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Contesting the "Sovereigntists": How to Learn to Stop Worrying and Love International Institutions

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BOOK REVIEW

CONTESTING THE "SOVEREIGNTISTS": HOW TO LEARN TO STOP WORRYING AND LOVE INTERNATIONAL INSTITUTIONS

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International Organizations and their Exercise of Sovereign Powers. Dan Sarooshi. Oxford University Press, 2005. Pp. 1, 176, $99.00 (hardcover).

I. INTRODUCTION

It has become fashionable in some quarters of the United States to denounce the "outsourcing" of American sovereignty to international courts,[1] the United Nations (UN),[2] and the World Trade Organization (WTO).[3] The central debate between these "sovereigntists" opposed to broad U.S. participation in international organizations (IOs) and "internationalists" who support such participation is not over the legal effect of conferring governmental functions on international institutions, but rather over the implications of such conferrals for democracy and national security:[4]

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1. *See, e.g.*, John R. Bolton, Under-Sec'y for Arms Control and Int'l Sec., Remarks at the American Enterprise Institute: American Justice and the International Criminal Court (Nov. 3, 2003), *available at* http://www.state.gov/t/us/rm/25818.htm; Statement of Steven Swanson, Chairman, Coal. for Free Lumber Exps. (Jan. 17, 2006), *available at* http://www.fairlumbercoalition.org/origdocs/releases/press_release_1-17-06.pdfStatement ("Never before in the history of the Republic has the U.S. government completely outsourced final decision-making about application of U.S. law to its citizens.").

2. *See, e.g.*, Colum Lynch, *Bolton Voices Opposition to U.N. Proposals*, WASH. POST, Sept. 1, 2005, at A23, *available at* 2005 WLNR 13711118; John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 221 (2000).

3. *See, e.g.*, Patrick J. Buchanan, *A House Divided*, PITTSBURGH TRIB. ONLINE, Aug. 21, 2005, *available at* 2005 WLNR 13700856 (2005) (noting that the Bush administration "continues to accept the dictations of a World Trade Organization, to which the Gingrich-Dole internationalists subordinated U.S. sovereignty in '94").

4. I borrow the term "sovereigntist" from Peter Spiro. *See* Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and its False Prophets*, FOR. AFF., Nov. 1, 2000, *available*

Does participation in international institutions strengthen or weaken U.S. democracy? Do IOs limit the ability of the government to protect national security?

The extreme end of the sovereigntist side of the debate has been marked by nativist fears of erosion of the American social and political fabric, and, most notably, by the belief that participation in international institutions and judicial processes actually weakens national security.[5] At the other extreme, some internationalists, to the detriment of their own argument, have ignored the rumblings of popular opinion against an international trade system that is perceived to sacrifice local welfare and quality of life to corporate necessity[6] and a UN that at times appears more concerned with protecting its own institutional reputation than with solving global problems.[7]

Against this background comes Professor Dan Sarooshi's *International Organizations and Their Exercise of Sovereign Powers*, which seeks to provide a conceptual and legal framework to explain how inter-

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at 2000 WLNR 199927. A doctrinally separate debate over the appropriate use of *foreign* legal, political or social developments in constitutional interpretation is often conflated with discussion of the role of international organizations and the role of international adjudication. *See The Insidious Wiles of Foreign Influence*, ECONOMIST, June 11, 2005, at 25–26. For the contours of the debate over foreign law and comparative constitutionalism, see, for example, Roger P. Alford, *In Search of a Theory for Comparative Constitutionalism*, 52 UCLA L. REV. 639 (2005) and William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 Int'l J. Const. L. 555 (2004).

5. *See, e.g.*, U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, March 18, 2005, at 5, http://www.defenselink.mil/news/Mar2005/d20050318nds1.pdf ("Our strength as a nation will continue to be challenged by those who employ a strategy of the weak, focusing on *international fora, judicial processes* and terrorism.") (emphasis added).

6. *See, e.g.*, Susan Page & David Jackson, *More Say U.S. Focus Should be Home; Poll: Americans Warier of World*, USA TODAY, Apr. 14, 2006, at 1A (finding two-thirds of Americans polled agreed that increased trade with other countries mostly hurts American workers); FOREIGN POLICY ATTITUDES NOW DRIVEN BY 9/11 AND IRAQ, COUNCIL ON FOREIGN REL. (2004) (finding that "when it comes to the impact on their own financial situation, more say free trade has probably hurt (41%) rather than helped (34%)."); AMERICANS ON GLOBALIZATION: A STUDY OF U.S. PUBLIC ATTITUDES, PROGRAM ON INTERNATIONAL POLICY ATTITUDES (2000), http://www.pipa.org/OnlineReports/Globalization/AmericansGlobalization_Mar00/AmericansGlobalization_Mar00_rpt.pdf (finding "a strong majority feels trade has not grown in a way that adequately incorporates concerns for American workers, international labor standards and the environment.").

7. *See, e.g.*, OPINION LEADERS TURN CAUTIOUS, PUBLIC LOOKS HOMEWARD: AMERICA'S PLACE IN THE WORLD, THE PEW RESEARCH CENTER (2005), *available at* http://people-press.org/reports/pdf/263.pdf (noting a decline in the public's view of the U.N., particularly among groups that historically have supported the U.N.); *Can Its Credibility Be Repaired?*, ECONOMIST, Sept. 10, 2005, at 30 (noting that the independent committee of inquiry into the oil-for-food scandal found that the scandal "castigates virtually every aspect of the UN, including its powerful Security Council.").

national organizations carry out functions that traditionally have rested with national governments.[8] In an earlier work, Professor Sarooshi formulated organizing principles for the ways in which individual Member States are empowered to carry out the functions of international institutions.[9] The current project presents itself as obverse to the first, formulating organizing principles for the ways in which international institutions carry out the functions traditionally associated with states.

