the United States as well as other parties to the treaty. Because the executive branch represents the government on the international stage, however, Congress's input would be diminished.

113. 306 U.S. 1 (1939).

114. *Id.* at 15–18.

115. *Id.* at 6.

116. *Id.*

117. *Id.* at 15–16.

against a nondelegation challenge in *United States v. Rock Royal Co-operative, Inc.*¹¹⁸

This analysis is right on point: when Congress directs an agency to supply notice and solicit comments whenever an international institution undertakes a specified action, the content of Congress's directive to the agency does not vary, but an entity outside the federal government can pull an on/off switch. When it enacts such contingent legislation, the Court has found, Congress is exercising its authority rather than delegating it.¹¹⁹

Curin does not cover content-assimilation provisions—those where Congress pre-commits agencies to implementing the subsidiary decisions of the international institution. For this type, the decision made on the international level shapes some of the content of the agencies' actions instead of just being an on/off switch triggering an agency obligation to provide notice and solicit comments.

2. *Evaluating Content-Assimilation Provisions*

Another line of cases addresses this type of legislative provision. In *United States v. Sharpnack*,¹²⁰ the Supreme Court upheld a statute that incorporates new content over time, even though that content was determined by an entity outside the federal government. In *Sharpnack*, the Supreme Court considered a delegation challenge to the Federal Assimilative Crimes Act, which provides that in federal enclaves, including air force bases, “acts not punishable by any enactment of Congress are punishable by the then effective laws of the State in which the enclave is situated.”¹²¹ The statute explicitly assimilated both existing and future state laws, and the Court upheld it against a nondelegation challenge:

The basic legislative decision made by Congress is its decision to conform the laws in the enclaves to the local laws as to all offenses not punishable by any enactment of Congress. Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves.

118. 307 U.S. 533, 577–78 & n.64 (1939).

119. Julian Ku reported that not all courts have followed the approach set out in *Curin*. See Ku, *supra* note 4, at 118 n.167 (citing *Confederated Tribes of Siletz Indians v. United States*, 841 F. Supp. 1479, 1491 (D. Or. 1994)). The reasoning of the outlier case he identified was rejected on appeal. See *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 694–96 (9th Cir. 1997).

120. 355 U.S. 286 (1958).

121. *Id.* at 287.

Having the power to assimilate the state laws, Congress obviously has like power to renew such assimilation annually or daily in order to keep the laws in the enclaves current with those in the States. That being so, we conclude that Congress is within its constitutional powers and legislative discretion when, after 123 years of experience with the policy of conformity, it enacts that policy in its most complete and accurate form. Rather than being a delegation by Congress of its legislative authority to the States, it is a *deliberate continuing adoption* by Congress for federal enclaves of such unpreempted offenses and punishments as shall have been already put in effect by the respective States for their own government.¹²²

Congress certainly has the authority to adopt the subsidiary decisions of regulatory treaty parties *after* those actions have been taken; *Sharpnack* says that under those circumstances Congress can pass a statute that assimilates—or continually adopts—those actions.

A number of circuit court cases have extended this reasoning to the international context, supporting the conclusion that the content-incorporation provisions on which this Article focuses would likewise survive scrutiny under the nondelegation doctrine. These cases concern the Lacey Act,¹²³ a statute that prospectively assimilates the decisions of governmental bodies outside the United States by making commercial trade in fish, wildlife, or plants taken in violation of *foreign* law a crime.¹²⁴ One circuit found that “foreign law” even includes regulations passed by bureaucracies in foreign governments.¹²⁵ It is true, as one commentator noted, that the Supreme Court has not addressed the constitutionality of this provision of the Lacey Act.¹²⁶ But this may be in part because the circuit courts that have considered nondelegation objections to the Lacey Act have found them meritless.¹²⁷ Two have gone so far as to label such challenges “frivolous.”¹²⁸

122. *Id.* at 293–94 (emphasis added).

123. 16 U.S.C. §§ 3371–3778 (2000).

124. *Id.* § 3772(a); *see also* Ku, *supra* note 4, at 105–06 (discussing Lacey Act cases); Swaine, *supra* note 15, at 1520–21 (same).

125. *United States v. Lee*, 937 F.2d 1388, 1391–92 (9th Cir. 1991).

126. Ku, *supra* note 4, at 106.

127. *E.g.*, *United States v. Hansen-Sturm*, 44 F.3d 793 (9th Cir. 1995); *United States v. Riosco*, 845 F.2d 299 (11th Cir. 1988); *United States v. Molt*, 599 F.2d 1217 (3d Cir. 1979).

128. *See Hansen-Sturm*, 44 F.3d at 795 (“[T]he contention that the Lacey Act is an unconstitutional delegation of congressional authority is frivolous.”); *Molt*, 599 F.2d at 1219 n.1 (“Defendants’ objections to the constitutionality of the Lacey Act were not ruled upon by the District Court, but are patently frivolous.”).

Neither *Sharpnack* nor the Lacey Act cases address the limits of Congress's authority to legislate by assimilating other sources of law. Indeed, *Sharpnack* is open to criticism that the "deliberate continuing adoption" language is meaningless: the constitutionality of what Congress did cannot sensibly depend on a hypothetical statute that Congress *might have* passed.

