NOTE

INTERNATIONAL DELEGATION AS ORDINARY DELEGATION

Increasing global trade, decreasing transportation costs, boundary-defying pollutants, and a host of other phenomena have made the world a much more international place. American legal academics have taken note, likening the expansion of global legal institutions to the New Deal and the rise of the federal administrative state.[1] As with the rise of the administrative state, U.S. participation in these international institutions — in particular U.S. delegation of federal power to them — raises important constitutional questions that speak to the heart of American democracy.

The recent proliferation of international organizations[2] and, arguably, of U.S. delegations to those organizations[3] has brought these constitutional questions to the fore. Academics have noted Fifth, Sixth, and Seventh Amendment concerns with U.S. participation in the International Criminal Court.[4] They have discussed Article III concerns regarding Canada–United States Free-Trade Agreement[5] binational panels, which review administrative trade decisions.[6] They have argued that the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction[7] contravenes the Appointments Clause.[8] And they have debated whether these international arrangements violate some version

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[1] *See, e.g.*, John O. McGinnis, Medellín *and the Future of International Delegation*, 118 YALE L.J. 1712, 1720 (2009) (noting the similarity between the problems posed by international delegations and those posed by "the rise of the administrative state"); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494–95 (2004).

[2] *See, e.g.*, Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 37, 38 (noting the proliferation of international courts since 1990).

[3] *See, e.g.*, Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 4 (2006) ("Litigants are increasingly asking U.S. courts to enforce judgments by international tribunals and courts."); Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 396 (1996). *But see* Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693, 1695 (2008) ("In reality, examples of non-trivial international delegations are quite rare.").

[4] *See, e.g.*, Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39, 79–86, 105–08 (2009).

[5] U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281.

[6] *See* Gordon A. Christenson & Kimberly Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW. 401, 403 (1989).

[7] Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter Chemical Weapons Convention].

[8] *See* John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 88–89 (1998).

of the nondelegation doctrine.[9] This Note takes aim only at the last question of nondelegation.

The stakes on both sides of the equation are high. On the one hand, failure to permit international delegations[10] could leave the United States (and potentially the world) helpless to address pressing global problems. For example, in the 1970s, scientists began paying attention to the potentially devastating consequences of the depletion of ozone in the Earth's stratosphere.[11] In a relatively impressive feat of global cooperation, the United States along with over 190 other countries[12] responded by adopting the Montreal Protocol on Substances that Deplete the Ozone Layer.[13] The Montreal Protocol included a straightforward phaseout of certain ozone-depleting substances,[14] but because the parties could not agree ex ante on how best to phase out methyl bromide,[15] an important pesticide for strawberries and tomatoes,[16] the protocol delegated to the parties collectively the power to create exemptions for its phaseout.[17]

The Montreal Protocol illustrates both the ways that international delegations may be necessary and the potential consequences of limiting those delegations. The protocol addressed a global problem that required collective action to solve, but the parties could not make an agreement without delegation. In that sense, the Montreal Protocol is

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[9] *See, e.g.*, Ku, *supra* note 3, at 61–63; *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 247–54 (2d ed. 1996) (discussing the constitutionality of international delegations generally).

[10] Although there are a number of possible definitions of the term "international delegation," this Note uses it to refer to the federal authorization of an international entity to create obligations that have the force of U.S. *domestic law*. However, to the extent that there could be a justiciable controversy concerning the U.S. authorization of an international entity to create new *international law* obligations on the United States, much of this Note's analysis should still apply. *See generally* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 135–38 (2000) (arguing that developments in international law increase the likelihood of its yielding justiciable controversies).

[11] *See, e.g.*, Mario J. Molina & F.S. Rowland, *Stratospheric Sink for Chlorofluoromethanes*, 249 NATURE 810, 810 (1974).

[12] *See Status of Ratification*, OZONE SECRETARIAT, UNITED NATIONS ENVIRONMENT PROGRAMME (Oct. 11, 2011), http://ozone.unep.org/new_site/en/treaty_ratification_status.php.

[13] Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol], *available as adjusted and amended at* http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf; *see The Montreal Protocol on Substances that Deplete the Ozone Layer*, U.S. DEP'T OF STATE, http://www.state.gov/g/oes/env/83007.htm (last visited Jan. 8, 2012) ("Perhaps the single most successful international agreement to date has been the Montreal Protocol." (quoting Kofi Annan, former Secretary General of the United Nations) (internal quotation marks omitted)).

[14] *See* Montreal Protocol, *supra* note 13, art. 2A.

[15] *See* Brian J. Gareau, *A Critical Review of the Successful CFC Phase-Out Versus the Delayed Methyl Bromide Phase-Out in the Montreal Protocol*, 10 INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 209, 222–24 (2010).

[16] *See id.* at 213.

[17] *See* Montreal Protocol, *supra* note 13, art. 2H, para. 5.

an example of the importance of international delegations to resolving global collective action problems.[18] But even when collective action problems are easier to solve, delegation may be necessary to enforce or interpret any agreement.[19]

On the other hand, many commentators argue that international delegations present a threat to the democracy of the United States.[20] International delegations involve a transfer of power from the federal government to international bodies. Because the American people exercise limited control over international bodies, international delegations permit decisions limiting the freedom of U.S. citizens to be made by entities only minimally accountable to them. Such delegations thus shift power away from the people.

More importantly, the constitutionality of international delegations is unsettled. In *Natural Resources Defense Council v. Environmental Protection Agency*,[21] a 2006 case involving the methyl bromide exemption to the Montreal Protocol — one of the only cases to address the constitutionality of international delegations[22] — the D.C. Circuit refused to give effect to the decision of the delegated body establishing the terms of the exemption for the United States.[23] Notwithstanding the Montreal Protocol's unambiguous language delegating the power to create exemptions to the methyl bromide phaseout,[24] and notwithstanding the unambiguous language of the legislation authorizing the Environmental Protection Agency (EPA) to enforce the Montreal Protocol,[25] the D.C. Circuit held that "serious constitutional questions in light of the nondelegation doctrine" required it to read the statute as not incorporating the international delegation into U.S. law.[26] Moreover, although the Supreme Court has not squarely confronted the is-

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[18] *See* Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, LAW & CONTEMP. PROBS., Winter 2008, at 151, 168–69 (noting the importance of delegation in solving "complex cooperation problems," *id.* at 168).

[19] *See id.* at 164 (noting the importance of delegation for dispute resolution and enforcement).

