

MEDELLIN, DELEGATION AND CONFLICTS (OF LAW)*Peter B. Rutledge**

INTRODUCTION

The case of *Medellin v. Texas*¹ presented the Supreme Court with a recurring question that has bedeviled judges, legal scholars, and political scientists—what effect, if any, must a United States court give to the decision of an international tribunal, particularly where, during the relevant time, the United States was party to a treaty protocol that bound it to that tribunal's judgments.² While the Supreme Court held that the International Court of Justice's ("ICJ") decision was not enforceable federal law,³ its decision reflected an important recognition that the issues presented in that case were not limited to the specific area of ICJ judgments.

* Associate Professor of Law, University of Georgia Law School. Dean Rebecca White supported this Essay through a generous grant. Steve Young provided invaluable library assistance as he always does. Sarah Wyss and John DeGenova provided excellent research assistance. Julie Kendrick assisted with completion of the manuscript. I would like to thank participants in a faculty workshop at the University of Georgia Law School, Pepperdine University School of Law, DePaul University College of Law, and an American Enterprise Institute symposium on the *Medellin* case for comments on this Essay and the ideas expressed herein. Trey Childress, Harlan Cohen, Tony Perez, Amy Schmitz, Ingrid Wuerth, and John Yoo all provided very valuable comments on the draft.

¹ 128 S. Ct. 1346 (2008).

² *Id.* at 1353. Specifically, *Medellin* concerned the duty of a United States court to give effect to a mandate of the International Court of Justice ("ICJ"). *Id.* Among other things, the ICJ adjudicates disputes involving the Vienna Convention on Consular Relations insofar as signatory states have signed onto an optional protocol submitting to the ICJ's jurisdiction. *Id.* Until recently, the United States was a signatory to that protocol, and in the 1990s, death penalty foes and international law specialists teamed up to challenge the capital sentences of foreign citizens who were on death row in the United States and who had allegedly been deprived of their right to consult with a consul following arrest under Article 36 of the Vienna Convention. *Id.* at 1354. While the ICJ has issued several judgments in these cases, status of ICJ judgments in the United States had been unclear. *Id.* at 1356. Scholars have hotly debated whether ICJ judgments have direct effect in the United States, and, after passing on the question several times, the Supreme Court confronted it in *Medellin*. *Id.*

For commentary on *Medellin*, see Paul B. Stephan, *Open Doors*, 13 LEWIS & CLARK L. REV. 11 (2009); Ronald A. Brand, *Treaties and the Separation of Powers in the United States: A Reassessment After Medellin v. Texas* 2 (Univ. of Pittsburgh Legal Studies Research Paper Series, Working Paper No. 2008-33, 2008), available at <http://ssrn.com/abstract=1319818>; Ingrid B. Wuerth, *Medellin: The New, New Formalism?* 2 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 08-52, 2008), available at <http://ssrn.com/abstract=1301283>. Two law reviews have dedicated issues to *Medellin*: volume 77 of the *Fordham Law Review* and volume 31 of the *Suffolk Transnational Law Review*.

³ *Medellin*, 128 S. Ct. at 1356-57.

Rather, these issues in *Medellin* represent simply the latest chapter in a longstanding and increasingly important debate among academics, political scientists and public policy experts—the wisdom of “delegations.”⁴ While the meaning of that term is controversial (a topic I address in Part I), there is common agreement that delegation *at least* includes a bilateral (or multilateral) grant of authority to an international institution. This includes relationships such as the United States’ membership in the United Nations or its accession to the North American Free Trade Agreement (“NAFTA”). Delegations often, though not always, involve a transnational dispute resolution body such as the NAFTA Dispute Resolution Boards or, in the case of *Medellin*, the International Court of Justice. Another current example of this hotly debated topic is whether the United States should ratify the United Nations Convention on the Law of the Seas (“UNCLOS”), which has its own dispute resolution body for boundary disputes.⁵ Advocates defend ratification as action in the national interest and in furtherance of international norms; critics decry it as a surrender of United States sovereignty, particularly its naval prerogatives, to unaccountable transnational bureaucrats.

In my view, delegation debates exemplified by cases like *Medellin* and the ratification debate over UNCLOS suffer from three related distortions. First, the term “delegation” has been defined too narrowly. Second, this unduly narrow definition has caused some participants in the debate to fail to differentiate between different types of delegations. Third, the unduly narrow definition and insufficiently nuanced account have skewed the normative analysis of specific delegations. Conflicts-of-law jurisprudence, particularly the early jurisprudence from both Europe and nineteenth century American conflicts scholars, supplies an important tool to correct all three distortions.

Part I of this Essay considers the first distortion. It addresses an important definitional aspect of this debate—the meaning of delegation. This issue involves more than mere quibbling over jargon. Rather, it defines the very scope of the discussion. An unduly narrow definition of delegation runs the risk of rendering irrelevant a data subset that might influence the analysis. Conversely, an unduly broad definition of delegation runs the opposite risk—defining the relevant sample set so broadly that verifiable conclusions cannot be generated or are, at best, so tentative and diluted as to be useless. Part I reviews the competing definitions offered in the literature. It

⁴ See generally Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 1. I say “longstanding” for, as Harold Koh has demonstrated, these debates at a broad level of abstraction simply represent the latest chapter in a much longer, historical discussion over “domestic obedience to internalized global law.” Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2659 (1997) (book review). This is particularly true following World War II where “international institutions governed by multilateral treaties organiz[ed] proactive assaults on all manner of global problems.” *Id.* at 2614.

⁵ See Jack Goldsmith & Jeremy Rabkin, Op-Ed., *A Treaty the Senate Should Sink*, WASH. POST, July 2, 2007, at A19.

then defends the following definition of delegation: delegation occurs whenever a sovereign state grants legislative or adjudicative jurisdiction to an institution—transnational or otherwise—that is not within the direct reach of the sovereign. I use the term “institution” in its broad sense—to encompass more than a physical or juridical entity. Instead, following Professor Robert Keohane, I use the term to mean legal regimes, with or without a bureaucratic infrastructure.⁶ Here, conflicts-of-law scholarship—which sought to provide a tool for reconciling jurisdictional conflicts among states in a post-Westphalian world—provides a historically rooted, well-tested benchmark for redefining delegation.

Part II of this Essay considers the second distortion in the delegation debate: the lack of a sufficiently nuanced account for classifying delegations. The early delegation debates tended to be bipolar—different camps criticized or defended delegation generally without really making much effort to differentiate between types of delegation.⁷ Unfortunately, framing the debate in this manner overlooks salient differences between various forms of delegation. Some recent scholarship has begun to recognize the need for a more sophisticated typology.⁸ This Part reviews those recent efforts and then derives a typology that, drawing on an important distinction in conflicts jurisprudence, classifies delegations according to the following criteria: (1) what type of jurisdiction is being delegated (legislative vs. judicial), (2) does the delegation create a new bureaucracy (or instead rely on preexisting institutions), and (3) are the decisions of the newly created bureaucracy automatically domesticated (or instead rely on domestic institutions to give legal effect to their decisions)? In contrast to previous schemes, this one better permits a more nuanced normative debate about delegation.

Part III addresses the third and final distortion: the need for a more nuanced normative debate over the costs and benefits of delegations. It begins by laying out an account of the costs of delegation (such as the loss of sovereignty) and the benefits of delegation (such as improved coordination). Part III then evaluates the costs and benefits through the lens of the conflicts-based typology developed in Part II; it discusses how particular delegations, depending on whether they involve legislative or judicial jurisdiction, organizational or non-organizational activity and automatic or non-automatic domestication, will entail different mixtures of costs and benefits.

⁶ See Robert O. Keohane, *International Institutions: Can Interdependence Work?*, FOREIGN POL'Y, Spring 1998, at 82, 84-85.

⁷ A notable exception to this bipolar debate is the excellent article by Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004). See especially his alternative typology of delegation that broadens the definition beyond vesting of authority in international institutions. *Id.* at 1506-30; see also Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 448 (2003) (recognizing the synergies between issues of delegation of judicial power to a transnational institution and the treatment of a state's judicial acts by another state judiciary).

⁸ See, e.g., Bradley & Kelley, *supra* note 4, at 10-17; Swaine, *supra* note 7, at 1506.

Part III concludes with a discussion of the lessons of the *Medellin* case for the future of the delegation debate.

While this Essay seeks to remedy these three distortions in the delegation debate, it is important to identify at the outset what it does *not* seek to do. It does not offer an opinion on the constitutionality of a particular delegation. Nor is it meant to provide a normative guidebook for the acceptability or unacceptability of a delegation. Rather, my ambition is more limited—by correcting these three distortions in the debate, I hope to refocus the debate along terms that will facilitate those broader constitutional and normative discussions, whether in the arena of a decision to enact legislation or a judicial decision to apply foreign law.

I. DEFINITIONS

This Part addresses a critical definitional point in the delegation debate—the meaning of delegation. Most scholars frame this debate in terms of grants of authority to international organizations such as the World Trade Organization. In Part I.A, I challenge that traditional framing of the debate. In my view, this definition takes an unduly narrow view of delegation issues. In Part I.B, I defend a broader view of delegation, one rooted in choice-of-law principles. Under this view, delegation occurs whenever a sovereign state grants legislative or adjudicative jurisdiction to an institution—transnational or otherwise—that is not within the direct reach of the sovereign. This definition encompasses a wide variety of acts excluded from the traditional definition such as choice-of-law treaties, assimilative legislation, and the enforcement of foreign judgments and arbitral awards.

A. *Orthodoxy in the Delegation Debate*

Epistemologically, academic debates, legal or otherwise, naturally orbit around a common vernacular.⁹ Terminological agreement, in theory at least, is indispensable. If we cannot agree on what we're talking about, how can we possibly have a coherent discussion? For example, when astronomers discuss the planets of the “solar system,” the efficacy of that debate may depend on a common agreement about the bodies qualifying as planets and the scope of the solar system.

At the same time, the common terminological ground framing a debate carries an attendant risk. The risk is that the terms of the debate become ossified and, worse yet, cease to be examined. Failure to reexamine these terms has two unfortunate consequences. It distracts the positive inquiry—

⁹ See Jonathan Grix, *Introducing Students to the Generic Terminology of Social Research*, 22 POL. 175, 176 (2002).

scholars engaging the debate dedicate their energy to the debate as defined by others rather than questioning whether the debate even has been appropriately framed. It also distorts the normative discussion—participants in the debate prescribe solutions to an ill-defined problem.