In analyzing such statutes, courts are looking for the same thing that they look for when Congress delegates to an executive branch agency—some indication that Congress itself made an affirmative policy choice. Thus, in *Currin*, the Supreme Court declared that "it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application,"¹²⁹ and in *Sharpnack* the Court spoke of the "basic legislative decision made by Congress."¹³⁰ The Eleventh Circuit's Lacey Act decision, echoing the Supreme Court's decisions in *Currin* as well as in *Sharpnack*, likewise searched for evidence that Congress had made an affirmative policy choice in deciding to assimilate foreign law:

Congress stated its concern with the environmental and economic effects of the illegal wildlife trade, as well as its desire to encourage state and foreign governments in their protection of wildlife and plants. To accomplish the dual purpose of eliminating this illegal trade and of protecting wild flora and fauna, Congress has made it a United States crime to take, to sell, or to transport wildlife taken in violation of any foreign law relating to wildlife. Congress, itself, has set out the penalties for violation of these Lacey Act provisions. Thus, Congress has delegated no power, but has itself set out its policies and has implemented them.¹³¹

The breadth of the assimilation also helps to assess whether Congress made the requisite affirmative policy choice. Justice Scalia observed as much in the context of analyzing the nondelegation claim in *Whitman v. American Trucking Ass'ns*.¹³² Justice Scalia noted that the broader the legislation's reach and the greater its impact, the more is demanded of Congress: "While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regula-

129. *Currin v. Wallace*, 306 U.S. 1, 16 (1939) (emphasis added).

130. *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) (emphasis added).

131. *Rioseco*, 845 F.2d at 302 (citations omitted).

132. 531 U.S. 457 (2001).

tions governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy.”¹³³

B. Should International Delegations Meet a Different Standard?

Although courts did not evaluate the characteristics of the entities whose decisions congressional statutes took into account in any of the cases described in the previous Section,¹³⁴ the instinct that something is different when entities are foreign or international is widespread. Two commentators—Julian Ku and Edward Swaine—argue that, as a normative matter, delegations to international bodies should be analyzed differently from domestic delegations due to the characteristics of international bodies. These distinctions make delegations to international bodies even more troubling, they argue, than delegations to states or private parties.¹³⁵ Ku argues that these distinctions justify a revival of the nondelegation doctrine,¹³⁶ while Swaine makes the more modest argument that these distinctions merit attention.¹³⁷

In articulating what they have found troubling about international delegations, these commentators have had in mind the entire universe of institutional arrangements that can amount to “international delegations.” As the introduction noted, commentators have discerned troubling international delegations in any arrangement that vests “continuing lawmaking authority in an international institution.”¹³⁸ This Article has focused on what could be classified as international delegation of legislative authority. Commentators have identified both other means of delegating legislative authority and delegations of other types of authority. For example, commentators have identified international delegations of legislative authority in the absence of any statute passed by Congress where courts interpret the subsidiary decisions of international bodies to be self-executing. The international body would be “legislating” because despite the absence

133. *Id.* at 475 (citation omitted).

134. Perhaps the most extreme example in this regard is *United States v. Lee*, a Lacey Act case in which the Ninth Circuit saw no constitutional obstacle to a criminal statute assimilating the content of foreign regulations issued by a foreign bureaucracy. 937 F.2d 1388, 1391–92 (9th Cir. 1991).

135. See Ku, *supra* note 4, at 121–30; Swaine, *supra* note 15, at 1554–66.

136. Ku, *supra* note 4, at 121 (arguing that “peculiar characteristics of international delegations . . . support adopting a more formalist analysis of international delegations than the Court has adopted in the state and domestic context”).

137. More specifically, Swaine suggests that he does “not attempt any dramatic revival of the nondelegation doctrine,” but only seeks “to explain why international delegations are distinctive in principle from ordinary legislative acts and deserve evaluation as such.” Swaine, *supra* note 15, at 1556.

138. See *supra* notes 15 & 24 and accompanying text.

of relevant congressional action, courts in the United States would be obliged to enforce the action in exactly the same way that courts are obliged to enforce statutes.¹³⁹ “[B]ecause these agreements increasingly seek to regulate areas of private party conduct,” argues Julian Ku, “these agreements can serve as an alternate mechanism for domestic legislation.”¹⁴⁰ As for delegating other types of authority, commentators have identified delegations of executive, judicial, and treaty-amending authority, among others.¹⁴¹ As an example of this last type of delegation, for example, commentators have frequently cited the World Trade Organization (WTO) as involving a delegation of treaty-amending authority because the WTO permits a three-fourths majority of member states to adopt binding interpretations of the terms of various trade agreements, and the power to interpret those agreements can amount to the power to amend the terms of the original agreement.¹⁴²

The concerns that may loom large when considering the entire universe of potential international delegations diminish considerably when the focus is limited to the combination of regulatory treaties and implementing legislation on which this Article focuses. This Section examines three arguments for reinvigorating the nondelegation doctrine. The first two concern features of international institutions: their lack of accountability and the United States’ limited control over these institutions. Neither justifies a stricter application of the nondelegation doctrine to either content-assimilation or procedure-triggering provisions. Finally, this Section turns to the argument that

139. See Ku, *supra* note 4, at 101 (noting that “just as a legislative act raises delegation concerns if it does not specify standards constraining an agency’s discretion, a broadly worded international agreement could effectively transfer the power to make international agreements, which is sometimes also the power to make binding federal law, to an international organization”); see also Swaine, *supra* note 15, at 1515–18 (characterizing powers delegated to international institutions as “resembl[ing] [powers] that the U.S. Congress might exercise under the Commerce Clause”).

140. Ku, *supra* note 4, at 101. So far this type of delegation of legislative authority to an international body is theoretical rather than actual; commentators have described many examples of international institutions exercising authority that resembles power which Congress might itself exercise, but they have not offered examples of the next step—decisions to treat them as self-executing. Cf. Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1595 (2003) (proposing treating such decisions as non-self-executing on U.S. courts).

