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Medellín and the Future of International Delegation

ABSTRACT. Given the rise of globalization and the need for international governance of problems of the commons, the delegation of binding domestic authority to international agents is likely to be an issue of growing importance. This Essay considers the extent to which U.S. law imposes constraints on such delegations and the extent to which those constraints will influence the structure of international delegations. International delegations of domestic authority raise even more profound problems of agency costs and democratic deficit than purely domestic delegations. The Supreme Court's recent decision in *Medellín v. Texas* reflects these concerns. By requiring a clear statement in U.S. law before giving domestic effect to the decision of an international agent (in this case the International Court of Justice), the Supreme Court raised the enactment costs of domestic delegations. Because the Court did not find such a clear statement in the treaties at issue in *Medellín*, it left unaddressed whether the Constitution otherwise constrains international delegations of domestic authority. The Essay considers the implications of four models—the administrative law model, the categorical constraint model, the categorical permission model, and the treaty model—for the policing of international delegations domestically and the improvement of such delegations internationally. It suggests that the treaty model—one by which the President and the Senate must authorize such delegations by treaty—may best reflect the original meaning of the Constitution. The Treaty Clause's requirement that such delegations be approved by a supermajority *ex ante* may also help address their *ex post* agency costs and democratic deficit.

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INTRODUCTION

Due to increasing technological acceleration and social complexity, modern government is administrative government. Globalization and the spillovers—actual and perceived—that it creates among nations increase the demand for international governance. The combination of these forces moves the world inexorably toward new forms of international administration. For instance, if nations establish a multilateral treaty to address global warming, it is likely that they will wish to delegate to international agents some responsibility for the complex regulation and enforcement of the treaty to make the scheme work.

Yet legal authority still springs from national sovereignty. Over the long history of the West, constraints have been developed to require domestic agents to deploy sovereign power for the public good. While in the United States these constitutional structures have been adapted to facilitate administrative government by delegating rulemaking and adjudicatory power to domestic agents, they have not seriously confronted the issue of delegating binding domestic power to international agents. Nor have international structures, for the most part, incorporated separation of powers or other constitutive mechanisms to require international agents to act for the public good.

International delegation of domestic power thus presents a dilemma for the separation of powers in an age of globalization. Delegation of legislative and executive power to international agents, including international courts, is likely necessary to address international coordination issues such as resolving problems of the global commons, like pollution. Yet such delegations raise dramatic problems of agency costs, because international agents' work is less transparent and less subject to control than domestic agents' work. Moreover, delegations create a substantial democratic deficit: the American democratic process by itself cannot control the international agent's exercise of authority, and nondemocratic states may exercise influence on the agent's appointment and decisions.

The question posed by such international delegations is much the same as that posed by the New Deal: how to permit effective governance while preserving the democratic accountability and constraints on interest groups provided by the U.S. Constitution.¹ In a world where the judiciary cannot itself

1. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 453-83 (1987) (describing some of the changes in legal doctrine that attempted to promote accountability and maintain freedom from interest group control through the exercise of control over administrative agencies by all three branches of government—executive, judicial, and legislative).

easily evaluate the need for international delegations but has reason to suspect that legislators will not internalize the costs to constitutional values, one way to achieve this objective is to raise the costs of enacting international delegations. Such rules would help assure that international delegations will be used only after substantial deliberation and only in circumstances in which they are likely to have substantial benefits.²

The recent decision in *Medellín v. Texas*³ reflects the U.S. Supreme Court's initial attempt to address the emerging problem of international delegation through a rule that imposes greater enactment costs on a provision that delegates binding domestic power to an international agent than on a provision that does not provide such a delegation. On its surface, *Medellín* creates two doctrinal puzzles. The *Medellín* majority required the equivalent of a clear statement before it would find that the treaties at issue gave domestic effect to the judgment of the International Court of Justice (ICJ). Yet the *Medellín* dissent correctly observes that such a requirement is more stringent than the rule the Court has traditionally applied in determining whether treaties are self-executing. The Court also rejected the argument that the President can give the ICJ's decision domestic effect with priority over state law. Yet, other recent cases have permitted executive foreign policy decisions to override state laws.

The salient difference from other cases that explains the result in *Medellín* is that the question at issue under the treaty was whether it delegated binding domestic authority to international agents—in this case, the ICJ. Because international delegations raise problems of democratic accountability and potential interest group exaction, the heightened standard for self-execution in the international delegation context helps to assure that legislative consent to the delegation is actual, deliberative, and transparent, thereby raising its costs of enactment. In contrast, permitting the President to bless delegations by himself would permit delegations that reflect lower enactment costs than ordinary legislation because executive authorization does not surmount either the treaty ratification process or bicameralism. Thus, if such delegations are to be effectively constrained, the President does not deserve the same latitude of deference as he does for a policy for which he alone is accountable. Understanding *Medellín* as the first jurisprudential foray into regulating

2. For a general discussion of “doctrines that raise the costs to government decisionmakers of enacting constitutionally problematic policies,” see Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *YALE L.J.* 2, 4 (2008).

3. 128 S. Ct. 1346 (2008).

consent to the domestic force of international delegation helps to dissolve its doctrinal perplexities.

The clear statement requirement of *Medellín* sets the stage for further debate about policing international delegations of domestic authority. While the Justices in *Medellín* all appeared to assume that a legislative process was available to delegate adjudicatory authority with binding domestic effect to the ICJ on this matter, other scholars have disputed the ability of Congress to delegate any binding authority to international agents.⁴ This view would categorically prohibit international delegations. Others argue that such delegations raise no serious constitutional questions and can be enacted through either treaty or congressional-executive agreement.⁵

In this Essay, I propose a third model that argues that such delegations are constitutional but only if expressly made through the treaty power. There is a good argument that the Constitution, as originally understood, requires the use of the treaty power to authorize an international tribunal or international agent to make decisions that can change the rights and obligations of U.S. citizens without the approval of our own political branches. If advice and consent under the Treaty Clause were required, international delegations would always require two-thirds of the Senate for consent. This supermajority rule also has attractions as a policy matter, because the higher hurdle of a supermajority rule may reduce the problem of democratic deficit and impede delegations that have high agency costs.

The relation between domestic law and international law is famously a “two-level game.”⁶ U.S. rules constraining international delegation domestically will influence in turn the development of international mechanisms to constrain international delegation. Because the United States remains the most important nation in the world, these latter rules will be shaped by the interest the international community has in obtaining her consent to international delegations with domestic effect. Thus, the rules imposing additional costs on consenting to binding international delegations may provide incentives for nations to improve these delegations’ quality by building into them internal checks and balances.

Part I of this Essay describes the necessity and dangers of international delegation and shows why delegations to international courts are not different

4. See *infra* Section III.B.

5. *Id.*

6. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 434 (1988); see also Oona A. Hathaway, *International Delegation and State Sovereignty*, LAW & CONTEMP. PROBS., Winter 2008, at 115, 117-19 (discussing the nature of the two-level game in the context of international delegations).

in kind from those to international agencies in terms of the problems of democratic deficit and agency cost exaction that they may cause. Part II analyzes *Medellín* from the perspective of international delegations and demonstrates that this analysis clarifies its otherwise odd doctrinal departures from previous law. Part III discusses various models through which the judiciary might reconcile international delegation of binding domestic power with constitutional principles. Specifically, it considers four models: (1) a model in which delegations would be permitted under congressional-executive agreements or treaties so long as the agreement or treaty contained a clear statement providing for the delegation, (2) a categorical prohibition model, (3) a categorical permissive model, and (4) a model permitting international delegations only through treaties. The administrative law model's requirement of a clear statement would be compatible with the treaty model, as *Medellín* itself shows.

In an Essay of this length, it is impossible to prove which model is superior, but Part III attempts to outline the pragmatic and positive considerations at stake in each model. It then considers how these models would in turn generate international constraints on the discretion of international agents who are to exercise binding domestic power. It ends by suggesting that the treaty model, a model that previously has not been defended, has the best grounding in the original understanding as well as a coherent and plausible policy case in its favor.

I. A COMPARISON OF DOMESTIC AND INTERNATIONAL DELEGATIONS

In an interdependent world, regulatory matters may often be too complicated to resolve by international agreement without leaving to agents the job of working out their details and implementation. But nations will not trust other nations' domestic agents to be faithful to the international scheme in implementation and enforcement for the same reason that they could not rely on national decisions to address the international problem in the first place. Thus, international agreements are likely to turn to international delegations for enforcement.

Some of these agreements will address matters on which there is consensus that there are spillovers from nation to nation that can be addressed efficiently

only at an international level.⁷ A prime example would be cross-border pollution. The recent global financial crisis might suggest more need for firmer international regulation of banks. Other agreements might address matters on which the wisdom of international regulation would be more contested. Lawrence Summers, the leading economic advisor to President Barack Obama, has suggested that international action may be necessary to harmonize labor standards and tax rates.⁸ These latter kinds of moves can be understood as a new New Deal for an era of globalization. Just as the old New Deal centralized decisions about many matters that were previously left to the states to decide, so the new New Deal would permit international institutions to decide matters previously left to nation-states. Whether prudent or unwise, such international initiatives may well involve delegations of some kind.

Even in the purely domestic context, modern legislation on such subjects almost invariably involves delegation, because its applications are too multifarious and the regulatory landscape it covers is too quickly changing for a comprehensive code written at a single instance to provide an effective regulatory tool.⁹ International agreements are not different; indeed, the need for delegation may be greater because the situations to be addressed are more heterogeneous among nations than within a single nation.¹⁰ Moreover, international actors, no less than legislators, might benefit from the expertise afforded by administrative agents.