International Organizations contributes to an ongoing academic discussion that has, thankfully, reined in some of the more extreme positions in the sovereigntist versus international debate. The academic literature has begun to illuminate the challenges that arise for constitutional democracies balancing the need to participate in IOs that facilitate interstate cooperation and help resolve complex transnational problems against the need to maintain robust, effective, participatory domestic governmental functions.[10] Political scientists, for example, have approached the issue of IOs performing sovereign functions from the perspective of liberal theory (sometimes under the labels "transgovernmental liberalism" or "institutionalism"), which posits that IOs are created through multi-state bargains to provide Member States with information and reduce transaction costs,[11] and agency theory, which seeks to explain the process through which states (as principals) confer powers on IOs (as agents).[12] Legal scholars have examined

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8. DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 1 (2005).

9. *See* DAN SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF IT CHAPTER VII POWERS (1999).

10. For a survey of the issues that arise from trying to balance democratic domestic institutions against the importance and effectiveness of international regimes and institutions, see DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY (Thomas M. Franck ed., 2000).

11. Liberal theory and institutionalism are both premised on rational state behavior. An emerging middle theory between liberal theory and institutionalism, labeled "transgovernmental liberalism," posits that, while institutions are created to increase access to information and reduce transaction costs, "they do *not* lead to the transfer of authority or loyalty from nation-states to a new centre." Mark A. Pollack, *International Relations Theory and European Integration*, J. COMMON MKT. STUD., June 2001, at 221, 226 (emphasis in original); *see also* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 233 (1993) (noting that "a Liberal approach [towards international organizations] fills many of the acknowledged gaps in current regime theory by providing the tools to determine when there will be mutual interests that can be furthered by international cooperation.").

12. Like liberal theory, agency theory relies on rationalism to address more specifically the ways in which states act in relation to IOs:

the issue through the dual lens of domestic constitutional analysis and public international legal principles. For constitutional scholars in the United States, for example, U.S. participation in IOs presents challenges to federalism, separation of powers, democratic accountability, and individual rights.[13] From the public international law perspective, what powers are conferred on IOs and how they are carried out raises doctrinal questions of treaty enforcement, state responsibility and broad guarantees of human rights.[14]

To Sarooshi, these latter debates within international law about the ways in which state sovereignty competes with international organizations have led to "international institutions being viewed with suspicion, and as being problematic from the perspective of the State."[15] He argues that the "narrow, technical" responses by internationalists have focused on the binding nature of interna-

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> [I]nstrumentally rational actors . . . delegate powers to executive and judicial agents . . . in order to lower the transaction costs of policy-making, and that in doing so they tailor the discretion of their agents . . . as a function of several factors including the demand for credible commitments, the demand for policy-relevant information, and the expected gap between the preferences of the principals and the agents.

Mark A. Pollack, *Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications, and Empirical Disputes* 1 (Duke Univ., Mar. 3–4, 2006) *available at* http://www.law.duke.edu/publiclaw/workshop/papers.html [hereinafter 2006 Duke Workshop].

13. *See* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation* 6, (Duke Univ., Mar. 3–4, 2006), *available at* http://www.law.duke.edu/publiclaw/workshop/papers.html (noting that legal scholars are concerned about "constitutional issues implicated by international delegations, such as interference with checks and balances in the domestic system, undermining accountability, erosion of federalism, and undermining of individual rights."); *see also* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557, 1595–96 (2003) (arguing that a "non-self-execution" approach to constituting treaties of IOs will "reduce many of the constitutional concerns [such as lack of accountability and aggrandizement of power] associated with international delegations without significantly affecting the United States' ability to participate in international institutions."); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 77 (2000) ("[I]nternational delegations place an unusually heavy strain upon the ideal of political accountability that animates much of the Constitution's structural design."). *But see* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1492 (2004) (arguing that despite colorable constitutional claims raised by some legislative delegations to international organizations, such delegations "actually serve other constitutional values, particularly the value federalism places on diffusing authority and creating checks on the power of the national government.").

14. *See generally* Frederic L. Kirgis, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING (1993); Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L. Q. 51, 53 (2006) (arguing that "the constituent document of an international organization is an international treaty of special nature," designed to "create a new subject of international law with a certain (law-making) autonomy, to which the States parties entrust the task of realizing common goals.").

15. SAROOSHI, *supra* note 8, at 3.

tional law, which has the ultimate effect of reaffirming sovereigntist fears that joining international organizations involves a "loss" of sovereignty.[16] Sarooshi stakes out new territory, making a firm doctrinal case that sovereigntist fears of loss of control over core governmental functions to IOs may be overstated.

The book, however, fails to advance the internationalist case as effectively as it implicitly claims to do. First, by framing the problem of global governance not as a problem confronting the exercise and meaning of democracy, but rather as one of ongoing "contestation" of the meaning of sovereignty, Sarooshi (quite intentionally) avoids the question of the democratic accountability of IOs. Second, his central doctrinal contribution, a description of how different types of state participation in IOs affect legal rights and obligations within the international system, starts with a presumption that the role of the nation state—and its constituent parts—is limited. What results is a tautological defense of the process of international institutions, in which it is already assumed that process, rather than the substantive norms underlying the institutions, can protect the values at stake. The reader is left somewhat confused as to whether Sarooshi is content or discontent with the current state of international institutions and the procedures under which they currently operate. For example, Sarooshi writes:

> Instead of focusing on the seemingly intractable 'democracy deficit' of international organizations it may be more useful to focus on identifying and improving the 'contestability deficit' of international organizations: that is, to improve the extent to which the structure and decision-making processes of organizations promote substantive contestation by States and their arms of government in the formulation and application of sovereign values.[17]

The indeterminacy of Sarooshi's approach leaves the reader wondering which of the sovereign value choices would better serve the goals of peace, security and the respect of human rights—which, after all, are the central goals of international organization.

