

FOREWORD

This issue of *Law and Contemporary Problems* explores the phenomenon of international delegation, which, as defined in the introductory article, involves a grant of authority by states to an international body. The articles contained in this issue are the product of two conferences at Duke Law School at which legal scholars and political scientists developed and discussed articles concerning *The Law and Politics of International Delegation*. The articles focus on the conceptual, normative, and empirical aspects of international delegation. Because these articles grew out of the lively discussions at both conferences, our thanks extend not only to the contributors to this issue, but also to the other conference participants: Rachel Brewster, Andrew Guzman, Bruce Jentleson, Robert Keohane, David Lake, Jennifer Landside, Joost Pauwelyn, Mark Pollack, Eric Posner, Christopher Schroeder, Edward Swaine, and Ernest Young. We would also like to thank Dana Norvell for her terrific administrative assistance in connection with the conferences.

I

THEORETICAL FOUNDATIONS

This issue begins with three conceptual articles. The first, authored by the two of us, defines and clarifies the concept of international delegation from both a legal and social-science perspective. The second, by Karen Alter, explores in greater depth the variation in international delegation to international courts. Lastly, David Epstein and Sharyn O'Halloran draw on their expertise concerning domestic delegation to develop a model of international delegation showing the conditions under which states agree to delegate sovereignty to international organizations, when states exit such arrangements, and the circumstances under which an international organization will be most effective.

In our introductory article, *The Concept of International Delegation*, we define an international delegation as a grant of authority by two or more states to an international body to make decisions or take actions. Going beyond traditional analysis of international delegation, we seek to capture the multilayered nature of international delegation by considering grants of authority not only to bureaucracies, but also to collective bodies, subgroups of states, and courts. Our article then identifies eight types of authority that states may grant: legislative, adjudicative, regulatory, monitoring and enforcement, agenda-setting, research and advice, policy implementation, and redelegation. Next, the article discusses how the extent of an international delegation can vary depending on its legal effect and on the degree of independence of the international body. These multiple levels of differentiation demonstrate that the nature of international delegation varies greatly and that typological precision is

therefore needed to avoid misleading overgeneralizations when considering the desirability and legality of any particular delegation. In light of this typology, the article then considers some of the benefits and costs of international delegation. The article concludes with a discussion of some of the questions raised by the typology and its implications for further research.

Karen Alter's article, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, highlights the diverse nature of international delegations to courts. She argues that the roles and tasks delegated to international courts increasingly mimic in form and content the broad variety of tasks delegated to courts in liberal democracies, but that delegating these tasks to international courts is fundamentally different than delegating them to domestic courts because of the implications for national sovereignty. Whereas international courts were initially established to be dispute-resolution bodies, they now also perform administrative review, enforcement, and even constitutional review. Alter explains how each of these judicial roles binds other actors, binds states, or both. Analyzing twenty founding treaties for international courts, her article also shows that delegation to international courts is extensive, and growing.

In their article, *Sovereignty and Delegation in International Organizations*, David Epstein and Sharyn O'Halloran present a formal model of international delegation. They begin by describing two differences between international delegation and domestic delegation. First, they note that states freely enter into international organizations and can often exit them as they like. Second, it is often the case that the more states that join an international organization, the greater the benefits for all involved; that is, international organizations often display network externalities. Their formal model incorporates these elements and derives conditions under which states will agree to delegate sovereignty to international organizations and when they will decide to exit such arrangements. Epstein and O'Halloran argue that international organizations are most effective when preferences are homogeneous and when the potential benefits of cooperation are high. Their model also suggests that, up to a point, outlier countries may wield higher influence in international organizations.

II

NORMATIVE CONSIDERATIONS

Turning to more normative considerations, the articles by Neil Siegel and Oona Hathaway discuss the effects of international delegation on the values of federalism and sovereignty, respectively.

In *International Delegation and the Values of Federalism*, Siegel argues that the relationship between an international delegation and the values thought to be promoted by a federal structure of government depends upon what would happen in the absence of the international delegation. Focusing on the effect of international delegation on U.S. subnational states, Siegel explains that when

the delegation replaces regulation by the federal government that would have displaced state choices anyway, then the effect on federalism values depends on the relative inclinations of the federal government and the international body to decentralize. When, however, there would be no federal regulation in the absence of an international delegation, so that the delegation reduces state autonomy, then the justifications for international delegations, whether constitutional or prudential, do not include the values commonly understood to be associated with federalism. In this situation, the assertion that international delegations diffuse political power is unpersuasive: power is more diffused when fifty subnational states maintain control than when authority is delegated to one international body. When international delegations reduce state control, moreover, they compromise every other value that federalism is commonly thought to advance.