[20] *See, e.g.*, JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 34 (1998); Ku, *supra* note 10, at 77.

[21] 464 F.3d 1 (D.C. Cir. 2006).

[22] *See* Alice L. Bodnar, NRDC v. EPA*: Testing the Waters of the Constitutionality of Delegation to International Organizations*, 34 ECOLOGY L.Q. 895, 918 (2007).

[23] *Natural Res. Def. Council*, 464 F.3d at 8–10.

[24] Montreal Protocol, *supra* note 13, art. 2H, para. 5 (creating an exception to a ban on methyl bromide "to the extent that the Parties decide to permit the level of production or consumption that is necessary to satisfy uses agreed by them to be critical uses").

[25] *See* 42 U.S.C. § 7671c(d)(6) (2006) ("To the extent consistent with the Montreal Protocol, the [EPA] Administrator . . . may exempt the production, importation, and consumption of methyl bromide for critical uses.").

[26] *Natural Res. Def. Council*, 464 F.3d at 9.

sue, there are reasons to believe it is at least skeptical of international delegations.[27]

Both the high stakes of international delegations and indications by courts that their constitutionality is still an open question[28] prompt this Note's examination of that question. Commentators have already begun to debate how the nondelegation doctrine should apply to international delegations.[29] This Note will attempt to add to that debate in two ways. The first is to set out a welfarist framework from which to make sense of the costs and benefits of international delegation that other commentators have identified. The second is to show that this framework provides little support for scrutinizing international delegations more stringently than domestic ones, but it does suggest that greater judicial interference with international delegations would reduce welfare. Although the Constitution is not merely a charter to maximize welfare, this welfarist approach can illuminate the constitutional question.

The Note proceeds in three parts. Part I provides an overview of the nondelegation doctrine as it is applied domestically and briefly discusses how that doctrine might translate to the international context. Part II examines critiques of international delegations from a welfare-maximization perspective, arguing that there are good reasons to believe that increasing judicial scrutiny of international delegations would reduce welfare. Part III contends that other constitutional theories of nondelegation may confirm the welfare-maximizing approach.

I. THE NONDELEGATION DOCTRINE

A. The Domestic Nondelegation Doctrine

The impetus for the nondelegation doctrine derives from the Vesting Clause of Article I, which vests "[a]ll legislative Powers" in the

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[27] *See* Medellín v. Texas, 128 S. Ct. 1346, 1358–60 (2008) (finding that U.S. treaty obligations do not require federal courts to give domestic effect to a decision of the International Court of Justice (ICJ) exercising its delegated power to interpret a treaty); McGinnis, *supra* note 1, at 1728–33 (explaining *Medellín* as an effort to avoid the constitutional problems of delegating interpretive power to the ICJ); *see also* Transcript of Oral Argument at 45, *Medellín*, 128 S. Ct. 1346 (No. 06-984) ("Isn't there some doubt whether the . . . Senate and the President, together, can . . . take away from this Court the power and responsibility to decide what the treaty obligations of the United States are?") (Scalia, J.).

[28] *See* McGinnis, *supra* note 1, at 1736.

[29] *Compare, e.g.*, Ku, *supra* note 3, at 59 (arguing for an enhanced nondelegation doctrine for international delegations), *with* Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707, 711 (2007) (arguing that the nondelegation doctrine poses no constitutional barrier to legislation implementing international delegations).

Congress of the United States.[30] Under the constitutional (or "conventional") version of the doctrine,[31] courts have enforced the Vesting Clause by policing the breadth of congressional delegations, based on the assumption that implementing extremely broad delegations requires exercising "legislative" power for constitutional purposes, whereas implementing narrower delegations requires exercising merely "executive" power or perhaps no federal power at all.[32]

But courts have failed to create a workable framework to implement the conventional nondelegation doctrine.[33] The Supreme Court articulated the present doctrine in *J.W. Hampton, Jr., & Co. v. United States*,[34] promising to uphold delegations of congressional authority as long as Congress provided an "intelligible principle" to guide its delegate.[35] After two 1935 cases striking down laws for failing to provide such a guiding principle,[36] the Court has never again invalidated a law as an excessively vague delegation.[37] This lax enforcement is all the more notable as Congress has provided the Court with many obvious targets for invalidation, including mandates that agencies regulate to advance the "public interest, convenience, or necessity"[38] or to set "'just and reasonable' rates" for certain commodities.[39]

The failure of the conventional nondelegation doctrine is largely one of institutional competence.[40] As Professor Cass Sunstein has noted, courts implementing the conventional doctrine must determine "[h]ow much executive discretion is too much to count as 'executive.'"[41] But the answer to that question is not amenable to clear rules or consistent metrics.[42] Accordingly, courts scrutinizing delegations face a choice between making largely ad hoc decisions about the scope

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30 U.S. CONST. art. I, § 1; *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317–18 (2000).

31 *See* Sunstein, *supra* note 30, at 317–21 (styling the version of the doctrine originally articulated by the courts as the conventional doctrine, to be contrasted with his theory of the doctrine as implemented through canons of construction).

32 *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406–09 (1928).

33 *See* Sunstein, *supra* note 30, at 322–28.

34 276 U.S. 394.

35 *Id.* at 409.

36 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 418–19 (1935).

37 Sunstein, *supra* note 30, at 318–19.

38 Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 215 (1943) (quoting Communications Act of 1934, 47 U.S.C. § 309(a) (1940)) (internal quotation marks omitted).

39 Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 611 (1944) (quoting Natural Gas Act, 15 U.S.C. § 717c(a) (1940)); *see also* Mistretta v. United States, 488 U.S. 361, 373–74 (1989) (collecting cases upholding broad delegations under the nondelegation doctrine).

40 *See* Sunstein, *supra* note 30, at 321 (citing *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324–28 (1987)).

41 *Id.* at 326–27.

42 *Id.* at 327.

of delegations and abandoning enforcement of the doctrine. This choice is all the starker given the practical implications of enforcement: if Congress continues to make broad delegations, then giving substance to the nondelegation doctrine could require courts to restructure large parts of the administrative state. With such unpalatable options, federal courts were likely wise to all but abandon enforcement of the doctrine.[43]

But the conventional nondelegation doctrine is not the only way courts can limit excessive delegations. Some scholars have argued that the nondelegation doctrine has transformed from a constitutional rule into statutory canons of construction.[44] Rather than striking down excessive delegations, they argue, courts construe those delegations narrowly in light of constitutional nondelegation problems.[45] As Sunstein has explained, however, while nondelegation canons block certain executive actions, they still leave room for a determined Congress to delegate as it wishes.[46] Accordingly, neither the conventional nondelegation doctrine nor the canons of construction it inspired pose a high barrier to delegations.