The current debate over international delegation suffers from some of these same problems.¹⁰ Most—but certainly not all—participants frame the debate in terms of a fairly specific problem: the transfer of authority to an international organization.¹¹ Both advocates and skeptics of delegation have employed this definition (which I call the “orthodox” view). For example, Curtis Bradley has defined delegation as “a grant of authority by two or more states to an international body to make decisions or take actions.”¹² Julian Ku has defined delegation as “the transfer of constitutionally-assigned federal powers—treaty-making, legislative, executive, and judicial powers—to an international organization.”¹³ Oona Hathaway defines delegation as the granting of domestic authority to international institutions.¹⁴ Other examples abound in the scholarly literature.¹⁵

While the delegation debate has largely been framed around these terms, some participants have acknowledged imperfections in this definition. The best example of someone who has largely rejected this definition of delegation is Edward Swaine. Swaine recognizes that acts that do not necessarily create organizations, such as assimilation of foreign law or customary international law, still are properly characterized as delegations.¹⁶ Even those employing the traditional definition sometimes hint that the debate could be broadened. For example, Ku also notes that a legislature can delegate by assimilation, meaning that countries can delegate their

¹⁰ For a thoughtful critique in this area published as I was completing this Essay, see Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1698-1701 (2008).

¹¹ Two critical sources of scholarship on this debate include the excellent symposium organized at Duke University Law School and a series of earlier path-breaking articles in the journal *International Organization*. Bradley & Kelley, *supra* note 4, at 2; Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 459 (2000). Other valuable sources include Guzman & Landside, *supra* note 10, at 1693; Swaine, *supra* note 7, at 1494-95; Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT’L L.J. 527, 527-28 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 72 (2000); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287 (1997).

¹² Bradley & Kelley, *supra* note 4, at 3.

¹³ Ku, *supra* note 11, at 72.

¹⁴ See Oona A. Hathaway, *International Delegation and State Sovereignty*, LAW & CONTEMP. PROBS., Winter 2008, at 115, 115-16.

¹⁵ See, e.g., Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 7 (Darren G. Hawkins et al. eds., 2006).

¹⁶ Swaine, *supra* note 7, at 1519-30.

lawmaking power by adopting foreign legal rules as their own.¹⁷ Likewise, Hathaway acknowledges the need for a more expansive inquiry and explains that “[i]nternational law and international delegation are deeply intertwined.”¹⁸ By these hedges, the authors suggest that the terms of the delegation debate can be meaningfully broadened.

To understand why the terms of the delegation debate should be broadened, it is helpful to understand why people are so concerned about delegation.¹⁹ At bottom, skeptics of delegation are largely—though certainly not exclusively—concerned with the loss of sovereignty and political accountability. Nightmares of faceless international bureaucrats who do not have the national interest at heart are the poster child for the skeptics.²⁰ Conversely, supporters of delegation are largely—though again not exclusively—concerned with both the benefits that come from international cooperation and the normative advancements enabled by international cooperation. Human rights and international criminal tribunals are their poster children.²¹

Once we step back from the definitions of delegation and instead consider the stakes behind the delegation debate, we can begin to appreciate that these underlying policy concerns, both of the skeptics and the advocates, can arise in situations other than simply through the grant of authority to an international body. As to the skeptics’ concern about loss of sovereignty, that can occur even without a transfer of power to an international organization. Consider assimilative statutes. Those statutes establish certain liability rules but define those rules by reference to some external norm. For example, the Lacey Act prohibits wildlife trade in violation of, among other things, “foreign” law.²² Here, no international organization is involved, yet an entity other than the sovereign itself is exercising a rulemaking power that affects liability rules within the sovereign’s jurisdiction.

As to the supporters’ interest in advancing international norms, consider human rights lawsuits under the Alien Tort Statute.²³ The Alien Tort Statute grants federal jurisdiction over certain torts in violation of the “law of nations.”²⁴ While the Supreme Court made clear in *Sosa v. Alvarez-Machain*²⁵ that this statute is nominally a jurisdictional statute, it also made clear that federal common law can recognize a limited number of causes of action derived from customary international law (in effect, another type of

¹⁷ Ku, *supra* note 11, at 105.

¹⁸ Hathaway, *supra* note 14, at 117.

¹⁹ See *infra* Part III.

²⁰ See Guzman & Landsidle, *supra* note 10, at 1694.

²¹ Hathaway, *supra* note 14, at 145-48.

²² 16 U.S.C. § 3372(a) (2006). Edward Swaine drew this example to my attention. See Swaine, *supra* note 7, at 1520.

²³ 28 U.S.C. § 1350 (2006).

²⁴ *Id.*

²⁵ 542 U.S. 692 (2004).

assimilation).²⁶ Customary international law derives not from the federal sovereign but rather from the consistent practices of states as evidenced in their official statements, judicial decisions, international agreements and other diplomatic actions.²⁷ Some lower courts have even discarded any pretext of relying on federal common law and instead held that international law supplies the relevant liability rule.²⁸ Here, as in the assimilation case described above, the example implicates core issues of the delegation debate but does not entail a grant of authority to an international organization.

Other, less charged, examples help seal the point. For example, the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (“New York Convention”) contains various grounds upon which a court can refuse to enforce a foreign arbitral award.²⁹ Some of those grounds permit a court to refuse enforcement by reference to a substantive law other than the enforcement forum. For example, a court may refuse enforcement if, barring party agreement, the procedure was not in accordance with the procedural law of the arbitral forum.³⁰ Likewise, both the Hague Evidence Convention and the Hague Service Convention obligate signatory countries to designate “central authorities” that will serve properly drafted letters rogatory on persons within their territory.³¹ The recently approved (but not yet ratified) Hague Convention on Choice of Courts Agreement, among other things, obligates the judicial branch of signatory nations generally to suspend litigation in favor of the country specified in a choice of courts clause and generally to enforce judgments rendered by that country.³² All of these examples share a same common feature—they bind a sovereign actor in some manner determined by reference to a rule or act of another entity not within the direct reach of the sovereign. Thus, a variety of international acts

²⁶ *Id.* at 712.

²⁷ GARY BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 15 (4th ed. 2007).

²⁸ See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (per curiam), *aff'd for lack of quorum sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008); *Doe I v. Unocal Corp.*, 395 F.3d 932, 949 (9th Cir. 2002), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 200); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320-21 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1343-49 (N.D. Ga. 2002).

²⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. For a recent essay that acknowledges the conceptual linkage between judicial enforcement of arbitral awards and other forms of delegation, see Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT'L L. 477, 491-92 (2008).

³⁰ New York Convention, *supra* note 29, art. 5.

³¹ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 5, *opened for signature* July 27, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Evidence Convention]; Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 2, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

³² Hague Convention on Choice of Court Agreements art. 8, June 30, 2005, 44 I.L.M. 1294.

entail the core concerns and benefits of participants in the delegation debate yet do not involve the creation of any international organization.

These sorts of delegations are not confined to judicial inquiry into a treaty's meaning; a variety of other doctrines, many of them the product of federal common law, involve similar considerations of a foreign sovereign's law of interests. For example, the act of state doctrine, the doctrine of comity, and the doctrine of *forum non conveniens* all fall within this definition. Some, such as the act of state doctrine, expressly require application of the foreign sovereign's law.³³ Others, such as the *forum non conveniens* doctrine, involve a less explicit consideration of the foreign sovereign's interests in the dispute.³⁴ In each case, a court in the United States is expressly considering foreign legal authority, over which the United States has no control, to decide whether and how to resolve a matter.

Indeed, the debate between the majority and dissenters in *Medellin* illustrates the conceptual linkages between these different sorts of delegations. Part of the debate in *Medellin* concerned the proper lesson to be drawn from treaties such as the Washington Convention and the New York Convention for the status of ICJ judgments.³⁵ The majority and dissent differed over the extent to which the self-executing nature of those documents imposed binding obligations under federal law.³⁶ Yet all nine Justices shared the common view that the commitments created under those treaties, even though they did not involve a supranational organization like the ICJ, nonetheless implicated issues common to the delegation questions presented by *Medellin*.³⁷

At this point, it is worth pausing to verify the narrowness of my claim so far. My point simply is that the orthodox view defines the term delegation too narrowly. Defining it solely to include the "transfer of constitutionally assigned powers"³⁸ to an international organization fails to capture various mechanisms such as assimilative laws, references to customary international law, and private international law treaties that raise the same underlying issues—such as loss of sovereignty or the advancement of international norms—but do not involve any international organization. At this point, I take no position on whether claims about the costs and benefits are well-founded or, assuming they are, how extensive they are in a particular case. Part III returns to those topics. For now, I simply want to make the reader uncomfortable enough with the orthodoxy that she recognizes the need to broaden the definition of delegation to some degree.

³³ See *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 409 (1990).

³⁴ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981).

³⁵ Compare *Medellin v. Texas*, 128 S. Ct. 1346, 1366 (2008), with *id.* at 1387-88 (Breyer, J., dissenting).

³⁶ *Id.* at 1365 (majority opinion).

³⁷ *Id.*

³⁸ *Ku*, *supra* note 11, at 91.

B. *Broadening Delegation: A Conflicts-of-Law Perspective*

If the orthodox definition of “delegation” is too narrow, what should take its place? In my view, delegation occurs whenever a sovereign state grants legislative or adjudicative jurisdiction to an institution—transnational or otherwise—that is not within the direct reach of the sovereign. This broadened definition obviously draws heavily on conflicts-of-law principles. The remainder of this section explains this reliance on conflicts principles and justifies the definition.

The relationship between sovereignty and conflicts-of-law has a long history and has been well documented.³⁹ A variety of historical writers in the conflicts-of-law field have recognized the relationship between notions of sovereignty and conflicts principles.⁴⁰ For example, Ulrich Huber, a seventeenth century Dutch writer, captured this relationship in his three seminal precepts of international law:

- (1) Every state’s laws apply within the state’s territory, but not beyond;
- (2) All persons within a state are subjects of the state;
- (3) “Comity” calls on states to recognize and enforce rights created by other states provided that such recognition does not prejudice the state or its subjects.⁴¹

Huber’s first precept recognized the relationship between territory, sovereignty, and legislative jurisdiction—that is, the power to prescribe rules governing conduct, relationships, or status (a principle in harmony with the views of delegation’s skeptics).⁴² At the same time, Huber recognized in his third precept that these rigid, territorially defined notions of sovereignty left some room for the development of connective tissue between states (a principle in harmony with the views of delegation’s advocates). Consider closely Huber’s phrasing of his third principle. When he speaks in terms of comity, he speaks not simply in terms of recognition of

³⁹ See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539, at 450 (2d ed. 1841) (“[N]o sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions.”); Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 305-07 (1953); ROBERT A. LEFLAR, THE LAW OF CONFLICTS OF LAWS § 110, at 207-09 (1959).

⁴⁰ See ERNEST G. LORENZEN, *Huber’s De Conflictu Legum*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS 136, 138-39 (1947). For teaching me about the relationship between international law and conflicts principles, I am grateful to my colleague, co-author, and friend, Gary Born. See BORN & RUTLEDGE, *supra* note 27, at 564-66. While the current edition of our international litigation casebook addresses some aspects of this relationship, Gary deserves the credit for developing these notions in earlier editions of the book. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 493-497 (3d ed. 1996).

⁴¹ LORENZEN, *supra* note 40, at 136-37.