International delegations can be of many types.¹¹ The delegated agent can consist of subgroups of the member states or of actual third parties.¹² The power delegated can be legislative, adjudicative, or regulatory.¹³ Given the brevity of this Essay, I will largely abstract from important nuances and

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7. See Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993, 1013 (2005) (“The conventional justification for public international law is the existence of important international externalities when decisions are made unilaterally.”).
 8. See Lawrence Summers, *A Strategy To Promote Healthy Globalisation*, Financial Times Economists’ Forum, May 5, 2008, <http://blogs.ft.com/economistsforum/2008/05/a-strategy-to-promote-healthy-globalisation>.
 9. See Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 90 (1994).
 10. Another way of putting this point is that it is efficient in some circumstances for international agreements to be incomplete contracts. See John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT’L L. 229, 251-52 (2003).
 11. See, e.g., Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 1.
 12. *Id.* at 6-9.
 13. *Id.* at 10-17.

concentrate on the distinction between delegations that possess binding force under U.S. law and those that do not. Only the former kind of delegation raises serious questions of legality under domestic law. If a delegation involves only an international law obligation, the political branches must bring that obligation into domestic law through the exercise of their domestic political powers, thereby making these branches, not the international agent, directly responsible for changing the law.¹⁴

U.S. law already contains examples of binding international delegation. Under the North American Free Trade Agreement (NAFTA), binational panels issue binding decisions on whether American companies can secure their rights under U.S. law to obtain additional duties against Mexican and Canadian companies that export products below cost.¹⁵ NAFTA was enacted through a congressional-executive agreement.¹⁶ Similarly, the Chemical Weapons Convention delegates the authority to conduct searches on the property of U.S. citizens in order to assure other nations that chemical weapons are not being assembled within the United States.¹⁷ The Convention on Chemical Weapons was passed as a treaty.¹⁸ Given problems of the global commons, we might expect international agents in the future to possess an even broader scope of responsibilities. For instance, under a Kyoto-like scheme for reducing carbon emissions, one issue that may arise is how to evaluate the amount of carbon that new technologies remove from the environment in order to determine how much an agency is reducing its emissions. Rather than reach new

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14. Some have questioned the relevance of this distinction on the theory that international law obligations can affect the behavior of the United States. See, e.g., Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1542 (2004). It is, of course, true that international obligations can have effects in the United States. But such an effect does not distinguish international obligations from other actions that do not have status under U.S. law. For instance, many other international and foreign actions also affect the United States and sometimes those acts are even taken in response to the actions of the United States or its citizens. In contrast, there is a clear distinction between acts that create obligations under U.S. law and those that do not. Moreover, the United States has a dualist tradition, see MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 85 (4th ed. 2003), and it simply does not view international legal obligations as having the same legal force as domestic law within our judicial system.
 15. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).
 16. NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).
 17. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 9, *opened for signature* Jan. 13, 1993, S. TREATY DOC. No. 21, 1974 U.N.T.S. 45, 343-44.
 18. The treaty was ratified on April 24, 1997. See Resolution of Ratification for the Chemical Weapons Convention, S. Res. 75, 105th Cong., 143 CONG. REC. 6247 (1997) (enacted).

agreements on the amounts such new technologies may offer as offsets as each technology is developed, nations may delegate the responsibility for making such calculations to international agents.¹⁹

A. *The Policy Concerns with Delegation*

The policy problems raised by international delegation of binding domestic authority are similar to those that were posed by domestic delegation of legislative or adjudicative authority during the rise of the administrative state. Over time, the Supreme Court crafted a series of compromises to permit large-scale delegation of power to the administrative state while attempting to ensure that constraints on that power would protect basic accountability and militate against interest group control.²⁰ My thesis here is that domestic delegations continue to have serious costs, despite the constraints of our domestic regime, but that international delegations are likely to impose even higher costs, in part because they are by their nature not subject to the constraints applied to domestic agents.

To understand the extent of the problems with the international delegation of binding power, it is useful to compare them with those of domestic delegation along two dimensions—democratic accountability on the one hand

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19. In an interesting recent essay, Andrew Guzman and Jennifer Landside suggest that international delegations are not very important. See Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CAL. L. REV. 1693 (2008). Oddly, the authors do not mention one particular international delegation in which the rights of Americans are determined today—the NAFTA binational panels. As my later analysis suggests, these panels may well be unconstitutional. See *infra* Subsections III.C.1, III.C.2. Moreover, three Justices on the *Medellín* Court believed that the delegation at issue in *Medellín* gave the ICJ's judgment "domestic legal effect." 128 S. Ct. 1346, 1383 (2008) (Breyer, J., dissenting). Guzman and Landside are generally correct, however, that international delegations, particularly of the binding domestic kind, do not yet bulk large in our legal order. But that is hardly a reason not to engage in serious analysis of their potential problems, particularly given that there is going to be more pressure for international delegations in the future for reasons that I discuss and with which these authors appear to sympathize. See Guzman & Landside, *supra*, at 1694.
20. See Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1255-59 (1989) (discussing the way that the Supreme Court made the administrative state more democratic through such doctrines as standing, reviewability, and requirements of rational decisionmaking); see also David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 513-16 (1987) (describing how the Court relaxed obstacles to the growth of the administrative state while retaining a role for judicial review of administrative action).

and agency costs and policy drift on the other.²¹ First, democratic accountability can be diminished by domestic delegations. Domestic administrative agents, like bureaucrats, are less directly controlled than are legislators (and the President) because bureaucrats are not elected and are not otherwise well monitored by citizens. Of course, this is true of international agents as well. But delegations to international agencies with domestic authority exacerbate the monitoring problem. International agencies are even less transparent than domestic agencies. Americans know more about what is going on in Washington than Geneva.²²

It is true that some scholars believe that the problem of domestic accountability is overstated, given the actual realities of politics.²³ Legislative responsibility is itself hardly a panacea for democratic accountability: members of Congress are only diffusely responsible for legislation, because there are so many of them.²⁴ In contrast, agencies are accountable to the President through appointment and, in most cases, removal.²⁵

Whatever one's view of the sufficiency of such indirect mechanisms of accountability, they are absent in the case of international delegations. By their nature, international agents are not going to be accountable to the President through appointment or removal. To be sure, the President of the United States can jawbone international agents in some circumstances, but that is nothing like the control afforded by the power of appointment and at least some degree of supervision afforded by Article II. Thus, on this dimension, as well as due to their relative opaqueness to the citizenry, international delegations raise more serious problems of democratic accountability.

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21. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2141-44 (2004).
 22. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1212-14 (2007) (using polling data to demonstrate Americans' comparative ignorance about international matters).
 23. See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985). For a collection and discussion of these scholars' work, see Merrill, *supra* note 21, at 2141.
 24. See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-53, 59-60 (1974) (suggesting that responsibility for legislation is quite diffuse except for locally focused legislation like pork barrel spending).
 25. Obviously the degree to which Congress can constitutionally insulate agencies from complete supervision of the President is quite hotly contested, but the better view—both as a policy matter and as a matter of the Constitution's original meaning—is that the President must have substantial supervisory authority. For the originalist case, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 610-11 (1994). For the normative policy case, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

The second problem for domestic delegations is that they often give power to interest groups and thus result in policy that drifts away from the policy ostensibly intended by the legislature.²⁶ This problem is analytically distinct from the problem of democratic accountability. Legislators are harder to capture than agencies, not simply because they are democratically accountable, but because legislatures are larger and more variegated.²⁷ The interest groups that can capture policy include groups outside the government who stand to gain or lose the most from the policies at issue.²⁸ They also can include the agents with delegated power, such as bureaucrats themselves, who may choose the policy that brings them the most material benefits or power through expanding their jurisdiction or choosing the policy that most aligns with their preferences.²⁹ These same dangers are certainly present with respect to international delegations as well. One particular danger of internal capture on the international level is that those working in the international arena are likely

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26. In an interesting article, Edward Swaine acknowledges problems of democratic deficit and agency costs caused by international delegations, but argues that they are nevertheless constitutionally redeemed because they advance the constitutional objective of diffusing power by constraining the federal government. See Swaine, *supra* note 14, at 1585-92. Setting aside whether it is permissible to read the Constitution's objectives at such a level of generality, I am skeptical of these claims as a general matter. In the usual case, international governance concentrates power by eliminating jurisdictional competition. See Neil S. Siegel, *International Delegations and the Values of Federalism*, LAW & CONTEMP. PROBS., Winter 2008, at 93, 102 (critiquing Swaine's thesis on these and other grounds). It is thus odd to see international delegation as performing the same functions as federalism, the hallmark of which is jurisdictional competition. Second, given the influence of nondemocratic states on international law and institutions and the remoteness of those institutions from government control, their decision-making process is likely to be seriously flawed. See McGinnis & Somin, *supra* note 22, at 1196-1217; Siegel, *supra*, at 103 (noting the lack of responsiveness in international systems). The American constitutional system does not seek diffusion of power, whatever the cost in faulty decisionmaking.
27. Cf. Merrill, *supra* note 21, at 2143-44 (describing this argument). Merrill disagrees that legislatures are harder to capture than domestic agencies, because of the presence of structural checks. *Id.* at 2144. I argue below that these checks are not present in the international arena. See *infra* notes 35-43 and accompanying text. It may well be that the problems of democratic accountability and agency costs are related, however. Delegations have been well analyzed as a device that helps Congress avoid accountability and reward special interests at the expense of the public. See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982). Congress's electoral incentives thus do not always preserve democratic accountability or constrain nontransparent interest group exactions. This fact provides a policy justification for creating constitutional constraints on legislative delegation.
28. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2354 (2001) (noting that agencies may respond to interest group lobbying rather than expertise).
29. See William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617, 618-24 (1975).

to have a more cosmopolitan view that favors international decisionmaking at the expense of national power, and so will have a bias in favor of expanding the scope of international agreements.³⁰

As with democratic accountability, some scholars argue that the danger of interest group capture in particular and policy drift in general is exaggerated.³¹ They note, for instance, that a popularly elected legislature and executive oversee agencies. Legislators conduct oversight hearings which bring policies to light and can even hasten the departure of agency heads.³² Presidents have set up a centralized system located in the Office of Management and Budget, which is less subject to special interest influence, to review regulations before they are issued.³³ Finally, at least in most circumstances, agency action is subject to judicial review for legality.³⁴

By their very nature, however, international delegations do not face such constraints.³⁵ International agents are not responsible to the President of the United States or Congress and need not, as a matter of international law, be responsible to domestic courts.³⁶ As a result, once again the problem of capture and agency cost are likely substantially more profound at the international level than at the domestic level.³⁷

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30. Cf. McGinnis & Somin, *supra* note 22, at 1204 (discussing international courts' interest in expanding the scope of international law).
 31. See Merrill, *supra* note 21, at 2144 (summarizing the literature specifying constraints on the behavior of domestic agencies).
 32. See JESSICA KORN, *THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO* 10 (1996) (noting the strength of legislative oversight).
 33. See Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1176 n.101 (2001).
 34. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320-94 (1965) (discussing the presumption in favor of judicial review of administrative action).
 35. Eric Posner and Adrian Vermeule argue that domestic delegations pose no serious problems because, among other things, Congress can override agency actions and the public can prevent transfers to interest groups to the extent they can do so in ordinary legislation. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1746-52 (2002). Edward Swaine has argued that they cursorily and "too readily" extend their analysis to international delegations. See Swaine, *supra* note 14, at 1558 & n.280.
 36. Cf. Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 409 (1987) (noting that as presidential control over decisions becomes more attenuated, agency costs rise).
 37. See 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 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—

It is true that international delegations can be repealed by Congress. But that is true of domestic delegations as well, and the power of repeal has not been thought a complete solution to the democratic deficit and interest group exactions that even purely domestic delegations pose.³⁸ First, legislatures can address a limited agenda at any one time and thus legislative inertia would be on the side of even an unpopular decision.³⁹ Moreover, agents, whether international or domestic, can strategically make decisions that take account of the veto points in the elaborate legislative process that may block their being overruled, even if overruling their decisions would have very substantial support. For instance, to obtain a legislative overruling, opponents of agency action must generally gain the support of the chairmen of relevant committees, committee approval, and support in both houses. It is for these reasons that Congress itself believed that for it to exert effective control over even domestic delegations, it needed a device more targeted and streamlined than its ordinary legislative powers, like the legislative veto.⁴⁰

Moreover, as a practical matter, Congress has less power over international delegations. While it can pass legislation to abrogate the agreement and thereby the exercise of delegated power, it cannot unilaterally modify the international regime.⁴¹ To accomplish that goal it would have to persuade its international partners. This difference effectively reduces Congress's authority over international delegations as compared to its authority over domestic delegations.

