

## RETHINKING THE COSTS OF INTERNATIONAL DELEGATIONS

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### ABSTRACT

*A prominent criticism of United States delegations to international institutions – or international delegations – focuses on agency costs. The criticism draws a stark contrast between international delegations and domestic delegations. For domestic delegations to agencies, U.S. congressional, executive, and judicial oversight mechanisms exist to try to ensure agency accountability. Since the agency is democratically accountable, agency costs are low. For international delegations of binding authority to international institutions, however, the conventional wisdom is that oversight mechanisms are absent and the United States cannot monitor the international institution to ensure it acts within its delegated authority. Therefore, in the international context, agency costs are high. The fear of high agency costs through the loss of democratic accountability, so the argument goes, justifies constitutionally inspired limits on international delegations. This Article challenges the conventional wisdom. It argues that the claim of high agency costs rests on weak foundations because agency costs will likely vary depending on the type, scope, and nature of the delegation; that the United States has actually implemented many of the domestic oversight tools in the international context, ensuring a surprisingly high level of accountability to American interests; and that the potential costs and benefits of international delegations may not be substantially different from those in domestic delegations. In other words, it is unlikely that there are*

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*dramatic differences between domestic and international delegations with respect to the efficacy of oversight mechanisms or the balance of costs and benefits. This Article concludes that constitutionally-inspired limits on binding international delegations are probably unnecessary because they will increase the costs for the United States to participate in potentially beneficial international cooperation.*

## 1. INTRODUCTION

Which is worse: a delegation to an unaccountable federal agency or a delegation to an unaccountable international institution? The answer is not as clear as it might seem. Today, Congress and the President delegate effective decision-making authority to federal entities and to international institutions. Although most accept domestic delegations to federal entities as part of the modern administrative state, some fear the prospect of international delegations to distant, unaccountable, and supposedly anti-American international institutions, and propose strict limits on them. They claim that international delegations pose a distinctive democratic accountability dilemma that domestic delegations do not. To frame the problem, consider two stylized examples.

*Example One.* Congress and the President have long delegated authority to the Federal Reserve, a domestic entity, to manage the U.S. financial system. In 2010, in response to the financial crisis, Congress and the President empowered the Federal Reserve to develop new regulations for banks. The Federal Reserve, through its Board of Governors, has since issued some forty-seven regulatory measures with neither open meetings nor public discussion of its rule-making. Congress and the President cannot monitor the Board of Governors' activities, participate in the debate, or block any rule inconsistent with their interests.

*Example Two.* Congress and the President have long delegated authority to the United Nations ("U.N."), an international institution, to maintain international peace and security. In 2011, in response to the Libyan uprising, Congress and the President sought to use the U.N. as a tool to implement a plan of military action against the Muammar Gaddafi regime. Acting through the Security Council, the United States sponsored and obtained successful passage of a resolution after holding open meetings and

debate. At the same time, a non-permanent member of the Security Council introduced a resolution condemning the actions of a U.S. ally in the Middle East. Since the United States is a permanent member of the Security Council and holds a veto, the executive branch was able to monitor this effort and eventually block the proposed resolution that was inconsistent with American interests.

Based upon these two examples, it is unclear which species of delegation, domestic or international, creates greater democratic accountability problems for Congress and the President. In light of this, it is worth considering carefully whether delegations of authority to international institutions such as the United Nations indeed create what are called greater “agency costs” than domestic delegations of authority to bodies such as the Federal Reserve. The conventional wisdom, which is critical of international delegations, mistakenly suggests the answer is obvious: international delegations almost always create significantly higher agency costs than domestic delegations. For domestic delegations, U.S. congressional, executive and judicial oversight mechanisms are present to monitor the agency to try to ensure accountability and democratic legitimacy. Here, agency costs are low. But for international delegations of binding authority to international institutions, critics contend U.S. oversight mechanisms are absent, leaving the United States unable to ensure that the international institution will act within the bounds of its delegated authority. Moreover, international institutions are neither representative of U.S. interests nor accountable to the American public. Therefore, agency costs are high for international delegations, and binding international delegations should be either disfavored or avoided.<sup>1</sup>

How would critics address this apparent problem? Most want to limit, but not entirely oust, international delegations. Some suggest that U.S. courts should adopt “super-strong” clear

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<sup>1</sup> See, e.g., John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT’L L.J. 527 (2003); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1540 (2004); John O. McGinnis, *Medellín and the Future of International Delegations*, 118 YALE L.J. 1712 (2009).

statement rules or non-self-execution default rules when considering whether the United States has made a binding international delegation. Others suggest that the United States should require that all binding international delegations go through the Article II treaty process, making them much harder to enact. In the end, the specter of high agency costs, so the argument goes, justifies modification to constitutional processes in ways that impose limits on international delegations.

To examine the merits of the agency costs claim, this Article focuses on two important questions: First, are the oversight tools used to manage international delegations and domestic delegations systematically different in efficacy? Second, is the balance of costs and benefits for international delegations systematically different from that of domestic delegations? For the reasons outlined below, I argue that the answer to both questions is likely no.

I challenge the key claim that international delegations create high agency costs because domestic oversight mechanisms are unavailable in the international context. To the contrary, many of the oversight mechanisms common to domestic delegations are already present, in different forms, for international delegations. The economic, political, and military power of the United States makes it uniquely well placed to influence *ex ante* the design and structure of the international institutions to which it might choose to delegate binding authority, and shape *ex post* the product of those international institutions. Because of this influence, the United States can replicate some of the domestic oversight tools – procedural constraints, appropriations, and agenda setting, for example – in the international context as well. Indeed, the United States has a number of tools unique to the international environment, ranging from side-payments and foreign aid, to weighted voting and veto powers, to try to align the international institutions with U.S. interests. From this perspective, international delegations and domestic delegations are not categorically distinct on any democratic accountability or agency cost metric; oversight mechanisms exist in both contexts to reduce agency costs.

I contend that the critics are wrong to conclude that the balance of costs and benefits from international delegations is systematically different from the balance in the domestic delegation context. An initial problem is that it is unclear how critics define agency costs, measure them, and determine when

agency costs are high enough to justify limits on international delegations. Agency costs, moreover, will likely vary depending on the type of delegation, the scope of the delegation, the issue area, and the frequency with which the international institution is likely to exercise delegated authority, among other factors.<sup>2</sup> Any strong claim about the level of agency costs must, at the very least, provide a more nuanced analysis of the interactions between the United States and international institutions. In addition, critics do not specify how high agency costs must be to warrant constitutional redress. If agency costs are lower than they assume—the claim is underspecified—then making international delegations more difficult to enact may very well be a solution in search of a problem. Agency costs are problematic if they outweigh the potential benefits from binding international delegations. The mere existence of agency costs, without greater specification, seems insufficient to warrant specific changes in the constitutional process solely to limit international delegations.

In fact, the President and Congress are already fully incentivized to consider carefully the wisdom of binding international delegations and will likely take steps to ensure accountability and reduce agency costs without any modification of constitutional process. This caution is reflected in the pattern of U.S. design, control, and influence over international institutions for non-binding international delegations and, given the United States' incentives to protect the American political processes, it is even more likely that this pattern will continue for binding international delegations. Since the United States would only delegate binding authority in the vast majority of cases to an international institution that it could influence, additional constitutionally inspired limits would be superfluous.

In the end, proposals to raise the enactment costs of all binding delegations create a crude rule of national constitutional design that will likely limit the ability of Congress and the President to conduct foreign affairs. A careful analysis of the costs and benefits

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<sup>2</sup> See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 1 (2008) (describing the various types of international delegations); Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693 (2008) (questioning the proper definition of international delegations and exploring the instances in which the United States delegates authority).

of binding international delegation will depend on international political considerations properly within the national government's foreign affairs prerogatives. Since international delegations are given effect by treaty or statute, Congress and the President clearly participate in the enactment process, ameliorating some of the accountability and legitimacy concerns. And of course, if a later Congress and President conclude that a specific international delegation is problematic, they can abrogate the delegation through subsequent legislation without triggering offsetting democratic costs.

This discussion suggests that agency costs in international delegations might not systematically be higher or categorically distinct from those in domestic delegations. The United States has tools to reduce agency costs in both contexts. If so, the adoption of constitutionally inspired design rules to raise the enactment costs of all binding international delegations is unnecessary and probably counterproductive, as such rules will limit the national government's flexibility to participate in and delegate to international institutions that might create benefits for the United States.

The Article proceeds as follows. Section 2 describes domestic and international delegations to set the framework for analysis. Section 3 evaluates the problems with international delegations and the proposals to raise the enactment costs of international delegations. Section 4 argues that many of the domestic oversight tools are available in the international context and that the United States is particularly well situated to influence the international institutions exercising delegated authority. The Article concludes with a discussion of the possible benefits of binding international delegations and suggests that constitutional limitations on international delegations are unnecessary.

## 2. DELEGATIONS: DOMESTIC AND INTERNATIONAL

### 2.1. *Domestic Delegations*

The regulatory structure governing domestic delegations to administrative agencies provides the framework through which scholars generally evaluate international delegations. Although the administrative law literature on domestic delegations is enormous and a review is beyond the scope of this Article, it is important to sketch an outline of it to compare to international

delegations. The comparison will shed light on the type of problems common to domestic delegations and on the attempts to address them, and will provide background on the critiques for binding delegations as well.

In the United States, domestic delegations were tools borne out of the increasingly complex and technical regulatory apparatus of the modern administrative state.<sup>3</sup> Congress, lacking the necessary expertise and resources to address new regulatory demands, began to delegate broad authority to executive agencies for them to issue rules, directives, and regulations in their specified issue areas.<sup>4</sup> The benefit is twofold: Congress can take advantage of agency expertise, in theory producing socially desirable outcomes, and Congress can focus its resources on issues for which it is better-suited to legislate.<sup>5</sup>

Despite the potential benefits, delegations create a principal-agent problem<sup>6</sup>—namely that Congress and the President<sup>7</sup> cannot

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<sup>3</sup> This development, combined with the Supreme Court's loosening of the non-delegation doctrine, opened the door to the expansion of domestic delegations. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132-33 (1980) (concluding the non-delegation doctrine is dead); see also CASS R. SUNSTEIN, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that although the non-delegation doctrine is no longer recognized, different canons of construction operate as a type of non-delegation principle to oversee the administrative state); ERIC A. POSNER & ADRIAN VERMEULE, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing there is no non-delegation doctrine as typically described and that agents acting under a statutory grant are exercising executive, not legislative, power).

<sup>4</sup> See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

<sup>5</sup> See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23, 142 (1938); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 23 (1990); JAMES O. FREEDMAN, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 363-66 (1976); see also ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 10-12 (1993) (noting the conservation of congressional resources as a benefit of delegation).

<sup>6</sup> Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 ("The problem of bureaucratic compliance has long been recognized as a principal-agent problem. Specifically, members of Congress and the president are principals in an agency relationship with an executive bureau."). For further background on the principal-agent problem, see generally Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44

perfectly control their agent, the domestic agencies exercising delegated authority. After the delegation, neither Congress nor the President can ensure that the agencies would consistently act within the bounds of their delegated authority. The agent might deviate from the interest of the principals, leading to legitimacy and accountability concerns. This is an ongoing problem and the legal and political science literatures on administrative agencies are filled with examples of Congress and the President's difficulties in ensuring the accountability of agencies.<sup>8</sup> Agencies shirk, sabotage, develop their own agendas, and engage in other activities that produce agency costs.<sup>9</sup> The higher the agency costs, the greater the concern that the agencies are operating independent of Congress and the President's wishes, reducing the value of the delegations and potentially leading to bureaucratic drift.<sup>10</sup> In light of these problems, scholars have identified and evaluated various monitoring and oversight mechanisms to constrain agencies and more closely align them with the interests of the principal

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PUB. CHOICE 147 (1984); Barry M. Mitnick, *The Theory of Agency: The Policing "Paradox" and Regulatory Behavior*, 24 PUB. CHOICE 27 (1975).

<sup>7</sup> The coalition in Congress that created the agency may be more directly the principal than Congress as a whole. See McCubbins, Noll & Weingast, *supra* note 6, at 255 ("[T]he coalition that forms to create an agency—the committee that drafted the legislation, the chamber majorities that approved it, and the president who signed it into law—will seek to ensure that the bargain struck among the members of the coalition does not unravel once the coalition disbands.").

<sup>8</sup> See JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC* (2002); McCubbins, Noll & Weingast, *supra* note 6; Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

<sup>9</sup> See BREHM & GATES, *supra* note 8; Matthew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation*, in CONGRESS: STRUCTURE AND POLICY 409, 410-14 (Matthew D. McCubbins & Terry Sullivan eds. 1987) (describing the problems of agency shirking and slippage); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1282-1300 (2006) (discussing how agency capture in the health and safety context results in overzealous regulations and inefficiencies).

<sup>10</sup> See McCubbins, Noll & Weingast, *supra* note 6, at 443-44 (noting the structure of an agency must be designed to be responsive to the constituencies the delegation was meant to satisfy to prevent policy drift); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111 (1992).