⁴² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. d (1971).

rights created by a foreign state but also *enforcement* of those rights.⁴³ That is, one state should be prepared, within limits, to enforce rights created by a foreign state. In other words, in Huber's view, strict notions of sovereignty are entirely compatible with a (limited) obligation to enforce the rights created by entities (such as other sovereigns) not within the direct reach of the sovereign itself.

Huber was not the only historic figure in conflicts jurisprudence to recognize this relationship between delegation and conflicts. Joseph Story recognized the connection as well. Echoing Huber's first principle of international law, Story declared that

no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein [F]or it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory.⁴⁴

At the same time, Story recognized that a degree of international cooperation was entirely consistent with his strict territorial model.⁴⁵ In sum, early conflicts scholars saw conflicts principles as the means by which to reconcile strict territorial-based notions of sovereignty and conceptions of comity underpinning international law.⁴⁶

The insights of the early conflicts scholars were not confined to the annals of legal theory but influenced legal doctrine as well. For example, early notions of personal jurisdiction were premised on strict principles of territorial sovereignty.⁴⁷ So too were notions of foreign sovereign immunity prior to the emergence of the restrictive theory and, eventually, the adoption of the Foreign Sovereign Immunities Act ("FSIA").⁴⁸

Modern examples in conflicts-of-law reflect this insight too. For example, principles governing enforcement of a foreign judgment echoed Huber's third principle by explicitly citing Joseph Story's principle that a court generally was obligated to recognize *and enforce* a foreign court's

⁴³ LORENZEN, *supra* note 40, at 137.

⁴⁴ STORY, *supra* note 39, § 20, at 20-21.

⁴⁵ *See id.* §§ 18-19, at 18-20.

⁴⁶ EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 18-20 (4th ed. 2004). The treatment of state laws and judgments similarly demonstrates how conflicts-of-law principles can help us to understand the relationship between sovereignty and delegation. At bottom, the Full Faith and Credit Clause represents a form of delegation by the state governments to the federal constitutional authority that affects both the states' jurisdiction to prescribe and their jurisdiction to adjudicate. *Id.* at 150. The states surrender the ability to derogate from each other's judgments in exchange for the benefits that come through closer federal cooperation. *Id.* At the same time, the states retain residual control over the governing legal rule in a given case through limits on their obligation to apply another state's law in their own courts. *Id.*

⁴⁷ *See, e.g.,* *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276-77 (1808).

⁴⁸ *See* BORN & RUTLEDGE, *supra* note 27, at 219-20.

judgment unless the court concluded that it would undermine the interest of the state or its citizens.⁴⁹ Likewise, courts have repeatedly held that they will attempt to construe language in a treaty in a manner consistent with the reasonable interpretations of that same language by foreign courts in other signatory nations.⁵⁰ Here too, the United States court is surrendering a degree of its adjudicative power by allowing foreign courts to influence its own judicial inquiry.⁵¹

Of course, at least two features differentiate these cases from those at the center of the delegation debate. For one thing, none of these examples entail the creation of new supranational organizations, unlike, for example, the World Trade Organization (“WTO”). For another thing, some of the examples, such as the enforcement of foreign judgments, explicitly preserve to the sovereign an ability to decline to give legal effect to the foreign sovereign’s act (such as refusing to enforce a foreign judgment on public policy grounds), whereas supranational organizations may not allow similar derogations (such as the Optional Protocol to the Vienna Convention at issue in *Medellin* or the elimination of judicial review of arbitration awards rendered under the Washington Convention of 1965).⁵²

These are however mere differences of degree, not of kind. As to the first distinction, the creation of a new organization may influence both the quality of the delegation and the cost-benefit calculus, but it is hardly an essential prerequisite for something to qualify as a delegation. As to the second distinction, many delegations (both organizational and non-organizational), including controversial ones such as NAFTA or the WTO, contain escape devices similar to the exceptions to the enforcement of foreign judgments.⁵³ My aim here is not to demonstrate that enforcement of foreign judgments and accession to international bodies are identical or functionally equivalent (or that either is particularly desirable or undesirable). Rather, it is simply to show that conflicts-of-law principles offer a useful lens through which to analyze the delegation debate. The writings of

⁴⁹ See *Hilton v. Guyot*, 159 U.S. 113, 164-65, 189-91, 202-03, 227-28 (1895).

⁵⁰ See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) (“We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.”).

⁵¹ Indeed, the more recent emphasis on explicit interest analysis in conflicts of law makes clear that courts routinely consider the interests of other sovereigns in deciding what rule to apply to a particular legal question before them. See BORN & RUTLEDGE, *supra* note 27, at 698-700.

⁵² *Medellin v. Texas*, 128 S. Ct. 1346, 1353-54 (2008). As we shall see in Part III, similar escape devices exist in other types of delegations, including more controversial ones such as NAFTA, the WTO, or the ICJ.

⁵³ See generally WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE 20-22* (2005) (describing the general use of “escape devices” within a traditional system of conflict of laws).

Huber and Story, the early doctrines in areas like personal jurisdiction, and more modern doctrines such as those governing enforcement of a foreign judgment all embrace this notion.⁵⁴ Part II of this Essay builds on this expanded definition and offers a novel typology by which to classify various forms of delegation.

II. MODELING THE CONFLICTS-OF-LAW APPROACH

Part I explained how scholars have framed the current delegation debate too narrowly. It defended a broadening of the term “delegation,” one that extends beyond simply the vesting of authority in international organizations and, instead, should also include the sharing of legislative and judicial jurisdiction with an institution not within the direct reach of the delegating sovereign. Building on that definition, this Part constructs a typology for analyzing such delegations. Part II.A reviews previous attempts to categorize delegations. Part II.B identifies and defends the salient characteristics in the typology. Part II.C details the typology and offers concrete examples.

	Organizational?	
	<i>Yes</i>	<i>No</i>
Legislative	Delegations To Organizations Whose Decisions Require Domestication (Part II.C.3)	Non-Organizational Delegations of Legislative Jurisdiction (Part II.C.1)
Judicial	Delegations To Organizations Whose Decisions Are Automatically Domesticated (Part II.C.4)	Non-Organizational Delegations of Judicial Jurisdiction (Part II.C.2)

A. Literature Review

Early contributions to the current delegation debate tended to adopt a fairly simplified approach (“the bipolar approach”).⁵⁵ That is, both defenders and skeptics tended to treat all delegations, in whatever form, as a singular phenomenon, to be supported or opposed.⁵⁶ The bipolar approach to

⁵⁴ See, e.g., STORY, *supra* note 40, § 550, at 462-63; LORENZEN, *supra* note 41, at 160-61.

⁵⁵ For commentary exemplifying the bipolar approach, see, for example, Young, *supra* note 11, at 527, 529, 533; Helfer & Slaughter, *supra* note 11, at 386-87.

⁵⁶ For exceptions, see Bradley & Kelley, *supra* note 4, at 2 (providing a more nuanced analysis of delegation and the types of authority that can be granted).

delegation offered simplicity, both a virtue and a drawback. As a virtue, simplicity enabled the debate, in its early stages, to form around common examples and common notions about its costs and benefits (explored in more detail in Part III). As a drawback, simplicity caused both sides in the delegation debate to fail to pay adequate attention to potentially important differences in types of delegation.

More recent scholarship has recognized this inattention and sought to provide a more nuanced account of delegation (“the multi-polar” approach). As Edward Swaine explains, “not all international delegations are created equal.”⁵⁷ Scholars employing the multi-polar approach have sought to categorize different types of delegation along various axes.⁵⁸ For example, Robert Keohane and others have argued that we should consider a delegation along three axes: independence, access, and embeddedness.⁵⁹ An institution’s location on this continuum will permit predictions about how the institution operates. Keohane’s article made an important contribution to the delegation scholarship by demonstrating the importance of organizational behavior to an understanding of the delegation phenomenon.⁶⁰ Yet, by failing to focus on the nuanced legal distinctions between the different types of delegated activity, the article left an important gap in the account.

Recent scholarship by Curtis Bradley and Judith Kelley help to fill that gap.⁶¹ Bradley and Kelley propose an eight-part typology of delegated authority.⁶² The types include legislative, adjudicative, monitoring and enforcement, regulatory, agenda-setting, research and advice, policy implementation, and re-delegation.⁶³ The authors then explain how the grant of authority to an organization will depend on the legal effect of its actions

⁵⁷ Swaine, *supra* note 7, at 1604.

⁵⁸ See, e.g., Keohane et al., *supra* note 11, at 458.

⁵⁹ Independence “measures the extent to which adjudicators for an international authority . . . are able to deliberate and reach legal judgments independently of national governments.” *Id.* at 459-60. Similarly, “access measures the range of social and political actors who have legal standing to submit a dispute to be resolved.” *Id.* at 462. Embeddedness represents the degree to which the states implement the international actor’s decisions. *Id.* at 466.

⁶⁰ *Id.* at 457, 488.

⁶¹ See Bradley & Kelley, *supra* note 4.

⁶² Given the emphasis that this Essay places on definitions, I should note that Bradley and Kelley employ a narrower definition of delegation than I do here. They define delegation as “a grant of authority by two or more states to an international body to make decisions or take actions.” Bradley & Kelley, *supra* note 4, at 2. I explain my disagreement with that definition *supra* note 7 and accompanying text.

⁶³ This Essay formally defines these terms, Bradley & Kelley, *supra* note 4, at 10-17, most of which are intuitive, so I do not repeat them here. The only one that might not be obvious to the informed reader is “re-delegation,” which consists of a decision by the international body to delegate authority to another entity. *Id.* at 17. The authors cite as an example a decision by the World Health Organization or the United Nations to subcontract various “in-country” tasks with non-governmental organizations or for-profit corporations. *Id.*

(such as the direct effect of judgments by the European Court of Justice⁶⁴) and the extent to which member states can control the organization's independence (such as the veto that a permanent member of the United Nations Security Council can exercise over a resolution).⁶⁵

Bradley and Kelley's framework contributes to the delegation scholarship in important ways. It employs the more nuanced approach characteristic of the "multi-polar approach" and offers one of the first systematic attempts to classify various forms of delegation.⁶⁶ Unfortunately, their approach asserts, rather than derives, the particular classifications.⁶⁷ That is to say, the authors do not attempt to explain *why* the lines should be drawn between, for example, monitoring delegations and policy implementation delegations. Nor do they attempt to identify first-order criteria on which delegations should be distinguished, however intuitively appealing those criteria might be to the American-trained lawyer versed in separation-of-powers principles. To be clear, this is not to say that the typology offered by Bradley and Kelley is necessarily invalid.⁶⁸ Rather, my point is simply that the authors have not adequately *justified* their selection. The next subpart fills this gap in Bradley and Kelley's work.

B. *Deriving the Criteria*

The preceding section explained the need for a more nuanced typology in which to classify delegations and how the recent scholarship by Bradley and Kelley advanced that quest. This section derives a set of criteria to inform the construction of the typology. In short, I defend the use of three criteria: (a) the type of jurisdiction delegated, (b) whether the delegation creates an organization, and (c) the extent to which that organization relies on domestic actors to implement its decisions.

