INTRODUCTION

For the first time in history, a permanent International Criminal Court (hereinafter ICC) will come into force on July 1, 2002.1 The enabling statute for the ICC is the Rome Statute, a United Nations (hereinafter U.N.) treaty originally drafted at the U.N.'s 1998 conference in Rome, Italy.2 It laid the foundation for a lasting international tribunal dedicated to "trying individuals accused of committing genocide, war crimes and crimes against humanity."3 The world's reaction to the atrocities of World War II was the ICC's modern genesis. Specifically, the temporary tribunals established at Nuremberg and Tokyo for the prosecution of Nazi and Japanese war criminals paved the way for a permanent international criminal tribunal.4 Although

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4 See Michael P. Scharf, The Politics Behind the U.S. Opposition to the International Criminal Court, 5 NEW ENG. INT'L & COMP. L. ANN. (1999), at http://www.nesl.edu/intljournal/vol5/scharf.htm ("After the Second World War, the international community established the Nuremberg and Tokyo Tribunals to prosecute the major Nazi and Japanese war criminals and said 'Never Again!'—meaning that it would never again sit idly by while crimes against humanity were committed.")
momentum for the ICC’s creation stalled for the next four decades, the late 1980s saw a resurgence of effort fueled by the U.N.’s recognition that national and international atrocities did not end with World War II. Almost a decade later, the U.N.’s Preparatory Committee would present the world with the Rome Statute.

The 1980’s revitalization of interest in the ICC mirrors the current global disposition towards this novel body. By April 11, 2002, 139 countries had signed the Rome Statute in expression of support for the tribunal’s future establishment. Even more significantly on this date, the Rome Statute received its sixtieth domestic ratification, the number required for the ICC to become operative with the binding force of international law. The United States under the Clinton Administration expressed enthusiastic support for the tribunal when it became a signatory party of the Rome Statute on December 31, 2000. As David Scheffer, serving as United States Ambassador at Large for War Crime Issues, stated after the Rome conference: “[The United States’] experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost efficient in its operation.”

Approximately four years later, however, the United States’ reticence continues to grow for concluding the domestic ratification of
the Statute necessary to make its membership in the ICC binding. The Senate's attempt to pass legislation that bars the United States' membership in the ICC and allows the President to use "all means necessary and appropriate" to free United States citizens and allies from ICC detention is emblematic of the heated debate in which the United States is now engaged over its future relationship with the international tribunal.13

Besides doubts as to the efficacy of such a body,14 the intensity level of the debate around the practical and constitutional implications of ICC membership continues to rise. Practically speaking, United States concerns derive from ICC criminal cases initiated by the complaint of a state party or by the Prosecutor of the ICC.15 Because the United States will have little to no control over these prosecutions, government officials fear that the ICC will undermine the Justice Department's efforts in international law enforcement.16 There is also concern that foreign powers will manipulate the court to achieve political agendas.17 The United States sees itself particularly vulnerable to this threat because, "as the world's greatest military and economic power, more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world," and therefore "[its] unique position renders United


14 See CNN, International War-Crimes Court Approved at http://www.cnn.com/WORLD/europe/9807/18/crimes.trib/ (July 18, 1998) (reporting that David Scheffer felt that the ICC was in danger of being "strong on paper and weak in reality").


16 See Scharf, supra note 4.

States personnel uniquely vulnerable to the potential jurisdiction of an international criminal court.\(^\text{18}\)

The United States allayed some of these fears after winning several procedural safeguards at the Rome conference.\(^\text{19}\) One notable protection is the Statute's integration of procedural "complimentarity." Under this system, the ICC serves solely as a court of last resort for cases initiated by state parties or the ICC Prosecutor and exercises jurisdiction only after it can be established that domestic authorities are "unwilling or unable genuinely to carry out the investigation or prosecution."\(^\text{20}\) Thus, there are significant obstacles to an ICC prosecution of United States citizens and officials against the will of the United States.\(^\text{21}\)

Urgent constitutional concerns, however, have yet to be sufficiently addressed or resolved. Accordingly, it is this Comment's goal to explore the constitutional conflicts that would arise were the United States to become a state party of the ICC. Part I of this Comment will analyze the procedural constitutional issues arising from the ICC's alleged failure to provide United States citizens and officials with their constitutionally guaranteed rights. Part II will focus on substantive constitutional concerns. Specifically, it will examine how membership in the ICC catalyzes the relocation of constitutional powers from the United States to the international tribunal, as well as from the legislative and judicial branches to the executive branch of the United States government. The Comment concludes by suggesting that the impetus for these transfers of constitutional power is the domestic acknowledgement of membership in the rising global community, and that this evolving association will further compel fundamental alterations of the Constitution's current paradigm.

I. LOSS OF CONSTITUTIONALLY GUARANTEED RIGHTS?

In attacking the constitutionality of United States' membership in the ICC, one of the major battle cries of scholars and government officials is that the ICC does not provide the procedural safeguards of

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\(^{19}\) Ambassador Scheffer stated that "the U.S. delegation [to the Rome conference] certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies." Statement of David Scheffer, supra note 12, at 13.


\(^{21}\) Statement of David Scheffer, supra note 12, at 12-15 (discussing safeguards for which the United States delegation fought).
the United States Constitution and its Bill of Rights. Thus, they argue, United States citizens and officials would be subject to unconstitutional prosecutions of crimes committed outside the United States that fall within the ICC's jurisdiction. A House Bill proposed to prevent ratification of the Rome Statute claims that "a defendant would face a judicial process almost entirely foreign to the traditions and standards of the United States and be denied the right to a trial by a jury of one's peers, reasonable bail, a speedy trial, and the ability to confront witnesses to challenge the evidence against the defendant." Critics have also pointed out that the Rome Statute does not provide safeguards against double jeopardy and follows guidelines for trials in absentia that significantly differ from those used in the United States. The fundamental assumption of these arguments is that United States citizens and officials are entitled to invoke constitutional protections in international courts sanctioned by their government. This proposition is bolstered by the United States Supreme Court's declaration that: "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."