(Congress or the enacting coalition in Congress).<sup>11</sup> For my purposes, I will simplify and treat Congress and the President as joint principals.

One common tool of oversight for Congress and the President is the appointment process. Since the President and Congress act together to nominate and confirm potential appointees, they can coordinate and “arrange for appointees who more nearly share the political consensus on policy [as] a self-enforcing mechanism for assuring reliable [sic] agency performance.”<sup>12</sup> With appointees who share a common approach serving as agency heads, the agencies might be less likely to deviate from the interests of Congress and the President, thereby presumably reducing agency costs and increasing accountability.

Another tool to constrain agents is through *ex ante* procedural controls.<sup>13</sup> Federal agencies are already subject to procedural constraints through the Administrative Procedure Act<sup>14</sup> but the language in the Act is general and not specifically tailored to the different administrative agencies. The President and Congress, however, could force agencies to adopt specific decision-making processes, use certain methodologies,<sup>15</sup> or engage in agenda

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<sup>11</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255–69 (2001) (evaluating informal controls on agency action such as “fire alarms,” reliance on experts, and interest group influence).

<sup>12</sup> Kenneth A. Shepsle, *Bureaucracy and Intergovernmental Relations*, in ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 429 (2d ed. 2010)

<sup>13</sup> *Id.*

<sup>14</sup> Administrative Procedure Act of 1946, Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (1994)).

<sup>15</sup> President Reagan was the first executive to require the use of cost-benefit analysis in agency decision-making. Exec. Order No. 12,291, § 2, 3 C.F.R. 127, 128 (1982) (“Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society . . . .”). For a discussion on cost-benefit analysis, see MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* (2006). At times, administrative agencies have been required to conduct a feasibility analysis, instead of a cost-benefit analysis. See, e.g., Occupational Safety and Health Act of 1970 § 6, Pub. L. No. 91–596, 84 Stat. 1590, 1593 (codified at 29 U.S.C. § 655(b)(5)) (requiring the agency to ensure “to the extent feasible” that exposure to hazards in the workplace does not harm workers’ health). For a discussion of the merits of feasibility analysis, see Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657 (2010).

setting<sup>16</sup> to narrow agency authority. Still others have suggested that Congress and the President consider the institutional design<sup>17</sup> of agencies to reduce agency costs by creating institutional structures that shape the way the agencies operate and provide greater transparency and limit agency discretion.<sup>18</sup>

Scholars have also examined the *ex post* tools available to ensure that the agencies continue to function within their delegated authority. On an ongoing basis, Congress can use “police-patrols,”<sup>19</sup> empower congressional committees to directly monitor agencies, or authorize individuals, corporations, or other parties subject to agency rule-making, to act as “fire-alarms,”<sup>20</sup> and report agency misbehavior back to Congress. In theory, once Congress observes bureaucratic drift or other problems, it could threaten to cut agency funding<sup>21</sup> or conduct oversight hearings<sup>22</sup> to question and embarrass agency heads.

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<sup>16</sup> In some circumstances, the agenda setting may be broad. *See, e.g.*, Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 21, 2011) (directing agencies to consider values such as equity, human dignity, fairness, and distributive impacts). In contrast, Congress may try to control an agency by limiting its discretion. *See* David Epstein & Sharyn O’Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227, 229 (1995) (“Legislators try to control agency actions through administrative procedures, such as budgeting authority, legislative vetoes, and limits on agency discretion.”).

<sup>17</sup> Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1424–26 (2008) (discussing the costs and benefits of concentrating executive power over administrative agencies).

<sup>18</sup> *See* Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 339 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (noting that Congress may “manipulate the structure of agencies” to “control agency discretion”).

<sup>19</sup> *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (“[A]t its own initiative, Congress examines a sample of executive-agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations.”).

<sup>20</sup> *See id.* (“Congress establishes a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions . . . to charge executive agencies with violating congressional goals . . .”); Kagan, *supra* note 11, at 2258 (“A primary mechanism of control “is a ‘fire alarm’ system” which “is a set of procedures and practices that enable citizens and interest groups to monitor an agency and report any perceived errors to the relevant congressional committees.”).

<sup>21</sup> J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2235–36 (2005) (listing the potential sanctions for an agency’s failure to fulfill its mandates).

Similarly, the President has tools to limit agency discretion.<sup>23</sup> The President can issue directives by Executive Order regarding the breadth of agency authority in a particular area,<sup>24</sup> engage in intra-executive review of agency actions, and even informally appropriate authority over agency function.<sup>25</sup> The President could threaten to terminate<sup>26</sup> or otherwise pressure agency heads to act within their delegated authority.

A final, weaker mechanism to control agencies and reduce agency costs is judicial review.<sup>27</sup> Individuals, companies, and other parties affected by agency decisions could bring suit challenging agency regulations in federal court, creating direct judicial oversight of agencies.<sup>28</sup> In theory, the *ex ante* prospect of *ex post*

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<sup>22</sup> *Id.*

<sup>23</sup> See Kagan, *supra* note 11, at 2285–2303 (discussing President Clinton’s use of formal directives, Office of Management and Budget (OMB) review, and personal appropriation of regulatory action to control agency discretion); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 583 (2011) (describing presidents’ strategies to control agencies, including increasing the size of the White House staff that oversees agencies, increasing the number of presidential appointees within agencies, and imposing reporting requirements).

<sup>24</sup> For instance, Executive Order 12,580 designated federal agencies as the President’s response authorities under the Comprehensive Environmental Response, Compensation, and Liability Act for facilities under their “jurisdiction custody and control.” Exec. Order No. 12,580, 61 Fed. Reg. 45,871 (Aug. 28, 1996).

<sup>25</sup> See DeShazo & Freeman, *supra* note 21, at 2231–33 (arguing that inter-agency review and coordination may control agency action); Kagan, *supra* note 11 (describing presidential appropriation of agency action).

<sup>26</sup> See Richard J. Pierce, Jr., *Saving the Unitary Executive from Those Who Would Destroy and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi & Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 597–98 (2010) (noting the president can fire an administrator and replace her with someone who shares his views).

<sup>27</sup> See Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 675 (1992) (arguing judicial review controls agency capture); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 394–95 (noting judicial review checks agencies’ ability to favor private interests).

<sup>28</sup> The Administrative Procedure Act (APA) provides a cause of action to challenge “final agency action,” including temporary and permanent regulations. Administrative Procedure Act of 1946, 5 U.S.C. § 704 (2000). Parties can also seek pre-enforcement judicial review of many agency actions, including review of regulations interpreting myriad statutes. *Abbott Labs. v. Gardner*, 387 U.S. 136, 153–54 (1967) (allowing for pre-enforcement injunctive and declaratory judgment remedies concerning statutory construction). For different approaches to judicial deference of agency regulations, see generally Antonin Scalia, *Judicial Deference to*

legal invalidation of agency regulations would constrain agency behavior. But the use of courts to rein in agencies has led to a different issue: an increase in administrative law cases filling the docket of federal courts.<sup>29</sup> Of course, courts lack the resources to adjudicate all administrative law cases and evaluate agency action, reducing their efficacy as a regulatory mechanism. If agencies know in advance that the legal system lacks the capacity to review agency rule-making, the threat of legal invalidation is illusory and will not seriously constrain agencies. The resource issue, combined with the Supreme Court's decision in *Chevron*,<sup>30</sup> narrowed the grounds upon which parties could challenge agency decisions and in effect took a tool for agency review off of the table.<sup>31</sup>

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*Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

<sup>29</sup> See Diarmuid F. O'Scannlain, *Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473, 477 (2009) (citing administrative agency appeals as accounting for nearly thirty-six percent of cases filed in the Ninth Circuit).

<sup>30</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190-91 (2006) (discussing the initial inquiry into whether the *Chevron* framework for judicial deference to agency action applies); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (exploring the scope of the *Chevron* doctrine); Adrian Vermeule & Jacob E. Gersen, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007) (proposing a voting rule to determine judicial deference to agency statutory interpretation).

<sup>31</sup> *Chevron* entails a two-step approach to reviewing agency action: it first asks whether the statute has a gap or ambiguity, and if so, whether the agency's interpretation of the ambiguity is reasonable. *Chevron*, 467 U.S. at 842-43. Later the Court clarified that *Chevron* rests on the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996). Numerous scholars have written on the effect of *Chevron*. See, e.g., Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998) (discussing the reasons for which a rational court would adopt the *Chevron* doctrine and exploring changes in court behavior induced by *Chevron*); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995) (examining the apparent breakdown of *Chevron* and its progeny).

Despite the fact that no mechanism can fully eliminate agency costs, domestic delegations are generally uncontroversial<sup>32</sup> because, in theory, politically accountable actors selected through the democratic process can generally review, monitor, or invalidate agency decisions.<sup>33</sup> Congress, acting with the President, delegates decision-making authority to an agency; the President nominates the people to staff the agency; the Senate confirms or rejects the nominees; and the courts are open for judicial review of agency action. In principle, each actor is representative of and responsive to the American public, and the process generally adheres to the Constitution's formal requirements and structural limitations. For domestic delegations, the benefits of agency expertise come with agency costs, which are reduced by formal and informal review mechanisms.

The discussion here is certainly incomplete in that it neither provides a complete account of the entire suite of tools available to Congress and the President, nor comprehensively examines its efficacy. Rather, this examination seeks to provide a window into the formal and informal mechanisms, and *ex post* and *ex ante* tools used to constrain domestic agencies. By understanding the general operation of these mechanisms, we can now develop a framework to compare the domestic and international oversight mechanisms used to reduce agency costs.

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<sup>32</sup> Some think that all delegations are invalid as a transfer of legislative authority to the executive. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (2002). Others seek to limit delegations or impose a higher level of judicial review on agency actions. See, e.g., Alex Forman, Note, *A Call to Restore Limitations on Unbridled Congressional Delegations: American Trucking Ass'ns v. EPA*, 34 IND. L. REV. 1477, 1497 (2001) ("The Supreme Court should have adopted the nondelegation doctrine as [a] means of monitoring the regulatory power of agencies, because it is consistent with constitutional norms as well as the doctrine's underlying principles.").

<sup>33</sup> See Cass R. Sunstein, *Changing Conceptions of Administration*, 1987 BYU L. REV. 927, 944 (noting how regulatory choices should be made "by officials subject to the control of a politically accountable actor"); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 153 (1997) (arguing that presidential control helps ensure democratic responsiveness and accountability).

## 2.2. International Delegations

The relatively straightforward account about the costs and benefits of domestic delegations changes, however, with respect to international delegations. International delegations are the transfer of executive, legislative, or adjudicative decision-making authority to an international organization, body, agency, panel, or other entity.<sup>34</sup> With the significant exception of the international component, international delegations are conceptually identical to domestic delegations.

International delegations are either non-binding or binding.<sup>35</sup> Non-binding international delegations assign decision-making authority to an international body, but do not make the decisions of that body automatically enforceable within the delegating state's (the principal's) legal system.<sup>36</sup> Consider the following modified example of a delegation of adjudicative authority drawn from the North American Free Trade Agreement ("NAFTA").<sup>37</sup> The United States, Canada, and Mexico want to create a free trade zone encompassing each country and sign a treaty to that effect. Under the terms of the treaty, the states create an adjudicative body or appeals panel to hear potential claims regarding the treatment of companies operating within the free trade zone. In this example, the United States has delegated adjudicative authority to the international appeals panel created by the treaty to resolve claims arising under the treaty; this transfer of authority is an international delegation.

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<sup>34</sup> See Bradley & Kelley, *supra* note 2, at 2 (surveying the kinds of international delegations); Guzman & Landside, *supra* note 2, at 1697-1701 (questioning the proper definition of international delegations).

<sup>35</sup> Bradley & Kelley, *supra* note 2, at 4; Guzman & Landside, *supra* note 2, at 1697-1701.

<sup>36</sup> See Bradley & Kelley, *supra* note 2, at 4 (concluding that international delegations exist even when states give an international body only nonbinding power to issue resolutions, proposals, and opinions).

<sup>37</sup> See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (Dec. 8, 1993); *American President: A Reference Resource: Clinton Signs NAFTA—December 8, 1993*, THE MILLER CTR., UNIV. OF VA. (1993), [http://millercenter.org/academic/americanpresident/events/12\\_08](http://millercenter.org/academic/americanpresident/events/12_08) (last visited May 1, 2013) (detailing the events leading up to the signing of NAFTA); Demetrius Andreas Floudas & Luis Fernando Rojas, *Some Thoughts on NAFTA and Trade Integration in the American Continent*, 52 INT'L PROB. 371, 371-72 (2000) (summarizing NAFTA and the events leading up to the agreement).

The appeals panel could issue judgments regarding claims brought under the treaty but, if the delegation were non-binding, the appeals panel's judgments would not be immediately enforceable or provide a rule of decision in U.S. courts. Some political branch action (i.e., action by Congress and/or the President) would be necessary before those judgments have legal effect in the United States.

Non-binding international delegations are generally not the source of the most serious constitutional concerns because some political branch action is necessary before any decision, judgment, or regulation becomes binding in the United States.<sup>38</sup> In other words, Congress and the President must act before anything becomes enforceable in the United States. Presumably, the constitutional problems here are minimal and the agency costs are low, or at least similar to those of domestic delegations.