B. The Domestic Nondelegation Doctrine Applied Abroad?

A faithful translation of either the conventional or the statutory version of the domestic nondelegation doctrine to the context of international delegations would prove similarly minimalist. Although a few international delegations may lack intelligible principles, even as compared to the broadest permissible domestic delegations,[47] many international delegations are relatively narrow.[48] Similarly, there is no reason to believe

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[43] *See id.* at 327–28.

[44] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223; Sunstein, *supra* note 30, at 315–16.

[45] *See* Manning, *supra* note 44, at 223.

[46] *See* Sunstein, *supra* note 30, at 335–36.

[47] For example, some treaties permit amendments without unanimous consent of states-parties. *See* Guzman & Landsidle, *supra* note 3, at 1701–06 (discussing nonunanimous amendment power as a potential threat to sovereignty in the context of the International Labor Organization, the International Monetary Fund, and the World Trade Organization). Where these powers are unconstrained, a court might reasonably conclude that the international organization has not been given an intelligible principle to guide its authority to amend the governing treaty.

[48] For instance, the delegation at issue in *Medellín v. Texas*, 128 S. Ct. 1346 (2008), was the ICJ's interpretation of Article 36 of the Vienna Convention on Consular Relations (VCCR), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, to require an exception to U.S. state procedural default rules where citizens of Mexico had not been notified of their right under the VCCR to communicate with Mexico's consular post. *See Medellín*, 128 S. Ct. at 1352–53; Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 19–22 (Mar. 31). Article 36 gives fairly explicit guidance on this issue, requiring the receiving state to "inform the consular post of the sending State if . . . a national of that State is arrested," when the person arrested so requests. VCCR, *supra*, art. 36(1)(b). It also requires the laws and regulations of the receiving state to "enable full effect to be

that international delegations are systematically more susceptible to narrowing canons of construction than are domestic delegations.

Rather than apply the nondelegation doctrine identically to domestic and international delegations, however, some scholars and courts have suggested that international delegations should be subject to greater judicial scrutiny than are domestic delegations. Such a system of heightened scrutiny could take two forms: First, it could involve judicial review of the content and scope of international delegations.[49] This review could take the form of a heightened "intelligible principle" standard, an absolute prohibition of all or some types of international delegations, a policy-motivated veto of undesirable delegations, or any other standard to distinguish those delegations that comport with the constitutional separation of powers from those that do not. Scholars have not advanced any particular heightened substantive standard, but neither have the courts taken this option off the table.[50] Second, the heightened scrutiny could involve raising the enactment costs of international delegations through procedural barriers,[51] a clear statement rule,[52] a "super-strong clear statement" rule,[53] or even an unpredictably enforced substantive review of international delegations.[54]

The next Part argues that, from a welfare-maximization perspective, international delegations should be treated the same as domestic delegations. It shows that, while the second option of raising enactment costs implicates fewer institutional design problems, both versions of heightened scrutiny unnecessarily (and potentially harmfully) remove the political branches' authority to make international delegations.

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given to the purposes for which the rights accorded under this Article are intended." *Id.* art. 36(2).

[49] *See, e.g.*, Ku, *supra* note 10, at 142–43 (suggesting review of international delegations under Article III).

[50] *See, e.g.*, Natural Res. Def. Council v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006) (finding that constitutional nondelegation principles required avoiding an international delegation where a domestic delegation would arguably have been unproblematic).

[51] *See* McGinnis, *supra* note 1, at 1716 (suggesting that international delegations should be considered valid only if made pursuant to the Treaty Clause).

[52] *Cf.* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587 (2003) (arguing for a presumption that international delegations are not self-executing). This Note focuses on clear statement rules as applied by the D.C. Circuit in *Natural Resources Defense Council*, not on rules that simply presume non-self-execution.

[53] Ku, *supra* note 3, at 60 (quoting William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992)) (internal quotation marks omitted).

[54] *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 58 (2008) (arguing that doctrinal uncertainty operates to raise enactment costs of legislation).

II. A WELFARIST FRAMEWORK FOR EVALUATING A CONSTITUTIONAL INTERNATIONAL NONDELEGATION DOCTRINE

Critics of international delegation tend to make a combination of formalist and policy arguments to support their position.[55] This Part asks whether the arguments they outline support the proposition that heightened judicial scrutiny of international delegations improves welfare. The first section looks to the central policy arguments that critics levy against international delegations. It aims to confirm what others have suggested[56]: that the policy arguments against international delegations are far from conclusive and that there are good reasons to believe international delegations are less problematic than critics allow. It concludes with a discussion of the potential benefits of international delegation. The second section argues that, even if the policy implications of international delegations are as grim as critics contend, the implications for heightened scrutiny are not obvious. To justify heightened scrutiny of international delegations, critics also need to demonstrate that the political branches lack the ability to make these delegations effectively — a showing they have yet to make.

A. First-Order Policy Arguments

At the heart of many critiques of international delegation is the belief that international delegations are simply worse than domestic delegations.[57] Their costs are higher; their benefits, lower. This section begins by focusing on three first-order policy arguments against international delegation that speak to the chief differences between international and domestic delegations. First, critics argue that the lesser degree of control that the political branches have over international delegates exacerbates the disconnect between the preferences of those who exercise power — international organizations — and voters (the problems of "policy drift" and "policy lock-in"). Second, critics argue that international delegations entail heightened sovereignty costs. Third, critics contend that international delegations lack the democratic legitimacy of domestic delegations. Finally, this section concludes by examining the potential benefits of international delegation.

1. Policy Drift and Policy Lock-In. — The policy drift and policy lock-in arguments against international delegation are closely related

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[55] *See, e.g.*, Ku, *supra* note 10, at 77 (arguing for a "formalist straightjacket" on the basis of policy problems, such as democratic legitimacy and political accountability).

[56] *See, e.g.*, Daugirdas, *supra* note 29, at 707–12.