1. Legislative vs. Judicial Delegations

To begin to derive the relevant criteria, it is important to recall the broad stakes in the debate—weighing an alleged loss of state sovereignty and political accountability against the purported benefits from international cooperation, including the advancement of certain international norms. On

⁶⁴ The European Court of Justice routinely judges the compatibility of the domestic enactments of member states with European law. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413-17, 2420-21 (1991).

⁶⁵ Bradley & Kelley, *supra* note 4, at 17-20.

⁶⁶ *Id.* at 10-17.

⁶⁷ For another recent critique of the Bradley & Kelley hypothesis, see Guzman & Landsidle, *supra* note 10, at 1697-1701.

⁶⁸ Indeed, as becomes apparent in Part II.C, I agree with their classifications in part.

the cost side, the degree of any claimed loss of sovereignty will depend on the nature of the transfer. Crafting legislative rules and making judicial determinations about scope of subject matter jurisdiction entail different sovereignty costs and accountability problems. For example, very different considerations influence, on one hand, the drafting of a securities law to prevent insider trading and, on the other hand, an inquiry by a court whether or not a particular trade falls within its jurisdiction.

Conflicts-of-law principles support this distinction. Conflicts scholars differentiate between legislative jurisdiction and judicial jurisdiction.⁶⁹ Legislative jurisdiction, sometimes referred to as prescriptive jurisdiction, concerns the power of the sovereign to make its law applicable to certain persons or activities.⁷⁰ A classic example is the power of Congress to apply its statutes extraterritorially.⁷¹ By contrast, judicial jurisdiction concerns the power of a court to decide a particular case.⁷² These two concepts provide a rough measure for capturing the difference between the two types of delegation (legislative vs. adjudicatory) described in the preceding paragraph. Thus, they can supply a first classificatory criterion.

By defending this distinction, I do not mean to suggest that *all* forms of legislative delegation necessarily entail greater sovereignty costs than all forms of judicial delegation. A judicial delegation that significantly ties the hands of a sovereign could obviously work significant sovereignty costs. Rather, my point here is simply to illustrate that there is a principled qualitative difference between the two forms of delegation that justifies their separate treatment in the typology.

2. Organizational vs. Non-Organizational Delegation

A typology that simply distinguished between legislative and adjudicative jurisdiction would fail to capture some of the important and evident dynamics in the delegation debate. Specifically, it overlooks the importance of organizational behavior in the dynamics of the delegation. Consequently, the presence or absence of an organization should supply a second criterion for classifying particular delegations.

Political science teaches us why this is the case. The creation of an organization entails certain principle-agent dynamics absent in a non-organizational delegation. In the specific context of international delega-

⁶⁹ For a discussion of the relationship between legislative and judicial jurisdiction in the context of an international case, see *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-15 (1993) (Scalia, J., dissenting).

⁷⁰ See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 60 (1934); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401-02 (1987).

⁷¹ See *Ford v. United States*, 273 U.S. 593, 621-23 (1927).

⁷² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(b) (1987).

tions, as Keohane has demonstrated, the dynamics of an organization critically influence the nature of a delegation.⁷³ Organizations, like any bureaucracy, are more prone to mission creep and may seek to expand their jurisdictional mandate over time.⁷⁴ Moreover, more “independent” organizations may be able to extract greater “sovereignty costs” from the delegating states (and achieve correspondingly more benefits through cooperation and norms advancement).⁷⁵ By contrast, delegations that do not entail the creation of an organization, but instead adhere to norms or conventions, create fewer opportunities for mission creep and defection.⁷⁶

Here, it might be argued that the emphasis on organization in the model is inconsistent with the definition of delegation developed in Part I. I believe that the two arguments are in fact consistent. While the expanded definition of delegation derived in Part I explained that a delegation did not *necessarily* have to entail the creation of a new organization, it did not suggest that the creation of an organization was *irrelevant* to the analysis.

3. Automatic Domestication vs. Non-Automatic Domestication⁷⁷

To this point, we have derived criteria to guide the classification of a given delegation: the type of jurisdiction delegated and whether the delegation creates an organization. Both theory and practice suggest that one final differentiation is necessary: between delegations to organizations whose decisions are automatically domesticated and those whose decisions are not. The principle of direct effect provides the most obvious example of this phenomenon and will be familiar to students of European law. At bottom, under that doctrine, an organization’s decisions have effect within a sovereign’s territory without the need for implementation or other action by the sovereign’s own domestic organizations.⁷⁸ Thus, for example, decisions of the European Court of Justice and directives of the European Commission have direct effect within the territories of member states irrespective of the actions of those states’ bureaucracies.⁷⁹

⁷³ See Keohane, *supra* note 11, at 479-87.

⁷⁴ Opportunities for mission creep will depend on, among other things, the degree of specificity in the scope of the delegation. See Ku, *supra* note 11, at 125-26. A precisely defined mandate reduces the opportunity for an organization to overstep its mandate. See *id.* By contrast, vague and flowery mandates that fail to demarcate clear boundaries enhance the risk of creep and accentuate the need for escape devices. See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ While this concept is also referenced with the term of art, “self-execution,” this Essay utilizes automatic domestication. Self-execution is used in the treaty context, while this Essay discusses other foreign laws that are automatically domesticated and are not self-executing in the traditional sense.

⁷⁸ Keohane, *supra* note 11, at 467-68, 481-83.

⁷⁹ Weiler, *supra* note 64, at 2413-17, 2420.

The treatment of a delegated decision within a sovereign's domestic legal system deserves separate legal treatment due to the different impact of escape devices. By escape devices, I mean any mechanism whereby a sovereign can block the delegated decision from having legal effect within its territory.⁸⁰ Examples of such devices abound. One familiar type of device is "RUDs" (which stands for "Reservations, Understandings and Declarations," statements that states deposit at the time they sign or ratify a treaty).⁸¹ RUDs are well accepted in international law and their use is a customary practice exemplified by section 2 of the Vienna Convention on the Law of Treaties.⁸² Another example includes the use of a veto power; in certain bodies, states can exercise a veto to block a particular exercise of legislative jurisdiction by the transnational institution (such as the power enjoyed by permanent members of the United Nations Security Council).⁸³ States can withdraw from treaties, as the United States recently did with respect to the International Criminal Court or the Optional Protocol in the Vienna Convention on Consular Relations.⁸⁴ Other escape devices include public policy exceptions to the enforcement of arbitration awards and foreign judgments, interpretive canons, and last-in-time principles for statutes.⁸⁵

Automatic domestication reduces the opportunity for exit or, at a minimum, increases the costs to the sovereign where the sovereign chooses to withdraw from the treaty. *Medellin v. Texas*⁸⁶ demonstrates the stakes. If the Supreme Court had held that judgments of the ICJ pursuant to the Vienna Convention Optional Protocol were directly enforceable in the United States, that would have worked a substantial inroad into the ability of United States Courts to determine the meaning of treaties. Conversely, advocates of delegation would argue that direct effect promotes the "embeddedness" of an international organization's decisions (the degree to which they seep into the legal fabric of sovereign states). Thus, the presence

⁸⁰ See generally REYNOLDS & RICHMAN, *supra* note 53, at 20-22.

⁸¹ Hathaway, *supra* note 14, at 126 n.36.

⁸² Vienna Convention on the Law of Treaties arts. 19-23, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (providing for reservations in treaties).

⁸³ U.N. Charter art. 27, para. 3.

⁸⁴ See Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1583, 1628 (2005); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2061-63 (2003); Letter from John R. Bolton, Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, U.N. Sec'y Gen. (May 6, 2002), *available at* <http://archives.cnn.com/2002/US/05/06/court.letter.text/index.html>; Letter from Condoleezza Rice, U.S. Sec'y of State, to Kofi Annan, U.N. Sec'y Gen. (March 7, 2005), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-8&chapter=3&lang=en.

⁸⁵ See BORN & RUTLEDGE, *supra* note 27, at 16 (explaining that the "last-in-time principle" holds that "a federal statute supersedes prior inconsistent treaties, and conversely, a treaty supersedes prior inconsistent federal statutes"); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1561-62, 1587-95 (2003); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 522 (2002).

⁸⁶ 128 S. Ct. 1346 (2008).

or absence of this condition has a meaningful impact on the extent to which a delegation implicates the core concerns in the delegation debate. Accordingly, it is appropriate to include it as a criterion in the typology.⁸⁷

This section has derived three criteria to guide the classification of international delegations: the type of jurisdiction delegated, whether the delegation creates an organization, and the effect of that organization's actions in the sovereign state's domestic legal sphere. The next section uses these criteria to construct a typology for analyzing delegations.

C. *Constructing the Typology*

The preceding section defended a list of factors that should guide the construction of a typology for evaluating delegations. This section constructs the typology. Using those criteria and the broadened definition of delegation developed in Part I, I offer a four-part typology here.

1. Non-Organizational Delegations of Legislative Jurisdiction

At one end of the delegation spectrum lie treaties that merely set a choice-of-law rule. The 2006 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention") provides a good example.⁸⁸ The Hague Securities Convention, which both the United States and Switzerland have signed (and several other countries plus the European Union are presently considering), regulates the applicable law in cross-border securities transactions.⁸⁹ In grossly oversimplified terms, the Convention provides that, if the parties have designated the governing law in their agreement, their chosen law

⁸⁷ The recent American Society of International Law ("ASIL")/ABA report on *Medellin* supports this emphasis on domestication as a critical feature of an international law obligation. See AM. SOC'Y OF INT'L LAW, ABA/ASIL JOINT TASK FORCE ON TREATIES IN U.S. LAW 10-12 (2009), www.asil.org/files/TreatiesTaskForceReport.pdf.

⁸⁸ Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, U.S.-Switz., July 5, 2006, available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=72 [hereinafter Hague Securities Convention]. Other examples include assimilative laws and customary international law. See *supra* notes 24-28 and accompanying text. Like the Hague Securities Convention, *supra*, each of these examples delegates a degree of legislative jurisdiction to external institutions without affecting judicial jurisdiction and without creating a new organizational entity.

⁸⁹ For commentary, see Chris Kentouris, *International Treaty Provides Conflict-of-Interest Guidance: U.S. and Switzerland First to Sign G30-Backed Hague Securities Convention*, SEC. INDUSTRY NEWS, July 24, 2006, at 1, available at <http://www.securitiesindustry.com/issues/20060723/18061-1.html?zk>; Kate Laughlin, *Regulation: Hague Plan Moves for Global Securities Laws*, HIGH YIELD REPORT, July 17, 2006; *Financial Markets: Member States Invited to Sign the Hague Securities Convention*, EUROPOLITICS, July 6, 2006.

generally will apply.⁹⁰ If the parties have not specified the governing law, the Convention sets forth a series of tests, built on conflicts principles, to determine the applicable law.⁹¹

Applying the criteria set forth in the preceding subsection, the Hague Securities Convention represents a particularly modest delegation. It delegates a degree of legislative jurisdiction to external actors (either the parties or, lacking specification on their part, the country whose law applies under the fallback tests in Article 5 such as the “qualifying office” test to determine the applicable law), allowing them to determine the applicable substantive law to matters falling under the Convention.⁹² It does not delegate any judicial jurisdiction.⁹³ Nor does it entail the creation of any new organizational bureaucracy to oversee the Convention’s implementation; rather, it relies on existing domestic institutions to enforce its rules.⁹⁴

One might argue that this type of international activity does not involve delegation at all. Rather, it could simply represent a sort of inter-state coordination, not unlike coordination among members of a society who agree to drive on one side of the road. Under these circumstances, the coordinating members are simply yielding the benefits of cooperation, not surrendering some jurisdictional power.