For some, the concerns about international delegations rise dramatically when the United States transfers *binding* decision-making authority to an international entity.<sup>39</sup> To illustrate the point, imagine that the NAFTA appeals panel in the example above could hear claims and its decisions would be immediately enforceable as a rule of decision in U.S. courts. After the appeals panel issues its judgment, Congress and the President would not have the option of noncompliance by refusing to act. The judgment would have immediate legal effect. For this reason, critics argue that binding international delegations are constitutionally problematic and exacerbate agency costs.

In addition, international delegations create formal and structural constitutional problems. For example, binding

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<sup>38</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1986) (“[A] ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary implementation.”); Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587 (2003) (discussing non-self-executing treaties and the requirement that Congress implement them before they override federal and state statutes that are enforceable in U.S. courts).

<sup>39</sup> See McGinnis, *supra* note 1, at 1714 (“International delegation of domestic power [] presents a dilemma for the separation of powers in an age of globalization.”); Guzman & Landside, *supra* note 2, at 1697–1701 (considering definitions of international delegations); Ku, *supra* note 1 (questioning the constitutionality of certain transfers of power to international delegations); Yoo, *supra* note 1, at 1958 (considering the constitutional limit of the application of treaties in suits against individuals).

international delegations of legislative authority may conflict with Article I procedural requirements for law-making<sup>40</sup> and appointments.<sup>41</sup> Typically, binding international delegations are part of Article II treaties or congressional-executive agreements that, by their terms, create an international body. Imagine that the United States signs and ratifies a multilateral treaty through the Article II treaty process (with the advice and consent of a two-thirds majority of the Senate). The treaty creates an international body that has binding authority to set minimum capital requirements for banks. The United States, as party to the treaty, has delegated the determination of capital requirements to an international body. Subsequently, the body acts and determines that all parties to the treaty must set the capital requirements for their domestic banks at ten percent. Thus, the United States has a binding obligation to comply with the new capital requirements.

For critics, this binding international delegation of legislative authority permits the international body to create new “law” with respect to capital requirements in violation of the Constitution’s bicameralism and presentment requirements.<sup>42</sup> The international body’s “legislation” would be automatically enforceable as U.S. law without further political branch action, circumventing the House of Representatives, the Senate, and President.

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<sup>40</sup> U.S. CONST. art. I, § 7. See *Medellín v. Texas*, 552 U.S. 491, 511 (2008) (rejecting the proposition that decisions by the International Court of Justice (“ICJ”) bind U.S. courts, finding instead that the “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments”); *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 8 (D.C. Cir. 2006) (noting that if future international environmental agreements pursuant to the Montreal Protocol are domestically enforceable law, then serious constitutional problems are raised by the international delegation of Congress’s law-making authority).

<sup>41</sup> U.S. CONST. art. I, § 2–3. See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87–130 (1998) (discussing the constitutionality of international delegations of power under the Appointments Clause).

<sup>42</sup> See *Natural Res. Def. Council v. EPA*, 464 F.3d at 8 (discussing the enforceability of future agreements); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Congress generally cannot delegate its legislative power to another Branch.”); Ernest A. Young, *supra* note 1, at 529 (2003) (“[B]ecause supranational lawmaking operates outside those systems of checks and balances and accountability, it risks undermining our Constitution’s institutional strategy.”).



Similarly, a binding international delegation to an international agency would implicate the Constitution's Appointments Clause<sup>43</sup> and potentially Article II requirements for treaties.<sup>44</sup> Imagine that the United States joins a multilateral treaty that creates an international agency with the authority to set binding regulations for the permissible amount of carbon emissions for each state party to the treaty. Therefore, the international agency's director and staff would have the authority to regulate the amount of carbon emissions in the United States and their determination would have immediate legal effect in the United States.<sup>45</sup>

In this example, the director and staff of the international agency would not be appointed by the President or confirmed by the Senate; she would be a representative of the international agency and appointed consistent with the terms of the treaty or the agency's internal rules. This arrangement would seemingly violate the Appointments Clause. Moreover, since the international agency can make ongoing binding determinations regarding its area of regulatory authority—in this case, carbon emissions—such determinations could be interpreted as creating a new international obligation for the United States. And, if it is a new international obligation for the United States, it might require a new treaty in conformance with the Treaty Clause.<sup>46</sup>

Perhaps the greatest concern for critics is binding delegations of adjudicative authority to international judicial bodies.<sup>47</sup> The

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<sup>43</sup> See U.S. CONST. art. I, § 2.

<sup>44</sup> For a discussion of the constitutional implications of binding grants of authority to international delegations, see Bradley, *supra* note 38; David M. Golove, *The New Confederatism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003); Ku, *supra* note 1, at 121; Yoo, *supra* note 41; Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573 (1994); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992).

<sup>45</sup> See *Natural Res. Def. Council v. EPA*, 464 F.3d at 1.

<sup>46</sup> *Id.* at 8 (noting that if the future agreements created under the Montreal Protocol are law, then Congress has “authorized amendment to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution”).

<sup>47</sup> In *Sanchez-Llamas v. Oregon*, petitioner argued that the United States was obligated to comply with the Vienna Convention as interpreted by the International Court of Justice (“ICJ”). 548 U.S. 331 (2006). The petitioner argued

treaties creating the United Nations,<sup>48</sup> NAFTA,<sup>49</sup> and the World Trade Organization (“WTO”),<sup>50</sup> among others, each include a quasi-judicial body to hear claims arising under each treaty. For example, NAFTA’s Article 19 Arbitration Panels<sup>51</sup> hear claims and issue judgments. Article 19 judgments provide a rule of decision enforceable in U.S. courts, seemingly violating Article III limits on the delegations of judicial authority<sup>52</sup> and the Appointments Clause.<sup>53</sup> The WTO’s appeals panel<sup>54</sup> hears cases and issues binding judgments, and the United States is party to several arbitral or claims agreements; for example, the Iran-United States Claims Tribunal<sup>55</sup> can issue binding decisions.

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that the Supreme Court should reconsider a previous holding because the ICJ had recently interpreted the Convention in the *LaGrand* and *Avena* cases and reached an opposite conclusion. *Id.* at 333. The Supreme Court rejected this proposition, stating the ICJ’s interpretation deserves only “respectful consideration.” *Id.* at 352–53. See *Medellín v. Texas*, 552 U.S. at 510 (“If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause.”). For a discussion of the problems related to the delegation of binding adjudicative authority to international bodies, see Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT’L L. 65 (2007); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); McGinnis, *supra* note 1.

<sup>48</sup> U.N. Charter art. 92 (designating the ICJ as the principal judicial organ of the United Nations).

<sup>49</sup> North American Free Trade Agreement, U.S.-Can.-Mex., art. 19, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

<sup>50</sup> Marrakesh Agreement Establishing the World Trade Organization art. IV, § 3, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. Notably, the Appellate Body that hears appeals from panel reports brought by WTO Members was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. See *Dispute Settlement: Appellate Body*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/appellate\\_body\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm) (last visited May 1, 2013).

<sup>51</sup> NAFTA, *supra* note 49, art. 19.

<sup>52</sup> U.S. CONST. art. III, §§ 1–2.

<sup>53</sup> U.S. CONST. art. II, § 2.

<sup>54</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement, *supra* note 50, Annex 2, 1869 U.N.T.S. 401. For examples of Appellate Body reports, see Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 1, 22–23, WT/DS2/AB/R (April 29, 1996); Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 179, WT/DS332/AB/R (Dec. 3, 2007).

<sup>55</sup> The Iran-United States Claims Tribunal was established in the Algiers Accords. See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of

The International Court of Justice (“ICJ”),<sup>56</sup> the legal arm of the United Nations, can hear claims arising under the Charter and international law generally with the consent of the state parties. In a series of cases concerning the Vienna Convention on Consular Relations, the ICJ concluded that the United States was in violation of the convention for failing to provide foreign nationals in police custody with access to their respective consulates.<sup>57</sup> Subsequently, the Supreme Court considered whether the ICJ decisions were “self-executing” and entitled to immediate legal effect in the United States.<sup>58</sup> Though the Court held that the structure of the U.N. Charter and the absence of definitive language demonstrated that ICJ decisions were “non-self-executing,”<sup>59</sup> concern increased about the ability of foreign courts to impose international law in the United States without U.S. political-branch action.<sup>60</sup>

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the United States of America and the Government of the Islamic Republic of Iran, art. IV, Jan. 19, 1981, available at *General Documents: Claims Settlement Declaration 19 January 1981*, IRAN-U.S. CLAIMS TRIBUNAL, <http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf>.

<sup>56</sup> U.N. Charter art. 92; PEMMARAJU S. RAO, UNITED NATIONS CONFERENCE ON TRADE & DEV., COURSE ON DISPUTE SETTLEMENT—MODULE 1.2. GENERAL TOPICS: INTERNATIONAL COURT OF JUSTICE, at 11, UNCTAD/EDM/Misc.232/Add.19 (2003), available at [http://unctad.org/en/Docs/edmmisc232add19\\_en.pdf](http://unctad.org/en/Docs/edmmisc232add19_en.pdf) (listing the types of jurisdiction the ICJ holds, including contentious jurisdiction in which the states submit the dispute by consent for a binding decision).

<sup>57</sup> *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, ¶¶ 90–91 (June 27); *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, ¶¶ 63, 76 (Mar. 31).

<sup>58</sup> *Medellín v. Texas*, 552 U.S. 491 (2008).

<sup>59</sup> *Id.* at 509 (“We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States ‘shall’ or ‘must’ comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts.”).

<sup>60</sup> For an overview of the debate regarding the Court’s legal reasoning in *Medellín* and the future of self-execution treaty cases, see Carlos Manuel Vazquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) (criticizing *Medellín*’s self-execution analysis); Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2009 SUP. CT. REV. 131 (supporting the self-execution analysis). See also David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. 32 (2009).

Beyond formal constitutional requirements, binding international delegations implicate general federalism<sup>61</sup> and separation of powers<sup>62</sup> concerns. Federalism<sup>63</sup> envisions certain limits on the national government that will be lost if international institutions can make decisions, issue regulatory directives or resolve legal claims that are binding in the United States.<sup>64</sup> And even if the President can represent U.S. interests at the international institutions—perhaps addressing some accountability concerns—the transfer of decision-making authority away from Congress and the states to the President encourages a consolidation of power in the executive branch.<sup>65</sup> For critics, binding international delegations conflict with the Constitution's

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<sup>61</sup> See Neil S. Siegel, *International Delegations and the Values of Federalism*, 71 LAW & CONTEMP. PROBS. 93, 100–06 (2008) (discussing the ways in which international delegations may either promote or undermine federalism).

<sup>62</sup> See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 272 (2d ed. 1996); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331 (1998); Ku, *supra* note 1, at 121; Yoo, *supra* note 41.

<sup>63</sup> Cf. Siegel, *supra* note 61, at 96–99 (“A federal system entails a vertical division of regulatory authority between the national government and subnational states. . . . [A] powerful check on the abuse of government power is said to exist when multiple levels of government compete for regulatory authority and political power is diffused.”).

<sup>64</sup> See *id.* at 101 (“Turning to the other federalism values discussed above, international delegations likely undermine all of them to the extent that such delegations reduce state regulatory control, as opposed to leaving state control unchanged and just reducing national control.”). See also Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

<sup>65</sup> Golove has described the concerns of some scholars that international delegations are antidemocratic and lack the necessary accountability to the American people. Golove, *supra* note 44, at 1699–1700. Cf. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1540 (2004) (noting that although the United States retains a veto on the U.N. security council, that power is held by the executive branch officials and “Congress still loses control”); Bradley, *supra* note 38, at 1559–60 (“Most typically, these transfers may increase the relative power of the executive branch, both because they often delegate the powers of other branches, and because the United States is represented in these institutions by executive branch agents.”). *But cf.* Ku, *supra* note 1 (arguing that courts should apply formalist principles to see whether international delegations are constitutional because formalism, rather than functionalism, ensures accountability).

formal limits<sup>66</sup> and traditional separation of powers and federalism concerns.

The failure to conform to formal and structural constitutional limitations produces a second and perhaps larger problem with binding international delegations—a lack of democratic legitimacy and political accountability for those entities exercising delegated authority.<sup>67</sup> For critics, international institutions are not exclusively or even predominantly accountable or responsive to the American interests.<sup>68</sup> They are only accountable to the states that created them—the United States and the dozens of other member states (the joint principals) that comprise the international institution’s membership. In the domestic context, at least Congress, the President, and the courts can proscribe delegations to administrative agencies, and monitor their behavior. In the international context, this oversight structure cannot be replicated. Thus, agency costs are low (or lower) in domestic delegations and higher in international delegations. In effect, delegations to domestic agencies are the ideal type: they are constrained by a United States principal subject to the American political process. Whatever problems with agency costs exist in the domestic context, they pale in comparison to the costs created by delegating binding authority to an international institution.