[57] *See, e.g.*, McGinnis, *supra* note 1, at 1720 ("My thesis here is that domestic delegations continue to have serious costs . . . but that international delegations are likely to impose even higher costs . . . .").

to the same arguments that have long been a concern in the context of domestic delegations.[58] Delegates of federal power, with different constituencies and pressures than those Congress faces, frequently do not share Congress's preferences. Moreover, because Congress has limited oversight authority, these delegates have the potential to use their power to steer policies away from those Congress intended and toward their own preferences.[59] This disconnect can lead to undesirable policies from the perspectives of Congress and voters through a variety of mechanisms, including special interests' capturing bureaucrats and shifting their policy preferences (policy drift)[60] and agencies' locking themselves into particular policy stances despite changes in voter preferences (policy lock-in).[61]

Commentators disagree on the extent to which these phenomena present a concern in domestic delegations. Some argue that agency drift and lock-in result in suboptimal policies, creating problems that outweigh any gains from increased efficiency or expertise.[62] Others argue that agencies are more accountable, relative to Congress, than they might appear.[63] Agencies are subject to executive supervision through appointment and often removal,[64] and most face varying degrees of review by the Office of Information and Regulatory Affairs and the Office of Management and Budget.[65] Perhaps more importantly, agencies are also subject to congressional oversight to the extent

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[58] For a positive political theory explanation of policy drift, see Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503–04 (1989).

[59] *See, e.g.*, Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434–35 (1989).

[60] *See generally* DOUGLASS CATER, POWER IN WASHINGTON 12–48 (1964) (discussing the mechanisms by which "subgovernments" shift policies to match their preferences).

[61] *See* Horn & Shepsle, *supra* note 58, at 503–04.

[62] *See, e.g.*, Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 821 (1999) (arguing that agencies' unaccountability makes them prone to act arbitrarily); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999) ("Although the Constitution established congressional responsibility as the main engine of our indirect democracy, members of Congress have evaded responsibility by delegating legislative powers to the executive branch. The result, as I have argued, is that democracy suffers."). *But see* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 97 GEO. L.J. 97, 119–23 (2000) (discussing and rebutting agency drift and lock-in critiques of delegation).

[63] *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 132 (1997); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–99 (1985); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 783–90 (1999) (noting different ways of holding agencies accountable).

[64] *See, e.g.*, McGinnis, *supra* note 1, at 1721.

[65] *See, e.g.*, Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006).

that their budgets depend on appropriations[66] and their legislative mandates are subject to statutory override.[67]

Critics of international delegations argue that many of these mitigating features, which clothe domestic delegations with some degree of accountability, are absent in the context of international delegations.[68] International organizations, though they sometimes directly or effectively exercise domestic authority, are not staffed by officers of the United States appointed by the President with the advice and consent of the Senate.[69] Their staffs are not removable by the President at will or even for cause.[70] They often depend on the United States for only a fraction of their budgets,[71] and even if their authority with respect to the United States can be reduced or eliminated if the United States leaves the organization,[72] such a change may occasionally contravene international law.[73] This lack of congressional and executive oversight, so the story goes, permits international organizations to make undesirable policy decisions with relative impunity.

But that story is incomplete. To begin with, international delegates may not be subject to less ex post control than are domestic ones.[74]

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[66] *See, e.g.*, Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84 (2006).

[67] *See* Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285, 294–95 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

[68] *See, e.g.*, Ku, *supra* note 10, at 124; McGinnis, *supra* note 1, at 1721.

[69] *See, e.g.*, Yoo, *supra* note 8, at 88–89.

[70] *See, e.g.*, *id.* at 119.

[71] *See, e.g.*, *Is the United Nations Good Value for the Money?*, UNITED NATIONS (2006), http://www.un.org/geninfo/ir/index.asp?id=150#q8 (reporting that the United States was responsible for paying twenty-two percent of the 2005 United Nations budget).

[72] *See* David Epstein & Sharyn O'Halloran, *Sovereignty and Delegation in International Organizations*, LAW & CONTEMP. PROBS., Winter 2008, at 77, 91.

[73] *See* Oona A. Hathaway, *International Delegation and State Sovereignty*, LAW & CONTEMP. PROBS., Winter 2008, at 115, 130–31.

[74] This argument about the degree of ex post control the executive may exercise over international delegations and the related argument that such delegations may impose only limited sovereignty costs, *see infra* section II.A.2, are both admittedly in tension with the claim that delegations add value because they permit nations to bind themselves. But the tension is not irreconcilable. First, it may be true both that a minimum level of ex post control is valuable and that the ability to limit ex post control is valuable. Domestic delegations retain some ex post control for Congress and the President but can also create value by binding both branches to certain policy choices. *See* Stephenson, *supra* note 67, at 289. Like international delegations, whether those domestic delegations add value without unconstitutionally tying the hands of the political branches may be a matter of degree. Second, not all methods of binding policymakers are necessarily equal. Thus a delegation could theoretically provide the means of offering a credible commitment without necessarily eliminating sovereignty or the requisite executive supervision. Depending on how one defines sovereignty, the example of self-executing delegations might illustrate the point. If the delegated power of an international institution can be implemented only through the federal courts, one might consider ultimate sovereignty to remain with the United States. Such a delegation may nonetheless permit the United States to credibly commit to an international obligation.

International organizations face pressures of their own. A membership-based organization, such as the United Nations Educational, Scientific and Cultural Organization, must moderate its actions or risk losing members.[75] This pressure increases with the importance of the membership of a particular state.[76] Accordingly, rational international organizations should take the preferences of the U.S. executive branch into account to the extent that they value the participation of the United States. Moreover, some international delegations, such as the one at issue in *Natural Resources Defense Council*, leave the executive branch with full veto power.[77] The executive branch's ex post control over international delegates could be greater than its control over domestic agencies, to which much more durable powers have been delegated.[78]

Moreover, ex post control is not the only way to address policy drift and policy lock-in. Indeed, there are good reasons to believe that Congress is aware of the risks of policy drift and policy lock-in and accounts for them accordingly.[79] For example, Congress may anticipate that the EPA is likely to draw staffers who are more dedicated to protecting the environment than is the median voter. When designing the EPA, therefore, a rational Congress would limit the enforcement powers of the agency in light of this potential for policy drift or lock-in. In other words, Congress should refuse to delegate where the delegation is not designed to account for policy drift or lock-in — even if the delegation is international. While the political branches are not as free to design international delegations (where there are multiple principals) as they are to design domestic delegations, they are just as free to refuse to delegate unless the delegation is appropriately designed. Thus, if international delegations are likely to empower people with disproportionately internationalist perspectives, then the political branches can be expected not to delegate unless the drift and lock-in effects are adequately constrained.[80]

2. Sovereignty Costs. — Critics of international delegation also argue that to delegate the power to bind the United States to an international organization is to cede U.S. sovereignty.[81] Although federal del-

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[75] *See* Epstein & O'Halloran, *supra* note 72, at 78.