141. See *supra* note 24.

142. See Ku, *supra* note 4, at 96–99. But see Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 70 LAW & CONTEMP. PROBS. (forthcoming 2007) (manuscript at 10–11), available at <http://www.law.duke.edu/cicl/pdf/dsworkshop/guzman.pdf> (arguing that “despite the formal voting rules, WTO decisions are, and as far as anybody can tell will continue to be, the product of consensus; giving every state the ability to prevent a rule change”).

international delegations must be constrained because they upset the balance of powers among the federal branches, and argues that the treaty-implementing provisions on which this Article focuses in fact help to maintain a balance of powers.

1. *International Institutions' Lack of Accountability*

Both supporters and skeptics of international regulatory regimes have articulated concerns about the accountability of international institutions.¹⁴³ Decisionmaking at the international level frequently lacks transparency,¹⁴⁴ although treaty-based regimes are better in this regard than less formal means of international decisionmaking because they “operate in significant part through formal, public legal acts, and typically make decisions through established rules and processes.”¹⁴⁵ Moreover, the multiplicity of actors makes assigning responsibility for a given outcome particularly difficult: “decisions will often be attributable to domestic, foreign, and international actors together. For good reason—often these actors must act in common.”¹⁴⁶ In contrast, as John Yoo has pointed out, state governments are much more accountable: “State officials are still responsible to the people of a state; indeed, because of their closer proximity to the electorate, state officials may be even more responsive to their constituents than federal officials.”¹⁴⁷

International institutions' lack of accountability is particularly troubling when an international delegation takes place without congressional action. But, as Curtis Bradley has suggested, congressional

143. See, e.g., Kingsbury, Krisch & Stewart, *supra* note 25, at 26 (“In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts.”); see also Ku, *supra* note 4, at 121–26. But see Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 37 (2005) (conceding the weakness in democratic accountability of international bodies but arguing that multilateral institutions are highly constrained by other accountability mechanisms, including supervisory accountability by member states, and fiscal accountability, since multilateral organizations are subsidized by member states).

144. See Bradley, *supra* note 140, at 1558 (noting that the lack of transparency in international decisionmaking may increase concerns about accountability).

145. Stewart, *supra* note 5, at 69; see also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 217–30 (2004).

146. Kingsbury, Krisch & Stewart, *supra* note 25, at 54.

147. John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 122 (1998).

action can mitigate this concern.¹⁴⁸ After all, once Congress has implemented a treaty, it carries a formidable democratic pedigree: the treaty's norms have become the law of the land only after securing approval from the President, at least two-thirds of the Senate, *and* a majority of the members of the House of Representatives. As Eric Posner and Adrian Vermeule note, "Congress is accountable when it delegates power."¹⁴⁹ If the recipient of the power exercises it poorly, Congress can step back in with new legislation. In fact, Congress often uses that power in the domestic context,¹⁵⁰ and, as Part III.B.3 will explain in more detail, there is no reason to believe that Congress will hesitate to use that power when it's implementing an international treaty.

Although commentators correctly observe that the Supreme Court has expressed concern when legislation muddles the lines of authority for policymaking,¹⁵¹ the Court has upheld Congress's creation of independent agencies where those lines are quite tangled. Take, for example, the United States Sentencing Commission. The Commission's output is to some extent the product of each of the three branches: members of the Sentencing Commission are appointed by the President with the advice and consent of the Senate, some of whom must be federal judges on a list submitted to the President by the Judicial Conference of the United States.¹⁵² The regulations promulgated by the Commission are binding but can, of course, be overturned by Congress.¹⁵³

2. *Control over International Decisionmaking*

In explaining why international delegations trouble them, some commentators point to the inability of the United States to control decisionmaking or outcomes at the international level. Ku emphasizes the executive branch's limited ability to subject international organizations to oversight; "[i]ndeed," he writes, "one of the main goals of creating more effective international organizations is to limit their control by member states."¹⁵⁴ In a similar vein, Swaine emphasizes that the United States is but one of many principals shaping the out-

148. See Bradley, *supra* note 140, at 1587 (arguing that if decisions by international bodies are treated as non-self-executing, the decisions will only be binding if they are implemented by Congress).

149. Posner & Vermeule, *supra* note 98, at 1748 (emphasis omitted).

150. *Id.*

151. See Ku, *supra* note 4, at 123.

152. *Mistretta v. United States*, 488 U.S. 361, 368 (1989).

153. See *id.* at 367.

154. Ku, *supra* note 4, at 124.

come at the international level.¹⁵⁵ While these arguments about the decisionmaking processes at international institutions may bear on other types of international delegations such as the self-executing subsidiary decisions described above, it's not clear why this factor is at all relevant to assessing implementing legislation passed by Congress.

Indeed, the fact that the executive branch is one of the principals directing decisionmaking at the international institutional level seems to make statutory assimilations of those decisions *less* troubling than delegations to states or private actors because the President continues to play an important role in the international decisionmaking process. Indeed, as Louis Henkin points out, “[i]n the few organizations that formally have power to make binding regulations, the United States has either a veto, the benefits of ‘weighted voting,’ or other special voting arrangements that render it difficult for any regulation to be established without U.S. concurrence.”¹⁵⁶

Even where the international institution might make a substantive decision over the objections of the United States, the United States always retains the option of breaching the treaty¹⁵⁷ or withdrawing from the treaty altogether. Regulatory treaties by their own terms often give parties the right to terminate their participation, typically some specified time after furnishing proper notice.¹⁵⁸ Some commentators object that the costs of exercising this option are so high that it is rarely a realistic one.¹⁵⁹ In fact these costs vary: the costs of withdrawing from a regulatory treaty like the Stockholm Convention

155. Swaine, *supra* note 15, at 1561 (“Once an international institution has been brokered, moreover, the U.S. government remains one among multiple principals, or becomes part of a collective principal, making it more difficult to correct any drift from its preferences.”); *see also* Bradley, *supra* note 140, at 1558 (“By transferring legal authority from U.S. actors to international actors—actors that are physically and culturally more distant from, and not directly responsible to, the U.S. electorate—these delegations may entail a dilution of domestic political accountability.”).

156. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 263 (2d ed. 1996).

157. *Id.* at 211 (noting that international law “recognizes the power—though not the right—of a state party to break a treaty and pay damages or abide other international consequences”).

158. *Id.*; *e.g.*, Stockholm Convention, *supra* note 6, art. 28 (permitting withdrawal with one year’s notice at any time after the Convention has been in effect for three years); Montreal Protocol, *supra* note 10, art. 19 (permitting withdrawal after one year’s notice at any time after four years of assuming specified obligations); Convention on Psychotropic Substances, *supra* note 32, art. 29 (permitting denunciation after up to one year’s notice any time after the Convention has been in force for two years).

159. *See, e.g.*, Swaine, *supra* note 15, at 1540 (“On the international plane, withdrawal is costly by design and infrequently done.”).

are certainly lower than the costs of withdrawing from the United Nations,¹⁶⁰ making the availability of this option analytically relevant.

3. *Maintaining a Balance of Federal Powers*

Another problem commentators have identified with international delegations is that they shift the balance of powers among the federal branches in favor of the executive branch.¹⁶¹ In fact, the type of implementing legislation on which this Article focuses is part of the solution rather than part of the problem. Congress's role in treaty implementation has been termed "a critical check on executive powers in foreign affairs."¹⁶² More stringent enforcement of the nondelegation principles would impose costs on congressional actions—and would make it harder for Congress to exercise a key check on executive power.

While Congress's power is attenuated in the foreign affairs arena,¹⁶³ Congress does not lack authority to implement regulatory treaties. As a textual matter, regulation of production or consumption of ozone-depleting chemicals, persistent organic pollutants, or psychotropic substances falls within the core of Congress's ability to regulate interstate commerce under Article I, Section 8 of the Constitution. There is no question that Congress could pass legislation imposing the substantive requirements eventually demanded by subsidiary decisions taken at the international level in the absence of those subsidiary decisions.¹⁶⁴

Moreover, in contrast to other foreign affairs areas, Congress doesn't lack incentives to involve itself in implementing international

160. See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1608–09 (2005) (suggesting that withdrawals from certain treaties "are likely to fall below the political radar screen").

161. See Bradley, *supra* note 140, at 1558–59.

162. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1986 (1999).

163. Swaine, *supra* note 15, at 1558–59.

164. Because Congress clearly has the authority to regulate in these areas even in the absence of a treaty, the implementing legislation does not raise federalism concerns that may be at issue with other treaties. In *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court concluded that at least some federalism limits on Congress's legislative authority fall away when Congress uses its treaty power. See *id.* at 416, 431–35 (holding that the Migratory Bird Treaty Act of 1918 was not an unconstitutional encroachment of state power because the nature of the problem addressed in the treaty demanded concerted international action). Scholars continue to debate the extent to which federalism does and ought to limit the types of international arrangements in which the United States participates. E.g., Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

regulatory treaties. As each of the examples in Part II make clear, Congress is dealing primarily with the intra-territorial effect of the various regulatory treaties. The regulated entities are the constituents of individual members who should have no special trouble securing attention from Congress.¹⁶⁵

There is one sense in which Congress's authority is more limited when it writes legislation that prospectively incorporates the decisions of international bodies than when Congress delegates to executive branch agencies. In the context of decisions by executive agencies, Congress can rely on tools at its disposal other than writing new legislation—such as holding oversight hearings—to call those agencies to account. But this oversight authority is lacking whenever Congress enacts statutes that include content-assimilation provisions. After passing the Federal Assimilative Crimes Act at issue in *Sharpnack*, for example, Congress could not exercise such authority over state legislatures,¹⁶⁶ and the same goes for the foreign governments whose laws the Lacey Act assimilates.¹⁶⁷ Because Congress is assimilating the decisions of bodies that are not its agents—the assimilation statutes are likely to play a fairly trivial role, if any at all, in the decisionmaking processes of the international bodies. If the decisions made by international bodies displease members of Congress, their only option is to write new legislation.

Resurrecting a more stringent version of the nondelegation doctrine risks eliminating Congress from having any role at all in determining whether and how to implement subsidiary decisions. Take, for example, the Montreal Protocol and its provision for the parties to hold meetings at regular intervals.¹⁶⁸ In practice, the parties have held these meetings annually (and, in a couple of exceptional cases, more than once per year).¹⁶⁹ If Congress supports implementing those subsidiary decisions but is constitutionally prohibited from enacting legislation that pre-commits agencies to doing so, it will retain at least two options. First, Congress might limit itself to passing legislation directing the EPA to implement decisions that have already been made. But the chance that Congress will promptly react and respond each time such a decision is made is—at best—slim. Second,

165. See *supra* note 85 and accompanying text (citing example of regulated entity's engagement in debate over proposed implementing legislation).

166. See generally *United States v. Sharpnack*, 355 U.S. 286 (1958).

167. See *supra* text accompanying notes 124–128.

168. Montreal Protocol, *supra* note 10, art. 11, para. 1.

169. U.N. Env't Programme, Meetings of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, http://ozone.unep.org/Events/Meetings_MOP.shtml (last visited Apr. 5, 2007).

Congress might pass legislation that authorizes, but doesn't require, the EPA to implement subsidiary decisions. By passing such legislation Congress would remove itself from having any role in deciding whether such decisions should be implemented or not; the result would leave implementation decisions exclusively in the hands of the executive branch.