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<sup>66</sup> See U.S. CONST. art. II, § 2, cl. 2 (endowing the President, “by and with the Advice and Consent of the Senate,” with authority to make treaties and appoint ambassadors and officers of the United States); U.S. CONST. art. I, § 7, cls. 2–3 (establishing that every bill, order, resolution, or vote passed by the House and Senate, before becoming a law or being given effect, must be presented to the President and subjected to re-approval by Congress in the event that the President vetoes). Article I of the Constitution also provides for bicameralism.

<sup>67</sup> See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 26 (2005) (“In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance . . . .”); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 37 (2005) (conceding there is a lack of democratic accountability of international bodies). Cf. Bradley, *supra* note 38, at 1558 (noting the lack of transparency in international decision-making may increase accountability concerns).

<sup>68</sup> See Swaine, *supra* note 65, at 1601–02 (“International delegations give power to officials and institutions that ‘are not accountable, directly or indirectly, exclusively to the American electorate,’ and indeed may not be accountable to much of anyone at all.”); Ku, *supra* note 1, at 125 (concluding it is the characteristics of evolving international organization that make them unaccountable entities within the United States).

Given the apparent constitutional concerns and high agency costs, what should be done? Since the United States continues to delegate both non-binding and binding authority to international institutions, scholars have focused on the *ex ante* national constitutional design mechanisms to regulate all international delegations and limit binding international delegations. The next Section examines those proposals.

### 3. CRITIQUING PROPOSALS TO LIMIT INTERNATIONAL DELEGATIONS

#### 3.1. *Raising the Enactment Costs of Binding International Delegations*

The combination of formal constitutional concerns and high agency costs has motivated proposals to make binding international delegations more difficult and, as a consequence, infrequent. How do critics purport to solve the problems created by binding international delegations? Three proposals are of particular prominence.<sup>69</sup> They either endorse the adoption of interpretive tools to effectively create a non-self execution default rule for all treaties and congressional-executive agreements that make international delegations or, alternatively, create a process rule to force all binding international delegations to go through the Article II treaty process.

One proposal suggests that courts should adopt a default rule of non-self-execution for all international delegations that purport to create a commitment or obligation for the United States.<sup>70</sup> Thus, if the United States wants to create a binding legal obligation, Congress and the President must specifically indicate the intent to bind the United States in the congressional-executive agreement or treaty that purports to make the international delegation. The proposal rests on both formal constitutional grounds outlined in Section 2. Another justification rests on additional consequentialist

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<sup>69</sup> A fourth proposal draws from the administrative structure of domestic delegations and endorses the creation of an Administrative Procedure Act for foreign affairs delegations to limit the President's discretion. See Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 219-24, 239-41 (2009) (proposing administrative law principles for a portion of international law issues and limitations of broad foreign affairs delegations to the executive).

<sup>70</sup> See John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2254-57 (1999) (arguing for a rule in which treaties are not self-executing unless lawmakers explicitly state so).

concerns, namely that “[i]nternational delegations, by potentially binding the United States ex ante to rules and decisions it has not specifically approved, may in fact reduce the case-by-case flexibility often thought important in foreign affairs.”<sup>71</sup> Binding international delegations are constitutionally infirm, create accountability problems, and constrain the United States in international politics.

A similar proposal suggests that the United States adopt a “super-strong clear statement rule,”<sup>72</sup> presumably requiring Congress and the President to explicitly state their intent to bind the United States through an international delegation of adjudicatory authority.<sup>73</sup> In the absence of a “super-strong” clear statement, courts would treat judgments of international legal tribunals as non-self executing and would not create any binding legal obligation in the United States. Though it is not entirely obvious how courts would distinguish between a clear statement rule and a “super-strong clear statement rule,”<sup>74</sup> this proposal is designed to make binding international delegations of adjudicative authority significantly more difficult and limit the binding effect of judgments from international judicial tribunals.

A third option proposes to “raise the costs of enacting”<sup>75</sup> binding international delegations by requiring that such delegations be made only through the Article II treaty process.<sup>76</sup> The Treaty Clause’s supermajority requirement would have the effect of prohibiting binding international delegations through congressional-executive agreements (which, like domestic

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<sup>71</sup> Bradley, *supra* note 38, at 1585.

<sup>72</sup> Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 7 (2006).

<sup>73</sup> *Id.*

<sup>74</sup> Ku argues a super-strong clear statement could come from implementing legislation or in the language of the treaty itself. He notes the Optional Protocol to the Vienna Convention on Consular Relations does not contain a sufficiently clear statement, which states “[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice. . . .” Under Ku’s analysis a super-strong clear statement might discuss the mechanisms of domestic enforcement or specific standards for U.S. courts to follow when enforcing international judgments, but it is unclear exactly when a clear statement becomes a super-strong clear statement. *Id.* at 62–63.

<sup>75</sup> McGinnis, *supra* note 1, at 1715.

<sup>76</sup> *Id.* at 1742.

legislation, go through both houses of Congress and are signed by the President) and through presidential-executive agreements (which are negotiated and signed by the President without congressional involvement).<sup>77</sup> Among other things, the proposal is framed as a compromise between a permissive regime<sup>78</sup> that allows binding international delegations without additional limitations and a prohibitory regime<sup>79</sup> that restricts them outright. Though they vary slightly, each of these proposals represents a constitutionally inspired limit to binding international delegations. Most important, the proposals are concerned with the same problems, namely a lack of formal adherence to constitutional limitations and structural requirements, combined with the high agency costs from poor accountability and legitimacy.

At this point, one might note a tension between the formalist limitations endorsed by critics of international delegations and functionalist justifications invoked in this Article. Critics are concerned with lack of conformance with constitutional requirements that will result in high agency costs, while this Article focuses on the reduction of agency costs through oversight mechanisms. But despite the critics' contention that binding international delegations are inconsistent with the Constitution, none of the proposals fully embraces the formalism that they espouse and prohibits all binding international delegations. Rather, they explicitly attempt to limit binding international delegations on functionalist grounds, namely concerns about agency costs. Thus, despite the formalist concerns outlined above, the debate really centers on whether or not the potential for high agency costs justifies limitations on binding international delegations, and this Article attempts to answer that question.

Since the United States has and will continue to delegate authority to international institutions, and there is no obvious reason to think that this trend will stop, international delegations will likely remain a tool for the United States and the international community to deal with challenges of global concern. If this

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<sup>77</sup> *Id.* at 1747 ("Because it is the treaty power that uniquely authorizes international delegations, a congressional-executive agreement would not be sufficient.").

<sup>78</sup> *Id.* at 1736 (describing the categorical permission model).

<sup>79</sup> *Id.*



characterization of the future of international delegations is accurate, is there an alternative basis for limiting international delegations? Each of the proposals outlined above argues that binding international delegations create serious problems related to democratic deficit, legitimacy, or accountability; in other words, they create high agency costs. And, according to some scholars, these costs are high enough to warrant some limit on binding delegations. Given this link, it is important to evaluate the agency costs claim.

### 3.2. *Specification of Agency Costs*

Critics of binding international delegations implicitly evaluate these delegations through the same lens that they apply to domestic delegations: they look to formal constitutional requirements and the agency costs from lack of political accountability. Since the oversight mechanisms available in domestic delegations to agencies are unavailable for international delegations to unaccountable international institutions, the critics argue that additional procedural constraints are necessary to make it harder for the United States to delegate binding authority.

The key justification for limits on international delegations is the presence of high agency costs. However, the lack of specificity in the claim regarding agency costs and lack of clarity regarding assumptions about the incentives of international institutions create doubt about the need for limits on binding international delegations. Let's begin with a consideration of agency costs.

#### 3.2.1. *Defining and Measuring High Agency Costs*

The literature is not always clear about the empirical or normative baseline to determine what constitutes high agency costs. The common criticisms in the literature make comparative claims about the nature of agency costs in domestic and international delegations and conclude that the increase in scale in the international context necessarily means high agency costs.<sup>80</sup>

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<sup>80</sup> See, e.g., McGinnis, *supra* note 1, at 1714 (“[D]elegations raise dramatic problems of agency costs, because international agents’ work is less transparent and less subject to control than domestic agents’ work.”); T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 *Tex. L. Rev.* 1989, 2002 (2004) (“In the case of domestic delegations—even those

But even with a comparative claim, we still need more guidance about the agency cost “threshold” that international delegations must cross to warrant the significant constitutional limits that critics endorse. Even if we assume that critics are most concerned about agency costs in the comparative context, we would expect agency costs to vary according to the nature of the international delegation (legislative, judicial, or regulatory);<sup>81</sup> the organizational structure of the body exercising decision-making authority;<sup>82</sup> the issue over which the organization has authority,<sup>83</sup> and the scope of domestic interference. But we would also expect the same thing in domestic delegations. Agency costs likely vary with respect to the type, scope, and issue area of the domestic delegation; and the institutional design, internal procedures, and decision-making processes of domestic agencies. To even begin a serious comparison of agency costs in the domestic and international context would require some consideration of these factors, among many others.

Moreover, it is not clear why agency costs are necessarily always higher in international delegations than domestic delegations. Consider this simple example. The United States signs a multilateral treaty with three small countries creating limits

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that license a fair degree of autonomy for administrative agencies—there are significant checks on agency behavior in the form of appropriations, oversight, amending legislation, and publicity. These checks are obviously weaker at the international level—particularly the ability of the United States to overturn decisions of transnational bodies, which would require the amendment of a treaty.”).

<sup>81</sup> See Siegel, *supra* note 61, at 95 (noting that the implications of international delegations vary based on whether the delegation merely transfers a regulatory power that would otherwise be exercised by the federal government or if the international delegation creates legislation that would not otherwise be promulgated by the federal government); Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. 257, 257 (2008) (noting the surprising amount of judicial lawmaking that has occurred under the WTO when the same action would face domestic resistance).

<sup>82</sup> See Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, 71 LAW & CONTEMP. PROBS. 151, 174–77 (2008) (noting that the design of a treaty or organization will influence the degree to which states’ choose to delegate).

<sup>83</sup> See Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 141–45 (2008) (arguing that international delegations of authority on a variety of issues create significant benefits that cannot be achieved absent delegation).

on the expropriation of foreign property. The treaty creates an eleven judge “International Expropriation Court” (“IEC”) with binding adjudicative authority to hear claims and issue final judgments; it is a binding international delegation by the United States to the IEC through a treaty. Agency costs, in theory, might be high since the United States cannot control the IEC’s judgments, as they would be automatically enforceable in U.S. courts.

However, let us assume further that the treaty requires that the IEC operate by majority vote for all decisions but permits the United States to appoint six of the eleven judges. With this majority, the United States would certainly have strong influence over how the IEC will dispose of all claims, including those relating to American interests. Here, agency costs are low because the IEC’s voting structure effectively ensures that it would reflect U.S. interests. The purpose of this example is to show that agency costs are difficult to assess and that a simple “international versus domestic” distinction might not be determinative. In fact, depending on the agency, the agency costs in a domestic delegation might very well be higher than a binding international delegation of adjudicative authority.

Moreover, it is not obvious who critics think the principal is for purposes of international delegations.<sup>84</sup> At the highest level of generality, the principal might be the American people and the claim would be that the international organization is unlikely to be responsive to its collective will. However, it is Congress, not the American people, which delegates authority. Congress, therefore, could be the principal. But, when Congress acts, it is reflecting the view of the enacting coalition, along with the President, for the treaty or congressional agreement that creates the specific international delegation. Without greater specification of the principal, it is hard to assess the agency cost claim in the international context.

Finally, critics do not explain why they think that international institutions would be more vulnerable than domestic agencies to agency costs stemming from agency drift,<sup>85</sup> coalition drift,<sup>86</sup> or

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<sup>84</sup> See note 7, *supra* (describing the lack of clarity on who exactly constitutes the principal in the domestic setting—Congress as a whole or the individual committees).

<sup>85</sup> Cf. McCubbins, Noll & Weingast, *Structure and Process, Politics and Policy*, *supra* note 8, at 440–44 (exploring potential structural and process limitations that,

interest group capture,<sup>87</sup> creating high agency costs. Of course, the United States might delegate binding authority to an international institution today that, over time, might expand the scope of its authority beyond the initial delegation, become beholden to interest groups, or develop interests separate and independent from the states which create it. These are certainly legitimate concerns, but it is unclear why the agency costs that these issues generate are significantly higher in the international context than in the domestic context.

### 3.2.2. *Incentives of International Institutions*

The problems with under-specification also exist with respect to the characterization of international institutions exercising delegated authority. The literature is unclear about the basis for assumptions about the structure and strategic incentives of international institutions. Though scholars do not always explicitly state their assumptions about international institutions and their relationship to the United States, these assumptions drive much of the concern about agency costs.

As an initial matter, it is difficult to know *ex ante* with any certainty the likely structure, procedural rules, and decision-making processes of the international institutions that might exercise binding authority. The issue, type, and scope of the delegation have consequences for the internal structure of the international institution, making general claims more speculative. Despite these problems, a few assumptions about the operation of international institutions seem to motivate the criticism of international delegations.

One clear assumption is that international institutions are staffed with cosmopolitan foreign elites who are either dismissive

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through agency design, can minimize agency drift or deviation away from the intended policies of the coalition creating the agency).