[76] *Cf. id.* at 87 (noting that international organizations' discretion is limited by the preferences only of the nations that the organizations hope to retain).

[77] *See* Montreal Protocol, *supra* note 13, art. 2H, para. 5.

[78] *See* Epstein & O'Halloran, *supra* note 72, at 78.

[79] *See generally* Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 256–64 (1987) (describing the methods by which Congress accounts ex ante for potential pitfalls of administrative schemes).

[80] One potential example of this phenomenon is the demand of the post–World War II superpowers to have permanent vetoes in the United Nations Security Council. *See Membership in 2011*, UN SECURITY COUNCIL, http://www.un.org/sc/members.asp (last visited Jan. 8, 2012).

[81] *See, e.g.*, JEREMY A. RABKIN, LAW WITHOUT NATIONS? 68–70 (2005).

egations to states and private parties also shift power from within the federal government to outside it, the federal government retains ultimate control over those delegates. In contrast, the federal government lacks sovereign control over international organizations. This distinction constitutes a loss of sovereignty, critics argue, and should cause courts to view international delegations more skeptically than they do domestic delegations.[82]

At one level, this claim is indisputable: the federal government's giving sovereign power to an international organization entails its losing some sovereign power. But beyond that superficial observation, the relationship between international delegation and sovereignty is less clear.

First, many delegations do not even arguably entail a loss of sovereignty. For instance, delegations to international bodies in which the United States retains veto power[83] and delegations that include exit clauses[84] both leave ultimate decisionmaking power with the United States.

Second, even a perfectly enforced delegation of power can be reframed from a loss of sovereignty to an exercise of sovereignty.[85] This concept — that the ability of a nation to bind itself to other nations enhances its sovereignty[86] — is clearest when one thinks of treaties as contracts between nations. Just as the ability of individuals to bind themselves through contract expands the range of options available to them, so too does the ability of nations to bind themselves through treaties. And by extension, the ability to make certain kinds of binding promises (such as the promise to adhere to the decisions of a delegate of sovereign power) further increases the options of sovereign nations. Thus, for example, a nation that can bind itself to a protocol limiting emissions of ozone-depleting chemicals[87] has more policy options available to reduce global depletion of the ozone layer than does a nation that lacks the ability to bind itself.

3. Democratic Legitimacy. — One prominent critic of international delegations, Professor Julian Ku, has argued that international delegations lack the democratic legitimacy of domestic delegations.[88] Ku argues that legitimacy is necessary for an organization to effectively im-

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[82] *See, e.g.*, RABKIN, *supra* note 20, at 34.

[83] Delegations to the United Nations Security Council and the methyl bromide exemption delegation in the Montreal Protocol are two examples.

[84] *See, e.g.*, Koremenos, *supra* note 18, at 152 (listing exit clauses as a way for countries to "minimiz[e] their sovereignty costs" in delegation).

[85] *Cf.* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (reframing delegations of legislative power as exercises of legislative power).

[86] *See* Hathaway, *supra* note 73, at 120–22.

[87] *See* Montreal Protocol, *supra* note 13.

[88] Ku, *supra* note 10, at 126–30.

plement the rules it makes.[89] But the "democratic deficit"[90] of international organizations means they lack that legitimacy on their own.[91] Moreover, these organizations cannot effectively acquire legitimacy through delegation from the U.S. government because that delegation is itself constitutionally suspect.[92] Thus, he argues, international delegations risk both tarnishing the legitimacy of the federal government and failing to confer legitimacy on the organizations to which it delegates.[93]

Ku's argument undoubtedly has some purchase. International organizations do lack certain legitimating features of federal agencies. For instance, international organizations are not subject to the same oversight as are most federal agencies, and as noted above, the officers of international organizations are not appointed by the President with the advice and consent of the Senate.

Nevertheless, there are problems with Ku's argument. Even if international delegations are somehow further from the democratic process than are other delegations, the relationship between that distance and democratic legitimacy is not obvious. For instance, the international bona fides of organizations like the United Nations and the World Trade Organization may be sufficient to render a delegation to an affiliated tribunal as legitimate as delegations to the EPA or the Securities and Exchange Commission (SEC) (not to mention delegations to private entities such as prison contractors). This intuition may hold true even if the tribunal can reasonably be said to be further from the cleansing ablution of the democratic process. Without any metric for measuring legitimacy, the answer to whether international delegations lack legitimacy comes down to a battle of intuitions between scholars, like Ku, who believe international delegation is illegitimate and those who believe international organizations provide important solutions to many global problems.[94]

Moreover, Ku's argument rests on a faulty assumption. He contends that U.S. consent to delegations cannot confer legitimacy unless the delegation adheres to the formal structure of the Constitution.[95] But the modern administrative state belies that argument. The contemporary federal government — with its so-called fourth branch —

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[89] *Id.* at 127.

[90] *Id.* (quoting Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 736 (1999)) (internal quotation marks omitted).

[91] *Id.*

[92] *Id.* at 128–29.

[93] *Id.* at 127.

[94] *See, e.g.*, Guzman & Landsidle, *supra* note 3, at 1693; *see also* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 434, 463–64 (2003) (arguing for an international judicial system as an effective tool for solving cross-border disputes).

[95] *See* Ku, *supra* note 10, at 128.

looks nothing like the Constitution's formal structure of three coordinate branches. Yet lingering questions about the legitimacy of domestic agencies do not appear to impair their efficacy.

4. Benefits of International Delegation. — Finally, to round out the welfarist account of international delegations, the benefits of international delegation bear mentioning. Unsurprisingly, international delegations have the potential to bring some of the benefits of domestic delegation to the international context, such as expertise[96] and flexibility.[97] But international delegations also have the unique benefit of facilitating cooperation where it would otherwise be difficult to achieve.[98] For instance, international delegations are especially helpful where states need to be able to make credible commitments to one another or to have confidence that anticipated disputes will be resolved fairly.[99] Facilitating cooperation may sound modest in the abstract, but with global collective action problems of sufficient urgency — perhaps climate change[100] or the proliferation of chemical weapons[101] — greater cooperation could mean the difference between successful global governance and calamity.