While I acknowledge this argument has some force, I ultimately think agreements of this sort are properly classified as delegations, albeit at a low level. In the case of an inter-state treaty regulating choice of law, the states still are surrendering a degree of legislative jurisdiction, for a foreign authority is articulating a rule that will potentially regulate the behavior of a United States entity. Here, one might differentiate between a case where the sovereigns agree on a uniform rule such as the Convention on the International Sale of Goods (which more closely resembles a coordination action) and a case where one sovereign agrees to apply the rule of another sovereign without advance notice of its content.⁹⁵

⁹⁰ Hague Securities Convention, *supra* note 88, art. 4. The Convention still requires that the relevant intermediary satisfy a “qualifying office” test set forth in Article 4. *Id.*; *see also* Hague Conference on Private Int’l Law, The Hague Securities Convention: A Modern and Global Conflict of Laws Regime for Transactions Involving Securities Held with an Intermediary 1 (Dec. 2006), <http://www.hcch.net/upload/outline36e.pdf> [hereinafter Hague Securities Convention Outline].

⁹¹ Hague Securities Convention, *supra* note 88, art. 5.

⁹² *Id.* arts. 4-5; Hague Securities Convention Outline, *supra* note 88, at 1.

⁹³ Hague Securities Convention Outline, *supra* note 88, at 1-2.

⁹⁴ *Id.*

⁹⁵ I considered but ultimately rejected a separate categorization of “executive” delegations, a concept that has received some support in the literature. *See* John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 115-19 (1998); Bradley & Kelley, *supra* note 4, at 5, 35. The paradigmatic example here is the Chemical Weapons Convention. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45. While that convention does involve an authorization to executive officers of an intergovernmental organization, *id.* art. VIII.C, I did not think that sort of example warranted a separate

2. Non-Organizational Delegations of Judicial Jurisdiction

Slightly further down the spectrum come treaties that contain choice-of-law rules and channel judicial jurisdiction to courts in particular countries.⁹⁶ The New York Convention again provides a good example. Signed by over 140 nations, the New York Convention sets forth a framework to promote the enforcement of international arbitration agreements and arbitral awards.⁹⁷ It provides that courts in signatory countries generally must enforce arbitration agreements (that satisfy certain prerequisites).⁹⁸ This enforcement obligation is subject to a limited exception for agreements that are “null and void, inoperative or incapable of being performed,”⁹⁹ a standard that is narrower than the grounds for non-enforcement under most national arbitral laws.¹⁰⁰ In this respect, the New York Convention delegates a degree of legislative jurisdiction (that is, ceding control over the grounds for declaring unenforceable an international arbitration agreement).

The New York Convention’s provisions on the enforcement of awards also channel a degree of judicial jurisdiction. For example, Article V(1)(e) permits non-recognition where the award has been set aside “by a competent authority of the country in which, or under the law of which, that award was made.”¹⁰¹ This ground links the behavior of the enforcement forum’s courts to actions by a foreign forum’s courts.¹⁰² In this respect, Article V(1)(e) of the New York Convention represents a qualitatively different delegation from the kinds considered so far. Yet like the Convention’s other provisions and the Hague Securities Convention, it relies on domestic judi-

classification for two reasons. First, executive delegations of that sort often accompany legislative delegations, as in the case of the Chemical Weapons Convention, so the executive delegation is ultimately derivative. Second, to the extent the legislative delegation involves the creation of a bureaucracy such as an entity enforcing the treaty obligations, my idea of organizational versus non-organizational delegations captures the distinction and enables one to draw on the literature about bureaucracy behavior to highlight the effects of the delegation.

⁹⁶ For a discussion of the relationship between domestic tribunals and supranational ones, see generally Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675 *passim* (2003).

⁹⁷ New York Convention, *supra* note 29, art. I.

⁹⁸ *Id.* art. II.

⁹⁹ *Id.* art. II(3).

¹⁰⁰ *Compare id.*, with Federal Arbitration Act, 9 U.S.C. § 10 (2006).

¹⁰¹ New York Convention, *supra* note 29, art. V(1)(e).

¹⁰² Other examples of this sort of delegation include the recently signed Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, and the law governing enforcement of foreign judgments. See *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895); AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE *passim* (2006) [hereinafter RECOGNITION AND ENFORCEMENT DRAFT]; NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4 (2005) [hereinafter UNIFORM MONEY JUDGMENTS ACT].

cial institutions, rather than a new transnational bureaucracy, to enforce its rules.¹⁰³

3. Delegations To Organizations Whose Decisions Require Domestication

Further down the spectrum are delegations that actually entail the creation of a new organization (here we begin a discussion of the delegations envisioned in the “orthodox view” described in Part I). The preceding subsection explained the need to differentiate between those organizations whose decisions had an automatic domestic effect and those whose decisions did not. International law is replete with examples of delegations to organizations whose decisions lack automatic domestic effect. The Iran-United States Claims Tribunal provides a good example.¹⁰⁴ That tribunal, created under the Algiers Accord, sought to provide an exclusive forum for claims by U.S. and Iranian nationals arising out of the Iranian hostage crisis and the subsequent freezing of Iranian assets by the United States.¹⁰⁵ Disputes are resolved through arbitration rather than domestic courts.¹⁰⁶ In determining the applicable law, the Algiers Accord’s Claims Settlement Declaration directs arbitrators to “apply[] such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable.”¹⁰⁷ The tribunal’s decisions have the force of arbitral awards.¹⁰⁸

Several features of this system are relevant to the delegation analysis. First, the signatories to the Algiers Accord are delegating both legislative jurisdiction and judicial jurisdiction. They are delegating legislative jurisdiction because international law, rather than domestic law, supplies the applicable rule of decision. They are delegating judicial jurisdiction because

¹⁰³ See also Young, *supra* note 29, at 479 (“[T]he enforcement of a judgment, without more, typically settles the dispute between the parties without resolving the rights of parties not before the court. Particularly where the parties have already consented to the arbitral forum, there are few sovereign concerns to outweigh the efficiency gains to be had from barring relitigation.”).

¹⁰⁴ See CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 238-41 (1998). Also note, in the case of the Algiers Accord, the arbitration proceedings had the force of President Carter’s actions under the International Emergency Economic Powers Act. See *Dames & Moore v. Regan*, 453 U.S. 654, 662-63 (1981). However, this case is still not distinguishable because the presence of arbitration proceedings usually means that the resulting decisions have the force of arbitral awards.

¹⁰⁵ Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 81 DEP’T STATE BULL., Feb. 1981, at 1-2, *reprinted in* 20 I.L.M. 224.

¹⁰⁶ *Id.*

¹⁰⁷ Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran art. V, Jan. 19, 1981, 81 DEP’T STATE BULL., Feb. 1981, at 3-4, *reprinted in* 20 I.L.M. 230, 232 [hereinafter Claims Settlement Declaration].

¹⁰⁸ *Id.* art. IV.

the Accords' tribunals, rather than domestic courts, are determining liability in a given case. Notably, however, the delegation does not flow in one direction—the Algiers Accord does not create an independent body to promulgate liability rules—instead, it delegates those rules to those “institutions” involved in the development of “principles of commercial and international law.”¹⁰⁹ By contrast, the judicial jurisdiction is vested in the Tribunal itself.¹¹⁰ Thus, the Iran-U.S. Claims Tribunal example teaches us that one method of managing the costs and benefits of delegation is to spread the jurisdictional grant across multiple institutions.¹¹¹

The second noteworthy feature of the delegation here is that the decisions of the Claims Tribunal still rely on the cooperation of domestic implementing institutions for legal effect. As arbitral awards, they are not automatically reduced to domestic judgment but, instead, must undergo confirmation, recognition and/or enforcement through the domestic courts and are subject to the signatory states' arbitration laws.¹¹² This preserves to the states a degree of control over how the delegation in fact affects the states' domestic legal regime.

Disputes under the North American Free Trade Agreement¹¹³ also arguably fall within this category. NAFTA obligated member states to remove various restrictions on trade and created an arbitration mechanism, dispute resolution boards (“DRBs”), to resolve disputes either between member states or between private parties and member states over whether particular conduct (such as dumping or countervailing duties) violated the treaty.¹¹⁴ Arbitrators are chosen from national lists maintained by member

¹⁰⁹ *Id.* art. V.

¹¹⁰ *Id.* art. II.

¹¹¹ One may object that the distinction offered here is hypertechnical. While the Algiers Accord does not formally vest the authority to determine the applicable liability rule to the tribunals, in practice the tribunals themselves are performing something akin to this function in the course of ascertaining what they believe to be the applicable conflicts principles and the relevant principles of commercial and international law. The criticism is valid but incomplete. First, it does not really affect the theoretical opportunity to spread the power of a delegation across multiple institutions. Second, it presumes that tribunals vested with this power to ascertain the applicable principles will exercise it in a self-aggrandizing rather than intellectually honest way. As Helfer and Slaughter have explained in the context of the European Court of Justice and European Court of Human Rights, the behavior of such transnational institutions suggests that they behave more modestly. *See Helfer & Slaughter, supra* note 11, at 314-17.

¹¹² Claims Settlement Declaration, *supra* note 107, art. IV(3).

¹¹³ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); North American Free Trade Agreement Implementation Act, 19 U.S.C. ch. 21 (2006) [hereinafter NAFTA Implementation Act].

¹¹⁴ *See* Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1459-62 (1992); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 766-68 (2004); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 835 (2007).

states.¹¹⁵ They resolve the disputes according to the law that they determine applicable by reference to international conflicts principles set forth in the treaty.¹¹⁶ The decisions of the arbitral panel are binding and largely immune from review in the domestic courts of the member states.¹¹⁷

NAFTA DRBs display many of the same characteristics as the Iran-U.S. Claims Tribunal. The signatory states are delegating a degree of legislative jurisdiction (letting international conflicts principles determine the substantive law). They also are delegating judicial jurisdiction (allowing the transnational tribunals to resolve the dispute largely to the exclusion of domestic institutions). They create new institutions (the boards).