II. Sovereignty as an "Essentially Contested" Concept

Sarooshi begins the book by embracing the philosophical notion of sovereignty as an "essentially contested concept."[18] He notes

16. *Id.* at 3.

17. *See id.* at 121–22.

18. In the philosophy of language, an "essentially contested concept" is one "that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application it to create disagreement over its correct application

that "[t]he precise meaning and scope of the application of sovereignty in different contexts remains unclear,"[19] and adopts the position that the "very existence of the concept of sovereignty generates continual arguments as to its core criteria" that include central questions about the conditions for the existence of sovereignty and who or what type of entities should exercise sovereignty.[20] Under this formulation of sovereignty, the central function of international organizations shifts from carrying out governmental functions of the Member States to providing a forum through which the contestation of sovereignty takes place.

As Sarooshi notes, political scientists have developed various approaches to giving content to sovereignty, and have even created labels to describe the sticks that can be bundled in various kinds of sovereignty: domestic sovereignty, interdependence sovereignty, international legal sovereignty, and traditional Westphalian sovereignty.[21] Rather than adopt these useful typologies as a starting point, Sarooshi sets them aside entirely. For Sarooshi, each of these formulations reflects the centrally contested nature of sovereignty: legal versus political sovereignty; external versus internal sovereignty; indivisible versus divisible sovereignty; governmental versus popular sovereignty.[22] The nature of contestation itself, not the substantive policy outcomes of these contests, defines sovereignty. Contestation of sovereignty is dynamic, and proceeds not from the existence of an original exemplar,[23] but from what Jeremy Waldron has posited as a "solution-concept," a central problem about which there is ongoing debate: "*what are powers reserved to*

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or, in other words, over what the concept is itself." SAROOSHI, *supra* note 8, at 4 (quoting Samantha Besson, *Sovereignty in Conflict*, 8 EUROPEAN INTEGRATION ONLINE PAPERS no. 15, §§ 3.2.1.1–3.2.1.5 (2004), http://eiop.or.at/eiop/texte/2004-015.htm). Georg Sorensen originated this view of sovereignty as an essentially contested concept in Georg Sorensen, *Sovereignty: Change and Continuity in a Fundamental Institution*, 47 POL. STUD. 590, 604 (1999). In order to be considered essentially contested, it must be "normative, intrinsically complex, and lacking any immutable minimal criteria of correct application." SAROOSHI, *supra* note 8, at 4 n.5 (citing Besson, *supra*, §§ 3.1–3.3); *see also* W.B. Gallie, *Essentially Contested Concepts*, LVI PROC. OF THE ARISTOTELIAN SOC'Y 167 (1956) (originating the promulgation of the idea of essentially contested concepts).

19. SAROOSHI, *supra* note 8, at 3.

20. *Id.* at 4.

21. *Id.* (citing S. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9 (1999)).

22. *Id.* (citing Besson, *supra* note 18, §§ 3.2.1.1–3.2.1.5).

23. Sarooshi adopts Jeremy Waldron's departure from Gallie's original formulation of "essentially contested concept" in which, in his discussion of the rule of law as an essentially contested concept, Waldron claimed that "reference back to the achievement of an exemplar may be too narrow an account of what gives unity to a contested concept." SAROOSHI, *supra* note 8, at 5 (quoting Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 157–58 (2002)).

government; who exercises which of them; and how should they be exercised?"[24]

Sarooshi implicitly rejects the long-held view that IOs reflect a voluntary exercise of sovereign power by nation states. The nation state, in Sarooshi's formulation, holds no special place in the discussion. Within what he frames as the project of determining how sovereignty is contested, the nation state is not some perfect ideal of sovereignty, but merely one of several reference points in the discussion.[25] He therefore does not privilege the traditional claims of loss of "state sovereignty" in the discussion of what sovereignty means. The language and content of domestic debates between sovereigntists and internationalists merely reflect a reference back to the nation state. Sarooshi admits that states are important actors in the discussion; just as lower levels of governments within national polities serve as an important check on "evils of excessive centralization," so, too, do nation states within international organizations.[26] But he views limitations on the exercise of governmental powers by international organizations as generally equivalent to those that would form limiting principles within national governments; "conceptions of sovereignty determined within States" have no higher claim than "those decided upon within international organizations."[27]

Sarooshi's formulation posits that states contest sovereignty as it is being carried out in international organizations, but that a state is not a "unitary rational actor with a non-dimensional set of preferences."[28] Indeed, Sarooshi notes that the process of contestation takes place between entities and actors on the domestic level as much as it does between the state and the international organization. This is an accurate description of the debates that are occurring within the United States about the scope of U.S. participation in certain international regimes—debates between states and the federal government, between elements of the executive branch,

24. SAROOSHI, *supra* note 8, at 5 (emphasis added).

25. *Id.* at 6. Indeed, Sarooshi sees the process of contesting sovereignty as evolving from tribe, to city-state, to region, to the independent sovereign nation-state and, finally, to international organizations. *Id.*

26. *Id.* at 6.

27. *Id.* at 6–7.