There is a wealth of practical and theoretical responses, however, that mortally wound the centrality of these concerns in the debate over the constitutionality of United States' membership in the ICC community. Most notably, analysis of the ICC's procedural frame-

22 Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. § 2(5) (1999) [hereinafter Foreign Prosecution Act] (stating that "[b]ecause the guarantees of the Bill of Rights in the United States Constitution would not be available to those individuals prosecuted by the Court, the United States could not participate in, or facilitate, any such court"). In addition, the Rome Statute contains no reference to or restriction by any particular country's domestic law. See Rome Statute, supra note 15.

23 For a discussion of the constitutional ramifications of ICC prosecution of crimes committed within the United States, see discussion infra Part II.A.3.

24 See Foreign Prosecution Act, § 2(3)(B). The Bill further claims that the ICC would prosecute United States citizens and officials "without the benefit of a trial by jury, in a tribunal that would not guarantee many other rights granted by the United States Constitution and laws of the United States, and where the judges may well cherish animosities, or prejudices against them." Id. § 2(6)(A).


27 Reid v. Covert, 354 U.S. 1, 6 (1957) (holding that respondents did not lose their civilian status by living abroad and as members of a United States soldier's family, and that the courts of the United States alone had the power to try the respondents for their offenses against the United States).
work, evaluation of the international tribunal's exemption from the requirements of Article III courts, and examination of the constitutionality of extradition treaties elucidates that constitutional concerns regarding the ICC's procedural framework are readily allayed.

A. The Procedural Safeguards of the ICC

The ICC is not devoid of fundamental principles of justice. On the contrary, the international tribunal conforms to many of the due process ideals espoused by the United States. In fact, it provides for a set of "minimum guarantees" which closely mirror many of the cherished protections afforded by the Constitution.38 For example, the Rome Statute implements the presumption of innocence, a habeas corpus standard and ex post facto protections.29 Additionally, the Statute provides for the adoption of a set of rules for procedure and evidence that will further ensure conformity with the United States' conceptions of fundamental constitutional due process.30

It is also important to note that the Supreme Court has recognized constitutionally permissible restrictions of procedural protections. For example, the Supreme Court held that Article I, Section 8, Clause 14 of the United States Constitution "creates an exception to the normal method of trial in civilian courts as provided by the Constitution and permits Congress to authorize military trials of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights."31 Moreover, the high Court in Palko v. Connecticut stated that rights such as trial by jury and immunity from prosecution except as the result of an indictment, while both rights of relative import, "are not of the very essence of a scheme of ordered liberty,"32 and that to discard them would not "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"33 Therefore, as long as the ICC is deemed to possess all procedural protections and rights con-

38 Rome Statute, supra note 15, art. 67(1).
39 Id. art. 24(1)-(2).
30 Brown, supra note 15, at 862. The ICC's Rules of Procedure and Evidence are being developed with the input of United States delegates and are believed to be consistent with United States notions of proper procedural protections. Additionally, a section will be added entitled "Elements of Crimes." This "will elaborate upon the detailed definitions of crimes already contained in the Statute." Id. at 865.
31 Reid, 354 U.S. at 19.
33 Id. (quoting Snyder v. Massachusetts, 291 U.S. 97 (1934)) (noting that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [such due process rights as trial by jury and immunity from prosecution except as the result of an indictment]").
sidered “fundamental,” the tribunal’s prosecutions would not offend constitutional due process standards.

B. The ICC Is Not an Article III Court

The ICC’s status as a court of foreign jurisdiction (as opposed to a court established under Article III of the United States Constitution), however, obviates the requirement that the international tribunal’s procedural safeguards mirror those of the Constitution. Non-Article III courts, such as courts of foreign jurisdiction, are in no way bound to provide the full constitutional guarantees that are constitutionally mandated for United States citizens in Article III court proceedings. The Supreme Court has definitively stated that United States citizens and officials are not constitutionally entitled to invoke constitutional protections when being prosecuted by a foreign court for a crime that occurred outside the jurisdiction of the United States.

Several factors clearly evince that the ICC is not an Article III court, but is rather an “organ of the United Nations or an associated independent international organization.” Most fundamentally, the ICC was not established pursuant to Article III. Congress did not create the ICC and plays no role in determining the duration of service and compensation of the ICC’s judges. Additionally, the President of the United States does not nominate the judges. Moreover, the ICC is deliberately structured to operate independently of the influences of any one nation by deriving its authority from the international community generally. Therefore, the ICC is in no way accountable to Article III or the Constitution.

It is likely that the ICC would not come under the purview of Article III even if the United States were deemed to have played a signifi-

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34 See Brown, supra note 26, at 789.
36 See Neely v. Henkel, 180 U.S. 109, 122 (1901) (proclaiming that the rights guaranteed under the Constitution to persons charged with committing a crime within the United States “have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country”).
37 See Marquardt, supra note 20, at 105.
38 See U.S. CONST. art. III, § 1 (requiring that “the judicial power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behavior, and shall . . . receive . . . a Compensation, which shall not be diminished during their Continuance in Office”).
39 Id.
40 See U.S. CONST. art. II, § 2, cl. 2.
41 See Marquardt, supra note 20, at 105 (claiming that “[t]he international court operates under its own authority and applies its own law; the judicial power it exercises is that of the international community rather than that of any one state”).
cant role in the creation of the court or in the investigation and detention of ICC suspects.\textsuperscript{42} This argument is based on the Supreme Court's holding in \textit{Hirota v. MacArthur.}\textsuperscript{43} In \textit{Hirota} the Court ruled that although the United States, through the actions of General Douglas MacArthur as Supreme Allied Commander, created an International Military Tribunal for Far East war crimes, the international court was "not a tribunal of the United States," and thus "the courts of the United States [had] no power or authority to review, to affirm, set aside or annul the judgments and sentences."\textsuperscript{44} It is significant to note that the United States exercised a substantially greater amount of direct control and influence in establishing the tribunal in \textit{Hirota} than in establishing the Rome Statute's ICC.\textsuperscript{45} Even so, "the fact that the United States participates in an international body with judiciary functions no more renders that body's actions 'the judicial Power of the United States' under Article III than the Security Council's actions are an exercise of United States 'legislative Powers' under Article I."\textsuperscript{46}