If international delegations were embodied in a treaty, on some theories of executive power, the President could unilaterally terminate the treaty.⁴² But

particularly the ability of the United States to overturn decisions of transnational bodies, which would require the amendment of a treaty.”).

38. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 113 (2008) (“[O]nce a treaty comes into effect, the burden of overcoming legislative inertia to supersede can be substantial because repealing a measure is always more difficult than enacting it in the first place.”).
39. See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 232 (1984).
40. See E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 150-60 (describing the legislative veto and other modes of legislative control).
41. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 682-83 (1997) (discussing the limited options of legislatures with respect to international matters).
42. For a discussion of the controversy over whether the President enjoys this power, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1323-25 (2008).

even if the President possessed such a power, it would not provide the equivalent of the Presidential power of supervision over administrative agencies, because it gives the President a blunderbuss rather than a scalpel. Consider a similar structure for a domestic delegation. If the President were deprived of his supervisory power over the Environmental Protection Agency (EPA), including his power to fire the administrator, but were permitted, if he chose, to abrogate the entire Clean Air Act, the EPA Administrator would enjoy huge discretion to take action at variance with the President's wishes. Terminating the Clean Air Act is itself likely so costly to the President that its value as a mechanism of bureaucratic control is slight.⁴³

B. The Analogy to Article I Courts

One might argue that the better analogy for some forms of international delegations is not to administrative agencies but to non-Article III courts. For instance, if Congress gives direct effect to the ICJ's interpretation of a treaty

43. The above analysis considers democratic accountability, agency capture and policy drift from the perspective of the United States, because the doctrinal issue to be considered here is authorizing delegations that have binding effect in U.S. law. It should be noted, however, that the problems of democratic accountability and policy drift do not look much different if viewed from a more universal welfarist rather than an American perspective. First, consider democratic accountability. Democratic governments other than the United States are likely to face similar problems: their ordinary structure for monitoring and controlling domestic agents will not be applicable. Moreover, in the international realm, wholly nondemocratic nations can wield influence on the appointment and actions of international agents, exacerbating the democratic deficit. See McGinnis & Somin, *supra* note 22, at 1204-05. The problem of policy drift from an international rather than American perspective is more complicated, but on balance still is not favorable to international delegations. Once again governments individually have greater problems in controlling policy drift because they individually enjoy less supervision of international agents. Second, even collectively governments face the well-known difficulty that multiple principals have more difficulty controlling an agent than a single principal. See Swaine, *supra* note 14, at 1560-61 (discussing how the fact of multiple principals may inhibit the policing of delegations).

One possible counterargument is that international agents are less likely to be dominated by a particular interest group, because their appointment will reflect very disparate interest groups that dominate nations differently situated. This point can be seen as a global version of Madison's argument for the large republic in *The Federalist Papers*. See THE FEDERALIST NO. 10 (James Madison). The multiplication of interests is certainly one advantage of an international as opposed to domestic delegation. Nevertheless, transnational ideological interest groups may face fewer constraints in the less transparent international arena. Indeed, the leadership of nongovernmental organizations (NGOs) may be unaccountable even to their members. See Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 963 (1996).

and makes that interpretation binding in the United States, it would appear to be delegating power to a court, rather than to an administrative agency, both because the ICJ has the trappings of a court and because the ICJ would be given authority to interpret the law rather than exercise discretion.

Nevertheless, I am not sure that this is a better analogy. Within our domestic regime, we do not regard the actions of courts in interpreting a law as a delegation of legislative or executive power because of the position of courts in our system of separation of powers. But international institutions are not defined by the separation of powers of our polity, and thus there is no assurance that institutions labeled courts will behave the way courts do within our system. In particular, federal courts in the United States are defined by characteristics, such as life tenure and a democratic appointment process, that may not characterize international courts. Moreover, judges on international courts may come from traditions that do not recognize or at least honor a distinction between discretion and formal obligation.⁴⁴

In any event, a comparison of international courts with Article I legislative courts again suggests that international courts are more problematic than the non-Article III courts to which Congress is permitted to delegate adjudicative power within the domestic regime. There are few more vexed and confusing subjects in federal law than the constraints on Article I courts, but for our purposes we can focus on just a few aspects of their doctrinal structure. The more categorical view of Article I courts preserves the Article III role of the judiciary in declaring federal law by sharply limiting Article I courts' permissible scope to a few prescribed categories, including military tribunals and public rights (for example, money claims against the government).⁴⁵ Even the more flexible view of Article I courts, which has attempted to harmonize the necessary adjudicative capacity of the administrative state with the values reflected by Article III, suggests that delegations of authority to Article I courts must "give[] an article III court ultimate power to control the legality and constitutionality of the powers asserted and exercised."⁴⁶ But if the judgments of international courts are given direct effect in the United States, there will be

44. Of course, even in the United States, where this distinction is widely recognized and courts are subject to the various constraints discussed below, the distinction is not always honored.

45. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-70 (1982) (plurality opinion). The private rights/public rights distinction is ably criticized in Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 210-14.

46. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 268 (1990); see also Redish, *supra* note 45, at 226-27 (arguing that effective appellate review offers a way of reconciling Article I courts with the Constitution).

no power of appeal to review such cases for legal error. By its very nature, the power of international courts to issue binding legal interpretations not reviewed by Article III courts gives them even more unaccountable power than the run of legislative courts.

Moreover, even in cases in which current law would not require Congress to provide such an appeal, international courts are more problematic than Article I legislative courts for some of the same reasons that international agencies are more problematic than domestic agencies: they have greater problems of democratic deficit and susceptibility to interest group influence.⁴⁷ Members of Article I courts are either appointed by the President and subject to Senate confirmation or are appointed by officials themselves subject to the confirmation process.⁴⁸ In contrast, international courts do not necessarily have a transparent or accountable appointments process.⁴⁹

For instance, the ICJ offers an example of a court not subject to meaningful democratic control. While appointments are made by the United Nations, they effectively reflect the influence of national governments and regional blocs.⁵⁰ Many of the justices hail from governments that are themselves authoritarian and not democratic.⁵¹ Even democratic nations do not nominate their justices for a U.N. appointment through a process that has the scrutiny, deliberation and legislative participation that characterizes appointments to Article III courts.⁵² As a result, elites interested in international law may have particular leverage in the process.

These problems might even more substantially afflict courts with more specialized jurisdictions (such as jurisdiction to adjudicate labor rights), because interest groups might take advantage of the lack of transparency to install candidates sympathetic to their cause. Yet, even though international courts need not possess the various characteristics of domestic courts that

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47. Cf. Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1208 (2005) (noting the relative lack of domestic legitimacy of international tribunals).
 48. Even in the case that gives perhaps the broadest scope to Article I tribunals, the arbitrators are themselves appointed by the head of the Federal Mediation and Conciliation Service, an official who is appointed by the President and confirmed by the Senate. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 574 n.1 (1985).
 49. See Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 538 (2003) (voicing concern about the lack of accountability of international court judges).
 50. See McGinnis & Somin, *supra* note 22, at 1203; Mark L. Movsesian, *Judging International Judgments*, VA. J. INT'L L. 65, 97 (2007).
 51. McGinnis & Somin, *supra* note 22, at 1203.
 52. Movsesian, *supra* note 50, at 97 (“[T]he ICJ Statute omits domestic political authorities from the resources it recommends that national groups consult in making nominations, referring them instead to high court judges and professors of international law.”).

assure greater accountability and reduce interest group influence, their designation as courts can trade off the reputation that courts have in this country for objectivity.

II. SOLVING THE PUZZLES OF MEDELLÍN

In *Medellín v. Texas*, the Supreme Court held that a decision of the ICJ interpreting a treaty was not directly judicially enforceable in U.S. courts.⁵³ Further, it held that the President could not unilaterally give the decision direct effect. Thus, the case turned on the question of whether to give direct domestic effect to a delegation of authority to an international agent.

At issue was a decision by the ICJ about the obligations of the United States under the Vienna Convention on Consular Relations. In the case *Avena and Other Mexican Nationals*,⁵⁴ the ICJ interpreted the Convention to hold that Ernesto Medellín and fifty other named Mexican individuals had the right to reconsideration of their convictions, because they had not been notified of their right to consult with consular officials.⁵⁵ According to the ICJ, Medellín enjoyed this right even though his lawyer did not raise the issue at trial and relevant state criminal procedure rules hold that rights not raised at trial are waived.⁵⁶ Texas, the state in which Medellín was convicted, refused to follow the ICJ's order.⁵⁷ The President then issued an order stating that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the decision."⁵⁸

A. Medellín's First Puzzle

The first legal question in the case was whether the treaty sources at issue that provide authority to the ICJ were self-executing. Self-execution in this context refers to the question of whether the treaty was intended to create a

53. 128 S. Ct. 1346 (2008).

54. *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

55. *Medellín*, 128 S. Ct. at 1355.

56. *Id.*

57. *Id.* at 1356.

58. See Memorandum from President George W. Bush on Compliance with the Decision of the International Court of Justice in *Avena* to the U.S. Att'y Gen. (Feb. 28, 2005) (on file with author), available at http://brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf.

direct domestic as well as an international legal obligation.⁵⁹ In *Medellín*, the primary treaty at issue was the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention.⁶⁰ This treaty provides “compulsory jurisdiction” to resolve disputes to the ICJ.⁶¹ The ICJ statute, an annex to the U.N. Charter, which is also a treaty that the United States has ratified, in turn provides that “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”⁶²

The *Medellín* majority held that these treaties were not self-executing under these circumstances and that the ICJ decision was thus not binding as domestic law.⁶³ It began with a presumption that a treaty “ordinarily depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.”⁶⁴ To hold a treaty enforceable as domestic law, the Court stated that it must find an express intent by Congress to do so. In particular, given that ICJ decisions can interfere with state procedural rules, “one would expect the ratifying parties to the relevant treaties to have *clearly stated* their intent to give those judgments domestic effect.”⁶⁵

The majority did not find that either the Protocol or the ICJ statute contains such a clear expression of intent. The Protocol grants jurisdiction but does not expressly refer to the domestic effect of such jurisdiction. To be sure, the ICJ statute suggests that states will “undertake[] to comply” with the ICJ’s rulings.⁶⁶ But the Court suggested that this statute’s authorization of recourse to the Security Council to remedy noncompliance undercuts the implication that ICJ decisions have direct effect within a national legal system.⁶⁷ Thus,

59. By direct domestic obligation, I mean one that is automatically or immediately enforceable in U.S. courts. See Carlos Manuel Vasquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 651 (2008) (arguing that when a treaty is potentially enforceable in courts, non-self-execution means that the treaty is enforceable “only *indirectly*—that is, pursuant to implementing legislation or other appropriate action by the political branches”).

60. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820.