In her article, *International Delegation and State Sovereignty*, Hathaway rebuts the claim that state sovereignty almost always suffers when states delegate authority to international institutions. Critics of delegation err, she contends, by overemphasizing the costs but losing sight of some of the substantial benefits of cooperation. She considers the challenge to sovereignty posed by international delegation by focusing on recent debates over the influence of international legal commitments on domestic governance. The scope of conflict between sovereignty and international delegation is substantially narrowed, she reasons, when we take account of state consent to delegation. Indeed, because of consent, international delegation can often be seen as an exercise of state sovereign authority rather than a diminution of it. She then explores how the intrusion of international law into areas that were once exclusively domestic might be explained and justified. She argues that by exploring both sides of the traditional cost-benefit equation, we can come to a deeper and more empirically grounded argument about the proper role of international law and delegation in an age of global interdependence.

III

EMPIRICAL INVESTIGATIONS

The remainder of the issue concentrates on empirical inquiries into the phenomenon of international delegation. The section starts with Barbara Koremenos' overview of the incidence of various types of delegation in international agreements and the various factors that correlate with this variation. Four articles addressing the consequences of delegation follow, each focusing on a specific example: the International Labour Organization (ILO), the Agreement on the Application of Sanitary and Phytosanitary Measures, the World Trade Organization Appellate Body, and the weapons-inspection regime in Iraq from 1991 to 2003.

In her article, *When, What, and Why do States Choose to Delegate?*, Barbara Koremenos demonstrates that international delegation is an important and

nontrivial empirical phenomenon. Using an extensive data set created from the United Nations Treaty Series, she finds that almost half of all international agreements involve delegation of some kind. By exploring the institutional design choices of international delegation, she finds that dispute resolution is the most commonly delegated function and often involves externally delegating authority to an existing arbitration tribunal or an international court. Furthermore, she finds that external delegation in particular increases with the existence of complex cooperation problems such as enforcement and uncertainty and with the heterogeneity and number of parties. Some of her findings open up areas for further research. For example, it appears that delegation may decrease with the average level of democracy of the signatories, but is unrelated to the existence of a superpower signatory or to the risk aversion of signing states.

Laurence Helfer's article, *Monitoring Compliance with Unratified Treaties: The ILO Experience*, challenges the conventional wisdom that the delegation of authority to the ILO involves only modest sovereignty costs. Helfer explains that the ILO has increasingly exercised the authority to monitor compliance with unratified labor treaties and recommendations, and that the exercise of this authority has significant effects. He further notes that this type of monitoring authority is not confined to the ILO, but in fact exists in several other international institutions and issue areas. The case of the ILO therefore suggests that some important delegations arise and thrive outside of the formal channels of authority. This makes it essential for scholars to look beyond treaty texts and institutional design features to consider how power is actually exercised within international organizations and how the costs and benefits of international delegations change over time. Helfer also argues that monitoring compliance with unconsented-to legal rules is an alternative institutional response to a problem that many international organizations confront: how to ensure that all states affected by a cooperation problem participate in the resolution of that problem rather than free-ride on the efforts of other countries.

Tim Bütte tells a different story of how international delegation can be highly consequential and not fully anticipated by states. In *The Globalization of Health and Safety Standards*, he examines why states delegated regulatory authority in the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures, an integral part of the founding treaty of the World Trade Organization (WTO). Bütte argues that, to explain this case of international delegation, principal-agent theory must be complemented by an analysis of cost-benefit calculations of the relevant domestic interest groups. Given these domestic interests, governments decided to institutionalize international cooperation on SPS measures outside of the WTO because they believed that such delegation would minimize the political costs of the loss of policymaking autonomy. Bütte notes, however, that in retrospect it appears that the widespread positive association of international standards with multilateralism and international consensus led many countries to underestimate those

autonomy losses. Material and ideational factors thus interacted to shape the definition of national interests and the outcome of international delegation.

In their article, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, Judith Goldstein and Richard Steinberg argue that the World Trade Organization Appellate Body has been able to use its authority to engage in judicial lawmaking to reduce trade barriers in ways that would not otherwise have been possible through negotiation. This lawmaking authority was not the result of a purposeful delegation; rather, it was an unintended byproduct of the creation of an underspecified set of rules and procedures. There is nevertheless a high rate of compliance with Appellate Body decisions because decentralized enforcement can induce domestic importers to lobby for trade liberalization. In the United States, this judicial lawmaking may also allow the President to achieve trade policies that are more liberal than those desired by Congress, if compliance can be achieved by a regulatory change or by sole Executive action.

In the final article, *Delegation Success and Policy Failure: Collective Delegation and the Search for Iraqi Weapons of Mass Destruction*, Michael Tierney argues that international delegation can have important consequences, even for powerful states. In particular, he contends that the U.S. delegation of inspection authority to United Nations weapons inspectors and to the International Atomic Energy Association after the Gulf War of 1990–91 entailed significant sovereignty costs by affecting the timing and costliness of the subsequent 2003 U.S. invasion of Iraq. Among other things, he notes that the inspectors' independent behavior made it much more difficult for the United States to assemble the type of multilateral coalition that would share the costs as it had in the earlier Gulf War. Tierney also notes that this example shows how different states can pay different costs as the result of the same episode of international delegation.

Together, these articles contribute new theoretical insights, discuss important normative questions, and enhance the empirical research of international delegation. This range of approaches highlights the interplay of the law and politics of international delegation, an aspect of international relations that continues to gain importance as the world grows more interdependent.

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