\textbf{C. Exercise of ICC Jurisdiction Is Functionally Equivalent to the Exercise of an Extradition Treaty}

A rebuke of the above Article III argument stemming from a construction of an early draft of the Rome Statute declares that, with regard to "complimentarity," the ICC is a "projection of national courts," and must therefore provide United States citizens with constitutional protections.\textsuperscript{47} To the contrary, there is little practical difference between the exercise of ICC complimentarity and the constitutional process of extradition.\textsuperscript{48} Therefore, and to the extent of their functional equivalence, the exercise of ICC jurisdiction should enjoy the same constitutional endorsement as extradition treaties.

\textsuperscript{42} See id.
\textsuperscript{43} 338 U.S. 197 (1948).
\textsuperscript{44} \textit{Hirota}, 338 U.S. at 198.
\textsuperscript{45} See Marquardt, supra note 20, at 107.
\textsuperscript{46} Id. at 105-06 (citing LOUIS HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW 126 (1958)).
\textsuperscript{48} See Brown, supra note 26, at 790; Marquardt, supra note 20, at 108-10. Marquardt explains that the ICC's complimentary system fits within the United States' current extradition scheme. He further notes that "extradition hearings are more like probable cause hearings than adjudications of guilt or innocence and need not be carried out before an Article III judge." Marquardt, supra note 20, at 108.
The Supreme Court stated that "there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in finding, in the country of refuge, some state, territory or district in which the offense charged is not punishable." In other words, "the United States may surrender a fugitive to be prosecuted for acts which are not crimes within the United States." As Justice Harlan proclaimed in *Neely v. Henkel*: "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people...." Justice Harlan's view is embodied in the United States judiciary's rule of "non-inquiry." This rule provides that, in determining United States obligations and compliance with a treaty governing an extradition hearing, a United States court must presume the foreign trial will be fair, and the court is not "permitted to inquire into the procedure which awaits [a defendant] upon his return.... Such matters, so far as they may be pertinent, are left to the State Department."

Although Supreme Court precedent appears to weigh heavily in favor of "non-inquiry," questions still linger as to the boundaries of this doctrine. In *Gallina v. Fraser*, the Court explained that the outer-limits of "non-inquiry" existed where extradition may place United States citizens at the mercy of "procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle [of non-inquiry]." As the above makes clear, the ICC's procedural framework could hardly be characterized as "antipathetic" to constitutional due process. Thus, in so far as it operates as an extradition treaty, the exercise of ICC jurisdiction is constitutionally permissible.

**D. Little To Fear from the ICC's Procedural Constitutionality**

Some scholars argue that a recent Supreme Court case provides a novel justification for the belief that the ICC's procedural structure must precisely comport with the Constitution's due process guarantees for the United States' membership to be constitutional. In

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49 Factor v. Laubenheimer, 290 U.S. 276, 300 (1933).
50 Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960) (citing Factor v. Laubenheimer, 290 U.S. 276 (1933)).
52 Garcia-Guillem v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971) (citing Gallina, 278 F.2d at 78).
53 See Marquardt, supra note 20, at 119-26.
54 Gallina, 278 F.2d at 79; see also Marquardt, supra note 20, at 110 (discussing the "theoretical possibility" of an exception to the principles of non-inquiry).
United States v. Balsys, the Court noted a situation where a United States citizen may be entitled to invoke Bill of Rights protections in a prosecution involving a court of foreign jurisdiction. The Court hypothesized:

If it could be said that the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution simply because that prosecution was not fairly characterized as distinctly "foreign." The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.

A closer reading of this case, however, uncovers that this hypothetical’s relevance to the ICC is questionable at best. First, it must be noted that the Court recognized this argument as mere speculation, and failed to reach the merits of its validity. Second, although some analogies may appropriately be drawn between this hypothetical and the United States’ relationship with the ICC, there are significant differences between the two that greatly diminish the value of their juxtaposition. Notably, the Court used the above hypothetical specifically to demonstrate that a defendant should be entitled to invoke the Self-Incrimination Clause where the United States government inaccurately or misleadingly characterizes a prosecution as “distinctly” foreign. Such a conclusion does not directly address, however, whether a foreign body, acting on authority independent of the United States (as the ICC will), may prosecute United States citizens and officials without the full guarantees of the Constitution. Moreover, the hypothetical simply involves the United States opting for an analogous foreign prosecution of an international offense, whereas the ICC requires a formal agreement (the Rome Statute) to instruct the jurisdictional change. This difference further depreciates the relevance of the above hypothetical for two reasons. The first is that ICC membership necessitates the domestic ratification of a treaty that clearly delineates the origins of an ICC prosecution, whereas the absence of a treaty in the hypothetical above obfuscates

57 See id. at 699.
58 See id.
59 See id. at 699.
60 See id. at 699-700.
whether the foreign jurisdiction would be exercised on behalf of the United States. The second is that, in addressing the constitutionality of the United States opting out of a prosecution for which it has jurisdiction, the Supreme Court has consistently declared that the United States government is not constitutionally mandated to exercise its jurisdiction in every instance that it is constitutionally granted. In fact, some scholars argue that the United States government has constitutional flexibility in deciding whether to act upon its constitutionally granted jurisdiction over crimes committed on United States soil.