28. Contrast Sarooshi's view with Jack Goldsmith and Eric Posner, THE LIMITS OF INTERNATIONAL LAW 3 (2005) ("International law emerges from states acting rationally to maximize their interests given their perceptions of the interests of other states and the distribution of state power.").

and/or between non-state interest groups and the government.[29] Sarooshi notes, for example, that in states where the judiciary has played a role in contesting sovereignty, *i.e.*, in advanced constitutional democracies, one is more likely to see that state actively contest the exercise of certain sovereign functions by international institutions.[30]

Importantly, Sarooshi recognizes that this process of contestation implicates a debate not just about the form of state control (*e.g.*, non-intervention in the internal affairs of other states), but of values—democracy, human rights, self-determination—even legitimacy, accountability, security and equality.[31] The degree to which a state has incorporated these normative values in turn affects how concepts like sovereignty are evaluated at the international level. Sarooshi goes so far as to argue that "the exercise of public powers of government can only be considered an exercise of *sovereign* powers when this is in accord with sovereign values;"[32] a state not acting to uphold these values is actually violating sovereignty.[33] By extension, an international organization that is exercising the judicial, legislative and executive governmental functions conferred upon it must also act in accord with sovereign values.

The premise of sovereignty as a contested concept results in three claims: (1) international organizations perform an ontological function, providing a forum separate from the state through which contestations of sovereignty, and in particular the content of sovereign values, are contested and formulated; (2) the extent to which a state can contest sovereign values within the international organization will depend on the degree or type of conferral of power that has been made to the organization; and (3) public and

29. *See, e.g.*, Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 101–02 (2004) (discussing the debate over the Geneva Conventions).

30. SAROOSHI, *supra* note 8, at 8. This is a corollary to the notion that developed democracies take more seriously the details and contours of their international commitments, and thus spend more time deliberating over them at the time they are adopted and are more likely to limit them through, for example, reservations to treaties. *See, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1976 (2002).

31. SAROOSHI, *supra* note 8, at 9 (quoting Besson, *supra* note 18, § 3.1).

32. *Id.* at 9–10.

33. *Id.* at 10. This argument is not new. In fact, Sarooshi notes that Michael Reisman's claim about international law generally starts from this position: the object of the protection of international law is not the "power base of the tyrant who rules directly by naked power or through the apparatus of totalitarian political order, but the continuing capacity of the population freely to express and effect choices about the identities and policies of its governors." *Id.* (quoting W. Michael Riesman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990)).

administrative law principles, rather than private law principles, can appropriately be applied to the analysis of IOs exercising conferred sovereign powers.[34]

For Sarooshi, ontological and legitimating decisions occur within the process of contestation, which in turn contribute to ongoing discussions of the meaning of community and society. Through the contestation of sovereignty, societies are constituted and societies exclude; decisions about sovereignty give meaning to social identity and exclude the "other." While historically these decisions have been based on ethnicity, language, tribe, and a constructed notion of "nationality," Sarooshi wonders if "it [is] possible that the next stage of contestations of sovereignty may, ontologically, focus on the constitution of communities based on the extent to which different persons accept and apply values . . . ."[35]

Sarooshi makes his case for the existence of international institutions that may affect the political and judicial prerogatives of states by reframing the question as one of a discussion of governance and power being played out within international institutions themselves, rather than one of intrusions into the prerogatives of sovereignty. While recognizing that this approach may solidify opposition to international organizations,[36] Sarooshi is comfortable within the framework he has drawn: decisions of nation states not to participate in certain international institutions (e.g., the UK decision not to enter into the European Monetary Union) contribute to the international process of contesting sovereignty. Because the process of contestation is inherent to the function of international institutions, it cannot pose a threat to them.

Sarooshi thus waves off the democracy debate as one of "sovereign values." But one is left to wonder: Who determines the con-

34. *See* SAROOSHI, *supra* note 8, at 12–14. The last point is a practical one, though connected to the concept of sovereignty as a value. Although he does not say so explicitly, Sarooshi's claim about the applicability of public law principles to international organizations stems from the development of the administrative state within constitutional democracies. Thus, he is correct in stating that to confer the powers of states on international organizations "free from the normative limitations that constrain the exercise of these powers at the national level is to dispense with, by the stroke of a pen, the limitations of governmental tyranny that peoples have fought hard to win within their domestic polity." *Id.* at 14. Certainly, with that statement, he is not talking about *all* Member States of the United Nations or the WTO. Surely the peoples of Sudan, Zimbabwe and Iran, to name but a few, have not yet won any limitations on government tyranny.

35. *Id.* at 12.

36. In Sarooshi's words, "the solidification of conceptions of sovereignty within a State in response to this *Other*" (*i.e.*, his own theory). *Id.* at 13.

tent of those values? Does renaming the debate as one of "values"—where democracy is just one item on a long list—change its essence? What of conferrals of sovereignty made by illegitimate and despotic regimes? Was it legitimate, for example, for the United Nations Human Rights Commission (UNHRC) to claim to speak on behalf of the international community when it exercised the power of Zimbabwe and Sudan?[37] Surely, the contestation of "sovereign values" within the UNHRC failed, leading to the call for a more democratic institution in which the nature of the sovereign regime matters more than its legal status as a sovereign.[38]

Whether Sarooshi intended this initial characterization of sovereignty as contested to be a rhetorical sleight of hand or a reframing device that creates the assumption that international organization is merely a higher level of governmental organization, his approach comes across, in part, as an exercise in question begging. Even accepting that sovereignty is highly contested, to rest one's case for the value and continuation of international institutions on the contested nature itself seems to weaken, rather than strengthen, the case for international cooperation. Are there additional values represented by the functions of IOs separate and apart from the forum of contestation that Sarooshi posits? Of course. Yet they barely find a mention in this book. To be fair, it may be that his project rests on a theoretical plane that looks primarily to understanding the legal effect of disaggregated governmental power; this could explain why Sarooshi puts aside the contestation of the substantive values of free trade, protection of human rights and regulation of the use of force, among the other values being promoted through international organization.