<sup>86</sup> See Shepsle, *supra* note 10, at 114-15 (observing that coalitional drift—changes in legislative or presidential preferences resulting from elections or the shifting winds of public opinion—moderates interest group expectations).

<sup>87</sup> See Macey, *supra* note 27, at 687-92, 702-03 (concluding that the Supreme Court's "liberal rules of standing for structurally disenfranchised groups" are part of the independent judiciary's response to the problem of interest group capture of administrative agencies).

of or openly hostile to American interests.<sup>88</sup> These elites will naturally reflect the interests of their respective states, and, so the argument goes, their interests will clash with American priorities. In principal-agent terms, there are many joint principals with conflicting preferences. The international institution is an aggregation of people who, on average, will not have American interests in mind. Since these foreign elites will be exercising binding decision-making authority, the agency costs of international delegations are high.

A variant of this assumption is that international institutions (and international law) are tools to constrain American power, making them unlikely to represent American interests.<sup>89</sup> Since the United States has a predominant role in international politics, other states cannot compete directly through traditional economic, political, or military means. Instead, such states seek to enmesh the United States in a web of international organizations, tribunals, and agencies in order to limit the United States' ability to dominate world affairs.<sup>90</sup> If the United States transfers binding authority to international institutions that operate as tools for weaker states to constrain the United States, the agency costs are, by definition, likely to be high.

While it is certainly true that international institutions will not perfectly reflect U.S. interests and that weaker states might try and use institutions to constrain the United States, it also clear that the United States has been the leading force in the conception, creation, and use of international institutions across a number of issue areas.<sup>91</sup> The most salient international institutions in world

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<sup>88</sup> See, e.g., John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 *LAW & CONTEMP. PROBS.* 167, 173 (2001) (“[O]ur main concern should be for our country’s top civilian and military leaders, those responsible for our defense and foreign policy. They are the real potential targets of the ICC’s politically unaccountable prosecutor.”).

<sup>89</sup> See ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 39–40 (2003) (“It is also understandable that Europeans should fear American unilateralism and seek to constrain it as best they can through such institutions as the United Nations. Those who cannot act unilaterally themselves naturally want to have a mechanism for controlling those who can.”).

<sup>90</sup> *Id.* at 40 (citing the example of the U.N. Security Council as a “multilateralising” organization substituting for the power that weak states lack individually to counterbalance U.S. hegemony).

<sup>91</sup> See JOHN ALLPHIN MOORE, JR. & JERRY PUBANTZ, *THE NEW UNITED NATIONS: INTERNATIONAL ORGANIZATION IN THE TWENTY-FIRST CENTURY* 43–51 (2005)

affairs—the United Nations and the World Trade Organization—are both the products of U.S. efforts to shape the world consistent with American interests and, arguably, those of the international community. In fact, for reasons discussed earlier, the United States is unlikely to ever delegate binding decision-making authority to international institutions that it cannot influence or control. Rather than being constrained by international institutions, the United States generally delegates to those international institutions that it created and over which it exercises disproportionate influence. To put it bluntly, the United States is likely to be the dominant principal of an agent that it designed and over which, for the most part, it exercises significant control.

### *3.3. The Potential Benefits of Binding International Delegations*

The critical literature on binding international delegations focuses almost exclusively on the agency costs problem but does not always weigh those costs against the benefits of international delegations.<sup>92</sup> In fact, critics generally offer only passing reference to the potential benefits, if at all, of greater international cooperation. But any analysis of the virtues of binding international delegations would have to consider both sides of the ledger—costs and benefits—in order to support any claim that the agency costs are sufficient to warrant restricting delegations. Rather than engaging in this analysis, the literature essentially provides a one-sided, agency cost-driven analysis.

While it is beyond the scope of this Article to provide a comprehensive analysis of costs and benefits of international delegations, it is uncontroversial to suggest that there are global challenges that can only be addressed through international cooperation, and that international delegations may be one way to exploit the organizational advantages of centralized international institutions. Some international issues have clear spillover effects that can be most effectively addressed on the international level. For example, the recent (and ongoing) world financial crisis

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(demonstrating, for instance, that President Roosevelt played a vital role in the formation of the United Nations and even saw it as the crowning achievement of his political career).

<sup>92</sup> See Hathaway, *supra* note 83, at 116, 141 (encouraging scholars to consider the benefits of international delegations, not only the costs).

increased calls for greater harmonization of financial and economic regulation;<sup>93</sup> the climate change threat has led to numerous attempts by the international community to expand the Kyoto Protocol<sup>94</sup> and reduce carbon emissions;<sup>95</sup> and the attacks of September 11 in the United States and bombings in the United Kingdom and Spain have resulted in greater cooperation in combating international terrorism, its funding, and organization.<sup>96</sup> This list is not nearly comprehensive, but it suggests that any

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<sup>93</sup> See, e.g., James G. Neuger, *EU Pushes for More Global Finance Rules in Challenge to Obama*, BLOOMBERG (Nov. 7, 2008, 8:27 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5gzUenHiqKM&refer=Europe> (reporting that, in light of the 2008 credit crisis, “[t]he EU will seek more powers for the International Monetary Fund, call for stiffer regulation of credit-rating agencies and hedge funds, and urge a crackdown on risk-taking and bankers’ pay”; while the Danish prime minister called for “better international regulation of the capital markets, . . . more transparency, . . . common rules concerning control and supervision, [and] common rules concerning accounting standards”); see also *Merkel Says Crisis Chance for Tough Financial Rules*, REUTERS, (Dec. 30, 2008, 11:26 PM), <http://uk.reuters.com/article/2008/12/30/uk-germany-merkel-idUKTRE4BT5IZ20081230> (“[German Chancellor Angela] Merkel, who has indirectly criticised the United States and Britain for thwarting earlier efforts to tighten controls and introduce more transparency, said she would press for international organizations to clamp down.”); David Lawder & Lisa Lambert, *U.S. Must Lead World to Tougher Regulation: Summers*, REUTERS, (Mar. 13, 2009, 5:48 PM), <http://www.reuters.com/article/2009/03/13/us-financial-summers-idUSTRE52C3UY20090313> (“Top White House economic adviser Lawrence Summers . . . called for the United States to lead a global effort to boost regulatory standards and warned against allowing regulators to compete with one other.”).

<sup>94</sup> Krittivas Mukherjee & Alister Doyle, *World Leaders Try to Save Troubled Climate Talks*, REUTERS (Dec. 16, 2009, 6:46 PM), <http://in.reuters.com/article/2009/12/16/idINIndia-44776420091216> (describing slow-going efforts to update and renew the climate regime, with governments attempting to negotiate “a deal to transform global economies by putting greater curbs on planet-warming greenhouse gas emissions, mainly from burning fossil fuels, from 2013 after Kyoto’s first phase ends”).

<sup>95</sup> Since the United Nations Framework Convention on Climate Change entered into force, parties to the agreement have met annually in Conferences of the Parties (COP) to discuss how to deal with climate change. During the 1990s, the COP began to negotiate legal obligations for reducing greenhouse gas emissions. Carbon emissions goals have been raised at numerous conferences including Copenhagen in 2009 and Durban in 2011. See, e.g., *Meetings: Durban Climate Change Conference – November/December 2011*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE [http://unfccc.int/meetings/durban\\_nov\\_2011/meeting/6245.php](http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php) (last visited May 1, 2013).

<sup>96</sup> *United Nations General Assembly Adopts Global Counter-Terrorism Strategy*, UNITED NATIONS ACTION TO COUNTER TERRORISM, <http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml> (last visited May 1, 2013).

determination of agency costs must be weighed against how the benefits of successful coordination on these issues, and many others, might redound to the United States.

Similar to domestic agencies in the United States, international institutions can take advantage of the aggregation of human expertise, broader access to data, greater legitimacy, and the accumulation of institutional knowledge built up over time to address the issues of global concern.<sup>97</sup> International institutions with standing committees, bodies, or executive structures can act more rapidly to address global issues as they occur, rather than wait for states to coordinate or to act independently in a crisis. These actions are mostly done at a lower cost through an international institution with decision-making authority rather than by state coordination on a bilateral or multilateral basis; on an issue-by-issue basis; or in a reactive, ad hoc manner. Limits on the national government's ability to delegate binding authority might make it harder for the United States to enjoy the gains of international cooperation in the situation where the gains might outweigh the potential agency costs.

The general or long-term benefits for the United States to have the flexibility of delegating binding authority to international institutions—without procedural constraints—are more speculative, but important. International relations scholars differ on the value of international institutions.<sup>98</sup> Some think that

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<sup>97</sup> See generally Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009) (arguing that multilateral institutions can enhance the quality of national democratic processes, even in well-functioning democracies).

<sup>98</sup> For example, social constructivism, democratic peace theory, and institutionalism all provide different understandings of the role of international institutions. Social constructivists argue that transnational litigation promotes the internalization of international legal norms in the domestic setting and influences how governments conduct international relations. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 199 (1996) (arguing that transnational litigation aids in the process where "international legal norms seep into, are internalized, and become entrenched in domestic legal and political processes"). Democratic peace theory posits that regime type—liberal or nonliberal—determines a State's compliance with international law. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 528–34 (1995) (outlining the differences between liberal and non-liberal regimes in inter-governmental agreements). Institutionalism argues that institutions reduce information asymmetries and uncertainty, and, as a result, facilitate cooperation



international institutions have an independent effect on state behavior and are therefore capable of shaping state interests,<sup>99</sup> while others find them as tools of the states that created them.<sup>100</sup> In the absence of a clear answer on this issue, it is unwise to create national constitutional-design rules that limit the ability of the United States to delegate to international institutions and narrow the United States' foreign affairs options.

For example, one prominent theory suggests that after conflict, the United States has historically designed international institutions with the goal of locking-in an existing legal or "constitutional" order of international governance—one that reflects the economic, political, and national security interests of the United States—in advance of their inevitable decline in power relative to other states.<sup>101</sup> By creating the rules of international politics when it is a hegemon, the United States is effectively "hedging" against future changes in the distribution of power in international politics. For example, after World War II, the United States created the U.N., the International Monetary Fund ("IMF"), and the World Bank, presumably at the peak of its relative power with the hope that, as Europe and Asia were rebuilding in the mid-twentieth century, they would enter an existing structure of international governance. This structure would deter challenges to the U.S.-crafted political, economic, and military order.

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among States. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 94 (1984).

<sup>99</sup> See, e.g., HEDLEY BULL, *THE ANARCHICAL SOCIETY* (1977); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999).

<sup>100</sup> See JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (2001) (developing a theory of structural realism to explain state behavior and the pursuit of power among the most powerful states in the international system); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (6th ed. 1985) (examining a realist approach to international law that analyzes foreign policy and international politics as being driven by interests in power); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (developing a balance of power theory of international relations that focuses on the structure of the international system).

<sup>101</sup> See generally G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* (2001) (arguing that the United States has tried to develop a constitutional post-war order through the use of international law and international organizations).

Now, with the rise of China, India, Brazil, and other developing countries, the United States' incentives to hedge or lock-in the existing order, which it still dominates, might be stronger. Though certainly speculative and contested, it is at least plausible that the United States could use international institutions as a tool to try to contain rising countries in a multilateral web of international governance, and maintain its influence on international politics, even as its economic and military power recede. If this proposition is accurate, then raising the costs of enacting international delegations might be counter-productive.

The point of this discussion is not to endorse any long-term strategy to use international delegations and international institutions for United States foreign policy purposes. Rather, it shows that the benefits of international delegations—both with respect to specific issues of global concern and broader U.S. foreign policy goals—might outweigh the agency costs associated with them. At the very least, claims that high agency costs justify making binding international delegations more difficult requires a deeper evaluation of their potential benefits.

#### 4. TOOLS FROM DOMESTIC DELEGATIONS AVAILABLE FOR INTERNATIONAL DELEGATIONS

This Article argues that many of the oversight tools for domestic delegations are available and used in the international context, a point frequently ignored by critics of international delegations. What are the domestic tools? And are they available and effective for the United States for international delegations? This Section outlines those tools and their international analogs. The analysis suggests that agency costs in international delegations may not be as high as critics assume and do not justify raising the enactment costs of such delegations. It also outlines some of the oversight tools unique to the international environment.

As discussed in Section 2, the *ex ante* domestic oversight mechanisms include the appointments process. In this process, Congress and the President can designate loyal agency heads to ensure that the agency acts within their delegated authority. Using procedural constraints on the agency can also achieve this goal, including requiring the use of specific decision-making methodologies or explicit agenda setting. Still others focus on

institutional design to limit discretion and constrain the agencies, or requirements to use specific decision-making methodologies.

After the agency begins exercising decision-making authority, Congress can use its appropriations power to limit the capacity of the agency to act, it can provide for greater judicial review of agency rule-making, and, perhaps most importantly, it can, in theory, set up committees to monitor agency activities through police patrols and fire alarms. Finally, the President can narrow agency discretion through explicit directives, intra-executive supervision, and the assumption of responsibility for agency actions. Though imperfect, these tools permit the principal to reduce agency slack and limit shirking and self-dealing by the agent.