61. *Id.*

62. U.N. Charter art. 94, para. 1.

63. 128 S. Ct. 1346, 1361 (2008).

64. *Id.* at 1357 (internal quotation marks omitted).

65. *Id.* at 1363–64 (emphasis added).

66. U.N. Charter art. 94, para. 1.

67. *Medellín*, 128 S. Ct. at 1359.

neither the Vienna Convention nor the ICJ statute provides an unambiguous direction to give the ICJ decision direct effect.⁶⁸

The majority observed in particular that its reading of the U.N. Charter would allow the political branches of the United States to make a decision about whether to give effect to the ICJ's decision:

[Medellín's] construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment—again, always regarded as an option by the political branches—any more than courts may consider whether to comply with any other species of domestic law.⁶⁹

This observation shows the Court's special concern with the loss of democratic accountability that could follow from a binding delegation and reveals the function served by what is in effect a clear statement rule.

The Court's stringent requirement for finding self-execution, if not its result, creates something of a doctrinal puzzle. As the *Medellín* dissent shows,⁷⁰ there is a wide variety of cases in which the Court has held that a treaty gives rise to domestic effects without a clear or even express statement to that effect. The *Third Restatement of the Foreign Relations Law of the United States* suggests that congressional intent is the key criterion for self-execution.⁷¹ Scholars have argued quite persuasively that the constitutional text creates a presumption in

68. See *id.* at 1363, 1369; see also *id.* at 1381 (Breyer, J., dissenting) (noting that the treaties at issue “do not explicitly state” that ICJ decisions are to have direct effect).

69. *Id.* at 1360 (majority opinion).

70. *Id.* at 1392-93 (Breyer, J., dissenting).

71. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1986) (stating that a treaty is non-self-executing “if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation”). Indeed, some have suggested that the *Restatement* creates a presumption in favor of self-execution. Whether the *Restatement* is correct as a normative matter is much disputed. I do not have space to resolve the question of what is the right standard for self-execution as an original or normative matter. My point is simply to show that the *Medellín* Court applied a more heightened standard for self-execution than a fair reading of the doctrine suggests.

favor of self-execution.⁷² Neither view would incorporate any requirement of an express or clear statement. Whatever the result of *Medellín* should have been under a more traditional application of the self-execution rule,⁷³ what is striking about the case remains the Court's presumption against self-execution in the absence of a clear statement to the contrary.

An explanation for the effective clear statement rule in *Medellín* is that the question here is not simply whether the provisions of the treaty are self-executing and thus bind our courts, but also whether the Senate and the President have delegated interpretive authority to an international agent that itself will have direct effect under domestic law. The question of international delegation raises issues of democratic deficit and interest group exaction that are not posed by the consideration of self-execution in the usual case. The Court's analysis is thus informed by considerations that are familiar from the law of domestic delegations. As Thomas Merrill has observed, all domestic delegations should be examined under two postulates.⁷⁴ First, only Congress may delegate legislative power—this postulate is the “exclusive delegation doctrine.”⁷⁵ Second, Congress may not delegate unconstrained legislative power—this postulate is the nondelegation doctrine.⁷⁶ Although the postulates are in some tension with one another,⁷⁷ both provide an analysis of delegations of legislative power under domestic law that suggests by analogy that a clear statement rule should be applied to international delegations.

As to the first postulate, while Congress is free to delegate as it chooses, an agency can obtain the authority to make domestic law only if Congress has stated that it has this authority.⁷⁸ To assure that this has been done, Congress must delegate expressly and in a manner that is transparently clear.⁷⁹ While the

72. See, e.g., Vasquez, *supra* note 59, at 602 (suggesting that treaties impose a presumption of self-execution, but that presumption may be defeated if, among other reasons, the treaty “imposes an obligation that requires the exercise of nonjudicial discretion”).

73. Justice Stevens clearly believes that the treaty is not self-executing, while disagreeing with the Court's “presumption against self-execution.” *Medellín*, 128 S. Ct. at 1372-73 (Stevens, J., concurring).

74. See Merrill, *supra* note 21, at 2098-99.

75. *Id.* at 2099.

76. *Id.*

77. *Id.*

78. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199 (1998) (arguing against interpreting ambiguous statutes as delegations, given that Congress knows how to delegate expressly).

79. For instance, *United States v. Mead Corp.*, 533 U.S. 218 (2001), represents a step in this direction by denying the U.S. Customs Service *Chevron* deference for its letter ruling, because Congress had never expressed a clear intent to give such rulings binding legal force.

Court has not always followed this postulate in domestic delegations, it has done so recently and it remains an ideal, because it helps to assure fuller accountability for its decisions to delegate.⁸⁰ Similarly, in the case of an international delegation, the Court's attempt to find a clear statement of congressional authorization of direct effect reflects an appropriate insistence that Congress delegate its power to an international agent clearly and transparently.⁸¹

Second, the Supreme Court itself has often translated the nondelegation postulate into a clear statement canon of construction that requires Congress to speak clearly when it delegates to a degree that raises concerns about constitutional values like accountable government and policy control by interest groups.⁸² For instance, the Court has interpreted delegations narrowly, even if a plausible construction of the delegation is much broader.⁸³ This practice has been praised as a less draconian way than the nondelegation doctrine to address the costs of delegation.⁸⁴

As we have discussed above, any international delegation is likely to raise substantial issues of democratic deficit and interest group exaction. Thus, in

See id. at 239 (Scalia, J., dissenting) (complaining that “[w]hat was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent”).

80. Clear statement rules in this context can also protect federalism, because binding international delegations can replace state authority, as they would have in *Medellín*. *See United States v. Bass*, 404 U.S. 336, 349 (1971) (“In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”).
81. The Court itself makes this clear. *See supra* note 69 and accompanying text.
82. The Court has recognized the deployment of the nondelegation doctrine as a canon of construction. *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (“In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”).
83. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-61 (2000) (interpreting the Food, Drug, and Cosmetic Act narrowly so as not to permit the regulation of cigarettes); *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (favoring a narrow construction of a statute to avoid a broad reading that might have raised questions under the constitutional delegation doctrine).
84. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 CHI. L. REV. 315 (2000); *see also id.* at 320 (discussing problems of democratic accountability); *id.* at 321 (discussing problems of interest group influence). *But see* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (criticizing the canon as altering the content of statutes and avoiding the constitutional question of nondelegation).

this context the nondelegation doctrine itself suggests that the Court should police the existence of an international delegation by requiring a clear statement. Responding to the problem of democratic deficit, such a requirement would help to assure that democratic representatives create such a deficit knowingly and transparently. Responding to the problem of interest group exaction from delegated authority *ex post*, the requirement would provide an opportunity for the diffuse citizenry (as opposed to interest groups) to oppose or narrow these delegations *ex ante*. Thus, the Court in *Medellín* acted in a way that is familiar in the context of domestic delegation for both the reasons underlying the exclusive delegation and nondelegation doctrines.

One possible response is to say that this analysis would be correct if Congress were delegating discretionary power to an international agency, but here it is delegating interpretive power to a court. But we have already discussed in Part I the functional similarities between international agencies and international courts. These provide similar functional justifications for applying the nondelegation and exclusive delegation rationales underlying the clear statement canon to international delegations.⁸⁵ Thus, whether one analogizes the ICJ to an administrative agency or an Article I tribunal, the *Medellín* Court had a substantial reason to require Congress to be explicit about giving it binding domestic authority.⁸⁶

B. *Medellín's Second Puzzle*

The second holding of *Medellín* also creates a doctrinal puzzle. There the Court held that the President had no authority to require state courts to comply

85. The *Medellín* Court was particularly aware that the decision to give final review authority to the ICJ could make a dispositive difference in the outcome. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court itself had occasion to decide the same issue as the ICJ did in *Avena* and came out with a contrary decision: that the Vienna Convention created no obligation for a state to give up its procedural rules to permit collateral or appellate consideration of whether a defendant was prejudiced by the failure of the government to permit him to consult with his consulate.

86. *Medellín* thus reflects the view of two scholars in particular, Curtis Bradley and Julian Ku, who have argued for a clear statement rule. See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587 (2003) (arguing for a presumption that delegations “do not create enforceable [domestic] law unless and until they are implemented by Congress”); Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 7 (2006) (arguing that U.S. courts should employ a “super-strong clear statement” rule before concluding that international delegations have domestically binding effect). Bradley briefly suggests this view of *Medellín* as well. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 547 (2008).

with the ICJ decision.⁸⁷ The perplexity here is that the Court has in the past permitted the President to deploy executive power to settle disputes with foreigners pursuant to his power over foreign affairs. Most recently, the Court in *American Insurance Ass'n v. Garamendi* upheld the President's authority to preempt state procedural rules on disclosure by executive agreement.⁸⁸ The executive agreement in that case concerned claims by those who had been deprived by Nazi Germany of their right to collect insurance proceeds.⁸⁹ The current German government agreed to establish a foundation to address and pay these claims.⁹⁰ The President successfully argued that the disclosure laws that California imposed on insurance companies interfered with this scheme and thus the President could preempt the California law through his unilateral foreign affairs power.⁹¹ Similarly, the President's decision to preempt state law in *Medellín* could be plausibly seen as an exercise of his dispute resolution authority and his ability to preempt inconsistent state laws.⁹² Once again, the perspective of international delegation explains why the Court did not permit the President to give effect to the ICJ decision,⁹³ despite the recent decisions that favored executive authority to override state decisions in the area of foreign affairs. The difference in those cases was that the President himself acted to advance his vision of foreign policy, assuring accountability. Here, however, the President was implementing a delegation to an international body that was itself acting without clear congressional authority. For reasons discussed above, administrative law requires the delegation to be made by those who have the power to delegate. Because the action in this case was undertaken by a treaty, the decisionmakers include the Senate as well as the

87. *Medellín v. Texas*, 128 S. Ct. 1346, 1371-72 (2008).

88. 539 U.S. 396 (2003).

89. *Id.* at 401-02.

90. *Id.* at 405-08.

91. *Id.* at 421-27.

92. The Court distinguished *Garamendi* and other dispute settlement cases on the view that they were based on a practice of making executive agreements and settling civil claims between American citizens and foreign nationals or governments—a practice in which Congress has acquiesced. *Medellín*, 128 S. Ct. at 1372. The basis for these distinctions is not entirely transparent. The fact that the President is settling a case pursuant to a treaty rather than an executive agreement would seem to strengthen his case, because other representatives of the federal government have specifically endorsed the international instrument whose interpretation he is invoking to preempt state law. It is also unclear why interfering with state property rights is so much less problematic than interfering with state criminal laws.

93. *Id.* at 1368.

President.⁹⁴ As a result, the President could not unilaterally delegate power to the ICJ.

Moreover, the President's action blurs the accountability for displacing state law. Indeed, the President had carefully distanced himself from the merits of the ICJ decision, withdrawing the United States from the Optional Protocol after the *Avena* decision was rendered.⁹⁵ The Court has previously been concerned with protecting the transparency of structural lines of authority. In *New York v. United States*, it declined to allow Congress to order the states to pass legislation, because such orders blurred accountability, allowing each agent of government to evade responsibility by blaming the other for the order.⁹⁶ Similarly, in *Medellín*, the action of the President risks confusion, because the President is able to blame the ICJ rather than take direct accountability for the decision.