Regardless of the lack of instructiveness this case provides for determining the constitutionality of United States’ membership in the ICC, there is no denying that the ICC will not provide all the protections afforded United States citizens and officials by the Constitution. The ICC does, however, possess many of the United States’ cherished due process guarantees, and it can reasonably be argued that the protections the ICC fails to provide are not so fundamental as to make the United States’ membership in the tribunal unconstitutional. Additionally, as a court of foreign jurisdiction, the Constitution does not require that the ICC provide the procedural protections mandated for all Article III courts. Finally, extradition precedent clearly indicates that similar exercises of ICC jurisdiction pass constitutional muster.

II. UNCONSTITUTIONAL POWER TRANSFERS

Part I focused on whether United States’ membership in the ICC was constitutionally permissible in light of the international tribunal’s deviation from the Constitution’s procedural framework. The force and persuasiveness of those decrying the ICC’s constitutionality in this regard are greatly diminished by appeal to the procedural protections the ICC provides, to the ICC’s exemption from the procedural requirements of Article III as a court of foreign jurisdiction, and to extradition precedent. The potential for constitutional crises remains unmitigated, however, in the realm of the substantive conflicts created by United States’ membership in the ICC community.
As the following analysis demonstrates, the constitutional volatility stems from the ICC’s compulsion of fundamental alterations to the structure and functioning of the United States government. Specifically, a binding membership in the ICC necessitates two significant forms of transfers of constitutionally created powers that reside within the executive, legislative, and judicial branches according to the Founders’ scheme. The first manifests as a transfer of constitutional power from the United States government as a whole to the international authority vested within the ICC. This Comment will refer to this first type of transfer as an “external transfer.” The second form of power transfer, the “internal transfer,” relocates constitutionally granted powers among the three branches. This Part examines these transfers, and elaborates on the unconstitutional alterations of the United States government they catalyze.

A. External Transfers of Constitutional Power

External transfers threaten the Founders’ scheme by delegating United States constitutional power to foreign entities capable of exercising that power unrestrained by constitutional shackles. These exercises result in the unconstitutional alteration of the United States government’s structure and the diminishment of United States sovereignty. United States’ membership in the ICC would engender external transfers of precedent genesis traditionally entrenched in domestic courts, of treaty conclusion powers, and of the United States government’s jurisdiction over its own citizens and officials. The succeeding sections of Part II.A will analyze these three transfers and their constitutional ramifications.

1. Usurpation and Replacement of Precedent Genesis

Once bound to the ICC as a state party, the United States would be subject to an external transfer that shifts the generation of legal precedents and norms from federal and state tribunals to the international tribunal. A similar process of molding foreign law into domestic jurisprudence has actually been a staple of the United States judiciary since the country's inception. As Justice Gray stated: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as first place for the state to bind itself and to accept the consequences of self-limitation.”


See, e.g., Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) (“[T]his court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances . . . .”).
often as questions of right depending upon it are duly presented for their determination."

This Comment does not call into question the constitutionality of such "precedent borrowing." It is a voluntary practice of the United States judiciary to seek guidance from foreign jurisdictions and to integrate those principles deemed to conform to the Constitution. The ICC, however, alters this practice by forcing the adoption of international law in two constitutionally suspect ways. The first is that the sheer novelty of the ICC crimes obligates United States courts to integrate ICC precedent in the establishment of any meaningful and valid domestic jurisprudence for these crimes. The second is that the United States judiciary will be compelled to follow ICC precedent to protect United States citizens and officials from ICC claims initiated by the ICC Prosecutor or by other state parties.65

a. Involuntary Adoption of Foreign Precedent To Establish Valid Jurisprudence for ICC Crimes

The ICC was created to adjudicate crimes entirely novel in global and national jurisprudence.67 In fact, even preliminary understandings of these crimes have yet to be codified.68 It is clear, however, that the ICC itself will ultimately sculpt and fix the definitions of these crimes.69 If United States' membership as a state party is to have any meaning, and if United States domestic adjudication of these crimes for extradition purposes or otherwise is to be considered valid by the ICC, United States courts have no choice but to conform to ICC precedent. As with any treaty or international institution, a base level of consistency of operation among the constituent parties is necessary for overall efficacy. In addition, independent development of jurisprudence for these crimes would be extremely difficult if not impossible as their uniqueness leaves United States courts with no substantial recourse to any existing domestic precedent. The Supreme Court has stated that, in the absence of guidance from domestic law, "resort must be had to the customs and usages of [other] civilized nations ....."70

65 The Paquete Habana, 175 U.S. 677, 700 (1900).
66 See discussion supra note 15.
68 See Brown, supra note 15, at 862.
69 See Marquardt, supra note 20, at 112.
70 The Paquete Habana, 175 U.S. at 700 (emphasis added).
b. Conformance with Foreign Precedent To Protect United States Citizens and Officials

The second alteration to the practice of "precedent borrowing" results from the threats of "complimentarity."71 As stated above, the ICC may prosecute citizens or officials of a state party, even where that state party held or purposively refused a trial, if the ICC Prosecutor or another state party establishes that the accused's government was unable or unwilling to conduct the prosecution in accord with ICC standards.72 Thus, in order to protect its citizens and officials from unwelcome sequestration by the international tribunal, domestic courts will be forced to follow precedent and trial procedures that comport with these standards.73 As a result, the ICC will "become an unavoidable participant in the national legal process."74 The ICC's functional equivalence to extradition treaties makes the threat more lucid. Namely, extradition proceedings typically involve a probable cause investigation.75 Therefore, to minimize the viability of a claim brought by the ICC Prosecutor or another state party against the legitimacy of a United States proceeding or refusal to hold a proceeding, a United States court would have to follow the ICC's definition of a "proper" probable cause investigation.

c. The Price of Conformity

The external transfer of precedent genesis, as seen in the two iterations above, poses three significant threats to the United States' constitutional paradigm. First, the transfer pressures the domestic judiciary to put ICC membership concerns over constitutional concerns. Where the basis of foreign precedent adoption is the maintenance of consistency with the ICC community rather than constitutional conformity, the potential exists for the integration of unconstitutional foreign laws in domestic precedent. The second and third threats, addressed in Part II.A.4 below, are the unconstitutional amendments of the government structure and the diminishment of sovereignty that result from the aggregate effect of all of the external transfers discussed in this Part.