Many of these *ex ante* and *ex post* tools are present, in slightly different forms, in the international context. Of course, the argument here is not that the international oversight tools perfectly mimic those tools in the domestic context, making agency costs exactly the same. Rather, the argument is that any claim that agency costs are sufficiently high to warrant constitutional redress fails without a closer examination of the various tools that the United States uses to influence international institutions. Understanding the full set of options available to mitigate agency costs also requires an examination of both *ex ante* and *ex post* tools, something that critics underplay in concluding that international delegations are problematic.

Some might argue that even if agency costs in international delegations are high, the number of international delegations by states that include actual binding authority is small,<sup>102</sup> ameliorating any concerns. But this argument misses two key points. First, it is clear that the most pressing problems of global concern require international cooperation. It is also clear that states have turned to international institutions as the entity to aggregate information, facilitate decision-making, and implement solutions. This expectation is the story of the late-twentieth and early-twenty-first

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<sup>102</sup> See Guzman & Landslide, *supra* note 2, at 1695–96 (noting there are only two significant delegations of authority to international institutions by states – the United Nations Security Council and the European Union). Though Guzman and Landslide are correct that international delegations of the binding variety do not comprise the majority of delegations, the prospect of such delegations is likely to grow over time, making an analysis worthwhile.

centuries and, perhaps unsurprisingly, the United States has been the chief protagonist. For better or worse, states are likely to continue to delegate authority to international institutions. If this premise is correct, it is important to focus on the United States and the oversight mechanisms that might exist to reduce agency costs in international delegations. This Article, in contrast to the extant critical literature on international delegations, looks to U.S. domestic delegations to better understand the monitoring and oversight tools available. By engaging in this analysis, it is easier to evaluate the implications of international delegations for U.S. domestic law and the logic of constitutionally-inspired limitations.

Second, as a practical matter, some international delegations might be important even if they are not binding. For example, we can imagine logrolling within an international institution. The United States might be willing to support initiatives that it does not like in exchange for support on issues that are particularly important. And since international institutions reduce the transactions costs related to international cooperation, the United States will naturally accept some limits on its ability to act unilaterally on an issue in order to ensure that other states “buy-in” to the broader structure of the international institution, one that over time and across the majority of issues generally reflects U.S. interests. Even if the United States has substantial control of an international institution, one can still imagine situations in which the United States loses the battle on a specific initiative in order to win the war of keeping states committed to an organizational structure that the United States created. Thus, the international delegation can have consequences for the United States, making a deeper understanding of the oversight tools a particularly important inquiry.

Of course, it is hard to predict, *ex ante*, the specific structure of the international institution that would exercise binding decision-making authority.<sup>103</sup> It is thus difficult to make definitive claims

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<sup>103</sup> CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 554-55 (4th ed. 2011) (emphasizing, for instance, that the United States ratified the Chemical Weapons Convention subject to twenty-eight conditions, including the condition that the President has the power to refuse an inspection and that Congress has a right to make reservations). See also Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346-48 (1995) (“The United States has been declaring the human rights

about the presence of high agency costs in binding international delegations or the need to limit them. But we can get traction on these questions by looking at the current structure of international institutions to which the United States has delegated non-binding authority and draw inferences about the possible structure of institutions that might exercise binding authority. If those international institutions exercising *non-binding* authority have internal structures that provide the United States with significant influence and control—and keep agency costs down—we can imagine how the United States would structure the international institutions to which it might delegate *binding* authority. Since the stakes are higher in the latter context, the United States is even more likely to ensure that the international institution is accountable to American interests. This becomes clear when viewing how the United States exercises its political, military, and economic influence to shape the design and internal operation of international institutions. Broadly speaking, the United States has the unique capacity to influence the activities of international organizations and ensure greater accountability than the critics of international delegations generally assume. The United States, for all intents and purposes, is the dominant principal in the world's most important international institutions. The list below describes a few of the tools available to the United States.

#### 4.1. Ex Ante Oversight Tools for International Delegations

As you might imagine, the claims about the ability of the United States to use *ex ante* tools derives from theories of international relations and their predictions regarding international institutions: who creates the institutions, how they operate, and how they enforce their policies, rules or decisions. International institutions are generally conceived, designed and operated by powerful states to allow them to coordinate and

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agreements it has ratified to be non-self-executing.”). The International Labour Organization also issues nonbinding guidelines for labor standards in addition to conventions that *may* be ratified by member states. *Conventions and Recommendations*, INT’L LABOUR ORG. (2012), <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited May 1, 2013).

achieve shared goals.<sup>104</sup> At the same time, the international relations literature on rational constitutional design also generates hypotheses about structuring international institutions to meet certain goals, to increase flexibility, and even to shape state interests.<sup>105</sup> If such options exist, the claim is less convincing that the difference in agency costs between international and domestic delegations, by itself, justifies disparate constitutional treatment. In the end, the capacity of the United States to influence the international institution will depend on the nature of the delegation; the decision-making procedures of the institution; the substantive area (pollution, chemical weapons, human rights); and the precision of the rule adopted<sup>106</sup> (hard law or soft law). The purpose of this discussion is to demonstrate that many of the oversight mechanisms in domestic delegations are also available to the United States in the international context. So what are the tools that the United States, as the principal, can use to reduce agency slack?

The most effective *ex ante* tools center on institutional design and procedures, namely agenda setting, attenuated delegation, voting rules (weighted voting and veto powers), appointments, and funding. The United States has been the founder and key member of the most significant international institutions in the world today including the U.N.,<sup>107</sup> the IMF, the World Bank, the

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<sup>104</sup> See KEOHANE, *supra* note 98 (discussing the importance of institutions as a means for reducing information asymmetries and uncertainty, while also helping facilitate cooperation among states); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SEC. 39 (1995) (highlighting the importance of institutions as channels for achieving the benefits of sustained cooperation).

<sup>105</sup> See Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001) (describing international institutions' range of features as "the result of rational, purposive interactions among states and other international actors to solve specific problems"); Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992) (suggesting that state interests in anarchy are not fixed and could be shaped by norms, ideas and inter-subjective understandings).

<sup>106</sup> See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 448 (2000) ("[S]trong states must typically make the substantive content of legalized arrangements (just) attractive enough to encourage broad participation at an acceptable cost.").

<sup>107</sup> *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited May 1, 2013).

General Agreement on Tariffs and Trade (“GATT”), and the World Trade Organization,<sup>108</sup> among others. Given its prominence in world affairs, the United States has been able to design the international institution with its interests in mind, making the institutions more accountable to its wishes. This Section provides examples of some of these *ex ante* tools in the operation of the U.N., the World Bank, the IMF, and the WTO. It is not, by any means, a comprehensive discussion of all the mechanisms that the United States has at its disposal to monitor international institutions. It also does not touch upon every single international entity to which the United States has delegated either binding or non-binding authority.

*Attenuated Delegation.* For many international institutions, the United States has created “majority rule” decision-making processes on some issues, while reserving the most important issues to smaller entities within the institution. In essence, the United States has delegated general authority to the international institution, and, within the institution, it has ensured that specific authority has been delegated to or nested in a smaller sub-group that exercises true decision-making authority. For example, the U.N. has some 192 members and each has a vote in the U.N. General Assembly. But, for the most important issues regarding the “maintenance of international peace and security,”<sup>109</sup> the U.N. is structured such that the U.N. General Assembly, in effect, delegates decision-making authority to the U.N. Security Council (“Security Council”).<sup>110</sup> The Security Council has only fifteen members at any given time, five of which are permanent and possess a veto: the United States, France, Great Britain, China and Russia.<sup>111</sup> With the veto power, the United States can block any potential Security Council resolution that conflicts with U.S. interests or those of its allies. For the key security issues of international politics, the 192 members of the United Nations do

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<sup>108</sup> See Press Brief, World Trade Org., Fiftieth Anniversary of the Multilateral Trading System (Dec., 1996), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/chrono.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm) (last visited May 1, 2013) (listing the United States as a founding member of the GATT).

<sup>109</sup> U.N. Charter art. 24, ¶ 1.

<sup>110</sup> *Id.* arts. 10–12 (describing the functions and powers of the General Assembly).

<sup>111</sup> *Id.* arts. 23, 27 (defining the composition of the Security Council).

not have the bulk of the influence; it is really an institution of five. The agency costs, such as they are, will likely be reduced in this structure. The World Bank and the IMF also have smaller subgroups that exercise true decision-making authority. Though the World Bank has 187 member states,<sup>112</sup> the real power remains with the twenty-five person executive board, five of which are nominated by the United States, Germany, France, Japan and the United Kingdom, and with the President of the World Bank, who has always been an American.<sup>113</sup> The IMF also has 187 member states, but real power for major decisions is lodged with the twenty-four directors on the executive board, with five of the directors representing the same five countries listed above.<sup>114</sup> Even this superficial overview of the decision-making structure of the IMF and the World Bank suggests that the United States has structured both institutions to try to ensure American control and, as a consequence, reduce agency costs. Just as in the domestic context, the United States has tools to monitor and oversee international institutions.

*Voting Rules.* The United States' outside influence through attenuated delegations in the U.N., the IMF, and WTO is exacerbated by their voting rules. Most international institutions are not democratic in their voting procedures and reflect a disproportionate influence for the United States well beyond the size of its population.<sup>115</sup> For example, the United States has a veto

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<sup>112</sup> *About Us: Member Countries*, THE WORLD BANK, <http://go.worldbank.org/SGCDPJKLX0> (last updated Jan. 19, 2012).

<sup>113</sup> *About Us: Boards of Directors*, THE WORLD BANK, <http://go.worldbank.org/LHHOT1LSW0> (last updated May 19, 2013); Robert K. Fleck & Christopher Kilby, *World Bank Independence: A Model and Statistical Analysis of US Influence*, 10 REV. OF DEV. ECON. 224, 224 (2006) (noting the "traditional nomination of World Bank Presidents by the US").

<sup>114</sup> *Membership*, INT'L MONETARY FUND, <http://www.imf.org/external/about/members.htm> (last visited May 1, 2013); *IMF Executive Directors and Voting Power*, INT'L MONETARY FUND, <http://www.imf.org/external/np/sec/memdir/eds.aspx> (May 1, 2013). See also MILES KAHLER, LEADERSHIP SELECTION IN THE MAJOR MULTILATERALS, at viii (2001) ("For the [International Financial Institutions], the United States and Europe have laid exclusive claims to leadership positions since the formation of the institutions.").

<sup>115</sup> See Fleck & Kilby, *supra* note 113 ("The US is the most influential member of the World Bank . . ."); see also Axel Dreher & Nathan M. Jensen, *Independent Actor or Agent? An Empirical Analysis of the Impact of U.S. Interests on International Monetary Fund Conditions*, 50 J.L. & ECON. 105, 106-07 (2007) (describing the United



and permanent seat on the Security Council;<sup>116</sup> though the United States cannot force resolutions through the Security Council due to the presence of other veto powers, it can prevent the Security Council from acting contrary to U.S. interests. At the IMF, the United States has a nearly seventeen percent weighted vote at an institution that requires a consensus of eighty-five percent for major decisions and amendments,<sup>117</sup> and virtually the same structure exists at the World Bank. In fact, the biggest criticism of both the World Bank and the IMF is the effective veto that the United States has over any major decisions.<sup>118</sup> Studies in the political science literature on the IMF and the World Bank find that, overall, they have been effective agents for the interests of their principal, the United States.<sup>119</sup> If anything, these international institutions are actually uniquely responsive to U.S. interests rather than unaccountable to the American public.

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States' power within the IMF and its ability to veto any decision based on its voting share).

<sup>116</sup> U.N. Charter arts. 23 and 27.

<sup>117</sup> See INT'L MONETARY FUND, ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND (1944) (requiring an eighty-five percent majority vote for all major decisions); *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, INT'L MONETARY FUND, <http://www.imf.org/external/np/sec/memdir/members.aspx#U> (last updated July 7, 2013) (listing quotas and voting shares for the United States and other IMF Members).

<sup>118</sup> See NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS* 27-28 (2006) (emphasizing the process of increasing influence that the most powerful states, and the United States in particular, have exercised on the IMF and the World Bank); Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT'L ORG. 241, 242, 254-56 (2003) (describing the intense influence that the United States can impose on the World Bank when Congress and the President have converging policies).

<sup>119</sup> See Dreher & Jensen, *supra* note 115 (describing the United States' influence within the IMF); Fleck & Kilby, *supra* note 113 (describing the United States as the most influential member of the World Bank); Thomas Oatley & Jason Yackee, *American Interests and IMF Lending*, 41 INT'L POL. 415 (2004) (describing how American policymakers influence the IMF to pursue their financial and foreign policy objectives); Thomas Barnebeck et al., *US Politics and World Bank IDA-Lending*, 42 J. DEV. STUD. 772 (2006) (concluding the United States exerted significant influence on International Development Association lending during the 1990s based on issues identified as important by the State Department).