37. *See The UN Commission on Human Rights: Protector or Accomplice?: Testimony before the Subcomm. on Africa, Global Human Rights and International Operations of the H. Comm. on International Relations*, 109th Cong. (Apr. 19, 2005) (statement of Mark P. Lagon, Deputy Assistant Secretary for International Organization Affairs) ("At present, the following countries are currently serving on the 53-member Commission: Cuba, Sudan, China, and Zimbabwe—not exactly exemplars of human rights treatment of their own citizens.").

38. Calls for reforming the U.N.'s human rights institution were sparked by a steady decline in the credibility and effectiveness of the Commission, which included in its membership some of the worst human rights abusers. *See, e.g.*, HUMAN RIGHTS WATCH, U.N. RIGHTS BODY IN SERIOUS DECLINE (2003), *available at* http://hrw.org/english/docs/2003/04/25/global5796.htm; *Fix It or Scrap It*, ECONOMIST, Jan. 14, 2006, at 17 ("Once revered as the creator of all the great universal human-rights rules and instruments, the 53-member Commission on Human Rights has been thoroughly discredited . . . . The reason for this is . . . [that the] present committee is packed with members who are themselves serial abusers of human rights."). On March 15, 2006, the United Nations General Assembly voted overwhelmingly (170–4) to approve the creation of the Human Rights Council. *See* G.A. Res. 251 (Mar. 15, 2006).

Indeed, if he had not included the first chapter's discussion of contestation of sovereignty, there would be less to object to in the book. Sarooshi does, however, stake out this normative claim, and the book is weaker for it.

III. Typology of Conferrals

The central contribution of the book is its descriptive project, a typology of the ways in which the disaggregated governmental powers of a state—executive, legislative and judicial functions—are transferred in one way or another to international institutions through state membership, and the distinct legal effect arising from each conferral type.[39] Sarooshi divides conferrals into three types: (1) Agency relationships; (2) Delegations; and (3) Transfers. Sarooshi introduces this typology not as exclusive categories, but rather a continuum starting with agency and ending with complete transfer of powers, which reflects the degree to which a state has "given away its powers to the organization."[40] Moreover, within one international organization, different types of conferrals of power from the Member States may be taking place. These conferrals are further characterized by the degree of revocability of the powers conferred, the degree to which the state retains control over the exercise of the powers conferred, and whether the organization has the exclusive right to exercise the power, or if the state has retained concurrent rights.[41]

Though Sarooshi does not provide a diagram or other visual depiction of this continuum and these characteristics, the following table is my own attempt to do so:

Sarooshi uses the typology as a roadmap to evaluate the strength of any particular argument that an international organization is exercising governmental power in a way that is inappropriate or illegitimate. According to Sarooshi, the farther to the right on the continuum the conferral lies (that is, the more it looks like a complete a transfer of powers), the weaker the claim to infringement of

39. The second chapter briefly describes the two ways in which conferrals of power from the state to the international organization take place: constituent treaties and *ad hoc* conferrals. The first process is self-explanatory. The second process is more limited in historical practice, but includes, for example, *ad hoc* conferrals made under the authority of powers conferred under constituent treaties (*i.e.*, UN Chapter VII powers in creating transitional authorities, such as the United Nations Transitional Authority in Eastern Slavonia (UNTAES), or *ad hoc* courts, such as the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)).

40. Sarooshi, *supra* note 8, at 29.

41. *Id.*

FIG. 1 SAROOSHI'S CONTINUUM OF CONFERRAL TYPES

Conferral Type / Indicia	Agency	→ Delegation	→ Transfer
Revocability by State of power conferred	**Yes**	**Yes**	**No**
Control by State over IO	**High**	**Medium**	**Low**
IO maintains exclusive or concurrent exercise of power	**Concurrent**	**Concurrent**	**Exclusive**

sovereignty. Indeed, he claims that these broad categories along the spectrum help answer some difficult doctrinal and theoretical questions: When exercising conferred powers, is an IO acting on its own behalf or on behalf of the state?[42] Whose legal relations are changed by the exercise of this power, the state's or the IO's? If the state has retained the right to exercise powers it has also conferred on an IO, whose interpretation of the powers prevail in a case of conflict arising from concurrent exercise of the powers? Who is responsible for breaches of international law that occur as a result of the IO's exercise of the conferred powers?[43]

A. *Agency Relationships*

Agency exists under international law where a "principal has empowered an agent to act on its behalf to change certain of its rights and duties."[44] International law recognizes two conditions that must exist to create an agency relationship: (1) the principal and agent must be two separate and distinct legal entities; and (2) both the principal and agent must consent to the conferral of powers on the agent to act on the principal's behalf.[45] The first condition relies on the accepted principle that international organizations can have a separate juridical personality where certain conditions are met, the second on the notion that the international legal system is consensual, and where public functions of Member States are being conferred, there can be no involuntary

42. *Id.* at 32.

43. *Id.*

44. *Id.* at 33.