It might be argued that the focus on accountability does not offer a strong distinction between other cases of executive power in international affairs, because the President often uses his power reactively to make the best foreign policy decision given the constraints of the world. The President may settle a foreign nation's claims even if he would not agree with those claims on the merits. On this account, the ICJ decision is just another fact of the international world to which he is reacting. The difference in this situation, however, is that the ICJ would not have had this authority without a previous legal decision of the United States. As a result, the United States's legal regime has the opportunity to impose constraints *ex ante* to maximize accountability *ex post*.

Consider this domestic analogy: The President can be delegated power conditional on an event happening in the world. But he cannot be delegated power conditional on the delegation of authority to others outside his control. For instance, the President could be delegated the authority to bail out certain companies conditional on interest rates going above a certain rate. But the President cannot be delegated the authority to bail out certain companies only if the presidents of certain banks first say the bailout is in the public interest.⁹⁷

94. If the delegation were made by a congressional-executive agreement, the decisionmakers would include both houses of Congress as well as the President.

95. See Adam Liptak, *U.S. Says It Has Withdrawn from World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16. The Bush Administration had also filed a brief in *Sanchez-Llamas* disagreeing with the ICJ's decision. Brief for the United States as Amicus Curiae Supporting Respondents, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51 & 04-10566), 2006 WL 271823.

96. 505 U.S. 144, 183 (1992).

97. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-12 (1936) (invalidating delegation to private individuals).

The difference is that in the latter case the structure of the U.S. law itself diffuses accountability.

Understanding delegation as central to the outcome in *Medellín* not only underscores its significance for future delegations, but diminishes its significance for future cases that do not concern delegation. It suggests that the Court may well apply a less stringent test for self-execution in cases which do not concern delegation and be more sympathetic to the use of the President's foreign affairs power in cases where the President advances some goal of his own rather than simply gives effect to an international delegation of power.

Because the Court did not find the clear statement necessary to create domestically binding international authority, it did not reach any questions of whether the Constitution prohibits binding international delegations or restricts the form they may take. But given the social trends described in the Introduction, the Court will not long be able to avoid such issues. It is to those questions we now turn.

III. THE FUTURE OF INTERNATIONAL DELEGATION

This Part discusses possible models for future Supreme Court doctrine on the international delegation of domestic power and their consequences for the structure of international delegations themselves. The first model is that which is implicit in the analysis of *Medellín* above: just as Congress should expressly delegate authority in the purely domestic regime, Congress by statute or the President and the Senate by treaty must expressly authorize the direct effect of the international delegation. As a result, delegations would be permissible but only if clearly stated. I then consider two models together—the categorical constraint and categorical permission models—because they are mirror images of one another. The categorical restraint model posits that because international agents are not appointed according to the Appointments Clause and do not follow other structural constraints of our Constitution, they cannot exercise any power under domestic law. Under this theory, international delegations could not have direct effect. The categorical permission model posits that because international agents act under international law and thus neither interpret U.S. law nor hold office under it, they are not subject to the Appointments Clause or constraints on Article I judges. Under this theory, international delegations raise no serious constitutional issues and should be constrained by no special rules.

The final model would permit delegations, but would require them to be authorized by treaties. According to this model, only the treaty power contemplates the authorization of foreign or international agents to exercise authority that would have binding effect under U.S. law. As a result,

international delegations would be subject to a two-thirds supermajority rule for approval. This model could also incorporate the administrative law model, requiring the consent to delegation to be express.

A. The Administrative Law Model

The requirement adumbrated in *Medellín*—that Congress by statute or the President and the Senate by treaty must clearly provide for the binding authority of international delegation—may become the model for addressing international delegations. That requirement would derive from the exclusive delegation doctrine applied now in the international sphere. This administrative law model also might permit clear statement rules to police the scope of international delegations; that method would derive from the nondelegation canon applied now in the international sphere. If the judiciary believes, as I have suggested above, that the dangers of democratic deficit and interest group exaction are greater in the international context than in the domestic context, they could make an even more aggressive use of these canons. For instance, the Court could deploy clear statement rules to choose the narrower scope of a delegation of binding authority, wherever any ambiguity exists.

The policy justification for the model posits that such delegations are constitutionally problematic because of the democratic deficit and potential interest group exactions they may impose. Yet international delegations of binding authority may be necessary and the judiciary is not well positioned to determine whether or how necessary particular delegations are and whether their benefits outweigh the costs in terms of democratic deficit and interest group exaction. A recent article by Matthew Stephenson has suggested that clear statement rules “raise[] the enactment costs for the coalition that supports the statute” or, as may be the case for international delegations, the treaty.⁹⁸ The coalition is likely to be willing to bear these costs only if the benefits are high. Accordingly, a clear statement rule may act as a modest filter, screening out international delegations that are not worth the costs, and yet it does not require the judiciary to evaluate directly the dangers of particular international delegations on a case-by-case basis.⁹⁹

Given that international delegations are a two-level game, the rules governing American consent are likely to affect the structure of international delegations. One possible reaction to the higher hurdle for obtaining the

98. Stephenson, *supra* note 2, at 40.

99. *Id.* at 42.

United States's consent is to improve the quality of these delegations with separation-of-powers mechanisms that reduce problems of agency costs or mechanisms for selecting international agents that reduce the democratic deficit. The international implications of a more stringent rule for U.S. consent to international delegation of domestically binding power will be explored more fully when we discuss the treaty rule and its supermajority requirement for consent.

B. Categorical Constraints and Categorical Permissions

Some scholars have argued that international delegations are unconstitutional because they cannot comport with the separation-of-powers provisions of the structural Constitution, principally the Appointments Clause and Article III. For instance, the argument based on the Appointments Clause is premised on the claim that international delegations with direct domestic effect permit international agents to change the rights of U.S. citizens under domestic law. But only individuals appointed under the Appointments Clause can exercise such authority under U.S. law.¹⁰⁰ Similarly, the provision of direct effect to international courts is argued to violate Article III, because the federal judiciary has no appellate authority to overrule these courts even if they are patently or grossly mistaken on federal law.¹⁰¹ Both of these arguments reprise with legal formality the policy concerns raised by international delegations discussed in Part I.

These structural provisions effectively impede international delegations of domestic legal authority. It is unlikely that international agents will or can be appointed according to Article II's Appointments Clause. The objective of the Appointments Clause is to assure that the President and the Senate are accountable for those executing U.S. law,¹⁰² whereas the objective of appointments provisions in international agreements will be to assure that the

100. See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 96-97 (1998).

101. See 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, 1463-75 (1992); see also *United States-Canada Free Trade Agreement: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 76 (1988) (testimony of John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice) (arguing on behalf of the Department of Justice that providing direct domestic effect to the decisions of binational panels on dumping cases violates the Appointments Clause).

102. See THE FEDERALIST NO. 76, at 455-58 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Yoo, *supra* note 100, at 101-05.

international agent (or the group of agents collectively) represent more global interests. Moreover, it is hardly plausible that an international agent can be confirmed through the domestic legal processes of the scores of nations that are parties to a multilateral agreement. The Article III objection similarly undermines the purpose of delegating binding authority to an international agent because the whole point of such a delegation is to have international rather than American institutions interpret and implement the law. Thus, the application of both these categorical restraints is in essence a rejection of the possibility of binding international delegations within the U.S. constitutional system.

The arguments advanced against these constraints are in a sense their mirror images, suggesting that international delegations are categorically permitted. To the argument that the Appointments Clause prevents delegating to international agents not properly appointed by the President with the advice and consent of the Senate if necessary, opponents respond that only those holding office under U.S. law must be properly appointed and that international agents do not hold office under U.S. law.¹⁰³ To the argument that international agents cannot exercise the judicial power of the United States, opponents similarly respond that they are not exercising authority under the laws of the United States, but rather under international legal authority.¹⁰⁴

^{103.} See Brief of Respondents-Intervenors at 36-45, *Coal. for Fair Lumber Imports Executive Comm. v. United States*, 471 F.3d 1329 (D.C. Cir. 2006) (No. 05-1366), 2006 WL 716571.

^{104.} *Id.* at 10-11.

Whatever their formal merits,¹⁰⁵ categorical arguments both in favor of and against the constitutionality of international delegations cannot take account of either the need for binding international delegation or its peculiar costs discussed above. The categorical restraint model rejects the possibility of binding international agency, whatever the need for the delegation. The categorical permission model allows international agency, however broad in scope, without acknowledging that its substantial democratic deficit and agency costs call for any special constitutive constraints.

Before considering whether there is a middle way between categorical constraint and categorical permission, we briefly evaluate the effect of categorical constraints and categorical permissions at the international level. Assuming that nations could not make effective agreements without including the United States, categorical constraints would move nations to rely on delegations that while binding only under international law are nevertheless effective at eliciting the compliance of the United States. International law in general may be less effective in eliciting compliance from the United States than from other nations, because the United States may often be powerful enough not to obey if obedience does not reflect its national interest.¹⁰⁶ In some circumstances, though, there are ways of structuring international delegations to constrain the United States without giving them binding effect.

The dispute resolution process of the World Trade Organization (WTO) has proved relatively effective. The arbitral panels and the Appellate Body

105. One problem with the permissive model is its reliance on the claim that international agents and tribunals are acting only under international law. If this is so, how do they change the rights and duties of Americans under our domestic law? One possible explanation is to analogize the giving of direct effect to international courts' decisions to the enforcing of arbitral tribunals' or foreign courts' judgments. Private disputes are frequently adjudicated by arbitration and foreign courts and these judgments are then enforced by federal courts without complaints that the arbitrators or foreign courts were inappropriately appointed or usurped the functions of Article III tribunals. There are some salient differences between the enforcement of judgments and giving direct effect to the decisions of international agents or tribunals. For instance, judgments and arbitrations are not enforced when they are against public policy, including our own interpretations of public laws. See Mark L. Movsesian, *International Commercial Arbitration and International Courts*, 18 DUKE J. COMP. & INT'L L. 423, 431 (2008) (discussing the public policy exception to arbitrations); Movsesian, *supra* note 50, at 115. While in the private law context public policy exceptions are narrow and invoked rarely, that may reflect the fact that the disputes are commercial, such that the preference for private ordering cabins the role for public policy and such that common views about commerce among nations make fundamental public policy differences rare. But giving direct effect to the ICJ's decisions in such cases as *Medellin* contemplates the interposition of no such barrier even in an area where public policy might be thought to bulk much larger.