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Although all of these first-order policy arguments depend on empirical unknowns, one can draw two tentative conclusions. First, despite systematic differences between domestic and international delegations, there are good reasons to believe that the costs traditionally imputed to international delegations are no greater than those traditionally imputed to domestic delegations. Second, along with unique costs, international delegations confer unique benefits. Because there is no reason to believe that one systematically outweighs the other, these arguments leave the political branches facing the same task of weighing the individual costs and benefits that they would confront with domestic delegations or any other policy choice.

B. From Policy Premises to Institutional Conclusions

Even assuming that critics are right about the costs of international delegations, heightened scrutiny of international delegations would still

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96 *See* Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, LAW & CONTEMP. PROBS., Summer–Autumn 2005, at 225, 230 (discussing expertise as a benefit of domestic and international delegations to private entities).

97 *See* Koremenos, *supra* note 18, at 154 (noting that delegation is one means of efficiently handling complexity and uncertainty when designing international agreements).

98 *See id.* at 168–69. The delegation in the Montreal Protocol may be one example of this virtue of international delegations.

99 *See id.* at 169.

100 *See* Montreal Protocol, *supra* note 13.

101 *See* Chemical Weapons Convention, *supra* note 7.

be unlikely to enhance welfare for reasons of institutional design. The different types of heightened review fall along a spectrum from the most intrusive — where courts review the content and scope of delegations[102] — to the most light handed, where courts impose a predictable procedural or interpretive hurdle that effectively taxes delegations to international bodies. The spectrum of methods for scrutinizing international delegations likewise suggests a range of potential justifications for heightened scrutiny. This section begins by addressing a potential justification for extensive judicial interference: that the courts are better at distinguishing bad delegations than are the political branches.[103] It then discusses a potential justification for even the most light-handed judicial interference: that a tax on international delegations would enhance welfare.

1. Unaccountable Political Branches. — The most straightforward welfare-oriented justification for requiring courts to review international delegations is that they provide a necessary means to overcome the deficiencies of the political branches. The standard presumption is that the courts are not well positioned to second-guess the policy decisions of the political branches. There are circumstances, however, where courts may be better positioned than the political branches to evaluate international delegations — in particular, if the political branches are not subject to adequate electoral control.[104]

Assuming that the political branches are subject to sufficient electoral control to be entrusted with domestic delegations — a matter of debate that is beyond the scope of this Note — the political branches should likewise be entrusted with international delegations. If the first-order policy arguments discussed above were the only distinctions between domestic and international delegations, then this point would be obvious. Those policy arguments speak to the costs and benefits of

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[102] Under a sufficiently pliant standard (such as a reinvigorated "intelligible principle"), even a good faith attempt to police the formal separation of powers could evolve into a much more substantive review.

[103] This Note refers to those delegations that are net welfare increasing (where the benefits outweigh the costs) as "good" delegations. Conversely, it refers to those delegations that are net welfare reducing (where the costs outweigh the benefits) as "bad" delegations.

[104] There are at least two other situations in which one might prefer to give the courts, rather than the political branches, power over international delegations. First, even if the political branches are subject to adequate electoral control, one might believe that the electorate is likely to make worse policy choices than are courts. This situation is sometimes invoked to defend judicial review of individual rights. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). Second, the judiciary may be a necessary referee between the coequal political branches. Some scholars have invoked this role to defend review of separation-of-powers decisions generally. *See, e.g.*, Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 3, 6 (1998). This Note does not address these situations in depth, as no court or commentator has argued that they apply with greater force in the international context than in the domestic context. *Cf.* Ku, *supra* note 10, at 141 (arguing only that the courts' role in policing separation of powers should not be limited to the domestic context).

international delegations, not to the competence of the political branches to make them.

But those arguments are not the end of the story. In particular, Professor John McGinnis has argued that international delegations are more opaque to voters than are equivalent domestic delegations.[105] He contends that this opacity prevents voters from rewarding good decisionmakers and punishing bad ones.[106] The underlying premise is that voters cannot monitor what is delegated to whom or determine who is responsible when a delegate adopts an undesirable policy.[107] If those arguments are correct, then the political branches may have such an incentive to engage in rent-seeking delegations that the courts would be better suited to evaluate international delegations.

International delegations could be more opaque to U.S. voters than domestic delegations for two reasons: international delegates may exercise their authority through particularly convoluted chains of power,[108] or Americans may be especially unfamiliar with international institutions and their actions.[109] These sources of opacity are plausible but not obvious. While there are undoubtedly convoluted chains of command in international delegations, the same is often true of domestic delegations.[110] So even if international delegations create confusing chains of authority, that quality does not necessarily make those delegations meaningfully distinct from domestic ones.

Moreover, although Americans may be less knowledgeable about international institutions than about domestic ones generally,[111] that does not demonstrate that they are less able to monitor the issues they care about. Americans' relative ignorance may merely be correlated with, not caused by, the location of the issue. For instance, McGinnis and Professor Ilya Somin note that fifty-eight percent of survey respondents knew that the "U.S. Supreme Court [d]etermines [the] [c]onstitutionality of [l]aws," whereas only thirty-five percent claimed to have heard of the International Criminal Court.[112] These numbers

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[105] *See* McGinnis, *supra* note 1, at 1721. While McGinnis makes this argument in the context of proposing a procedural tax on international delegations, *see id.* at 1716, it bears mentioning here because the argument could theoretically support the stronger conclusion that courts are better than the political branches are at distinguishing the good delegations from the bad.

[106] *See id.* at 1721.

[107] *See* Stephenson, *supra* note 67, at 290.

[108] *See, e.g.*, Ku, *supra* note 10, at 121–26 (discussing the potentially convoluted chain of accountability involved in international delegations).

[109] *See* McGinnis, *supra* note 1, at 1721. As McGinnis puts it, "Americans know more about what is going on in Washington than Geneva." *Id.* (citing John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1212–14 (2007)).

[110] *See, e.g.*, Batterton v. Francis, 432 U.S. 416, 418–24 (1977) (describing a particularly convoluted delegation scheme).

[111] *See* McGinnis & Somin, *supra* note 109, at 1212–14.