45. *See id.* Sarooshi, though, is careful not to extend the analogies of agency as it exists in domestic law, where agency is primarily concerned with conferral of private law powers and with the balancing of business and economic risk. *See id.* at 35 n.9.

conferral of power.[46] In this regard, agency is distinct from the doctrine of state responsibility, which holds states responsible for the actions of private individuals and entities that act "under the instruction of, or under the direction or control of" the state when carrying out the conduct.[47] There may be circumstances where the acts creating agency are co-extensive with those that create state responsibility. Yet, although consent to an agency relationship can be implied, agency is marked by a high degree of consent that need not be present in all cases in which state responsibility is found.

Just as with domestic agency law, consent to the international agency relationship also requires that the agency be revocable. The revocability requirement ensures that the agency reflects the ongoing wishes of the principal state—a point that is particularly important where a change in government occurs. Revocability exists independently of the requirements of the treaty creating the agency relationship. In other words, a state may revoke agency in a manner that does not comply with the terms of the constituent treaty. Although such a revocation may be the basis for a claim of treaty breach, Sarooshi treats the claim of breach as conceptually distinct from the rights and obligations arising from conferral of power.[48]

In the context of international organizations, Sarooshi sets out a presumption against agency. That is, for both non-Member and Member States, the existence of the IO does not alter the requirements of creation of a separate legal identity and mutual consent. Indeed, by fulfilling the first requirement (through the creation of

46. *See id.* at 34 n.7 (citing Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) (establishing that even where the constituent treaty of an international organization (IO) does not expressly provide for separate legal personality, such a finding can be made under a functions test)); *id.* at 34 n.8 (citing Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240, 258 (June 26) (concluding that the Administering Authority of Nauru was not distinct from the three states constituting the Authority (Australia, New Zealand and the United Kingdom))).

47. *See id.* at 38 n.22 (citing JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 110–13 (2002)); *id.* at 38 n.23 (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 62, 64–65 (June 27)). *But see id.* at 39 n.26 (discussing objections made to the "effective control" test by the ICTY trial chamber in the Tadic case). The line of international law cases delineating the degree of state control necessary for an individual's actions to be imputed to the state can be analogized more closely to the test for state action employed by U.S. courts. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 486–517 (2d ed. 2002).

48. *See* SAROOSHI, *supra* note 8, at 42 n.32 (citing A. Sereni, *Agency in International Law*, 34 AM. J. INT'L L. 638, 645 (1940) (noting that in the case of a breach, the liability of the state breaching is limited to the liability under the treaty of wrongful termination)).

a separate juridical personality), IOs frequently obviate the need for agency: when they act, they act as the organization, not as agents of the Member States. The Member States thus do not bear liability for the acts of the IO on which they have conferred some authority.[49] Neither membership nor participation in the decision-making apparatus of an IO is considered sufficient to create agency. The presumption against agency can therefore generally be rebutted only by demonstrating that *ad hoc* agency has been established.

In practical terms, this means that consent to agency will be found where: (a) a Member State expressly declares in a particular case that the IO is acting as agent for the state (there is no IO constituent treaty through which members have expressly conferred agency powers); (b) the IO expressly accepts the agency; and (c) there is "effective control" evidenced by "an actual instruction or direction by Member States—not envisaged by the constituent treaty—that is subsequently followed by the organization."[50] Sarooshi admits that this standard is difficult to meet.

State conferrals of agency on IOs can result in certain consequences: (1) the IO has the power to change the principal's legal relationship with third parties, but the agency does not change the IO's own legal relationships; (2) the principal is responsible for the acts of the IO agent within the scope of the agency, though the IO retains joint liability for the acts; and (3) the IO has a fiduciary duty to act in the interests of the principal.[51]

B. *Delegations*

In Sarooshi's typology, delegations differ from agency in that in a delegation "the State does not have the competence to exert direct control over the way in which conferred powers are being exercised by the organization."[52] A delegation is, however, a less than complete conferral of power than is a formal transfer because (1) the power remains revocable by the state, and (2) the state reserves authority to exercise the power concurrent with, and independent of, the IO. Transfers confer exclusive authority on the IO. Sarooshi's description of delegation is thus more specific and

49. *Id.* at 43–45.

50. *Id.* at 46–47. Interestingly, because agency is not conferred through a constituent treaty, non-member states can be found to have conferred agency on an IO.

51. *Id.* at 53. The fiduciary nature of this relationship means that a state may raise the issue of an agent acting *ultra vires*. *Id.* It also means that agents may not sub-delegate authority conferred unless expressly authorized by the principal. *Id.*

52. *Id.* at 54.

limited than either the domestic definition of legislative delegation in the United States[53] or the way in which international delegation has been described by political scientists and other international law scholars.[54]

Unlike in Sarooshi's agency relationship, revocability of delegation must be provided for—expressly or impliedly—in the constituent instrument of the IO through which the state conferred power. The best example of revocability is a treaty provision that creates a unilateral right to withdrawal.[55] In the absence of an express provision, unilateral withdrawal will be lawful where, pursuant to Article 56 of the Vienna Convention on the Law of Treaties (VCLT), the parties intended such withdrawal rights, or a right to withdrawal can be implied from the nature of the treaty.[56] The VCLT, however, creates a reverse presumption that applies even where the treaty is a constituent instrument: Absent an express provision for unilateral withdrawal, none will be read into the treaty unless the conditions of Article 56 are met. If they are not, the delegation of powers must be considered a full transfer to the IO.