71 See Ballard, supra note 25, at 178-80.
72 See Rome Statute, supra note 15.
74 Id.
75 See Marquardt, supra note 20, at 108-09.
2. Delegation of the Treaty Power

ICC judgments have implications that extend beyond the scope of the original treaty. The fact that ICC case law can significantly alter or supplant domestic precedent and jurisprudence is a prime example. State parties, bound by their membership to abide by the international tribunal's decisions, must also acquiesce to the consequences of ICC decisions, even those not contemplated by the original statute. Maintaining state party status in the face of this eventuality is functionally equivalent to allowing the international tribunal to unilaterally conclude new treaties.

It has been argued that, "[t]o permit a foreign body to conclude a treaty binding upon the United States would be equivalent to delegating the power of making treaties in the measure of the provisions of the treaty in question." One could accurately counter that, where the United States remained a state party of its own volition, treaty conclusion with the ICC would remain bilateral, as failure to withdraw from membership effectively equals acceptance of the status quo. In practice, however, the difficulty of readily comprehending the consequences of ICC actions and sufficiently addressing them soon after discovery seemingly opens indefinite windows of opportunity for the ICC to unilaterally conclude "new treaties."

The obvious constitutional threat from unilateral treaty conclusion is that unconstitutional law can be imposed upon the United States system, and in this case, at least until the proper institutions remedy the law or effectuate the withdrawal of the United States' membership from the ICC community. Moreover, as with the external transfer of precedent genesis, the transfer of treaty-making powers contributes to the unconstitutional alteration of the United States government's structure and diminishment of United States sovereignty addressed in Part II.A.4 below.

3. Curtailment of United States Jurisdiction over United States Citizens and Officials

United States membership in the ICC abrogates constitutionally created jurisdiction over United States citizens and officials. This external transfer is most controversial where a United States citizen or

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At the outset, it is important to highlight the distinction between this case, and the similar one presented in Part I. Part I explained that there is little cause for constitutional alarm where the ICC prosecutes United States citizens or officials for crimes committed outside the United States' jurisdiction. The situation discussed here, however, involves ICC crimes committed inside United States borders by a United States citizen or official. The significance of this difference is the explicitness with which the Constitution addresses these separate situations. Where the crimes are committed outside of the United States, the Constitution is relatively silent, thus perpetuating the exemption from the constitutional requirements of Article III courts enjoyed by courts of foreign jurisdiction, as well as justifying constitutional endorsement of extradition precedent.

On the other hand, the Constitution explicitly mandates that the United States judiciary has jurisdiction over crimes committed by United States citizens and officials on United States soil. Some scholars argue that the Constitution provides that "only the States and the Federal Government have the authority to prosecute and try individuals for offenses committed in the United States, and [that] they may do so only in accordance with the guarantees contained in the Bill of Rights." The question raised by such arguments is whether, and under what circumstances it is constitutionally permissible for the United States to transfer constitutionally mandated jurisdiction over United States citizens and officials.

An American Bar Association Task Force warned: "For the United States to cede jurisdiction to an international criminal court under these circumstances would raise profound and perhaps insurmountable constitutional issues..." This is dramatically evident where the ICC seeks to prosecute American citizens or officials against the will of the United States government. The Supremacy Clause strictly

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78 See discussion infra Part I.B.
81 ABA Task Force, supra note 79, at 268.
82 This would most likely occur where the ICC Prosecutor or another state party established before the ICC that the United States was unable or unwilling to try the citizen or official in a
prohibits a foreign power from overriding the United States government's constitutionally granted jurisdiction. When its membership obligations force the United States to cede such jurisdiction, state party status in the ICC cannot be maintained without displacing the supremacy of the Constitution.

Even where the United States willingly relinquishes its jurisdiction, however, the constitutionality of such actions remains questionable. Although the Supreme Court has definitively proclaimed that it is unconstitutional for non-Article III courts to act on behalf of the United States, the ICC will not be an agent of the United States, but rather will act on its own independent authority. Therefore, the constitutionality of this transfer turns on whether the United States may opt out of its constitutional jurisdiction so that a foreign body can act in its place.

Some scholars argue that the Supreme Court flatly rejected the notion that the United States must exercise its jurisdiction wherever granted by the Constitution. The constitutionality of concurrent jurisdiction bolsters this proposition as federal courts may, under certain circumstances, allow a state judiciary to exercise jurisdiction constitutionally granted to the federal system. The United States judiciary's system of concurrency, however, only permits courts bound by the Constitution to exercise constitutionally granted jurisdiction. On the other hand, the ICC operates without constitutional constraint. A congressional bill expresses the concern that "the creation of the [ICC] would constitute the transfer of the ultimate authority to judge the acts of United States officials away from the people of the United States to an unelected and unaccountable international bureaucracy." Combined with the external transfers articulated above, this would result in the unconstitutional alteration of the United States government's structure and the diminishment of United States sovereignty discussed in Part II.A.4 below.