IV. BROADER SEPARATION OF POWERS CONCERNS REGARDING DELEGATIONS

The last section argued that treaty-implementing legislation can have salutary effects on the balance of power. This Part considers the possibility that Congress has overreached. After all, the nondelegation doctrine is not the only limitation on Congress's ability to delegate authority to other entities—broader separation of powers principles impose another.¹⁷⁰ These principles are relevant in evaluating the role of international bodies in both content-assimilation and procedure-triggering provisions; both Justice Scalia and academic commentators have argued that these separation of powers concerns are heightened where Congress has delegated to a body other than an executive branch agency. This Part argues that neither type of implementing provision violates separation of powers because neither type of provision reflects an aggrandizement of congressional authority or an encroachment on executive authority.

In evaluating whether statutory arrangements violate the separation of powers, the Supreme Court's analysis has focused on encroachment and aggrandizement. In *Morrison v. Olson*,¹⁷¹ for example, the Court rejected a separation of powers challenge to a statute that "allows for the appointment of an 'independent counsel' to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws."¹⁷² The Supreme Court observed that the statute "does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch,"¹⁷³ does not work "any judicial usurpation of properly executive func-

170. Thus, in *Mistretta v. United States*, the Supreme Court turned to separation of powers arguments after concluding that the statute creating the federal Sentencing Commission did not violate the nondelegation doctrine. 488 U.S. 361, 380 (1989). Likewise, in *Bowsher v. Synar*, the Court identified as the problem not that Congress's statute lacked an intelligible principle, but that Congress had impermissibly encroached on the President's executive authority. 478 U.S. 714, 734 (1986).

171. 487 U.S. 654 (1988).

172. *Id.* at 660.

173. *Id.* at 694.

tions,”¹⁷⁴ and does not impermissibly undermine executive branch powers.¹⁷⁵

Both Harold Krent and the Office of Legal Counsel have argued that delegations outside of the federal government may pose both encroachment and aggrandizement problems.¹⁷⁶ Krent points out that “if the delegates outside the federal government are accountable instead to Congress, Congress may be able to keep the reins of power without facing direct electoral accountability for the subsequent formulation of policy.”¹⁷⁷ He also argues that such delegations may encroach on the President’s role in administering the execution of legislative enactments because such delegations don’t allow the President to appoint or remove the officials who are making the key policymaking decisions¹⁷⁸—aspects of executive control that both *Morrison* and *Mistretta* highlight.

A. Congressional Aggrandizement

Even though it allows an entity outside the federal government to determine certain aspects of agency action, implementing legislation that takes into account regulatory treaties’ subsidiary decisions does not reflect congressional aggrandizement. The key reason is that the international institutions at issue simply are not agents of Congress in any meaningful sense.

To illustrate how Congress might aggrandize itself by delegating to an entity outside the federal government, Krent sets out a hypothetical in which Congress writes a statute delegating authority to the head of the Brookings Institution, a highly regarded think tank with considerable economic expertise, to make certain key budgetary decisions.¹⁷⁹ He points out that Congress would be the only entity that could remove Brookings from power—it could do so by passing a new statute undoing the delegation.¹⁸⁰ Although Congress wouldn’t re-

174. *Id.* at 695 (emphasis omitted).

175. *Id.*

176. See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. REV. 62, 67 (1990); The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 176 (1996) (noting that the “anti-aggrandizement principle” prohibits Congress from assuming executive functions, and further explaining that “legislation delegating federal authority to state or local officials or private persons could undermine the executive branch’s ability to carry out its functions”).

177. Krent, *supra* note 176, at 67.

178. *Id.*

179. *Id.* at 79. This hypothetical is a variation of the statute at issue in *Bowsher v. Synar*, 478 U.S. 714 (1986).

180. Krent, *supra* note 176, at 79.

tain any other oversight authority, “[t]he delegate would know that it owed its authority to Congress, and would likely conform its actions in light of that knowledge,” thus allowing Congress to aggrandize itself by directing not only the passage of laws but also their execution.¹⁸¹

This argument doesn’t extend to the subsidiary decisions at issue in this Article. As discussed earlier, the international bodies aren’t quite agents of Congress.¹⁸² Unlike the Brookings Institution in the above hypothetical, the threat of Congress’s disapproval is not likely to have any significant effect on the international decisionmakers.

B. Encroaching on Executive Authority

In evaluating whether Congress had gone too far in interfering with executive authority in the context of the independent counsel statute at issue in *Morrison v. Olson*, the Supreme Court asked whether the statute upset the constitutional balance between the branches by impeding the executive branch’s ability to accomplish its “constitutionally assigned functions.”¹⁸³ Having identified the relevant function as supervising prosecution of crimes, the Court then looked to the ways in which the statute reduced the executive branch’s capacity to do so.¹⁸⁴ The Court concluded that the Attorney General and the President retained enough control to satisfy constitutional requirements, giving three reasons: first, the independent counsel could be fired for good cause; second, no independent counsel could be appointed without the Attorney General’s action; and third, “the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not ‘possible’ to do so.”¹⁸⁵

The key constitutionally assigned functions at issue here are the President’s powers to negotiate and make treaties.¹⁸⁶ The precise contours of the President’s negotiation authority are not clear. The

181. *Id.*

182. *See supra* Part III.B.3.

183. 487 U.S. 654, 695 (1988) (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

184. *Id.* at 691, 695–96.

185. *Id.* at 696.

186. Louis Henkin explains the distinct roles of the Executive:

[T]he President wears two different, distinct hats. His Executive power includes the duty to take care that the laws, including treaties and customary international law insofar as they are part of U.S. law, be faithfully executed. But the President, we know, also has independent constitutional authority in foreign affairs as Executive, as treaty-maker, as sole organ, and as Commander in Chief.