106. See, e.g., Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 840-41 (2006).

regularly decide disputes among nations about trade matters, yet their judgments do not purport to be binding as a matter of U.S. law.¹⁰⁷ The WTO seeks to enforce its decisions not through direct effect, but through the authorization of trade sanctions against noncomplying parties, including the United States. In particular, the WTO agreement authorizes nations to raise tariffs otherwise prohibited against the goods and services of the offending nations.¹⁰⁸ These tariffs are chosen strategically to harm key exporters in the offending nation under the theory that these exporters will lobby their nation to come into compliance.¹⁰⁹

Some scholars think so highly of its effectiveness that they argue that the WTO should become a more general world economic regulatory body.¹¹⁰ Such a transformation might suggest that international delegations without direct effect might prove effective substitutes for those with direct effect. But one problem with such expansion of the WTO's jurisdiction is that it might increase opposition to international trade agreements in the first place. Exporter interests are being used as the punching bag, as it were, that makes enforcement possible. In an agreement focused on making trade freer, exporters might well decide that these costs are worth paying because they get something in return, in the form of access to foreign markets or lower trade barriers abroad. But they are much more likely to oppose an agreement in which they would be the instruments of enforcement for objectives that are foreign and in some cases antithetical to their interests.¹¹¹ The more general point is that in an agreement without direct effect, delegations are likely to depend for enforcement on sanctions on concentrated groups who will bring pressure on their government to comply. Precisely for that reason, however, those concentrated groups may effectively block an agreement with such a mechanism of enforcement unless the agreement directly serves their interests.

Thus, it is unlikely that there is anything approximating perfect substitution between delegations with direct effect and those without direct effect. Again a domestic analogy may be instructive: it is generally thought that the direct effect of federal court judgments has been essential to the smooth

107. See Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 503 n.75 (2001).

108. See Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 8-10 (2003).

109. *Id.* at 10.

110. See Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004).

111. See John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT'L L.J. 353, 364 (2004).

enforcement of federal law throughout the United States.¹¹² Enforcement would hardly be as effective if individual state courts or legislatures decided whether they would agree to enforce federal law within their jurisdiction. Thus, categorical constraints could well prove a substantial impediment to the entry of the United States into a wide range of agreements.

The categorical permission model, in contrast, will impose no constraints on binding international delegation, but neither will it provide any structural impetus to improve these delegations to ameliorate the democratic deficit and agency costs that can be their salient characteristics. And impetus for improvement is sorely needed. Currently, international institutions to which delegations are made have serious flaws.¹¹³ Moreover, the enterprise of improving such institutions to make them more suitable for delegation has been seriously undertheorized. Without an external impetus, it is not clear that there will be substantial improvement in the near term, because to my knowledge no other important nations also have processes for consent that would impose pressures for change.

C. *The Treaty Clause as a Policing Mechanism*

A third alternative is to permit international delegations of domestic power, but only if they are accomplished through ratified treaties.¹¹⁴ This position finds support in the original meaning of the Treaty Clause. As against the categorical restraints model, the original understanding of the Constitution suggests that the Treaty Clause contemplated the capacity to enter into international confederations and create international tribunals that possessed binding power under domestic law. As against the categorical permission model, the original understanding suggests that international agreements with the capacity to create a permanent presence of foreign powers in America's affairs, as binding delegations contemplate, must be ratified as treaties. Moreover, the supermajority required for approval of treaties may also be desirable as a matter of policy: the supermajority rule raises the enactment costs for such delegations well beyond that for ordinary legislation, including domestic delegations, in order to compensate for the more substantial democratic deficit and agency exactions that such international delegations

112. This was recognized early in our republic by *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

113. See *supra* Section I.A.

114. Whether they must also be done expressly depends on the kind of arguments described in the administrative law model. See *supra* Section III.A.

threaten. The result of the treaty model may also be to improve at the margin the structure of international delegations, because an improvement in their quality would make it more likely they would surmount the supermajority hurdle created for the approval of treaties.

1. *The Original Meaning of the Treaty Clause and International Delegations*

At the time of the Framing, the treaty power encompassed every kind of agreement that nations made with one another. As Alexander Hamilton stated,

[I]t was understood . . . to give to that power the most ample latitude to render it competent to all the stipulations, which the exigencies of National Affairs might require—competent to the making of Treaties of Alliance, Treaties of Commerce, Treaties of Peace and every other species of Convention usual among nations¹¹⁵

One kind of agreement usual among nations was that of confederation, through which nations agreed to be jointly governed in some aspects of their affairs.

On its face, the Articles of Confederation, which obviously constituted the confederation best known to the Framers, appears to suggest that the authority to enter into treaties included the power to enter into confederations with binding power. As David Golove notes, that first compact of the United States was itself a treaty among the thirteen sovereign states in which they delegated a variety of powers to the central government.¹¹⁶ These authorities included the power to regulate commerce with Indian tribes and the power to provide “the last resort” in deciding boundary disputes.¹¹⁷ Certainly such powers appear to be directly binding on the confederating states. Moreover, James Madison himself stated that they were directly binding.¹¹⁸ Yet separation-of-powers arguments similar to those based on the Appointments Clause and Article III

115. ALEXANDER HAMILTON, *The Defence No. XXXVIII* (Jan. 9, 1796), reprinted in 20 THE PAPERS OF ALEXANDER HAMILTON 22, 22 (Harold C. Syrett ed., 1974).

116. For a fuller discussion of this point, see David Golove, *The New Confederation: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1706-21 (2003).

117. See Articles of Confederation art. IX.

118. THE FEDERALIST NO. 40 (James Madison), *supra* note 102, at 250 (discussing the “immediate” effect on individuals of the many provisions of the Article, particularly the ability of courts martial of the confederation to inflict the penalty of death). This point is discussed by Golove. See Golove, *supra* note 116, at 1720 (quoting Hamilton).

could be raised against such delegations under the state constitutions of the confederating states.¹¹⁹

The Jay Treaty, the most important and fiercely debated treaty in the early republic, also suggests that the treaty power encompassed delegations with binding effects that operated outside the usual strictures of the domestic structural constitution.¹²⁰ The Jay Treaty authorized a mixed commission to make “conclusive” judgments on a wide variety of matters, including debts owed by American citizens to loyalists.¹²¹ Significantly, while the American-appointed commissioners were confirmed by the President and approved by the Senate, a majority of the commission was not.¹²²

Moreover, the Jay Treaty does not merely provide a data point from the early republic supporting the treaty model. The principal defense of the mixed commission’s constitutionality invoked the treaty power as a theory of its legality. In fact, Hamilton’s analysis of the breadth of the treaty power quoted above came in the context of his defense of the constitutionality of the Jay Treaty in general and the commissions in particular.¹²³ He argued that the treaty power in the Constitution was at least as robust as that given in the

119. See, e.g., S.C. CONST. art. XX (1776) (establishment of the judiciary); *id.* art. XXV (provisions for appointment of officers).

120. My colleague, Eugene Kontorovich, has written a fascinating article showing that nineteenth-century American politicians expressed doubts about the constitutionality of mixed international tribunals in which British and American commissioners would jointly try those who violated laws against slave trading. See Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals*, 158 U. PA. L. REV. (forthcoming 2009); see also Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550 (2008) (discussing mixed commissions to punish slave traders as an example of a nineteenth century international mechanism to protect international rights). I do not consider that these debates have much bearing on the original meaning, because they are too late—after most of the enacting generation had died or passed from the political scene. Cf. Calabresi & Prakash, *supra* note 25, at 613 (setting similar limits to the scope of evidence for originalism). Second, their objections to these tribunals were not only on structural grounds, but on those of the Bill of Rights—objections that, in some cases, have merit. See *infra* note 129. Thus, I do not believe that opposition to these tribunals is nearly as weighty as the power of the Jay Treaty precedent on purely structural issues.

121. Treaty of Amity, Commerce, and Navigation (Jay Treaty), U.S.-Gr. Brit., art. VI, Nov. 19, 1794, 8 Stat. 116. The treaty included similar commissions to arbitrate boundaries and settle claims of American citizens for illegal captures of ships and confiscation of their cargoes. *Id.* arts. V, VII.

122. *Id.* art. VI.

123. See Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 177-78 (1996) (discussing the essays Hamilton wrote in defense of the Jay Treaty).

Articles of Confederation and that there the power was used to establish “*within the country* tribunals unknown to our Constitutions and laws.”¹²⁴

These remarks appear to respond to a specific kind of charge that the tribunals established by the Jay Treaty would violate Article III. For instance, during the later debates over appropriating funds for the treaty, Congressman John Page of Virginia made the kind of complaint to which Hamilton appears to be responding. Page argued that the Jay Treaty was unconstitutional, “because it interferes with the authority of the Judiciary, by establishing a Court of Commissioners, a kind of supreme court of appeals, within the United States, with powers to proceed, unknown to our laws.”¹²⁵ But Hamilton, to the contrary, had concluded that a treaty could set up tribunals outside those that could otherwise be established by the Constitution. For Hamilton, the limitation on such tribunals was not the structure of Article III or the Appointments Clause, but that they were properly related to the subject matter of a treaty.¹²⁶ Thus, the debate surrounding the constitutionality of the Jay Treaty’s mixed commissions under Article III provides strong evidence for the treaty model.

Thus, an alternative to concluding that the Constitution would have condemned the Jay Treaty and that analogous arguments in the states would have proscribed the Articles of Confederation is to suggest that the treaty power permits the exercise of binding power by international agents, even if such power would be otherwise prohibited by our domestic Constitution. Just as the Treaty Clause permits the federal government to exercise powers outside of its ordinary enumerated powers, it may also permit the federal government to delegate power outside its usual structural constraints for purposes consistent with establishing a confederation.¹²⁷ Analogously too, the

124. See HAMILTON, *supra* note 115, at 30.

125. See 5 ANNALS OF CONG. 1099 (1796) (remarks of Rep. John Page).

126. Henry Paul Monaghan sees the Jay Treaty as precedent for the constitutionality of international tribunals, regardless of whether enacted through treaty or congressional-executive agreement, because it provides powerful evidence that international tribunals addressing public rights do not violate Article III. See Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 869 (2007) (suggesting that reliance on the Jay Treaty precedent is at bottom reliance on a public rights exception to Article III). But one difficulty with this argument is that the most sophisticated defense against the claim that the Jay Treaty violated Article III does not discuss the intricacies of the public rights doctrine (which had not been invented), but focuses on the capaciousness and safeguards uniquely provided by the Treaty Clause.

127. Whether the treaty power permits agreements beyond the enumerated powers is itself controversial. Compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (contending that the Treaty Clause does not authorize agreements outside the scope of Congress’s enumerated powers), with David M. Golove, *Treaty-Making*

President's commander-in-chief powers permit him to put troops under the command of foreign officers not appointed under Article II, because that is a natural consequence of foreign military alliances—alliances also recognized at the time of the Framing.¹²⁸

Put in a more formal way, the Treaty Clause thus answers the complaints under the Appointments Clause and Article III by agreeing with the basic contention of the categorical permission model that international tribunals are operating under international rather than domestic law. But, unlike previous answers to these questions, it also provides the location of the authority to establish tribunals with direct domestic effect, when Congress could not by statute give binding federal authority domestically to non-Article III tribunals composed of private citizens, whose appointments did not follow the strictures of the Appointments Clause.¹²⁹ The Treaty Clause itself provides authorization for establishing agents of confederal or international power and giving their decisions direct domestic effect.¹³⁰

But if the treaty power dissolves structural constitutional impediments to international delegation, it comes with a substantial price: the requirement of

and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075 (2000) (contending that the treaty power is not limited by Congress's enumerated powers). In my view, the supermajority ratification compensates for the lack of enumerated limits to the power. This is the position taken by the Supreme Court in *Missouri v. Holland*, 252 U.S. 416 (1920).