Another constitutional problem arises, regardless of the voluntariness of the cession of jurisdiction, when United States officials be-

\[\text{manner that sufficiently comports to ICC standards. See infra note 20; see also discussion infra Part II.A.1.b.}\]

\[\text{83 See U.S. CONST. art. VI, cl. 2; see also discussion infra Part II.A.4.}\]

\[\text{84 See, e.g., Ex parte Milligan, 71 U.S. (4 Wall.) 2, 56 (1866) (holding that a military court could exercise no part of the judicial power of the country); Reid v. Covert, 354 U.S. 1, 5-6 (1957) (rejecting the notion that the U.S. could act on its citizens abroad without providing the protections of the Bill of Rights).}\]

\[\text{85 See supra note 41.}\]

\[\text{86 See supra note 61.}\]

\[\text{87 See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478-80 (1981) (holding federal courts do not have exclusive jurisdiction over cases arising under the Outer Continental Shelf Lands Act (OSCLA)).}\]

\[\text{88 Foreign Prosecution Act, supra note 22, § 2(2)(C).}\]
gin to factor in their accountability to the international tribunal when making and executing decisions in their official capacity. This clearly violates the fundamental precept that the United States government must only concern itself with the dictates of its citizens and the Constitution.

4. Unconstitutional Alteration of Government Structure and Diminishment of Sovereignty

The Sections above demonstrate that ICC membership is a harbinger of external transfers of constitutional powers. Individually, these transfers were shown capable of introducing alien interests, pressures, and concerns into the domestic governmental structure, forcing the integration of potentially unconstitutional law with domestic jurisprudence and infusing foreign entities with constitutional powers. The aggregate effect of these transfers creates two additional constitutional crises. The first is the alteration of the United States government's structure. The second is the diminishment of United States sovereignty.

a. Unconstitutional Amendment

Where forces and interests originating outside of the United States body politic hold sway in government decisions, and where foreign entities operate constitutional tools of government, the founding structure of the United States government would undeniably be altered. Allowing the ICC treaty to effectuate such amendments to the Founders' scheme "give[s] the treaty almost the status of a distinct branch of government—a collaboration of the executive and legislative branches that also requires the consent of a foreign nation. To that extent, the Framers did not define the substantive scope of constitutional treaty-making . . .".

The Framers did proclaim, however, that the treaty power must not be perceived as "boundless," for if it were, "we [would] have no Constitution." The Supreme Court has also stringently declared that treaties must be subordinate to the Constitution. In The Cherokee Tobacco, the Court proclaimed that "a treaty cannot change the

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89 Reid, 354 U.S. at 6-7; Ku, supra note 76, at 122-23.
90 See Ballard, supra note 25, at 181-82 (examining the impact of an ICC treaty on United States double jeopardy law).
91 Havel, supra note 65, at 332-33.
93 See Reid, 354 U.S. at 16-18.
Constitution or be held valid if it be in violation of that instrument."\(^9\)

The *Reid* Court held that "[i]t would be manifestly contrary to the objectives of those who created the Constitution . . . to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."\(^95\)

b. *Erosion of Sovereignty*

This metamorphosis of the government is also unconstitutional for perpetuating forces that threaten the supremacy of the Constitution domestically, and thus threatens the sovereignty of the United States. These threats specifically emanate from allowing an entity to exercise constitutional power free of the Constitution's constraints—the "ideal of political accountability that animates much of the Constitution's structural design."\(^96\)

The Supreme Court explains that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source."\(^97\) The Constitution makes no explicit reference to external transfers, and it is likely that the Founding Fathers did not consider multilateral treaties.\(^98\) The Supreme Court has held, however, that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."\(^99\) Logically, then, the Supreme Court's prohibition on the United States government's unrestrained use of constitutional power applies just as rigorously, if not more so, to foreign entities as they are even further removed from the influences of the Constitution and the dictates of United States citizens.

Allowing unmitigated use of constitutional power threatens sovereignty by creating "authority outside of (and arguably superior to) the United States Constitution; and inhibit[ing] the full autonomy of

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\(^9\) The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1870).
\(^95\) *Reid*, 354 U.S. at 17. *See also* U.S. CONST. art. V, stating, in pertinent part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . .

U.S. CONST. art. V.

\(^96\) *Ku*, *supra* note 76, at 77.
\(^97\) *Reid*, 354 U.S. at 5-6.
\(^98\) *See id.* at 95.
\(^99\) *Reid*, 354 U.S. at 16.
all three branches of the United States government . . ." As noted above, such power could be used to override judgments of the United States judiciary, conclude new treaties or unduly influence the decisionmaking of United States officials.

Moreover, for membership in the international tribunal to be binding, at least a minimal amount of the state parties' power must be subordinated to that of the tribunals. Although "the rules formally bind individuals, they in fact bind states as well, since a state cannot act except through the individuals who compose it." Arguably, the ICC can only be completely effective via the diminishment of its state parties' sovereignty.

B. Internal Transfers of Constitutional Power

Use of the treaty power to create binding memberships in the ICC and other international organizations generates internal transfers that shift power from the legislative and judicial branches to the executive branch. This aggrandizement of executive power offsets the Founders' checks and balances and allows for the circumvention of domestic constitutional constraints. Part II.B examines the executive branch's (specifically the President's) use of the treaty power to ensnare the powers of the other branches and the resultant constitutional crises.

1. Globalization Increases the Domestic Power of the Executive Branch

The trend towards globalization intensifies the domestic impact of both international relations and binding international agreements. As discussed above, treaties implementing membership in international organizations do more than simply set standards for interaction at the international level. Rather, they also have the potential to

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101 See Ku, supra note 76, at 86; Havel, supra note 63, at 257; Marquardt, supra note 20, at 142-43; Dempsey, supra note 5, at http://cato.org/pubs/pas/pa-511.html.