The ability of the state to exercise these delegated powers concurrently with the IO is based on the foundational international legal principle of state autonomy articulated in the *S.S. Lotus* case: "restriction on the independence of States cannot . . .be presumed."[57] Sarooshi cites the ability of states to conclude treaties outside of the UN, even though membership in the UN delegates authority to the UN to conclude treaties on behalf of its Member States. Nonetheless, conferral to IOs of certain powers that are central to the ability of the organization to carry out its function

53. *See, e.g.*, Whitman v. Am. Trucking Ass'n , 531 U.S. 457, 472 (2001) (describing the lawful delegation of legislative power where "Congress confers decisionmaking authority upon agencies" and also must lay "'down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform'") (citing J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

54. Curtis A. Bradley and Judith G. Kelley, for example, define an international delegation as a "grant of authority by a state to an entity to make decisions or take actions that bind the state or commit its resources." *See* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, (Duke Univ., Mar. 3–4, 2006), *available at* http://www.law.duke.edu/publiclaw/workshop/papers.html.

55. Such withdrawals, or revocations, are lawful under the Vienna Convention on the Law of Treaties. *See* SAROOSHI, *supra* note 8, at 55 nn.6–7 (discussing the many constituent treaties that contain withdrawal provisions). Most withdrawal provisions allow for revocation within relatively short time frames (*i.e.*, 90 days to 12 months). Where the notice requirement is longer than five years, it may be considered a full transfer. *See id.* at 56.

56. *See id.* at 56 (citing Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339).

57. *Id.* at 59 n.22 (quoting S.S. 'Lotus' (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10, at 18).

may limit the Member States' authority to exercise the power concurrently. As to legal effects, unlike with agency, delegation does not fundamentally alter the legal obligations of the state; nor does the IO owe a fiduciary duty to the state. When the IO acts under delegated powers, only the legal relations of the IO are changed. The legal relations of the state remain unchanged.[58]

C. *Transfers*

Sarooshi's thesis regarding the contestation of sovereignty finds little traction in the agency and delegation contexts. When the discussion turns to transfers, however, the paradox of sovereignty contestations becomes clear: "the greater the degree of conferrals by States of Sovereign powers on organizations the less are members able to exercise direct control over organizations in the exercise of these powers."[59] The more power is transferred, the more likely it is that various constituent elements of the state will object to the exercise of the power. Transfers are generally characterized by irrevocability,[60] but where two other indicia—exclusive exercise of the conferred power and lack of state control—are present, Sarooshi argues that the conferrals should be deemed transfers.[61] These transfers may be full or partial. Where a state agrees to be bound by the IO's exercise of the conferred power, including giving direct effect to the IO's decisions within its domestic legal order, the transfer is said to be full. Where a state agrees to be bound only to the international legal obligations that flow from a conferral, the transfer is partial.[62]

Because a transfer results in greater loss of state control than either agency or delegation, a state may not agree that the conferral of power is a transfer, or may view the conferral as having transferred fewer powers than are being exercised by the IO. As a result, contestation of the exercise of governmental powers may take place through the courts, legislatures or executives of the Member

58. Because the state does not retain control over the IO in a delegation, state responsibility will generally not be found for the unlawful acts of the IO. However, where the state through its own acts violates international law in the course of a delegation, state responsibility will attach. *Id.* at 63–64.

59. *Id.* at 65.

60. This generally means that there is no unilateral withdrawal provision in the constituting treaty. *See id.* at 66–67 (discussing the absence of an express withdrawal provision in the EC Treaty). *But see id.* at 68 (discussing the German constitutional court's decision that Member States have a unilateral right of withdrawal).

61. *Id.* at 69 nn.16–18 (employing the Dispute Settlement Understanding of the WTO as an example of irrevocable transfer).

62. *Id.* at 70.

States. At least two of the national courts of the EU Member States, for example, have asserted their own roles in reviewing the extent to which acts of the European Commission (EC) as interpreted by the European Court of Justice conform with the authority vested in the EC through the constituent treaty.[63] Sarooshi sees these court challenges as creating a "stand off," resolvable by having the EU "develop its own sovereign values that attach to the exercise of transferred sovereign powers."[64] In other words, if the EU can start to act in support of basic civil and political rights, the clash between the national and supranational will be diminished. As soon as the claim is uttered, however, Sarooshi wisely pulls back, recognizing that adoption by an IO of a normative framework, such as the Charter of Fundamental Rights of the Union, does not resolve the contestation, but merely marks the beginning of political debate and further "contestation" of the content of those rights.

Sarooshi uses the U.S. experience with the WTO to illustrate the ways in which legislatures have acted to contest sovereign values. The problem of self-execution and non-self-execution of treaties is the starting point of this contestation within the U.S. Congress.[65] Because there is a presumption of non-self-execution—that is, international treaties do not create domestically enforceable law without implementing legislation—transfers to IOs are generally considered partial. It would follow that the default rule of the United States should be to not give full domestic effect to legal decisions of IOs. But the WTO itself provides a forum through which contestations within the U.S. government about appropriate exercise of governmental functions can be made. So, for example, the debate between free trade (that preferences the market and the autonomy of corporations) and regulated trade (that protects

63. *See id.* at 72–74 (noting that both the German constitutional court and the Supreme Court of Denmark held that if the European Union (EU) extended the Union Treaty in a way in which was no longer covered by the treaty when authorized, the organs of the respective states would be prevented from applying it). The Danish and German courts, however, appear to be in the minority. In fact, Sarooshi notes that the courts of France, Italy, Belgium, the United Kingdom and the Netherlands have not taken up the question of whether they—or the European Court of Justice—have ultimate competence to discuss the legality of the exercise of EU powers. *Id.*

64. *Id.* at 74.