128. See Charles J. Cooper & John O. McGinnis, *The Republican Congress and the Constitution in Foreign and Military Affairs*, 2 COMMON SENSE 75, 83-86 (1995); see also David J. Bederman, Book Review, 110 AM. J. INT'L L. 490, 494 (2006) (reviewing JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005)) (discussing the history both before and after the Constitution of putting American troops under foreign command).
129. It does not follow, however, that a treaty can violate the Bill of Rights. Those rights were enacted as specific limitations on the powers in the original Constitution, including the treaty power. The Supreme Court in fact has held that treaty provisions must conform to provisions of the Bill of Rights. See *Reid v. Covert*, 354 U.S. 1 (1957).
130. The analysis here is complementary to the theory of domestic Article I tribunals advanced by my colleague James Pfander. He argues that Congress is authorized to set up Article I tribunals by Article I, Section 8 so long as they remain inferior to the judicial power. See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 775-76 (2004). Pfander further suggests that international tribunals, like that constituted by NAFTA, should not be understood as Article I tribunals, because they apply international law. Pfander's focus on the need for specific authorization for Article I tribunals, however, raises the question of what authorizes Congress to establish tribunals in the context of international delegation, which are neither Article I nor Article III tribunals. Here I suggest that the Treaty Clause with its authority to establish confederations encompasses that authority. See Kontorovich, *supra* note 120, at 64 (discussing Pfander's analysis in relation to the constitutionality of international tribunals).

supermajority ratification in the Senate.¹³¹ In the same passage in which Hamilton extolled the breadth of the treaty power to enter into treaties such as confederations, he expressly connected the scope of the treaty power with its being “carefully guarded” by requiring the “cooperation of two thirds of the Senate with the President.”¹³² Thus, as an original matter the Treaty Clause plays an essential function in policing international delegations: they are constitutional only with the requisite agreement of the Senate and the President.

2. *The Interchangeability Objection*

This argument might seem to bump up against the modern practice of interchangeability—the notion that congressional-executive agreements and treaties can be used interchangeably to make international agreements the supreme law of the land.¹³³ But given the previous analysis, the doctrine of interchangeability has no purchase here. Because it is the treaty power that uniquely authorizes international delegations, a congressional-executive agreement would not be sufficient. Exactly the parallel argument has been accepted in another area where the treaty power authorizes substantive actions that other provisions of the Constitution would not.¹³⁴ For instance, the treaty power authorizes action beyond the enumerated powers in Article I,¹³⁵ but precisely for that reason congressional-executive agreements, dependent on Article I powers, are not interchangeable with treaties on matters reaching beyond the enumerated powers.

The scope of interchangeability does become relevant if one does not believe, contrary to the arguments advanced above, that the Treaty Clause is necessary to give international delegations direct effect. But even those who argue that the structural Constitution imposes no impediments to international

131. For a discussion of why the supermajority requirement makes the ratification of international delegations more difficult, see *infra* Subsection III.C.4.

132. See HAMILTON, *supra* note 115, at 22.

133. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1990) (stating that interchangeability of congressional-executive agreements is the prevailing view).

134. Hathaway, *supra* note 42, at 1339 (“In those few cases in which an agreement exceeds the constitutionally permitted scope of a congressional-executive agreement, the agreement would have to be concluded under the Article II Treaty Clause.”).

135. See *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that the treaty power permits the federal government to enter into an agreement about migratory birds, even if that agreement exceeds the enumerated powers in Article I, Section 8).

delegation must face the proposition that such delegations must be done by treaty. The argument for complete interchangeability in this context is not correct as a matter of original meaning.¹³⁶ For instance, Hamilton's defense of mixed commissions discussed above suggests the rejection of interchangeability by an arch-Federalist.¹³⁷ It was also well understood that the Antifederalists would have objected had international agreements been able to be ratified by a mere majority of both houses.¹³⁸ The requirement of the supermajority in the Senate protected the interests of the states.¹³⁹ Thus, both sides of our first constitutional fault line were united in their view that the Treaty Clause had a unique and irreplaceable function.

If any kind of agreement must be done through a treaty rather than a congressional-executive agreement, it would appear to be international delegations. Because international delegations of binding authority create a continuing foreign "entanglement" in domestic affairs, they represent the paradigm of the kind of agreement that the higher hurdle of the Treaty Clause was designed to regulate.¹⁴⁰ Indeed, because the arguments in favor of the constitutionality of international delegations emphasize that their decisions are made through international rather than American mechanisms, they underscore the reasons that the Treaty Clause is properly the unique avenue for their approval.¹⁴¹

136. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 764-65 (2002). For full refutations of the modern interchangeability thesis on originalist grounds, see RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 140-56 (1974); and Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998).

137. See HAMILTON, *supra* note 115, at 22.

138. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 810-11 (1995).

139. See Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 734 (1998) (discussing the interest in protecting the interests of states at the time of the Framing).

140. For a discussion of this rationale for the two-thirds ratification requirement of treaties, see McGinnis & Rappaport, *supra* note 136, at 760-69. See also Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT'L L. 1, 56 n.284 (2001) ("The supermajority requirement for Senate action . . . operates to ensure that the ratification of a treaty . . . reflects a broadly based, national consensus.").

141. Mark Tushnet argues that the substitution of congressional-executive agreements for treaties is an example of a "constitutional workaround." See Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. (forthcoming 2009). He defines a workaround as a situation in which one constitutional text appears to forbid a practice, but that practice is popularly desired and another constitutional text appears to provide a route to the desired result. As an originalist, I am skeptical of the concept of constitutional workarounds: arguments from

Practice does not preclude this position, because complete interchangeability is not yet accepted.¹⁴² For instance, the Senate objected strenuously when President Jimmy Carter attempted to pass the Strategic Arms Limitation Talks II (SALT II) as a congressional-executive agreement.¹⁴³ A fortiori, an agreement that delegates binding power to international agents and binds us to an ongoing international regime must be ratified by a treaty. This position thus does not necessarily require the rejection of the well-settled practice of concluding trade agreements by congressional-executive agreement.¹⁴⁴ With one exception, these agreements merely change our own laws. They do not authorize a binding power of international delegation.¹⁴⁵

3. *Implementing a Treaty's Delegation*

Two other important doctrinal issues may arise, assuming that the treaty power becomes a requirement for domestically binding international

structure and intent are available to resolve the ambiguity created by the two constitutional texts to decide whether the practice is permitted. As discussed above, that is the reason that congressional-executive agreements cannot be substituted for treaties, at least in the context of the authorization of binding international delegations. Moreover, Tushnet himself recognizes that constitutional workarounds will seem more plausible insofar as the constraining constitutional text seems to have no policy justification. As discussed below, in the context of international delegations the treaty requirement does have a policy justification. Thus, as a matter of original meaning and policy, the Court and the Senate have reasons to resist the “workaround” of a congressional-executive agreement in this context, or as it may be properly labeled, a constitutional circumvention.

142. It has been argued that the Constitution now does authorize interchangeability, *see* Ackerman & Golove, *supra* note 138, but this view is based on the theory that the Constitution can be changed through “constitutional moments”—a theory that I have rejected elsewhere, *see* McGinnis & Rappaport, *supra* note 136, at 794-95.
143. *See* Phillip R. Trimble & Jack S. Weiss, *The Role of the President, The Senate and Congress with Respect to Arms Control Treaties Concluded by the United States*, 67 CHI.-KENT L. REV. 645, 662 (1991).
144. How far one is justified in departing from the original meaning of the Constitution in light of past precedent and practice is obviously too large a question to address here. But elsewhere I have suggested that the original meaning should be followed unless there are very large costs imposed by discarding a line of precedent or unless that precedent enjoys a popular consensus akin to that required to pass a constitutional amendment. *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. (forthcoming 2009). Clearly these conditions would not preclude applying the original understanding of the Constitution to international delegations.
145. The binational panels established under NAFTA have authority under domestic law to settle certain antidumping disputes, and NAFTA was passed under a congressional-executive agreement, not a treaty. *See supra* notes 15-16 and accompanying text. Thus, the analysis offered here would cast doubt on the constitutionality of that provision.

delegation. The first is whether Congress by statute can make domestically binding a delegation that a previous treaty made only internationally binding. The second is whether Congress by statute can make the rule of an international decision the law of the United States once an international tribunal has rendered its judgment.

A congressional power to convert internationally binding delegations into domestically binding delegations without passing a separate treaty would represent an end run around the supermajority requirement of the treaty power—the very provision that Hamilton saw as a guarantee against unwise decisions to enter into confederal arrangements. Nevertheless, it might be argued on the authority of *Missouri v. Holland* that Congress enjoys the authority to turn an international delegation into a domestic delegation through implementing legislation.¹⁴⁶ In that case the Court upheld a statute that regulated the hunting of migratory birds, although by hypothesis that statute was beyond Congress's specific enumerated powers. The Court held that Congress had the authority under the Necessary and Proper Clause to pass a statute to execute a previous treaty between Canada and the United States to protect migratory birds.¹⁴⁷

But it has been persuasively shown that *Missouri v. Holland*'s one conclusory sentence about the relation between the Necessary and Proper Clause and the Treaty Clause is wholly wrong.¹⁴⁸ The governmental power at issue in Article II is the “power to make treaties,” not the powers conferred by the treaties themselves.¹⁴⁹ Thus, under the necessary and proper authority to “carry[] into Execution . . . all . . . Powers vested . . . in the Government of the United States,”¹⁵⁰ Congress can pass legislation to facilitate the President's making of treaties through negotiation, but it cannot pass legislation to implement treaties themselves, should that legislation be outside its enumerated powers.¹⁵¹ Besides the powerful textual argument to this effect, Nicholas Rosenkranz has also shown that various anomalies would result from a contrary reading.¹⁵² For instance, would a statute executing a treaty beyond

146. 252 U.S. 416 (1920).

147. *Id.* at 432 (“If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”).

148. See Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

149. U.S. CONST. art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

150. *Id.* art. I, § 8, cl. 18.

151. Rosenkranz, *supra* note 148, at 1880–92.

152. *Id.* at 1903–12.

Congress's enumerated powers continue to have formal force if the treaty itself had been terminated?¹⁵³ Given that this particular aspect of *Missouri v. Holland* both was unconsidered and has not been extensively relied upon,¹⁵⁴ there is no reason to follow it as a precedent.¹⁵⁵ Thus, in this context of delegation as well, because Congress lacks the power to establish domestically binding international delegations under Article I, it cannot make such a binding domestic delegation by statute, even if a treaty previously committed the United States to an internationally binding delegation.