[112] *See id.* at 1213.

may simply reflect that Americans are more ignorant about some international issues because they care less about them. Indeed, polls suggest that problems relating to international delegations do not rank among the issues Americans find most important.[113] Thus voters may monitor delegations of equal importance equally well in the domestic and international contexts. This interpretation is consistent with (but not proved by) the arguably small degree of authority delegated to international organizations[114] and the relatively larger press coverage of potentially significant international delegations (such as the creation of the International Criminal Court) than of smaller domestic delegations (such as copyright arbitration royalty panels).[115]

Even if Americans are more ignorant about international delegations than about domestic delegations of equal concern, however, it does not necessarily follow that they are unable to hold lawmakers to account. Voters do not need to know how an international organization works to punish the lawmakers who delegate power to it. Nor, given large-scale U.S. protests of World Trade Organization meetings,[116] does it seem likely that voters will fail to identify a source of displeasure simply because it comes from an international organization. Indeed, as commentators have noted in the domestic context, these arguments about delegations' reducing accountability depend on the questionable assumption that voters are semi-sophisticated[117] — attuned enough to politics to be upset, for example, that the United States has agreed to limit methyl bromide consumption but nonetheless unable to discern that the culprit for the limitation was a treaty signed by the President and ratified by the Senate. Moreover, if one credits the arguments that politicians lack ex post control over international delegations, then it may be in their self-interest to exercise restraint in making those delegations because any policy drift would necessarily contravene their policy preferences. The lack of ex post control could therefore prevent the political branches from taking advantage of any opacity to make rent-seeking delegations.

Finally, even if the opacity of international delegations casts a shadow on the desirability of leaving the political branches to their own devices, there are compelling reasons for courts to refrain from intervening

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113 *See Most Important Problem*, GALLUP, http://www.gallup.com/poll/1675/most-important-problem.aspx (last visited Jan. 8, 2012).

114 *See* Guzman & Landsidle, *supra* note 3, at 1694.

115 A search of the Major Newspapers database in LexisNexis for "copyright arbitration royalty panel" yielded 57 results as compared to over 3000 results for "international criminal court."

116 *See, e.g.*, Sam Howe Verhovek & Steven Greenhouse, *Seattle Is Under Curfew After Disruptions*, N.Y. TIMES, Dec. 1, 1999, at A1.

117 *See* Stephenson, *supra* note 67, at 290.

in this context.[118] Courts have long been reluctant to interfere with foreign policy decisions.[119] This reluctance flows from the superior democratic accountability and fact-gathering abilities of the political branches relative to the courts[120] and from the unique sensitivity of foreign affairs decisions.[121]

2. Judicial Scrutiny as a Tax on International Delegations. — In contrast to review of the content and scope of delegations, the less intrusive methods of judicial scrutiny can improve welfare even if the political branches are better at evaluating international delegations than the courts. As Professor Matthew Stephenson has argued, strategies such as clear statement rules can function as a tax on lawmaking, forcing lawmakers to internalize certain costs that they may otherwise undervalue.[122] This strategy is undoubtedly less problematic than is substantive review, which implicates all of the institutional problems discussed above and could have the further effect of reducing the quality of international delegations.[123] Nevertheless, there are reasons to be skeptical of its benefits.

Like imposing any tax, raising the enactment costs of international delegation should reduce the number of those delegations. Because of this reduction, there are two ways the tax can improve welfare. First, raising enactment costs should enhance welfare if the marginal delegations foregone as a result of the tax are bad. This situation would exist if, for example, lawmakers systematically undervalued certain costs of international delegation. However, as discussed in the previous section, the arguments impugning the ability of the political branches to responsibly delegate to international organizations leave serious doubts about this premise. Second, certain types of enactment strategies, such as those requiring a clear statement and those requiring evidence of meaningful deliberation, might enhance welfare by improving the average quality of international delegations enough to offset any reduc-

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118 One could argue that by giving domestic legal effect to international delegations, the courts become more involved in foreign relations rather than less. Nevertheless, that involvement is distinct from reviewing international delegations because it is necessarily at the direction of the political branches rather than in opposition to their instructions.

119 *See, e.g.*, Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111–12 (1948).

120 *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (noting that Congress is better equipped than courts are to evaluate empirical information); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1353, 1374 & n.137 (2001).

121 *See, e.g.*, *Chi. & S. Air Lines*, 333 U.S. at 111.

122 *See* Stephenson, *supra* note 54, at 4–6, 26. From a welfare perspective, this tax functions analogously to the multiple-veto-points framework that Professor Richard Fallon uses to defend judicial review of fundamental rights. *See generally* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008).

123 Scholars have long assumed that direct judicial review reduces the quality of legislation. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

tion in welfare as a result of losing some good delegations at the margin. No scholar has made this argument, however, and there are reasons to question its validity in this context. In particular, even if these strategies improve the quality of ordinary legislation, they may not be as effective in the context of multilateral agreements, where many parties are not subject to the same interpretive rules.[124]

Indeed, the context of multilateral lawmaking may undermine assumptions on which both enactment cost strategies rely.[125] In particular, for the tax to be worthwhile, it must impose greater costs on lawmakers than on society at large.[126] For international delegations, however, the social costs of a clear statement rule or similar strategy may exceed those of ordinary legislation. Rather than simply increasing the opportunity costs of lawmakers, these interpretive rules could weaken the hand of U.S. negotiators and derail unproblematic international agreements.

III. CONSTITUTIONAL CONSIDERATIONS

Although the previous Part casts doubt on whether a strengthened international nondelegation doctrine would be welfare enhancing, the U.S. Constitution is not merely a pact to maximize welfare. Indeed, by some lights, the welfare effects of international delegations are and should be irrelevant to their constitutionality.[127] This Part briefly discusses formalist and functionalist perspectives on the nondelegation doctrine, arguing that they do not warrant ignoring the welfare effects discussed in Part II.

A. The Formalist View of International Delegations

The formalist theory animating the conventional nondelegation doctrine is that, in order to enforce the Vesting Clause of Article I, the courts must prevent Congress from delegating any power properly thought of as "legislative."[128] Viewed narrowly, this formalist justification for the nondelegation doctrine should not distinguish between delegations to domestic and international delegates. If the problem is

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[124] *Cf.* Medellín v. Texas, 128 S. Ct. 1346, 1380–81 (2008) (Breyer, J., dissenting) (discussing the difficulties of expecting a clear statement of self-execution in treaties when the states-parties have different laws regarding domestic enforceability of treaties).

[125] *Cf.* Stephenson, *supra* note 54, at 16 (describing these assumptions).