Though much of the literature on the WTO focuses on its dispute resolution mechanism,<sup>120</sup> the WTO's consensus decision-making structure ensures that the developed countries, including the United States, have disproportionate influence over outcomes. Although each member state has a vote, virtually all decisions by the WTO are taken by consensus, meaning "if no member *present at the meeting* when the decision is formally taken, formally objects to the proposed decisions."<sup>121</sup> As a consequence, the ability of the WTO's member states—and their respective delegates—to attend and participate in meetings is of particular importance in shaping the agenda, negotiations, and decision-making at the WTO.<sup>122</sup>

But, unsurprisingly, developing countries do not have the staff or resources to follow and actively participate in the WTO's decision-making. Each year, the WTO General Council meets as many as six times,<sup>123</sup> discussing multiple issue areas ranging from the effect of non-tariff measures on small economies to trade finance reform. While the developed countries have the resources to participate—the United States, Japan, and Germany, for example, have forty-seven<sup>124</sup> delegates working full time at the WTO—some forty-five countries have fewer than *three*.<sup>125</sup>

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<sup>120</sup> See, e.g., Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416 (1996); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EURO. J. INT'L L. 753 (2002); Marc L. Busch & Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement*, 68 WORLD POL. 446 (2006).

<sup>121</sup> Marrakesh Agreement, *supra* note 50, art. IX, n.1 (emphasis added).

<sup>122</sup> For example, the WTO has a small Secretariat, with approximately six hundred official staff, that runs the day-to-day operations for the institution. See *The WTO: Secretariat and Budget: Overview of the WTO Secretariat*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/secre\\_e/intro\\_e.htm](http://www.wto.org/english/thewto_e/secre_e/intro_e.htm) (last visited May 1, 2013). This might seem large, but it is dwarfed by the World Bank's ten thousand official staff or even the IMF's twenty-four hundred official staff. *About Us: People*, THE WORLD BANK, <http://go.worldbank.org/B6U4HPNDS0> (last updated June 29, 2012); *Staff of International Civil Servants*, INT'L MONETARY FUND, <http://www.imf.org/external/about/staff.htm> (last visited May 1, 2013).

<sup>123</sup> The WTO General Council is scheduled to meet six times in 2013. *WTO General Council*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/gcounc\\_e/gcounc\\_e.htm](http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm) (last visited May 1, 2013).

<sup>124</sup> Carolyn Deere, *Changing the Power Balance at the WTO: Is the Capacity-Building Agenda Helping* 32 (United Nations Dev. Programme Human Dev. Report Office Occasional Paper No. 2005/5, 2005), available at [http://hdr.undp.org/en/reports/global/hdr2005/papers/HDR2005\\_Carolyn\\_Deere\\_5.pdf](http://hdr.undp.org/en/reports/global/hdr2005/papers/HDR2005_Carolyn_Deere_5.pdf).

<sup>125</sup> *Id.* at 32-34.

Moreover, some of these delegates from developing countries are not only tasked with responsibility at the WTO's headquarters in Geneva but also represent their respective states at the half dozen other international institutions located in the city.<sup>126</sup> In effect, it is hard for developing countries to participate in the WTO's decision-making structure, while easier for wealthier, developed countries like the United States to influence outcomes. Again, the WTO shrinks from an international institution with 153 member states to one in which a small number of states exercises real power.<sup>127</sup>

*Appointments.* The United States also has influence over the appointment and termination of top officials at many international institutions.<sup>128</sup> In agency-cost terms, the United States has tried to ensure that agency heads are not too far removed from American interests. One unobservable way in which the United States influences international institutions is by shaping the decision-making of other states. If a state knows that the United States is likely to look unfavorably on a potential nominee, that state will be less willing to nominate the person in the first place. U.S. preferences frame the breadth of decision-making options for other states. But there are observable factors as well. The United States single-handedly blocked the re-appointment of Boutros Boutros-Ghali as U.N. Secretary General in 1996,<sup>129</sup> by exercising its veto power on the Security Council despite losing the Security Council vote 1-14.<sup>130</sup> In casting this vote, Secretary of State Madeleine Albright stated that the United States was dissatisfied with his

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<sup>126</sup> *Id.* at 10.

<sup>127</sup> Of course, many might question this analysis given the difficulties that the United States and other developed countries have had in moving forward on the Doha Round of negotiations. But the argument in this Article is that the United States can influence the operation of international institutions to ensure that they will not act contrary to U.S. interests, while still allowing the United States to pursue its own initiatives.

<sup>128</sup> See Robert Hunter Wade, *Hegemony and the World Bank: The Fight over People and Ideas*, 9 REV. INT'L POL. ECO. 201, 217-18 (2002) (describing how the United States used its influence over the composition of World Bank leadership); cf. KAHLER, *supra* note 114.

<sup>129</sup> *Security Council Unanimously Chooses Annan as New Leader*, THE NEWS (Boca Raton), Dec. 14, 1996, <http://news.google.co.uk/newspapers?id=rDRUAAAIBAJ&sjid=nY4DAAAIBA&pg=5835%2C3781302>; *U.S. Blocks Re-Appointment of Boutros-Ghali as U.N. Secretary-General; Kofi Annan Elected as Successor*, 8 FOREIGN POL'Y BULL. 104 (Feb. 1, 1997).

<sup>130</sup> *Security Council Unanimously Chooses Annan as New Leader*, *supra* note 129.

leadership and wanted a new direction at the U.N., regardless of the level of his support in the international community.<sup>131</sup> When the Security Council authorizes the use of force, the United States also insists that all American troops acting on behalf of the U.N. only serve under an American commander, even though the United States is formally acting under U.N. auspices.<sup>132</sup> At the World Bank, the United States not only has an effective veto power over major decisions but also unilaterally names the President of the World Bank,<sup>133</sup> inevitably an American who will likely shape the direction of the international institution to pursue U.S. interests.

Even this simple discussion of four of the world's most prominent international institutions demonstrates that the United States implemented many *ex ante* tools to try to ensure that the international institutions to which it has delegated non-binding authority remain effective agents for their principal—the United States. But this is not the limit of the United States' capacity to influence international institutions and reduce agency costs; just as within the domestic delegations context, the United States has several *ex post* tools as well.

#### 4.2. Ex Post Oversight Tools for International Delegations

The United States' predominance in international politics also allows it to use a set of *ex post* tools that are conceptually similar to those available in the domestic context. They range from funding international institutions, side payments to states, and conditions on foreign aid, to provisional participation, withdrawal, and the

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<sup>131</sup> Discussing the United States' veto on Boutros-Ghali's reelection, Madeleine Albright stated "[w]e believe that the United Nations needs new leadership for the 21st century, somebody whos [sic] going to get up every morning and decide that reforming the U.N. so that it can function in the 21st century is his or her major goal." *U.S. Poised to Veto Boutros-Ghali*, CNNINTERACTIVE (Nov. 17, 1996, 10:45 PM), <http://www.cnn.com/WORLD/9611/17/ghali/>.

<sup>132</sup> See U.S. DEP'T OF STATE, PUB. NO. 10161, THE CLINTON ADMINISTRATION'S POLICY ON REFORMING MULTILATERAL PEACE OPERATIONS (1994), available at <http://clinton4.nara.gov/textonly/WH/EOP/NSC/html/documents/NSCdoc1.html> (noting that while the President "will never relinquish command of U.S. forces," he retains the authority to place forces under operational control of a foreign commander).

<sup>133</sup> Fleck & Kilby, *supra* note 113.

creation of new international institutions. While these *ex post* tools might be more costly for the United States—withdrawal from an international institution or the creation of a new one is not easy—they are available to the United States, and on occasion it has utilized them. But, if the United States' participation in any international institution is key for that institution's efficacy, the very availability of these tools and the *prospect* of their use also shape the operation of international institutions and keeps them generally aligned with U.S. interests. The United States does not have to *exercise* its power in order to influence state behavior.

*Funding.*<sup>134</sup> Perhaps most obvious, just like Congress can threaten or formally limit the agency budget, designate the funding for specific purposes, and condition increases on the achievement of certain goals, the United States can do similarly with some international institutions.<sup>135</sup> This tool is uniquely available to the United States because it is often the single biggest financial supporter of international institutions.<sup>136</sup> The United States is the largest contributor to the IMF and World Bank,<sup>137</sup> and it contributes almost twenty-two percent of the U.N.'s operating

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<sup>134</sup> Ian A. Bowles & Cyril F. Komos, *Environmental Reform at the World Bank: The Role of the U.S. Congress*, 35 VA. J. INT'L L. 777, 782 (1995) (noting that in the context of multilateral development banks, "Congress is free to determine the amount of funding it provides for any given program, to set conditions for disbursement or even to earmark part of its contribution").

<sup>135</sup> The Clinton administration, for instance, conditioned World Bank funding on specific reforms, including the creation of an inspection panel and the restructuring of the World Bank's Global Environment Facility. Ian A. Bowles & Cyril F. Komos, *The American Campaign for Environmental Reforms at the World Bank*, 23 FLETCHER F. WORLD AFF. 211, 220 (1999). The United States has also withheld contributions from the Inter-American Development Bank until the institution required all borrowers to stop discriminating against procurement bids from potential suppliers in the United States and other countries. JONATHAN E. SANFORD, CONG. RESEARCH SERV., RS20791, MULTILATERAL DEVELOPMENT BANKS: PROCEDURES FOR U.S. PARTICIPATION 3 (2001).

<sup>136</sup> In 2011, the United States contributed more than \$580 million, or twenty-two percent of the U.N. budget. U.N. Secretariat, *Assessment of Member States' Contributions to the United Nations Regular Budget for the Year 2011*, U.N. Doc. ST/ADM/SER.B/824 (Dec. 28, 2010). Although the United States does not contribute money to the IMF every year, it remains the largest contributor to the IMF with a SDR quota of 42,122.4 million or more than seventeen percent of the Fund's total. JONATHAN E. SANFORD, CONG. RESEARCH SERV., RS20413, *IMF AND WORLD BANK: U.S. CONTRIBUTIONS AND AGENCY BUDGETS 1* (1999); *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, *supra* note 117.

<sup>137</sup> SANFORD, *supra* note 136.

budget. In fact, in the 1990s, the United States successfully conditioned payment of its outstanding dues to the U.N. on changes to the U.N.'s institutional structure to address corruption concerns and to increase transparency.<sup>138</sup> Further, when the Security Council authorizes a use of force, it relies on the contribution of the member states for enforcement.<sup>139</sup> The United States is by some distance the largest supplier of troops, funding, and materiel to U.N. "coalition" forces. For example, when the Security Council authorized the use of force to remove Iraqi troops from Kuwait in 1991,<sup>140</sup> the U.N. turned to the United States and other countries for support. Unsurprisingly, the United States led the coalition and contributed the vast majority of troops and materiel to the effort.<sup>141</sup> Even during the recent Security Council-sanctioned campaign in Libya,<sup>142</sup> the United States had to supply the bulk of munitions and intelligence because France and other countries were running out of resources.<sup>143</sup>

<sup>138</sup> MARJORIE ANN BROWNE, CONG. RESEARCH SERV., RL33611, UNITED NATIONS SYSTEM FUNDING: CONGRESSIONAL ISSUES 43 (2011); Margaret P. Karns & Karen A. Mingst, *The United States as "Deadbeat"? U.S. Policy and the UN Financial Crisis*, in MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT 267, 275 (Stewart Patrick & Shepard Forman eds., 2002).

<sup>139</sup> See Edward C. Luck, *Tackling Terrorism*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 85, 97 (David M. Malone ed., 2004) (noting the U.N. Security Council's "reliance on powerful member states for military enforcement"); see, e.g., S.C. Res. 743, U.N. Doc. S/RES/743 (Feb. 21, 1992) (authorizing the creation of the U.N. Protection Force).

<sup>140</sup> S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing the use of "all necessary means" against Iraq beginning January 16, 1991, and requesting the States to provide support).

<sup>141</sup> The United States contributed more than five hundred thousand troops against Iraq during Operation Desert Shield and Desert Storm—more than four times the amount of the next nation. The United States also provided more than three thousand tanks and planes. Daniel S. Papp, *The Gulf War Coalition: The Politics and Economics of a Most Unusual Alliance*, in THE EAGLE IN THE DESERT: LOOKING BACK ON U.S. INVOLVEMENT IN THE PERSIAN GULF WAR 21, 22 (William Head & Earl H. Tilford, Jr. eds., 1996).

<sup>142</sup> S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing the use of "all necessary means" to protect Libyan civilians and serving as the basis for military intervention).

<sup>143</sup> See Borzou Daragahi & Brian Bennett, *Libya Bombing Campaign Targets Kadafi's Air, Ground Forces*, L.A. TIMES, Mar. 21, 2011, <http://articles.latimes.com/2011/mar/21/world/la-fg-libya-fighting-20110321> ("One problem the administration faces is that even though Obama wants the U.S. to play a supporting role in Libya—and, indeed, the first strike came from a French fighter jet—only the United States has the resources to launch the complex operations to

*Side Payments and Foreign Aid.*<sup>144</sup> Similarly, the United States uses side-payments and attaches conditions on foreign aid to influence (or lobby) states to support U.S. initiatives both within and outside of international institutions. We can imagine the United States using economic influence—some observable, some unobservable—to secure support for U.S. initiatives within international institutions or circumvent them. At the U.N., after it became clear that the Security Council would not provide a resolution authorizing the use of force for the Second Gulf War, President George W. Bush created a “coalition of the willing”<sup>145</sup> that included states which received cash or in-kind payments in exchange for supporting the United States.<sup>146</sup> When the United

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clear Kadafi’s air defenses.”); James Kirkup et al., *Libya: US Urged to Return to Front Line*, TELEGRAPH (U.K.), Apr. 13, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8449063/Libya-US-urged-to-return-to-front-line.html> (reporting on France’s suggestion that the United States should deploy its resources in the Libya operations again); Meera Selva & Danica Kirka, *Europe’s Libya Campaign Comes Under Scrutiny*, SAN DIEGO UNION-TRIBUNE, June 14, 2011, <http://www.utsandiego.com/news/2011/jun/14/europes-libya-campaign-comes-under-scrutiny/> (reporting that France and Britain have been struggling with a lack of munitions and equipment).