102 Marquardt, supra note 20, at 143.

103 See Bolton statement, supra note 100. Some completely reject that international bodies such as the ICC necessitate unconstitutional state sovereignty diminishment. See generally LOUIS HEIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990). Henkin argues that the belief in the inevitability of unconstitutional sovereignty diminishment from membership in international organizations derives from employing a too narrow and formalistic interpretation of constitutional sovereignty. Instead, he suggests the appropriate interpretive paradigm is one of flexibility and functionality that facilitates United States interaction with emerging international institutions. See also Patricia A. McKeon, Balancing the Principles of Sovereignty Against the Demands for International Justice, 12 ST. JOHN'S J. LEGAL COMMENT 535, 542-43 (1997).
catalyze substantive domestic governmental change in ways likely not envisioned by the Founding Fathers. The President, as the nation’s principal wielder of the treaty-making power, is therefore uniquely positioned to harness this power in equally unimagined ways. Consequently, as globalization forces increase, so too will the President’s domestic power.

A prime example is the President’s utilization of self-executing treaties. These international agreements allow the President to circumvent Senate approval in concluding treaties with binding force of law. Even where the President seeks the Senate’s consent, the forces of globalization may aid him in forcing congressional acquiescence. Global and domestic pressure can make the Senate “reluctant to defy and confront the President (especially after he can no longer retreat), [and] ... unwilling to make the United States system appear undependable, even ludicrous.” Once ratified, the “constitution declares a treaty to be the law of the land,” and “is to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”

The President’s newfound legislative power and his ability to leverage Congress are also bolstered by “fast-track” ratification. The President can use this power to alter a treaty’s substantive make-up in order to expedite its conclusion. Although a congressionally dele-
gated power, it allows significant circumvention of the normal congressional checks. This probably explains why "Congress has shown itself to be less than enthusiastic about continuing the practice of granting ‘fast-track’ negotiating authority to the President." Notwithstanding, the Supreme Court has mandated that Congress "accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

An "executive agreement" is another relatively new instrument that facilitates the internal transfer of constitutional power to the executive branch. Executive agreements encompass a broad range of international treaties that are concluded by the President without Senate approval. The significance of these agreements ranges from statements of policy to creation of contractual obligations with foreign nations or international bodies. Although the limitations on the President's freedom to conclude executive agreements "are still not authoritatively defined," it is generally accepted that he may use them in fulfillment of his duties as Commander-in-Chief. In addition, the Supreme Court has upheld the constitutionality of executive agreements, including those without Senate consent, proclaiming that they enjoy the "same supremacy over state law and policy enjoyed by treaties."

2. Constitutional Implications of Executive Aggrandizement

As international relations begin to impose greater influence domestically through treaties such as the Rome Statute, the Executive's role in domestic governmental functioning will also be more influential. A quick tour of recent history reveals that Congress and the Supreme Court have taken turns attempting to restrain the Executive's recent rise in power. Both branches have been frustrated by past

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113 See id.
114 Id. at 475.
116 See Berman, supra note 107, at 464.
117 See 14 WHITEMAN, DIGEST OF INTERNATIONAL LAW 1 (1982).
118 For example, in United States v. Pink, the Supreme Court upheld the Litvinov agreement, an executive agreement committing the United States to the recognition of the Soviet government in exchange for the assignment of Russian assets. See United States v. Pink, 315 U.S. 203 (1942).
119 Id.; see also Berman, supra note 107, at 464.
120 See Berman, supra note 107, at 464.
121 Id. at 465 (citing Pink, 315 U.S. at 229); see also Principality of Monaco v. Mississippi, 292 U.S. 313, 351 (1934); United States v. Curtiss-Wright Corp., 299 U.S. 304, 306, 316 (1936); State of Russia v. National City Bank, 69 F.2d 44, 48 (2d Cir. 1934).
122 See Elliot L. Richardson, Distribution of Constitutional Authority: Checks and Balances in Foreign Relations, 83 AM. INT'L L. 736, 738 (1989).
presidents “unilaterally committ[ing] [the United States] to a series of controversial policies, including the Berlin airlift, the Korean War, the Congo rescue operation, the Bay of Pigs invasion, intervention in the Dominican Republic, and engagement in the Cuban missile crisis—seeking legislative approval after the fact, if at all.” Executive aggrandizement creates two fundamental constitutional crises. The first is the unbalancing of the three governmental branches’ constitutional powers. The second is the circumvention of domestic constitutional constraints.

a. Unbalance of Powers

“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”124 With exclusive control over foreign relations powers whose domestic impact increases with the rise of the global community, the President will be increasingly capable of exercising constitutional powers originally and exclusively delegated by the Constitution to the other branches.125 Part II.A and B elucidate the treaty-power’s ability to harness both legislative and judicial constitutional powers. Specifically, treaty conclusion has the binding force of law and is capable of altering domestic legal precedent and jurisprudence and transferring jurisdiction. The Supreme Court explicitly declared this unconstitutional when it proclaimed that “the basic separation of powers structure, which seeks to keep powers divided among different branches, is undermined when one branch begins collecting all these constitutionally-assigned powers for itself.”126 The Court also held that “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws as he thinks may be needed or advisable ...”127 Therefore, even overt and voluntary internal transfers, such as congressional delegation of the “fast-track” power, may be unconstitutional.

These Supreme Court holdings embody the Founders’ justifications for a rigid system of checks and balances. For, “[i]n the American constitutional order, the constant democratic value of each citizen’s vote derives not primarily from the act of voting itself, but from the constitutional guarantee that the elected political bodies must compete with one another for power and influence in a system of di-

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123 Id.
125 See SCHLESINGER, supra note 106, at 2.
126 Ku, supra note 76, at 90 (citing Buckley v. Valeo, 424 U.S. 1, 90-91 (1976)).
vided government.” The Founding Fathers saw the balance of powers as critical to preventing any one faction’s political dominance, and to restraining the government from exercising its will against the people’s will. In the Federalist Papers, James Madison made clear that, without the proper balance, tyranny is possible.

b. Circumvention of Domestic Constitutional Constraints

Internal transfers allow the federal government to accomplish through treaties what it could not constitutionally legislate domestically. For example, in Missouri v. Holland, the Supreme Court held that, although the federal government had no constitutional basis for passing domestic legislation to protect the migration of certain birds, it was constitutionally viable for the federal government to pass the same legislation via the treaty power in entering an international agreement. This circumvention undermines the Supreme Court’s declaration that “[t]he prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.” The NAFTA treaty may elucidate the inherent dangers of such nullification. NAFTA, it is argued, has diminished state sovereignty beyond what would be constitutionally permissible without the treaty power. Specifically, the NAFTA treaty enables the federal government to interfere with state regulation of intrastate commerce, an invasion prohibited by the Constitution.