[126] *Cf. id.* at 22–23 (discussing the prerequisite that courts "must be able to fashion doctrines that increase the private opportunity costs to policymakers more than the attendant social opportunity costs," *id.* at 22).

[127] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958 (2011) (describing conventional accounts of formalism as requiring adherence to constitutional text "*instead of* resorting to the broad purposes underlying it" (citing M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1138 (2000))).

[128] *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 408–09 (1928).

merely that an entity other than Congress is exercising legislative power, then the identity of the delegate should not change the calculus. And even if one argues that the characteristics of the power exercised vary according to the body exercising the power, there is no reason to believe that the power exercised by international entities is likely to be more "legislative" than are identical powers exercised by domestic entities.[129]

Yet formalists may also oppose international delegations on the distinct separation-of-powers basis that international organizations cannot properly be considered to exercise *executive* power. Under this theory, the lack of executive oversight over international delegations might be considered a violation of the Vesting Clause of Article II.[130] However, there are a few reasons to believe that this objection should not require a heightened nondelegation doctrine for international delegations. First, although the same distinction is potentially relevant in the domestic context, courts generally do not enforce it.[131] For example, Congress and the executive branch routinely delegate powers to private entities over which the President has little control.[132] Second, the degree to which a delegated power can properly be considered executive is susceptible to all of the same line-drawing problems that have prevented courts from effectively implementing the intelligible principle doctrine. Critics of international delegation might suggest the very clear rule of prohibiting international as opposed to domestic delegations, but at that point formalists could no longer purport to be faithfully policing the line between executive and nonexecutive exercises of power. For example, the delegation at issue in the Montreal Protocol required the unanimous consent of the states-parties to the protocol.[133] The President therefore effectively exercised veto power over any decisions made by the delegated body. Such close executive control arguably exceeds the level of oversight the executive branch

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[129] Indeed, the conventional wisdom is that the more a particular issue relates to international affairs, the more likely it is to fall into the category of executive power. *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–21 (1936) (describing international affairs as peculiarly within the scope of the executive power).

[130] *See* Ku, *supra* note 10, at 91–92.

[131] For example, courts have long sanctioned delegations to independent agencies notwithstanding the President's lack of control over them. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629–32 (1935) (upholding the constitutionality of the Federal Trade Commission notwithstanding removal restrictions). *But cf.* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (invalidating a delegation scheme as alienating too much executive power from the President by creating an accounting board with two levels of for-cause removal protection).

[132] *See, e.g.*, U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 567–68 (D.C. Cir. 2004) (discussing permissible subdelegations to private parties).

[133] *See* Montreal Protocol, *supra* note 13, art. 2H, para. 5; Natural Res. Def. Council v. EPA, 464 F.3d 1, 7 (D.C. Cir. 2006).

exercises over many domestic delegations.[134] Third, even as a general matter, it is far from obvious that international delegations ought to be considered less "executive" than domestic delegations. As discussed above, while the types of control the President exercises over international delegations may differ from those exercised over domestic delegations, it is not clear that the level of control is meaningfully reduced in the international context.

B. The Functionalist View of International Delegations

One would expect functionalists, unlike formalists, to take into consideration the welfarist arguments made in Part II when evaluating the constitutionality of international delegations. Functionalists have traditionally considered the nondelegation doctrine to be a means of preserving the benefits of the constitutional separation of powers.[135] These benefits are necessarily tied to the welfare effects of any distribution of federal power.[136]

For example, functionalists have traditionally been sympathetic to concerns about institutional capacity,[137] so the line-drawing and lack-of-expertise problems that make it difficult for courts to police good versus bad and limited versus excessive delegations should continue to carry weight in the international context. While functionalists would likely be troubled by problems such as a lack of democratic accountability and legitimacy and a loss of sovereignty, they would not necessarily assume that departures from constitutionally defined political structures inherently lead to those problems.[138] Instead, given the known welfare problems of enforcing the domestic nondelegation doctrine judicially, one would expect functionalists to be concerned about international delegations only after seeing evidence that international delegations actually fail to function.

Nevertheless, some functionalists may view certain separation-of-powers values as ends, apart from any welfare effects those values have. For instance, preserving the balance of power between Congress

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[134] For instance, the President's primary mechanism for control over the SEC is the power of appointment of commissioners, which is restricted by staggered terms and party affiliation. *See generally* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1135–55 (2000) (discussing the structure of independent agencies, including the SEC).

[135] *See, e.g.*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 994–95 (1983) (White, J., dissenting).

[136] *Cf.* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

[137] *See id.*

[138] *See Chadha*, 462 U.S. at 977–78 (White, J., dissenting).

and the President may be of independent concern for functionalists,[139] even where there is no immediate concern that shifting the balance in a particular context would be harmful in a utilitarian sense. However, given that functionalists tend both to adopt a permissive stance toward separation-of-powers concerns and to accord great weight to the welfare effects of institutional arrangements, one would expect them to embrace the application of the domestic nondelegation doctrine to international delegations.[140]

CONCLUSION

Although critics of international delegation raise many legitimate concerns about delegating federal power to international organizations, they have yet to justify imposing a strengthened nondelegation doctrine on international delegations. From a welfare-maximizing perspective, the charges laid against international delegations fall short. In particular, although the empirical evidence is sparse, there are good reasons to doubt that international delegations will have the negative effects that critics suggest. Even if these effects are confirmed, though, critics have not shown that those costs outweigh the potential benefits of international delegation.

More importantly, however, these first-order policy contentions are not enough to warrant a heightened international nondelegation doctrine. To justify increasing judicial scrutiny of international delegations, critics must make a distinct institutional design argument explaining why voters cannot rely on the political branches to make these policy choices or, alternatively, why courts are well positioned to veto the choices of the political branches. But critics of international delegation have shown neither that the political branches are especially liable to err in the context of international delegations nor that courts are especially well positioned.

To be sure, this analysis does not end the inquiry. The Constitution is not simply an instrument for maximizing welfare, and constitutional doctrines are not the only way to limit international delegations. Nevertheless, this analysis does suggest that courts should hesitate before invalidating or refusing to enforce international delegations on the basis of a constitutional or statutory nondelegation doctrine.

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[139] *See* Manning, *supra* note 127, at 1951 (describing functionalists as focused on respecting the "broad background purpose[s]" of the constitutional balance of powers).

[140] *See* Ku, *supra* note 10, at 76.