<sup>144</sup> Side payments have long been used as a means of procuring cooperation with U.S. international policy goals. In 1911, the United States made side payments to both Great Britain and Japan to seal the 1911 North Pacific Fur Seal Treaty. SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING* 34 (2003). More recently, the United States supplied North Korea with fuel oil and constructed two light-water reactors for North Korea’s continued participation in the Nuclear Non-Proliferation Treaty. Alan Riding, *U.S. and North Korea Sign Pact to End Nuclear Dispute*, N.Y. TIMES, Oct. 22, 1994, <http://www.nytimes.com/1994/10/22/world/us-and-north-korea-sign-pact-to-end-nuclear-dispute.html>. Cf. Royal C. Gardner, *Exporting American Values: Tenth Amendment Principles and International Environmental Assistance*, 22 HARV. ENVTL. L. REV. 1, 34 (1998) (discussing the incentives provided to China and India to accede to the Montreal Protocol including a provision creating a fund for grants and concessional loans to developing nations to enable their compliance).

<sup>145</sup> Hamada Zahawi, Comment, *Redefining the Laws of Occupation in the Wake of Operation Iraqi “Freedom,”* 95 CALIF. L. REV. 2295, 2296 (2007) (“On March 19, 2003 President George W. Bush proclaimed, ‘My fellow citizens, at this hour, American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.’ With those words the United States and its ‘Coalition of the Willing’ launched Operation Iraqi Freedom.”) (footnotes omitted).

<sup>146</sup> Laura McClure, *Coalition of the Billing – Or Unwilling?*, SALON (Mar. 12, 2003, 7:43 PM), [http://www.salon.com/2003/03/12/foreign\\_aid/](http://www.salon.com/2003/03/12/foreign_aid/) (reporting the use of payments to build a coalition of approximately 40 nations to back the Iraq war effort).

States expressed concern that the International Criminal Court (“ICC”) might gain custody over Americans abroad, the United States conditioned the receipt of foreign aid to some countries on their willingness to refuse to turn over Americans to the ICC.<sup>147</sup> Moreover, since the United States has a substantial role in determining which states receive World Bank loans and IMF support, the United States has encouraged the attachment of many conditions on aid, forcing the recipients—who often cannot access private capital markets—to liberalize their economies, to cut the public sector, and to pass austerity packages.<sup>148</sup> Many have criticized the conditions attached to aid as the United States imposing its policy preferences under duress.<sup>149</sup> The takeaway is that the United States has tools to influence the product of international institutions by shaping the preferences of the member states.

*Create New Institutions.* Another tool that the United States has used to maintain influence over international institutions is simply creating a new institution when, for whatever reason, the old institution has been ineffective or unresponsive to U.S. interests. For example, in the negotiations to form the WTO, the United States and other large economic powers withdrew from the General Agreement on Tariffs and Trade (“GATT”) and forced the developing countries to either join the new WTO in a single undertaking or remain outside the new international trade system.<sup>150</sup> The United States and others forced the developing

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<sup>147</sup> See JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 17 (2006) (describing the U.S. laws prohibiting Economic Support Funds from being paid to any party to the ICC that has not agreed to protect U.S. citizens from being turned over to the ICC); Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI L. REV. 83 (2003).

<sup>148</sup> See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1939–49 (“With the IMF able to walk away from the table without injury, while a country on the other side of the talks faces ruin, it is not surprising that countries in debt typically agree to IMF conditionalities.”). Scheppele notes the typical conditions included monetary discipline, fiscal discipline, and privatization of state property. *Id.* at 1940 (citing JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 55 (2002)).

<sup>149</sup> See Dreher & Jensen, *supra* note 115 (surveying criticisms of the IMF as an “agent of U.S. foreign policy”).

<sup>150</sup> See Richard L. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339 (2002). Judith H.



countries to join on their terms or lose access to the world's largest economic markets. Of course, creating a new institution is costly and requires participation from other states with similar interests, but it remains available depending on the degree to which the old international institution deviates from U.S. interests.

*Withdrawal.* The United States can refuse to join international institutions, withdraw, or only provisionally participate in international institutions that have acted or are likely to act consistently against U.S. interests. For example, the United States refused to join the League of Nations in the early-twentieth century, likely condemning it to failure at its inception. More recently, the United States signed but eventually indicated its intent not to become a party to the Rome Statute creating the International Criminal Court.<sup>151</sup> Since the United States was particularly concerned with the ICC's potential to create liability for both parties and *non-parties* to the treaty, the United States simply passed domestic legislation<sup>152</sup> and signed Article 98 Agreements with states parties to the ICC to ensure that Americans would not fall under its jurisdiction.<sup>153</sup> In 2005, after the International Court of Justice decision in *Avena*, the United States withdrew from the Optional Protocol of the Vienna Convention on Consular Relations,<sup>154</sup> which provided that the ICJ would have

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Goldstein and Richard L. Steinberg also show that WTO judicial law-making matters only when powerful states adhere to judicial decisions and that compliance with liberalization decisions is in the U.S. interest. See Goldstein & Steinberg, *supra* note 81, at 257.

<sup>151</sup> Statement of Bill Clinton, President of the United States, Authorizing the U.S. Signing of the Rome Statute of the International Criminal Court, Dec. 31, 2000, available at <http://www.iccnw.org/documents/USClintonSigning31Dec00.pdf> (stating the U.S. signature on the Rome Statute is necessary to influence the evolution of the court, but that he will not submit the treaty to the Senate until U.S. concerns are addressed).

<sup>152</sup> See ELSEA, *supra* note 147.

<sup>153</sup> *Id.*

<sup>154</sup> Adam Liptak, *The U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, March 10, 2005, <http://www.nytimes.com/2005/03/10/politics/10death.html>. According to then-State Department spokeswoman, Darla Jordan, the reason for withdrawal was to protect the United States "against future International Court of Justice judgment that might similarly interfere in ways [the United States] did not anticipate when [it] joined the optional protocol." *Id.*

jurisdiction for claims under the Convention.<sup>155</sup> Even earlier, in 1984, the United States withdrew from the compulsory jurisdiction of the ICJ during the *Nicaragua* case<sup>156</sup> and refused to participate in the ICJ's proceedings.

Though the discussion does not cover all the mechanisms available to the United States, it demonstrates that the United States has substantial tools to affect the conduct of international institutions by influencing the organization's procedural rules, the composition of the rule-making body, and the agenda of the relevant decision-makers. The United States can engage in both intra-institution and inter-institution logrolling, shift decision-making authority across multiple organizational bodies,<sup>157</sup> or create narrow or issue-specific organizations<sup>158</sup> to make organizations more responsive to U.S. interests. Agency costs exist in both domestic and international delegations but, given the United States' oversight mechanisms, those costs might not differ significantly.

#### 4.3. Acts and Omissions of International Institutions

By now it is clear that the United States has *ex ante* and *ex post* mechanisms to influence the operations of international institutions and ensure that they remain accountable to American interests. Depending on the structure of the international institution, the relevant issue, and the interests of the other states, the United States will likely choose the mechanism that is most likely to generate the preferred outcome. For reasons related to the United States' power advantage, the United States has a broader

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<sup>155</sup> Optional Protocol Concerning the Compulsory Settlement of Disputes, art 1, Apr. 18, 1964, 500 U.N.T.S. 241.

<sup>156</sup> Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392, 398 (Nov. 26); see also John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 DUKE J. COMP. & INT'L L. 263, 290-91 (2009).

<sup>157</sup> Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596 (2007) (noting "the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries").

<sup>158</sup> See *id.* at 597.

set of tools to shape the final work product of the international institution.

But the United States' asymmetric power advantage does not mean that it can influence international institutions in all situations; rather, the United States can stop initiatives that it does not like, but it cannot always push through institutional objectives that it prefers. For example, the United States' veto on the Security Council means the United States can stop the Security Council from acting contrary to U.S. interests, but it doesn't mean that the United States can always force the U.N. to act consistently with U.S. preferences. Of course, the United States has other tools to encourage other states to align themselves with U.S. preferences—some of those tools were outlined above—but the United States cannot guarantee that the international institution will always act in certain way. On balance, the United States can often get what it wants out of an international institution, and can almost always block initiatives that it dislikes.

Why is this important? The dynamic described above suggests that the international institutions have a status-quo bias, one that favors the state or states that have designed, funded, and retained operational control of international institutions—in most instances, the United States. Since the international institutions generally cannot act without U.S. consent, they cannot hurt the United States; in principal-agent terms, the agent cannot act without the principal's approval. The key point is that there is no accountability issue with international institutions since the United States can block the initiatives it opposes and generally push through those that it supports. Thus, the acts and omissions of international institutions are unlikely to generate the kind of agency costs that warrant a formal limit on international delegations.

#### 4.4. *The Future of International Delegations*

Finally, the argument outlined here focuses on the United States' asymmetric power advantage in creating international institutions and ensuring some operational control through *ex ante* and *ex post* mechanisms. But the United States will not maintain this power forever, and, sooner or later, its influence over international institutions will begin to wane. Does this potential

eventuality support the critics' contention that delegations create high agency costs?

The answer to this question requires consideration of the international political environment in which the United States operates. If the United States is the dominant power in international politics, the mechanisms outlined above will allow the United States to maintain effective control over international institutions, sharply reducing agency costs and accountability issues. This suggests that, at least while the United States is dominant, international delegations to international institutions do not present serious problems. However, if the United States is only one of two or three dominant countries in the world (with China, Brazil, and Germany rising), then the United States' ability to control the international institution diminishes, creating greater accountability concerns. In such an international environment, international delegations become more problematic and they will likely present more significant principal-agent concerns. Thus, the ability of the United States to influence international institutions—and the wisdom of international delegations—is a function of the level of constraint on the United States.<sup>159</sup>

Even in a world in which the United States is no longer dominant, it is unclear why limits on international delegations are necessary when Congress and the President will be able to assess the United States' ability to influence an international institution before delegating decision-making authority. Congress and the President are well placed to analyze the costs and benefits of a specific delegation to an international institution, and, given the possibility that the international institution might make decisions inconsistent with U.S. interests, Congress and the President will likely be sensitive to the consequences of international delegations for the American people. In other words, Congress and the President are already fully incentivized to internalize the costs of international delegations and to ensure that the international institutions with delegated authority are accountable to U.S. interests.

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<sup>159</sup> For a discussion of the role of international constraints on the President's foreign affairs authority, see Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 *STAN. J. INT'L L.* 1 (2013).

## 5. CONCLUSION

This Article's central claim is that similar accountability issues are present in both domestic and international delegations, and that a similar range of oversight tools is available to the United States. If agency costs are comparable, we can better assess arguments in favor of creating supermajority requirements, requiring a clear statement rule, or endorsing additional political branch authorization for international delegations.

These arguments rest on the mistaken presumption that agency costs are high in the international delegations, and, as a result, *ex ante* constraints are necessary to ensure accountability. But, as this Article has demonstrated, such constraints are unnecessary. In fact, given the steps that the United States has taken to ensure the accountability in non-binding international delegations, it is likely that Congress and the President are already cognizant of the potential costs and benefits of international delegations when they provide their joint consent through the Article II process for treaties or through the Article I general law-making procedures for congressional-executive agreements. It is unlikely that the political branches would need a clear statement requirement or a default of non-self-execution to force them to internalize the costs of delegating binding authority to an international institution; the political branches are well aware of the costs and benefits of international delegations. Congress and the President's use of reservations, understandings, and declarations ("RUDs") in the treaty context, for example, demonstrate that awareness. Again, given the United States' role in the conception, design, and operation of many of the world's most important international organizations, it is hard to imagine the United States delegating binding authority to an international institution that would act consistently against American interests or impose net costs on the United States.

International delegations are in many ways substantially similar to domestic delegations. They both generate agency costs, and, in each context, the United States, acting through Congress and the President, has similar oversight mechanisms to reduce them. The specific agency costs in any single international delegations are likely to rest on myriad context-sensitive factors that make a general assessment difficult. But what is clear is that proposals in support of limits on binding international delegations

require greater clarity on the measures of agency costs, the efficacy of oversight mechanisms, and the assumptions about the operation of international institutions. Given the prominence of international governance in the American political discourse, Congress and the President are fully incentivized to consider carefully the wisdom of both binding and non-binding international delegations; national constitutional design limits are unnecessary.