It is, perhaps, an open question how far the DRBs' decisions rely on domestic institutions for implementation. By and large, this has not been tested, for parties largely comply with DRB decisions, and a fallback mechanism in the NAFTA implementing legislation provides that the President via executive order can adopt a DRB decision as his own (not unlike the President's strategy in *Medellin*).¹¹⁸ This issue did spill out—albeit inconclusively—in the recent Canadian softwood lumber dispute.¹¹⁹ In that dispute, which ultimately settled, a NAFTA DRB issued an order which seemingly mandated that the Department of Commerce eliminate 16 percent of their duties on Canadian lumber imports.¹²⁰ The implication was that the dispute resolution boards had the authority to issue orders to the U.S. Department of Commerce without any intervening action by the Executive Branch. Subsequent litigation will be necessary to test whether such an order exceeded the DRB's jurisdiction.

4. Delegations To Organizations Whose Decisions are Automatically Domesticated

At the far end of the spectrum lie delegations of jurisdiction to institutions that do not rely on domestic agents for implementation of their decisions.¹²¹ Few, if any, examples truly exist. Among the most often-cited are

¹¹⁵ Chen, *supra* note 114, at 1461.

¹¹⁶ Pfander, *supra* note 114, at 768 (“[NAFTA panels] apply the law of the United States only as provided in the Agreement itself and otherwise look to an evolving body of international principles that govern fair investor treatment.”).

¹¹⁷ Chen, *supra* note 114, at 1461-62 (describing the effect of arbitral review under NAFTA).

¹¹⁸ NAFTA Implementation Act, *supra* note 113, 19 U.S.C. § 3314.

¹¹⁹ John R. Crook, *Commerce Department Acts to Comply with NAFTA Panel Instructions in Softwood Lumber Case*, 100 AM. J. INT'L L. 242, 242-43 (2008).

¹²⁰ Matthew Daly, *NAFTA Panel Gives U.S. One Week to Cut Softwood Lumber Duties*, TRADE OBSERVATORY, Nov. 17, 2005, <http://www.tradeobservatory.org/headlines.cfm?refID=77554>.

¹²¹ Here, one might posit a distinction between international delegations (where the decisions of the body have effect but only at the level of international law) and domestic delegations (where the decisions of the international body have direct effect without further domestication by the sovereign).

the institutions of the European Community.¹²² In broad terms, the various member states through several treaties, most notably the Treaty of Rome and the Treaty of Maastricht, have delegated both legislative and judicial jurisdiction to several transnational institutions, including the European Commission (“EC”), the European Parliament, and the European Court of Justice.¹²³ Various acts of these institutions, most notably the directives of the European Commission, have “direct effect” in the territories of the member states.¹²⁴ In other words, the Commission’s directives apply without further action, whether executive, legislative, or judicial in the member states.¹²⁵

As to the European Community, there is of course a gap between the legal theory and the actual practice, which dampens somewhat the plausibility of this account. While it certainly is true, as a legal matter, that EC directives have direct effect in member nations, the European institutions still rely on the domestic institutions of those member nations to implement those directives within the Member States.¹²⁶ As some have noted, this residual reliance on domestic institutions, even following the pronouncement of the direct effect doctrine, has the potential to constrain the European institutions from overreaching.¹²⁷

The *Medellin* case demonstrates how the line between a transnational bureaucracy that relies on domestic actors and one that does not can become blurred. Originally, the International Court of Justice was created in conjunction with the United Nations as a vehicle for resolving disputes between states.¹²⁸ Over time, it has taken on new roles, including jurisdiction over disputes under the Vienna Convention on Consular Relations pursuant to an Optional Protocol which the United States originally signed (and from which it subsequently withdrew).¹²⁹ If the Supreme Court had concluded in *Medellin* that ICJ judgments had an automatic domestic effect in the United States, that decision would require us to classify it along with European Community directives, a topic to which I return in Part III.C.

The former case might be treated as simply a weaker form of the delegation I describe here. See Young, *supra* note 29, at 509-10.

¹²² See Guzman & Landside, *supra* note 10, at 1694-96; Helfer & Slaughter, *supra* note 11, at 290-98.

¹²³ T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW passim* (5th ed. 2003).

¹²⁴ See Joined Cases C-6 & C-9/90, *Francovich, Bonifaci v. Italian Republic*, 1991 E.C.R. I-5357, ¶¶ 7-8 (citing Case C-221/88, *European Coal & Steel Cmty. v. Acciaierie e ferriere Busseni S.p.A.*, 1990 E.C.R. I-495, ¶ 22).

¹²⁵ See *id.* ¶ 7.

¹²⁶ Weiler, *supra* note 64, at 2420-22.

¹²⁷ See *id.* at 2406 n.7; Helfer & Slaughter, *supra* note 11, at 315.

¹²⁸ See ARTHUR EYFFINGER, *THE INTERNATIONAL COURT OF JUSTICE: 1946-1996*, at 145 (1996).

¹²⁹ The expansion in the ICJ’s mandate perhaps exemplifies the mission creep mentioned earlier and justifies organizational creation as one criterion in the typology.

In sum, this Part has reviewed the existing classifications of delegation, defended a multi-polar approach to the question, built on some of the weaknesses in the account offered by Bradley and Kelley, derived three salient criteria, and constructed a four-part typology based on those criteria. The next Part utilizes that typology to engage in some preliminary normative analysis about specific delegations.

III. APPLYING THE TYPOLOGY: THE NORMATIVE DEBATE

This Part ties together the analysis and proceeds in three subparts. The first subpart offers a normative tool for evaluating the costs and benefits of delegation. The second subpart then applies this tool to examples of specific delegations classified according to the typology developed in Part II. The last subpart discusses the lessons of this normative framework for the *Medellin* case.

A. *The Costs and Benefits of Delegation*

The normative debate over delegations, generally speaking, is well worn, and I do not rehash it here. Rather, I synthesize and refine the dominant views in the literature.

1. Benefits of Delegation

While scholars have categorized them in various ways, the benefits of delegation basically fall into three categories. First, delegation enables states to achieve through cooperation goals that they could not achieve acting through unilateral action (in more theoretical terms, delegation overcomes a collective action problem).¹³⁰ For example, accession to NAFTA or the WTO enables a country to achieve certain trade benefits with the awareness that other nations who have ratified the treaty will abide by its provisions, due in part to the mutual ability of all signatory nations to ensure compliance.

¹³⁰ See Guzman & Landside, *supra* note 10, at 1693-94; Hathaway, *supra* note 14, at 137. At a slightly more nuanced level, we might subdivide the “collective action” benefits into five subcategories—it facilitates collective decision-making; it creates policy bias; it provides a less costly mechanism for resolving disputes; it provides a mechanism for managing policy externalities; and finally, over time, it provides opportunities to enhance the credibility of international commitments. See Hawkins, *supra* note 15, at 13-23.

Second, delegation advances certain norms such as human rights—norms that states, for whatever reason, might seek to impede.¹³¹ For example, the International Covenant on Civil and Political Rights embraces certain norms such as the right to compensation for an “unlawful arrest or detention.”¹³²

Third, delegation offers efficiencies through division of labor and gains from specialization.¹³³ In other words, states create an organizational mechanism that assumes responsibility for a particular task and, in the course of doing so, develop a superior expertise in a given area. The International Atomic Energy Agency (“IAEA”) provides a good example. Created as an independent agency in 1957 and reporting to (though independent from) the United Nations General Assembly, the IAEA’s overarching function is to pursue “safe, secure and peaceful uses of nuclear science and technology.”¹³⁴ To fulfill this mandate, it performs three main tasks. It inspects existing nuclear facilities to ensure that they are using technology for peaceful purposes; it supplies technical information to ensure the safety of nuclear facilities; and it serves as a clearinghouse for scientific research into the safe uses of nuclear technology.¹³⁵ Through these functions, the IAEA relieves states of the need to undertake some of the functions themselves and develops an unparalleled expertise in nuclear technology.¹³⁶

2. Costs of Delegation

As with the benefits, skeptics of delegation have offered different accounts of its costs,¹³⁷ but they too basically boil down to three points. First,

¹³¹ Hathaway, *supra* note 14, at 145-48. In more abstract terms, delegation as an institutional matter promotes a certain “policy bias” that is less likely to be obtained in a purely statist setting. Hawkins, *supra* note 15, at 13, 19-20.

¹³² International Covenant on Civil and Political Rights art. 9(5), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

¹³³ Hawkins et al., *supra* note 15, at 13-15.

¹³⁴ Our Work: Work at the IAEA, <http://www.iaea.org/OurWork/index.html> (last visited Sept. 25, 2009).

¹³⁵ *Id.*

¹³⁶ Of course, it should be noted that in certain circumstances states may actually prefer redundant capabilities, even if they are inefficient. For one thing, there may be circumstances where the agency’s interests diverge from the delegating state’s. For another thing, the state may wish to preserve an independent means (and the consequent expertise) to verify claims by the independent agency. These countervailing considerations may dampen the efficiency gains that come from the division of labor and the specialization with the international agency.

¹³⁷ Bradley & Kelley *supra* note 4, at 27-32 (suggesting diminished autonomy, unwanted concessions, increased costs for noncompliance with international commitment, and lost opportunity costs as downsides to delegation); Hathaway, *supra* note 14, at 120-40 (suggesting consenting authority, time-inconsistent preferences, unintended consequences, and asymmetric power as costs of delegation).

the most often cited one is “sovereignty costs.”¹³⁸ While the value of that term is debatable, it essentially captures the idea that, through the grant of authority, a nation is surrendering some bit of its “sovereignty” over a particular issue.¹³⁹ Transnational institutions, unlike domestic political institutions, are not politically accountable to an electorate and, therefore, may be less responsive to the needs of a citizenry.¹⁴⁰ This lack of political accountability for their actions, according to the sovereignty costs argument, compromises the legitimacy of the transnational organization’s actions.¹⁴¹

Second, delegation may require the sovereign to agree on a second-best solution or to subject itself to a sanctioning or monitoring mechanism in order to achieve a necessary compromise with its treaty partners.¹⁴² According to this argument, states’ choices reflect a series of preference ordering, and when acting unilaterally, states can more easily choose to pursue the choice that optimizes their interest.¹⁴³ By contrast, when acting cooperatively, states sometimes must pursue courses other than the optimal one in order to satisfy the competing needs of their treaty partner.¹⁴⁴

Finally, though not noted in the literature, an additional cost of delegation is the risk of defection. This risk is often captured in various forms of the prisoner’s dilemma.¹⁴⁵ For example, suppose that by acting autonomously, two individuals can obtain a payoff of “2.” Suppose further that by cooperating they can obtain a payoff of “3.” But if one cooperates and the other defects, then the cooperator only obtains a payoff of “1” while the defector obtains a payoff of “4.” In that case, delegation might put the sovereign in a *worse* position than if it had not cooperated in the first place. In

¹³⁸ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 436-41 (2000).

¹³⁹ Bradley & Kelley, *supra* note 4, at 27-28.

¹⁴⁰ A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J INT’L L. 877, 937 (2000).

¹⁴¹ *Id.*; Ku, *supra* note 11, at 124.