HENKIN, *supra* note 156, at 242 (internal quotation marks omitted).

most relevant provision is Article II, Section 2: the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹⁸⁷ No form of the verb “negotiate” made its way into the text. Nor has the Supreme Court said very much about it.¹⁸⁸ Nevertheless, the core of the President’s “sole organ” power is fairly uncontroversial: the President, as head of the executive branch, has a monopoly over formal diplomatic communications. Only the President or his agents in the executive branch may speak for the United States.¹⁸⁹ It is also undisputed that Congress may not direct the President to vote a certain way in an international forum. Although Presidents have argued that Congress unconstitutionally interferes with the presidential role as negotiator and maker of treaties by directing them to consult “with private parties in connection with the conduct of international relations” or to disclose certain kinds of information about international negotiations,¹⁹⁰ courts have not addressed the issue and Congress continues to write and enact legislation with both types of provisions,¹⁹¹ so their constitutionality remains unsettled.

Even if one accepted these contested executive branch claims regarding consultation or information disclosure, to consider procedure-triggering provisions in the implementing legislation an unconstitutional interference with the President’s constitutionally assigned negotiation authority is to take a staggeringly broad view of both the scope of exclusive executive authority and of what constitutes interference with it. Take, for example, the procedure-triggering pro-

187. U.S. CONST. art. II, § 2, cl. 2.

188. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 68–69 (1990) (referring to the “relatively few *judicial decisions* that have construed the basic constitutional structure and text with regard to foreign-affairs matters over the past two centuries”).

189. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1082 (2000) (explaining that “all formal diplomatic communications with foreign states are to be under [the President’s] exclusive control . . . not only the states, but Congress itself, is entirely excluded from the field”).

190. Moschella Letter, *supra* note 88, at 2–3.

191. *Id.* at 3. For example, the 2002 Foreign Operations, Export Financing, and Related Programs Appropriations Act imposed the following requirement upon the Secretary of State before giving aid to the Colombian Armed Forces: “At least 10 days prior to making the determination and certification required by this section, and every 120 days thereafter during fiscal year 2002, the Secretary of State shall consult with internationally recognized human rights organizations regarding progress in meeting the conditions contained in subsection (a).” Pub. L. No. 107-115 § 567(b), 115 Stat. 2118. Subsection(a), in turn, conditions foreign aid to the Colombian Armed Forces only upon certain findings. *Id.* § 567(a); see also Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, 38 WEEKLY COMP. PRES. DOC. 49, 50 (Jan. 10, 2002) (objecting to section 567(b)).

visions in the proposed implementing legislation for the Stockholm Convention.¹⁹² As described earlier, these provisions would require the EPA to supply notice and request comment whenever a proposal for regulating a new substance as a persistent organic pollutant advances through the three-stage process set out in the Stockholm Convention.¹⁹³ The most critical feature of the notice requirement in the proposed implementing legislation is that it does not require the disclosure of any confidential information that might hamper the United States' ability to pursue its interests as a party to the Stockholm Convention. To the contrary, the notice requirement demands release of information *that is available to every party to the treaty*.¹⁹⁴ Moreover, under the Stockholm Convention, organizations with observer status have the same access to information as parties to the treaty.¹⁹⁵ Those observer organizations include public interest and industry groups that have been active in the implementation debate in the United States,¹⁹⁶ which means that the notice-and-comment provisions will require disclosure *only* of information to which the most interested of the interest groups already have access. As for the comment provisions in the proposed implementing legislation, they leave complete discretion to the executive branch to figure out how to best make use of them; the statutory provisions don't require the EPA to act on the received comments in any way.¹⁹⁷

The content-assimilation provisions likewise do not encroach on executive authority. It is indisputable that the presence of legislation staking out Congress's position before subsidiary decisions are taken at the international level may affect how the President goes about negotiating on the international plane. But it can't be the case that any congressional action that affects executive branch negotiations unconstitutionally encroaches on the executive branch's prerogatives. After all, the absence of implementing legislation would also affect the Pres-

192. 21 U.S.C. § 811(d)(2) (2000). Similar provisions in the legislation for the Psychotropic Substances Convention requires such notice and comment whenever proposals are made to add or delete a drug from the schedule, or to transfer a drug from one schedule to another. *See supra* Part II.C.

193. *See supra* Part II.C.

194. Stockholm Convention, *supra* note 6, arts. 9 & 10.

195. *Id.* art. 8, para. 4(a).

196. For example, public interest groups concerned with the Stockholm Convention include: the Center for International Environmental Law, Physicians for Social Responsibility, the Sierra Club, and the World Wildlife Fund. One of the industry groups that has been active in the domestic debate includes CropLife International. *See* Stockholm Convention on Persistent Organic Pollutants, List of Agencies Seeking Observer Status at the First Meeting, http://www.pops.int/documents/meetings/cop_1/NGO_IGO.htm.

197. *See supra* Part II.C.

ident's negotiations on the international plane, as would nonbinding resolutions expressing congressional views regarding upcoming negotiations, which are generally accepted as constitutional (at least so long as they don't micromanage the President's negotiations).¹⁹⁸ Ex ante, it's hard to predict whether the President's goal for a given negotiation could be achieved more easily in the presence or absence of such legislation.

Lastly, the President retains the ultimate authority to unilaterally terminate the United States' participation in a treaty.¹⁹⁹ Although both the Senate and Congress as a whole have claimed that the President can't terminate a treaty without their participation, they have failed to establish an authority on their part to join or veto him.²⁰⁰ As a matter of fact, the decision to terminate a treaty remains the President's alone because he represents the United States at the international level.²⁰¹

V. SUBSIDIARY DECISIONS AND STATUTORY INTERPRETATION

This final Part argues that treaty-implementing legislation that takes into account subsidiary decisions does not call for any special rules of statutory interpretation; to the contrary, the familiar two-step analysis articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁰² proves adequate. Under the framework set out in *Chevron*, courts will defer to an agency's construction of the statute it administers unless Congress has clearly communicated its intent:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for

198. Howard R. Sklamberg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treaty-making*, 18 MICH. J. INT'L L. 445, 464–65 (1997) (arguing that in the negotiation context, the Senate may offer recommendations on broad policy goals but not day-to-day-strategy).