65. *See, e.g.*, Curtis A. Bradley, *International Delegation, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587–95 (2003) ("some . . . delegation concerns . . . can be addressed by presuming that the decisions and rulings of international institutions are 'non-self-executing'—that is, that they do not create enforceable federal law unless and until they are implemented by Congress.").

the national economy and other social values) is carried out *through* decisions under the Most Favored Nation and National Treatment provisions of the General Agreement on Tariffs and Trade (GATT).[66] When a decision of the WTO is handed down, it is subject to political (and possibly legal) contestation by the Member States and within the political processes of the Member States. In the United States, for example, only Congress has the power to decide if and how to implement a decision of the WTO – neither the courts nor the executive has the constitutional authority to do so. Sarooshi's claim is thus that the fears of the WTO within the United States are much exaggerated: the system itself allows the substance of the debate (free trade v. economic regulation) to take place, thus preserving the political autonomy of Congress.[67]

Conferrals made through transfers of power, Sarooshi posits, place on the Member States the fiduciary duty not to impinge on the work of the IO.[68] Whether a state can be held responsible for an act of the IO to which it has transferred power depends on whether the transfer is partial or full. In the case of partial transfers, Sarooshi argues for considering the degree to which the IO is acting in the "capacity" of the state and/or whether the state has chosen to give effect to the unlawful act of the IO. For full transfers, the decision of the IO not only binds the state, but has direct effect in the Member State's legal system.

IV. The Elephants in the Room: American Exceptionalism and the Democracy Deficit

Sarooshi's framework helps address technical legal questions concerning the assignment of rights and obligations that occur when states create and participate in international institutions. However, his recharacterization of central questions about democracy as it is practiced domestically and on the international level as questions of sovereign values is less helpful. Indeed, many of the legal prescriptions that Sarooshi proposes would appear to compound some of the problems inherent in state participation in international institutions. Reliance on the ability of Member States to withdraw from international arrangements or engage in "partial

66. General Agreement on Tariffs and Trade arts. I, III, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

67. Sarooshi, *supra* note 8, at 78–79. In an aside to this discussion, Sarooshi traces the history of the economic and political theories underlying shifting US resistance to, and later embrace of, binding dispute resolution at the WTO. *See id.* at 82–99.

68. *Id.* at 101 (citing Case 22/70, Comm'n v. Council (ERTA), 1971 E.C.R. 263).

transfers" of governmental powers raises more questions than it answers. Thomas Franck has asked the following questions regarding U.S. participation in IOs: "[Is it] honorable, or beneficial to U.S. interests and those of our partners, to half-join treaty regimes? Has the rest of the world learned to live with such ambiguous U.S. accession? Does it really prefer to have the United States in quasi-compliance with a global regime than altogether outside it?"[69] And where the United States does choose to remain outside an international legal regime—an uncomplicated outcome from a legal perspective—does it endanger the growth and effectiveness of those institutions?[70] Both the International Criminal Court and the Kyoto Protocol exemplify a trend in which U.S. exceptionalism may weaken the overall effectiveness of the regime.

Moreover, by positing that the contestation of sovereignty at the international level is analogous to contestations between local and national governments, Sarooshi glosses over an important distinction: national governments—perhaps especially those that govern within a federal system—retain primary authority over international relations. The fact that local governments may be "closer to the people" has never been an absolute bar to the national government's ability to perform the national security function. Indeed, it is the central importance of the national security function as a *raison d'etre* for the creation of a national government through the Constitution that makes the transfer of governmental functions from the national government to international institutions uniquely problematic in the U.S. system.[71]

Sarooshi's typology is further deficient in that it does not account for the status of individuals. Where individuals have direct standing before an international human rights commission or court, can that function be said to derive from a transfer by the Member State, or is it more accurately viewed as an inherent individual right that falls outside of any consideration of sovereignty? This is an important question to which Sarooshi provides no answer. By merely transforming any substantive claims individuals

69. Thomas M. Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes?*, *in* DELEGATING ASPECTS OF SOVEREIGNTY, *supra* note 10, at 7–8. Franck notes that such "quasi-accession" may also pose constitutional questions. For example, can the International Covenant on Civil and Political Rights, as ratified by the United States with extension reservations, be considered the supreme law of the land under Article VI of the U.S. Constitution? Franck responds in the negative. *See id.*

70. *See id.*

71. *See id.* at 10–11.

have under international law into sovereignty values, Sarooshi misses the mark.

There is value to understanding, at the international level, the legal processes through which states challenge international institutions, how to hold IOs responsible for *ultra vires* acts, and the ways in which states themselves can be held legally responsible for actions carried out on their behalf by international institutions. Sarooshi's typology is thus a valuable contribution to the development of legal doctrine in this area. Ultimately, however, Sarooshi's book comes across as defensive. His message is clear: We need not worry so much about international institutions encroaching on national governmental functions because the law is capable of handling conflicts that arise between states and international institutions.

As international institutions continue to expand and international regulations affect growing swaths of the economic and political lives of individuals around the globe, the effectiveness of those institutions and the democratic nature of their processes will come under increasing scrutiny. Those who feel abandoned by their own governments to fend for themselves in a global marketplace, alongside those who look to reassert national interests over the "insidious wiles" of foreign influences, will continue to attack the wisdom and fairness of international institutions. Responsible internationalists have an ongoing obligation to make the case for those institutions that work, support reform of those that do not, and take seriously the need to overcome the democracy deficit. Sarooshi's typology of conferrals is an important contribution to the project of unpacking the complex web of legal relationships created through state transfers of power to IOs. Without elaborating on the substantive norms underlying his contestability thesis, however, his call for addressing the "contestability deficit" rings hollow.