¹⁴² Bradley & Kelley, *supra* note 4, at 28. One may legitimately question whether either of these represents a cost at all. The answer depends both on the intensity of the state’s preference and the likely result in case of non-cooperation. For example, suppose that a country accedes to a treaty that generates net \$x in export flows but requires it to make concession that reduce economic output by \$y; in this case accession to the treaty only would entail a “cost” if \$y > \$x. Similarly if the economic impact of a treaty’s sanctioning mechanism is represented by \$a and the net export flows by \$b, then the monitoring mechanism only represents a “cost” if \$a > \$b.

¹⁴³ *See id.*

¹⁴⁴ *Id.* Defenders of delegation naturally respond that this critique presents a false dilemma. *See* Hathaway, *supra* note 14, at 140-41. In their view, delegations and cooperation create opportunities not available to states acting atomistically. *Id.* Thereby, the delegation increases the state’s aggregate wealth even if the state must pursue a suboptimal strategy with respect to one or more particular decisions. *See id.* at 141-42.

¹⁴⁵ T. Burns & L.D. Meeker, *Structural Properties and Resolutions of the Prisoners’ Dilemma Game*, in GAME THEORY AS A THEORY OF CONFLICT RESOLUTION 35, 35-36 (Anatol Rapoport ed., 1974). *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 22-36 (2d ed. 1971).

other words, the risks of defection mean that the benefits of cooperation can be overstated.

3. Does Consent Supply the Missing Link?

A recent article by Oona Hathaway has cast doubt on some of the cost arguments and submits that notions of “consent” supply a missing link in the defense of delegation.¹⁴⁶ Hathaway argues that delegation skeptics overlook the significance of state “consent” to the delegation.¹⁴⁷ In other words, by acceding to a treaty such as NAFTA, states voluntarily assume the obligations and voluntarily cede the authority to the international organization. This consent reduces sovereignty costs both because the sovereign has willingly chosen to assume the obligation and also perhaps because the sovereign has calculated that the benefits from cooperation exceed the costs.¹⁴⁸

While Hathaway’s article fills an important gap in the theoretical debate, it does not supply a fully satisfying answer to the costs of delegation. Hathaway’s argument overlooks the fact that an international organization’s mandate is vague and ill-defined. As Keohane et al. have explained, such conditions enhance the risk that the international organization will seek to expand the scope of its mandate beyond that envisioned by the sovereign when it consented to the delegation.¹⁴⁹ One example is when the arbitral panel in the Canadian Softwood Lumber case actually ordered the Department of Commerce to lower its countervailing duties.¹⁵⁰ Such expansions in scope can then entail an added and unforeseen loss of sovereignty.

Moreover, the consent argument turns on a normative consideration about the degree of consent necessary to legitimize a delegation. Defenders of delegation such as Hathaway appear to argue that consent to *process* suffices. In other words, by opting into a treaty that contains a dispute resolution mechanism, a state knows that it is consenting to a degree of uncertainty about how that dispute resolution mechanism is going to be implemented. Skeptics of international delegation appear to argue that consent to process does not suffice; rather, there must be consent to the *outcome* of the international institution’s decision. Escape devices, such as public policy exceptions or RUDs, provide an imperfect opportunity for a state to engage in this type of outcome-based consent.¹⁵¹

¹⁴⁶ Hathaway, *supra* note 14, at 121-22.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 121-22, 125-27.

¹⁴⁹ Keohane et al., *supra* note 11, at 461-62, 481-82.

¹⁵⁰ Crook, *supra* note 119, at 242-43.

¹⁵¹ I say imperfect because I believe that the use of these escape devices is not costless. It may undermine the “embeddedness” of the international institution’s decisions and, thereby, undermine the institution’s ability to engage in other acts that advance the sovereign’s interests.

To summarize, delegations offer three main benefits: (1) cooperation, (2) norms advancement, and (3) efficiency gains from specialization. They also entail several costs: (1) sovereignty costs, (2) second-best outcomes, and (3) risks of defection. Notions of consent supply an important consideration in the analysis but cannot completely address the potentially significant costs in a particular delegation. Part III.B applies those normative tools to particular types of delegation.

B. *Considering Costs and Benefits in Light of the Typology*

This Part provides several preliminary applications of the theory. It considers the theoretical costs and benefits of delegations using the typology developed in Part II. By doing so, I hope to provide a richer account of what types of delegations are more likely to yield net benefits.

1. Non-Organizational Delegations of Legislative Jurisdiction

With respect to this first category of delegations, the benefits are easily realized and the costs minor. Consider again the Hague Securities Convention. Such choice-of-law conventions yield cooperative benefits: they provide greater clarity and, consequently, greater predictability to the securities market. They also potentially advance a second benefit of delegation, norms development; to the extent one believes that efficient capital markets are a desirable end, treaties such as these that eliminate uncertainty engendered by conflicts-of-law analysis advance that end. As to the third potential benefit of delegation (efficiency gains from specialization), choice-of-law treaties by their very nature generally do not advance this interest, for they continue to rely on multiple domestic political organizations for their implementation. In at least one respect, however, the Hague Securities Convention indirectly advances this goal. By specifying that signatory countries have regard for “the need to promote uniformity in . . . application,”¹⁵² the treaty promotes a degree of transnational legal harmonization that, over time, may reduce the differences between domestic laws on the subject and create the conditions for the emergence of a transnational organization. In sum, benefits of such delegations are substantial.

Costs, by contrast, are minimal. Sovereignty costs are nominal: the sovereign still retains full judicial jurisdiction over the case and merely has surrendered marginal control over the applicable choice-of-law rule to the extent a foreign state might supply the applicable liability rule (either by operation of contract or by operation of the qualifying office test). There is at best a slight risk of forcing the states to settle for second-best outcomes

¹⁵² Hague Securities Convention, *supra* note 88, art. 13.

(the optimal outcome, I suppose, would be a choice-of-law test that optimized the sovereign's interests and, presumably, those corporate entities within its jurisdiction). Finally, risks of defection also are slight. To the extent the treaty merely ensures the enforceability of the party's choice-of-law clause, any defection (such as a refusal to enforce the clause) would be highly visible.¹⁵³ To the extent parties do not specify the governing law, risks of defection rise (courts might misapply the "qualifying office" test).

2. Non-Organizational Delegations of Judicial Jurisdiction

Delegations of judicial jurisdiction entail a more complex mix of costs and benefits than delegations of legislative jurisdiction. On the benefit side, the analysis is substantially similar. Treaties such as the New York Convention and the Hague Choice of Courts Convention offer similar benefits from cooperation, mostly through improved capital flows stimulated by greater certainty over the enforceability of a decision resolving disputes. Likewise, they offer the chance to advance certain norms—whether described as facilitating foreign commerce or promoting international comity. Benefits from efficiency gains are again minimal due to the reliance on domestic actors—here courts—to implement the treaties.

The cost analysis mirrors that with respect to non-organizational delegations of legislative jurisdiction—with one major exception. Delegations of this sort do carry a greater risk of defection. For example, although both the United States and India are signatories to the New York Convention, U.S. courts generally are more willing to enforce foreign arbitral awards rendered in India than Indian courts are to enforce awards rendered in the United States.¹⁵⁴

Here, escape devices such as reciprocity can mitigate the risk of defection. Structuring a reciprocity provision so as to link one sovereign's execution of its obligation to another sovereign's willingness to do likewise penalizes the defecting sovereign after its first move. In this sense, it closely resembles the "Tit-for-Tat" strategy identified by Robert Axelrod as the optimal solution to the prisoner's dilemma.¹⁵⁵

¹⁵³ See, e.g., *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535-42 (1991) (discerning the original meaning of the Warsaw Convention). This point is demonstrated broadly, not just in the context of choice-of-law provisions, by Justice Marshall's opinion in *Eastern Airlines, Inc. v. Skyway, Inc.* While not explicitly stated, it is clear one goal of this approach was to avoid any perception that the U.S. was deviating from the Warsaw Convention. See *id.*

¹⁵⁴ See Ricardo Almeida, *Problems of Jurisdiction and of Recognition and Enforcement of Foreign Judgments and Arbitral Awards in India*, in *CURRENT LEGAL ISSUES IN INTERNATIONAL COMMERCIAL LITIGATION* 438, 448-66 (Teo Keang Sood et al. eds., 1997); Jan Paulsson, *The New York Convention's Misadventures in India*, *INT'L ARB. REP.*, June 1992, at 18, 18-21.

¹⁵⁵ Robert Axelrod, *The Evolution of Cooperation*, in *PERSPECTIVES ON PROPERTY LAW* 261, 262-66 (Robert C. Ellickson et al. eds., 3d ed. 2002).

This analysis carries important lessons for contemporary debates such as the law governing the enforcement of foreign judgments. Since the Supreme Court's decision in *Hilton v. Guyot*,¹⁵⁶ states have moved away from a reciprocity requirement, but the wisdom of that draft has been the subject of much recent debate. Drafters of the American Law Institute's ("ALI") proposed law on foreign judgment enforcement have reinserted a reciprocity requirement into the draft law.¹⁵⁷ By contrast, drafters of the revised uniform state law on the enforcement of foreign money judgments rejected a proposal to reinsert a reciprocity requirement.¹⁵⁸ The analysis offered here suggests that the ALI drafters (and the original *Hilton* majority) may have the better argument. Reinserting a reciprocity norm in the foreign judgment law reduces other sovereigns' incentive to defect and provides an escape device for the United States in case another sovereign does so.

3. Delegations to Organizations Whose Decisions are Not Automatically Domesticated

When we shift from non-organizational delegations to organizational ones, the cost-benefit analysis becomes more complex. Costs can be severe but perhaps not as severe as critics of delegation often argue. Consider the Iran-U.S. Claims Tribunal. The Tribunal demonstrates that the costs generated by second-best solutions sometimes are quite minor. What alternatives were there? The United States might have simply demanded payment from Iran through a U.S.-run dispute resolution process, but there was little indication at the time that Iran would be willing to pay. Alternatively, it might have allowed U.S. plaintiffs to continue to pursue their claims in a federal forum, but any outcome (while perhaps more remunerative than a tribunal award) would surely have run into enforceability problems (to the extent assets were unavailable to satisfy the award).

Sovereignty costs and risks of defection, however, are more salient, for the United States is ceding its courts' authority to hear claims falling under the Tribunal's jurisdiction.¹⁵⁹ Risks of defection depend on the extent to which the agents of that organization (here the judges of the Tribunal) are beholden to the states (principals) who create them. In Keohane's terms, the risks of defection depend on the "independence" of the Tribunal.¹⁶⁰ The

¹⁵⁶ 159 U.S. 113, 163-64 (1895) (explaining the application of comity and suggesting that extending comity to the laws of other nations is not a breach of sovereignty).

¹⁵⁷ RECOGNITION AND ENFORCEMENT DRAFT, *supra* note 102, § 7.

¹⁵⁸ See UNIFORM MONEY JUDGMENTS ACT, *supra* note 102, § 4. For a fuller explication of the reciprocity argument, see Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 257-65 (2004).

¹⁵⁹ See Claims Settlement Declaration, *supra* note 107, art. II.