199. Cf. Krent, *supra* note 176, at 96 ("When the executive branch retains effective veto power, . . . the potential for encroachment into executive prerogatives is slim.")

200. HENKIN, *supra* note 156, at 212. In *Goldwater v. Carter*, a plurality of Justices invoked the political question doctrine and declined to assess the merits of the claim that the President may unilaterally terminate a treaty. 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment).

201. See HENKIN, *supra* note 156, at 212.

202. 467 U.S. 837 (1984).

the court is whether the agency's answer is based on a permissible construction of the statute.²⁰³

Unless Congress has clearly expressed its desire to pre-commit to subsidiary decisions taken at the international level and clearly directed agencies to comply with those subsidiary decisions, courts should read that legislation to *permit* but not to *require* agency actions to conform to subsidiary decisions taken at the international level. The ordinary *Chevron* framework both accords proper deference to the executive branch's interpretation of international treaties and ensures that at least one of the political branches commits to incorporating the decisions of an international institution into domestic law before agencies give those decisions binding effect in the form of domestic regulations. By way of illustration, this Part will loop back to the statutory interpretation question at issue in *NRDC v. EPA*, and argue that the D.C. Circuit reached the right result, albeit for the wrong reason.

As Part II.B explained, the question in *NRDC v. EPA* was the extent to which (if at all) Congress had pre-committed the EPA to implement certain subsidiary decisions (Article 11 decisions²⁰⁴) regarding methyl bromide made by the parties to the Montreal Protocol.²⁰⁵ Aiming to avoid "serious constitutional questions," the court concluded that no aspect of these Article 11 decisions bound the EPA.²⁰⁶ This Article has demonstrated that closer scrutiny reveals those constitutional concerns lack foundation. Nevertheless, because the statutory provisions governing implementation of the Montreal Protocol do not clearly reveal whether Congress intended the EPA to abide by every aspect of those consensus decisions, the court correctly found that the EPA's regulations survived judicial challenge.

The Montreal Protocol contemplates three means of modifying or elaborating the parties' obligations.²⁰⁷ First, like other treaties, the Protocol might be amended; this is the default procedure for changing parties' obligations. Second, the Protocol might be adjusted; this procedure is used to modify the phase-out schedules of chemicals the parties have already agreed to regulate.²⁰⁸ Finally, the parties to the Protocol might make Article 11 decisions—certain additional decisions that are necessary to effectively implement the treaty.²⁰⁹

203. *Id.* at 842–43.

204. *See supra* notes 46–48 and accompanying text.

205. *NRDC v. EPA*, 464 F.3d 1, 8 (D.C. Cir. 2006).

206. *Id.* at 9.

207. *See supra* Part II.B.

208. *See supra* text accompanying notes 42–45.

209. *See supra* text accompanying notes 46–48.

The legislation implementing the Montreal Protocol unequivocally directs the EPA to implement amendments and adjustments. As discussed above, in legislation passed shortly after the United States ratified the Montreal Protocol in 1988, Congress amended the Clean Air Act to define “Montreal Protocol” to mean the “Montreal Protocol on Substances that Deplete the Ozone Layer” and “adjustments adopted by Parties thereto and amendments that have entered into force.”²¹⁰ A separate provision directs the Administrator of the EPA to promulgate regulations establishing a more stringent phase-out schedule for listed substances if “the Montreal Protocol is modified to include a schedule to control or reduce production, consumption, or use of any substance more rapidly than the applicable schedule under this subchapter.”²¹¹

The statute is ambiguous as to whether Congress intended the EPA to be bound by Article 11 decisions. The implementing legislation doesn’t mention them specifically. Two other provisions are relevant to this analysis. Specific to methyl bromide, the implementing legislation provides: “To the extent consistent with the Montreal Protocol, the Administrator, after notice and the opportunity for public comment, . . . may exempt the production, importation, and consumption of methyl bromide for critical uses.”²¹² The implementing legislation also provides that it should “not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol. In the case of conflict between any provision of this subchapter and any provision of the Montreal Protocol, the more stringent provision shall govern.”²¹³

As the briefing in the *NRDC* case demonstrates, the statutory language can support multiple interpretations. The Methyl Bromide Industry Panel makes a colorable argument that Congress did not intend the EPA to implement Article 11 decisions at all.²¹⁴ The Industry Panel focuses on the statutory definition of “Montreal Protocol,” which—as quoted above—does not explicitly refer to Article 11 decisions.²¹⁵ There is a strong response to this argument, however. The text of the Montreal Protocol anticipates subsidiary decisions. More significantly, the provisions addressing methyl bromide anticipate Ar-

210. See *supra* note 59 and accompanying text.

211. 42 U.S.C. § 7671e(a)(3) (2000).

212. *Id.* § 7671c(d)(6).

213. *Id.* § 7671m(b).

214. Supplemental Brief for Intervenor, *supra* note 65, at 11–12.

215. *Id.* at 11.

Article 11 decisions: Article 2H prohibits production or consumption of methyl bromide after January 1, 2005, except “to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses.”²¹⁶

Under the *Chevron* framework, the ambiguity in these statutory provisions would oblige a court to accept the EPA’s interpretation so long as it was reasonable.²¹⁷ Congress could require the EPA to implement Article 11 decisions, but to do so it must enact statutory provisions that clearly direct the EPA to abide by these decisions. Because Congress did not speak clearly here, the D.C. Circuit’s conclusion that the EPA is not obliged to implement Article 11 decisions in their entirety is correct.