CONCLUSION

ICC membership engenders internal and external transfers of constitutionally created power that catalyze significant alteration of the United States government’s power balances, and thus, the Constitution’s scheme of accountability and legitimacy. External transfers shift constitutional power to foreign bodies capable of exercising that power free of constitutional constraints. Such transfers unconstitutionally amend the government’s structure and diminish United States sovereignty. Similarly, internal transfers cause an unbalancing...
of the three branches’ powers and permit federal circumvention of
domestic constitutional constraints, thus violating the Founders’ no-
tions of ordered liberty.

It is critical to note, however, that new forms of international le-
gitimacy and accountability, vested exclusively in institutions such as
the ICC, are rapidly emerging in the global arena. International law
no longer only governs relations between states, but now also man-
dates that "individuals are accountable members of an international
community. In fact, the existence of international criminal law im-
plies that ties to the global community \textit{trump} national ties . . . .\textsuperscript{157} For
example, the laws of Nuremberg charged that an individual had a \textit{le-
gal duty} to "disobey his sovereign national government if it attempts
to violate certain international legal principles."\textsuperscript{158}

The nations of the world are beginning to integrate cognizant of
the primacy of the global community, and the ICC is only one of the
latest manifestations of this trend. The crimes of the ICC (genocide,
war crimes, and crimes against humanity)\textsuperscript{159} are considered to be
crimes of universal jurisdiction. In other words, "\textit{These crimes are}
so universally condemned that those who commit them are consid-
ered \textit{hostis humani generis} (an enemy of all humankind), and any na-
tion in the world has the authority to exercise jurisdiction over such
persons without the consent of the individual’s state of nationality."\textsuperscript{160}
The United States Restatement, recognizing the existence of uni-
versal jurisdiction, explains that \"\textit{a} state has jurisdiction to define and
prescribe punishment for certain offenses recognized by the com-
munity of nations as of universal concern, such as piracy, slave trade,
attacks on or hijacking of aircraft, genocide, war crimes, and perhaps
certain acts of terrorism . . . . \textsuperscript{161}\n
Both the development of international organizations and the uni-
versal jurisdiction they embody reflect the evolving sense of global
community. One of the Constitution’s founding precepts is severely
complicated, however, by United States citizens’ acknowledgement of
their indivisibility from the global community. As Alexander Hamil-
ton explains, "every power requisite to the full accomplishment of the
objects committed to \textit{the Constitution’s} care, and to the complete
execution of the trusts for which it is responsible, \textit{must be} free from

\textsuperscript{157} Marquardt, \textit{supra} note 20, at 142 (emphasis added).
\textsuperscript{158} \textit{Id.} (emphasis added).
\textsuperscript{159} Rome Statute, \textit{supra} note 15.
\textsuperscript{160} Scharf, \textit{supra} note 5, at http://www.nesl.edu/intjnl/vol5/scharf.htm (citing IAN
BROWNLEE, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 905 (4th ed. 1990); Kenneth C. Randall,
\textit{Universal Jurisdiction Under International Law}, \textit{66} TEX. L. REV. 785 (1985); \textit{RESTATEMENT (THIRD)
OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987)).
\textsuperscript{161} \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404
(1986).}
every other control but a regard to the public good and to the sense of the people." This begs the question of how to define "people" in the face of globalization—can "people" realistically continue to be limited to "We the People of the United States?"

The short answer is "no." The Constitution was created to be a vehicle of the "People's" will. If the Constitution fails to account for United States citizens embracing their membership in the global community, the founding document would be guilty of violating the same conceptions of accountability and legitimacy for which the ICC currently stands accused. Such failure would also threaten the United States' legitimacy in the international arena. For example, it is easy to imagine the difficulties the United States would face as a non-state party attempting to prosecute a war criminal where the rest of the nations of the world had uniformly joined the ICC. This is not to say the United States should be pressured to join the ICC or other international bodies, just that the United States will clearly lose some of its ability to shape the growth of the global community if it abstains from membership in international institutions.

It is possible, however, for the Constitution to retain legitimacy and accountability in the face of the United States' membership in the ICC and other international institutions. The Rome Statute does not bar "interpretative declarations," or "understandings," that allow the United States to maintain its constitutional integrity while accounting for the concerns of the global community.

For example, before ratifying the International Covenant on Civil and Political Rights, the United States Committee on Foreign Relations made the interpretative declaration that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." Thus, where a treaty poses a constitutional threat, the declaration provides the United States with the opportunity to take remedial actions without jeopardizing either its commitment to the international agreement or its constitutional sovereignty. In addition, legislative safeguards or even constitutional amendments could further bolster coexistence between the Constitution and international organizations. Notwithstanding these protective measures, it is clear that the Constitution must account for the rise in primacy of the global community. Whether the integrity of

142 The Federalist No. 31 (Alexander Hamilton).
143 The Declaration of Independence (U.S. 1776).
144 The Federalist No. 31 (Alexander Hamilton).
146 Brown, supra note 15, at 888-89.
148 See Brown, supra note 15, at 888-89.
the founding document will withstand the adjustment is a question only time can answer.