¹⁶⁰ See Keohane et al., *supra* note 11, at 458-62.

history of the tribunal has generally been a positive one but does include a few examples of defection, particularly by the Iranian judges.¹⁶¹ States might structure organizations to avoid this problem through mechanisms that ensure independence. Such mechanisms may reduce the risk of defection, but may accentuate other costs. Specifically, it may enhance the sovereignty costs caused by mission creep, particularly where the organization's mandate is vaguely defined (in which case the need for escape devices grows).¹⁶² In sum, organizational delegations of jurisdiction entail more substantial costs, and mechanisms for controlling some of those costs may worsen others.

While costs are mixed, benefits can be substantial. As to cooperation, the Iran-U.S. Tribunal example reveals that the "cooperative" benefit is really the flipside of the "second-best" cost—the Tribunal accomplished an outcome that neither party, acting unilaterally, could have achieved.¹⁶³ The Tribunal also advanced several norms such as the peaceful resolution of citizen-state disputes over expropriation of property that previously had been addressed through fruitless domestic litigation or ineffective state-state litigation.¹⁶⁴ Finally, the Tribunal also exemplifies the gains to be derived through division of labor and specialization. The Tribunal developed one of the most comprehensive bodies of jurisprudence interpreting the United Nations Commission on International Trade Law ("UNCITRAL") Model Arbitration Rules.¹⁶⁵ Though the Tribunal has completed its work, its jurisprudence has proven instrumental in subsequent cases involving the UNCITRAL Rules as well as the international law governing expropriations.¹⁶⁶

¹⁶¹ BROWER & BRUESCHKE, *supra* note 104, at 22-25, 153-81 (describing the challenges of Iranian judicial defection and challenges of international justices). Judge Brower also summarizes the success of the Tribunal despite the difficulties presented by Iranian defections and challenges. *Id.* at 657-69.

¹⁶² See Keohane et al., *supra* note 11, at 461-62.

¹⁶³ RICHARD B. LILLICH, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 1981-1983*, at vii (1984) (referring to the Iran-U.S. Claims Tribunal as the "most significant arbitral body in history").

¹⁶⁴ GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 43, 217-42 (1996) (explaining resolutions for conflicts arising from the expropriation of property). "From my perspective," Aldrich writes, "the Tribunal has largely succeeded . . . in doing justice to the parties before it. In the process, the Tribunal has created a jurisprudence that represents a significant contribution to the development of international law . . ." *Id.* at 43.

¹⁶⁵ See generally Stewart A. Baker & Mark D. Davis, *Arbitral Proceedings Under the UNCITRAL Rules—The Experience of the Iran-United States Claims Tribunal*, 23 *GEO. WASH. J. INT'L L. & ECON.* 267 *passim* (1989).

¹⁶⁶ See *id.*; Christopher S. Gibson & Christopher R. Drahozal, *Iran-United States Claim Tribunal Precedent in Investor-State Arbitration*, 23 *J. INT'L ARB.* 521, 531-32 (2006).

4. Delegations To Organizations Whose Decisions Are Automatically Domesticated

As with the preceding category, the mix of costs and benefits here is complex. Costs are more pronounced in cases of delegations to an institution whose decisions have an automatic domestic effect. Sovereignty costs are even higher than in the preceding category: the delegating sovereign loses the ability to utilize its domestic institutions as escape devices to prevent unwarranted expansions of the institution's mandate. In automatic domestication cases, the only effective escape device may be exit from the treaty regime entirely. So too is there a risk of second-best outcomes: the European Commission exemplifies how the transnational institution may render a decision in the economic interest of the Community even if it is an inferior outcome with respect to a local industry or economy that a particular member state has sought to protect.¹⁶⁷ At the same time, risk of defection by other sovereigns is low because automatic domestication reduces the role of their domestic institutions in implementation. Delegations with an automatic domestic effect thus display an inverse relationship with respect to two costs: as sovereignty costs rise, risks of defection decline.

On the benefit side, examples such as the European Community demonstrate the advantages. The common market created by the European Community, enabling the "four freedoms" of movement, demonstrates the benefits of cooperation.¹⁶⁸ The European Community also demonstrates how these organizations can advance international norms. (By contrast, the less successful attempt to establish a European Constitution demonstrates how the institution sometimes can "overreach" in attempting to advance a set of norms beyond those that the constituent sovereign entities are prepared to extend.) Finally, the EC displays the specialization benefits to be derived from these sorts of delegations; the development of antitrust expertise in the EC's competition directorate provides a particularly salient example.¹⁶⁹

¹⁶⁷ A classic example is its assault on the "Notar" system in certain member nations as a restriction on the free movement of services. *Commission Says Notaries Must Open up to Foreigners*, EURACTIV, Oct. 13, 2006, <http://www.euractiv.com/en/competition/commission-notaries-open-foreigners/article-158768>.

¹⁶⁸ See generally CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU* 3 (2d ed. 2007) (identifying the Four Freedoms as the free movement of goods, the free movement of capital, the free movement of services, and the free movement of persons).

¹⁶⁹ See generally David J. Gerber, *Two Forms of Modernization in European Competition Law*, 31 *FORDHAM INT'L L.J.* 1235 *passim* (2008).

C. *Lessons for Medellin*

This Essay opened with the case of *Medellin v. Texas*¹⁷⁰ as an example of the broader theoretical issues about delegation explored herein. It is perhaps appropriate therefore to close by sketching out the lessons of this analysis for that case. *Medellin*'s discussion of the New York Convention and foreign judgment enforcement vindicates the model developed here. It reflects an awareness that treaty obligations such as those at issue in the Vienna Convention do share a conceptual similarity with those obligations on topics such as the enforcement of arbitral awards that have been largely excluded from the delegation debate in the literature.

Medellin does not, however, entirely foreclose the possibility of a delegation ever having automatic domestic effect. The European Community demonstrates that such systems are not unattainable. Here it is important to understand how the doctrine of direct effect evolved in the European Community and to contrast its evolution with the norms at stake in *Medellin*. When it developed the doctrine of direct effect, the European Court of Justice still required a degree of cooperation from Europe's domestic actors (even if their compliance was, strictly speaking, not legally required).¹⁷¹ Thus, as Joseph Weiler has observed, the European Court of Justice did not seek out the most controversial, intractable issues among the European states in which to articulate the doctrine; it chose issues on which to articulate the doctrine of direct effect that were relatively non-controversial among the member states of the European community.¹⁷² As a result, the mechanism of domestic absorption was relatively uncontroversial.¹⁷³ Contrast that with *Medellin*. *Medellin* presented a true divergence between the domestic political views and the international norms on an issue (there the death penalty). Recent studies indicate that the American public remains deeply divided over the death penalty with a (declining) majority of the country still favoring it.¹⁷⁴ International norms, by contrast, are squarely aligned against it.¹⁷⁵ Thus, advocates trying to incorporate a doctrine of di-

¹⁷⁰ 128 S. Ct. 1346 (2008).

¹⁷¹ Alicia Farrell Miller, Note, *The Preliminary Reference Procedure of the Court of Justice of the European Communities: A Model for the ICJ?*, 32 HASTINGS INT'L & COMP. L. REV. 669, 669-70 (2009).

¹⁷² Weiler, *supra* note 64, at 2413-14.

¹⁷³ *Id.* at 2405-07.

¹⁷⁴ For recent research synthesizing public opinion on the death penalty, see Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 605 & n.29 (2007) (citing a 2006 Gallup poll indicating half of Americans favored the death penalty); Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 22-23 (2007) (noting that at the time of the Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), public opinion favored the death penalty by a 2:1 margin).

¹⁷⁵ For example, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court cited an international trend against execution of minors. *Id.* at 567, 575. Similarly, one sticking point in the negotiations

rect effect or its analogue in the *Medellin* case picked a poor case by which to effect that strategy. In short, they did not learn the lessons of the European Court of Justice.

Indeed, the broader lesson from *Medellin* may be that, even where it lacks effect as “hard law,” decisions that lack automatic domestication nonetheless can have an important indirect impact as soft law.¹⁷⁶ Such judgments may not receive an automatic domestic effect, but they still influence the domestic political process potentially in more politically accountable ways. For example, in the wake of some decisions by the ICJ prior to the *Avena*¹⁷⁷/*Medellin* litigation, some governors commuted death sentences of individuals, perhaps in response to some of the pressure coming from these international tribunals.¹⁷⁸ Thus, the most interesting aspect of *Medellin* may not be its outcome but how it influences the strategy of those who advocate the integration of international tribunals’ decisions into our domestic system. One might expect these advocates to rely to a greater degree on “soft law” methods to bridge the dissensus between the domestic political norms and the international norms in order to facilitate the transition that occurred in the EU before direct effect took hold.

CONCLUSION

This Essay seeks to contribute to the ongoing debate in the academy and policy circles over delegation. A central problem with that debate, in my view, has been an unduly narrow definition of the term, one that skews the analysis of costs and benefits. A broader definition of the term, one decoupled from the explicit creation of organizations and bureaucracies, more accurately captures the policy concerns underlying the debate. Viewed in those terms, delegation is best understood as a conflicts-of-law problem, an insight that conflicts titans such as Huber and Story recognized. A four-part

over Turkey’s accession to the European Community turns on that country’s willingness to abolish capital punishment. Seda Ciftci, *Turkey Update: Turkey and the European Union: Heading for a Break?*, CENTER FOR STRATEGIC & INT’L STUD., Mar. 8, 2002, at 1-2, <http://csis.org/files/media/isis/pubs/tu020308.pdf>.

¹⁷⁶ See, e.g., A.E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L. & COMP. L.Q. 901, 902-12 (1999); C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L. & COMP. L.Q. 850, 850-52, 859-62 (1989); Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 508-11 (1999). For a very recent article examining the influence of international tribunal decisions on domestic legal norms, see William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT’L L. 279, 289-309 (2008).

¹⁷⁷ Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

¹⁷⁸ See, e.g., Press Release, Office of Gov. Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at http://www.gov.ok.gov/display_article.php?article_id=301&article_type=1.

typology provides a tool by which one can better evaluate the desirability of a given delegation. While the typology and description of the tradeoffs offered here may advance the discussion, this Essay raises as many questions as it answers, charting a course for future research. I briefly identify two avenues here.

First, as a positive matter, the model requires more systematic testing. The typology developed in Part II supplies various examples for the proposed categories, but the treatment is not exhaustive. A variety of delegations, under the definition proffered here, have not been classified. Moreover, further research can test the explanatory value of the model by examining whether certain delegations fall within more than one camp (such as the ICJ) and thereby call into doubt the explanatory value of the typology.

Second, as a normative matter, further research is necessary on how to balance the costs and benefits. The argument developed in Part III provided an analytic tool to measure how some of the perceived costs and benefits of delegation mapped onto the categories in the typology. Yet it offered relatively little guidance about how policymakers, or society more generally, are supposed to balance those competing considerations and determine whether the risk of payoff from a particular set of benefits justifies the expected costs of a given delegation. Further normative scholarship can help illuminate this topic too.