The *Chevron* framework is consistent with the obligation on courts to pay “great weight” to the meaning given to treaties “by the departments of government particularly charged with their negotiation and enforcement.”²¹⁸ As the discussion above and in Part II.B illustrates, especially where statutory language is ambiguous, an agency’s interpretation of a congressional statute may depend on the agency’s interpretation of the underlying treaty. This obligation makes courts reluctant to find that the executive branch’s implementation of a treaty violates Congress’s implementing statute, even in the absence of the international nondelegation wrinkle. For example, in 2001, the D.C. Circuit reviewed a challenge to a regulation that the Department of the Interior had promulgated pursuant to the Migratory Bird Treaty Act (MBTA).²¹⁹ This statute implements four different treaties protecting migratory birds.²²⁰ The plaintiff in the D.C. Circuit case

216. Montreal Protocol, *supra* note 10, art. 2H, para. 5. Indeed, the EPA argued that this provision showed that the “United States agreed to accept future decisions of the parties on only two narrow issues: (1) what uses are critical and (2) the amount of methyl bromide that could be produced and imported after the 2005 phase-out to satisfy those uses,” because “[t]hese are the only two decisions that are specifically called for by the Montreal Protocol itself.” Supplemental Brief for the Respondent, *supra* note 63, at 6–7. Thus, the EPA argued, the numerical limits on production and importation set out in Decision Ex. I/3 are binding. *Id.* at 7–8.

217. See *supra* note 203 and accompanying text.

218. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006) (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)).

219. *Hill v. Norton*, 275 F.3d 98, 99 (D.C. Cir. 2001), *superseded by statute*, Migratory Bird Treaty Reform Act of 2004, Pub. L. No. 108-447, § 143, 118 Stat. 2809, 3071–72, *as recognized in* *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 873 (D.C. Cir. 2006); see also 16 U.S.C. §§ 703–711 (2000) (amended by the Migratory Bird Treaty Reform Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809).

220. *Hill*, 275 F.3d at 99–100. The treaty discussed in *Hill* is the Protocol Amending the 1916 Convention for the Protection of Migratory Birds, Dec. 14, 1995, U.S.-Can., S. TREATY Doc. No. 104-28.

challenged regulations that excluded the mute swan from the official list of protected migratory birds.²²¹ The court reviewed the question under the familiar two-step framework set out in *Chevron*.²²² Inquiring first whether Congress had spoken to the precise question at issue, the court found that “the plain meaning of the statute and the applicable treaties strongly indicate that mute swans are qualifying migratory birds under the MBTA.”²²³ Nevertheless, the court hesitated to decide the case on step one in part “because of the odd regulatory scheme created by the MBTA which refers to four different treaties to glean a single substantive definition of migratory birds.”²²⁴ It found instead that the Interior Department floundered on step two in light of the support for the plaintiff’s position in the text of the treaties and the statute, as well as the absence of anything in the statute, applicable treaties, or administrative record to justify the exclusion of mute swans,²²⁵ thus giving the executive branch another opportunity to explain why its interpretation of the treaties was reasonable.

Chevron analysis is also consistent with the canon of interpretation (sometimes called the *Charming Betsy* canon²²⁶) requiring courts to “be most cautious before interpreting . . . domestic legislation in such manner as to violate international agreements.”²²⁷ In the administrative law context, this canon urges courts to read ambiguous statutes to permit (but not to require) agencies to take actions that are necessary to comply with international legal obligations. The D.C. Circuit has invoked the *Charming Betsy* canon in the context of a subsidiary decision of an international body. In *George E. Warren Corp. v. EPA*,²²⁸ the D.C. Circuit reviewed the consistency of certain regulations that the EPA modified to comply with the determination of the WTO’s dispute settlement body that the earlier version of the regulations violated the United States’ obligations under the General Agreement on Tariffs and Trade treaty.²²⁹ The parties challenging the regulations argued that the modifications violated the statute that the EPA was imple-

221. *Hill*, 275 F.3d at 99.

222. *Id.* at 104.

223. *Id.* at 99.

224. *Id.* at 99, 104–05.

225. *Id.* at 106.

226. *United States v. Yousef*, 327 F.3d 56, 92 & n.26 (2d Cir. 2003) (referring to *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

227. *See Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

228. 159 F.3d 616 (D.C. Cir. 1998).

229. *Id.* at 619–20.

menting, but the court cited the *Charming Betsy* canon to support its conclusion that the EPA's reading of the statute was permissible.²³⁰

Thus, *Chevron* analysis leaves room both for a significant congressional role in treaty implementation and for executive branch latitude in interpreting treaties and assuring compliance with them. It allows Congress to pre-commit the executive branch to implement subsidiary decisions, but requires it to speak clearly to accomplish this goal. Where Congress's implementing legislation is ambiguous, it requires deference to the executive branch's interpretation. And, reinforced by the *Charming Betsy* canon, *Chevron* analysis ensures that statutory ambiguity is not read to preclude the executive branch from choosing to comply with subsidiary decisions taken on the international plane where it chooses to do so.

VI. CONCLUSION

This Article seeks to demonstrate that the nondelegation arguments that have been raised to challenge legislation implementing regulatory treaties lack a doctrinal foundation. In doing so, it highlights the need for precision in analyzing international delegations. The "unconstitutional delegation" label has been attached to a great variety of institutional arrangements. Even if some of those arrangements are constitutionally troubling, the constitutional problems they pose are not all equally grave. What is more, even within the category of implementing legislation, there are distinctions. More precise analysis of different types of institutional arrangements is a prerequisite for distinguishing more serious objections from less serious objections—and ultimately for figuring out how to address those constitutional problems that remain without undercutting the ability of the United States to effectively address environmental, safety, and health issues on a global level.

230. *Id.* at 624.