The second question, whether Congress can enact a specific decision made by an international tribunal into domestic law, is more straightforward. The question is not one of delegation: Congress is itself enacting a rule of law and thus taking full accountability for its content. Thus, Congress may enact this rule of decision into law, assuming that it has authority to enact such a law. It can do so prospectively so long as the law is within the scope of its Article I, Section 8 powers. It can do so retrospectively as well, so long as it remains within its enumerated powers and it does not violate any constitutional prohibitions under the Due Process Clause and other constitutional clauses constraining retrospective legislation.

Nothing in *Medellín* is inconsistent with this analysis. *Medellín* addressed whether a treaty delegated binding domestic authority to an international tribunal. It simply did not address how Congress can transmute an internationally binding delegation of a previous treaty into a domestically binding delegation or translate a particular rule of the ICJ into an enactment that would constitute binding federal law.

Thus, requiring domestically binding delegations to be enacted by treaty has an important effect: it requires a two-thirds supermajority of the Senate to focus on and approve an authorization for foreign or international powers to create legal obligations within our own domestic regime. It is the practical effects of such a requirement both at home and abroad to which we now turn.

4. *The Higher Threshold of Treaties*

A threshold empirical question for the policy wisdom of requiring domestically binding international delegations to be authorized by treaty is whether in fact the process for consenting to a treaty imposes a higher hurdle

153. *Id.* at 1907–09.

154. *Id.* at 1936. Overruling *Missouri v. Holland* in this respect would still permit the treaty power to conclude pacts beyond Congress's enumerated powers in Article I.

155. *Id.* at 1935–37; see McGinnis & Rappaport, *supra* note 144.

and, if so, to what degree. Only by considering that question can we gauge the policy effect of requiring binding international delegations to be implemented by treaty rather than congressional-executive agreement. Most commentators have believed that it is harder to obtain the two-thirds support in the Senate for an international agreement than to pass a congressional-executive agreement with the support of both houses of Congress and the President.¹⁵⁶ Indeed, it was an assumption that underlay the long historical effort to permit the congressional-executive agreement to be used instead of treaty ratification: proponents believed that the Senate was the graveyard of important international agreements.¹⁵⁷

There is also political science support for this view. The ideological medians of the House and Senate have been quite similar for the last seventy years and their ideological distributions have not been dissimilar.¹⁵⁸ Thus, assuming that it will be harder to get the vote of a representative who is more ideologically predisposed to oppose the international agreement at issue, it is likely to be harder to get the vote of one who is at the sixty-seventh percentile of opposition than one who is at the fifty-first percentile.¹⁵⁹

It should be recognized that the Senate permits filibusters, making the sixtieth senator rather than the fifty-first senator sometimes pivotal even for ordinary legislation.¹⁶⁰ Nevertheless, the filibuster is weaker than an express sixty-vote supermajority rule for at least two reasons. First, senators who engage in a filibuster and thereby prevent legislation from coming to a vote can be portrayed as obstructionist.¹⁶¹ Second, as the threat of the so-called nuclear option shows, senators are likely to deploy the filibuster more cautiously,

156. See Hathaway, *supra* note 42, at 1312 (discussing those who believed that “an extraordinary level of consensus is necessary to conclude an Article II treaty”). The best discussion of the higher hurdles for Senate ratification of a treaty is John K. Setear, *The President’s Rational Choice of a Treaty’s Preratification Pathway: Article II, Congressional Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. 55, S17-S21 (2002).

157. Ackerman & Golove, *supra* note 138, at 861-73.

158. See Keith Poole, 105th Congress, <http://voteview.com/c105/c105.htm> (last visited Apr. 29, 2009).

159. Another way to consider the greater hurdle is that the treaty process is much more likely than that of congressional-executive agreements to require the President to obtain support from the opposition party. See Setear, *supra* note 156, at S17 (“Never has there been a twentieth-century Congress in which the president’s party controlled two-thirds or more of the Senate but less than half of the House.”).

160. See *Standing Rules, U.S. Senate, 102nd Congress*, at R. XXII, in CONGRESSIONAL QUARTERLY’S GUIDE TO CONGRESS 68-A (4th ed. 1991).

161. See John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, The Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257, 281.

because a majority can get rid of the filibuster rule.¹⁶² Thus, my best estimate is that the two-thirds ratification requirement in the Senate would generally represent an appreciably, but not hugely, higher hurdle for international delegations of domestic power.¹⁶³

It is true that congressional-executive agreements might on occasion face veto points, like an obstructionist House committee chairman or an ideologically unrepresentative committee, that could make ratification under a congressional-executive agreement harder than ratification by the Senate,¹⁶⁴ but that would be the exceptional case rather than a general tendency. In any event, the doctrinal choice here is not between a regime in which congressional-executive agreements replace treaties, but one in which either a congressional-executive agreement or a treaty is available for international delegations and one in which only a treaty is available. Under the alternate regime, proponents would choose the treaty route when it was easier.¹⁶⁵ Thus, for international delegations as a class the treaty regime is likely to be a higher hurdle than one in which the devices can be used interchangeably.

162. *Id.* The Senate purports to insulate this rule from change except by a two-thirds vote. See S. DOC. NO. 110-9, at 15-16 (2007) (explaining that Rule XXII requires the votes of three-fifths of all senators in office for cloture, except on measures to amend Senate rules, which require the votes of two-thirds of senators present and voting). However, this requirement is likely unconstitutional. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 246-52 (1997).

163. One argument against a supermajority rule in the Senate comes from the greater representation of states with small populations. This is a theoretical problem but as the ideological tracking of the median members of the Senate and House suggests, see *supra* note 158, it may be more theoretical than real. When support for a measure in the Senate is not correlated with the population of a state, the supermajority rule in the Senate would operate much like a supermajority rule in the House. See McGinnis & Rappaport, *supra* note 136, at 748; see also John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism*, 98 GEO. L.J. (forthcoming 2010) (manuscript at 45, on file with author) (arguing that while small states and large states differ systematically on issues, like agriculture, there is no reason to believe there are currently strong ideological differences).

164. See Hathaway, *supra* note 42, at 1314-15.

165. Oona Hathaway recently has suggested that policymakers might pursue a strategy of using congressional-executive agreements as the sole vehicle for ratifying international agreements, leading to desuetude of the treaty option. See *id.* at 1352. It is unclear to me how this is a realistic possibility. If the President and the Senate believe that an agreement they would prefer is easier to ratify by treaty than congressional-executive agreement, they will make use of that route. It seems unlikely that a Supreme Court, however activist, would negate an express constitutional provision, if the President and Senate decided to make use of it.

5. *Policy Advantages of the Treaty Requirement for International Delegation*

Assuming that a treaty requirement would impose a more stringent consent hurdle than congressional-executive agreements, a plausible case can be made that the treaty requirement is also sensible as a matter of policy. The basic argument is similar to the argument for a clear statement rule: it raises the enactment costs *ex ante* to compensate for the danger of democratic deficit and interest group exactions *ex post*.¹⁶⁶ In domestic administrative law, the filter of bicameralism and presentment and clear statement rules may be sufficient.¹⁶⁷ But because these dangers are greater in the context of international delegations, a stronger filter is required.

In particular, as to the issue of democratic deficit, the stringent process for entrenching a provision in the Constitution itself provides an analogy to raising the stringency of the *ex ante* approval process for international delegations. In the constitutional context, principles are entrenched and put beyond the reach of ordinary politics and direct democratic control because they have received the substantial consensus support *ex ante* reflected by the supermajoritarian process for originating the Constitution or amending it.¹⁶⁸ Similarly here, the supermajoritarian requirement for advice and consent to treaties requires more consensus support *ex ante* (albeit less than the support required for entrenchment) to compensate for the democratic deficit *ex post*.

As for agency costs, the presence of high agency costs makes international delegations potentially costly, and, for reasons discussed above,¹⁶⁹ legislators are unlikely to take full account of these costs. The higher supermajority rule for treaties addresses this problem, requiring more support for international delegations and thus likely filtering out those whose costs exceed their benefits.

Thus, unlike arguments that would resolve the constitutionality of international delegations through doctrines that are difficult to connect to the costs and benefits of international delegations, the supermajority rule at least

166. T. Alexander Aleinikoff suggests that these weaker *ex post* checks on delegation are likely to produce stronger constraints *ex ante*. See Aleinikoff, *supra* note 37, at 2002. My argument here is that these *ex ante* constraints must be constitutionally based, because members of Congress may have an interest in delegation that is not public-regarding. See *supra* note 26 and accompanying text.

167. For an argument that this process is likely a sufficient discipline in the domestic context, see Merrill, *supra* note 21, at 2158-59.

168. Cf. Dorf, *supra* note 38, at 122-24 (suggesting that international delegations and dynamic incorporation of international rules raise similar kinds of problems as constitutional entrenchment).

169. See *supra* Section I.A.

has the virtue of addressing their essential dilemma: while international delegations may be substantively necessary, they have large governance costs.

In my view, the strongest policy counterargument is that international delegations may be unpopular because of xenophobic and nationalist feelings among the people and that this difference between domestic and international delegations may make the latter less of a danger to constitutional values. In other words, fear of foreigners serves as a fire alarm against the tendency to avoid accountability and reward special interests that are characteristic of delegation.

But while it is true that voters sometimes express such feelings,¹⁷⁰ they are likely to be vented when the subject matter of the legislation itself can be portrayed, however wrongly, as posing a threat from foreigners, like free trade. If the issue, however, can be framed as protecting Americans against the threat of foreigners, it is not at all clear that the international aspect of delegation would serve as a fire alarm to the public and hence as a constraint on legislators. For instance, an international delegation designed to harmonize labor standards can be framed as saving American jobs from foreign theft, thus drawing support from xenophobia. Moreover, as with other constitutional constraints, the justification for the treaty regime depends on the long run. Over time, one could expect the international aspect of delegations to lose its novelty and controversy in a stream of routine policy decisions to join international agencies to address issues of globalization.¹⁷¹ It should be remembered that at the time of the first federal delegations, individuals had strong attachments to their states and yet these attachments did not prevent the emergence of the national administrative state.¹⁷² Thus, given that the problem of xenophobia is situational and likely transient, it seems plausible that if we were to design a system from scratch, this system might impose a more stringent voting rule for international delegations than for domestic delegations, because of the greater danger to democratic accountability and of interest group exaction.

170. On antiforeign bias among voters, see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 36-39 (2007).

171. *Cf.* Dorf, *supra* note 38, at 113 (“[A]s a practical matter, an act originally intended only as a delegation may become a cession of sovereignty over time, as arguably occurred in the United States between the ratification of the Constitution and the conclusion of the Civil War.”).

172. See John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 95-97 (2004) (discussing why the decline in attachments to states makes citizens inattentive to federal structure).

Oona Hathaway has recently made a variety of policy arguments against the use of the treaty power in general, preferring that international agreements be made through congressional-executive agreements and thus employ the ordinary lawmaking process of bicameralism and presidential agreement.¹⁷³ But her arguments against the use of treaties in general do not undermine the policy case for requiring international delegations to be implemented through the treaty power.¹⁷⁴

First, Hathaway argues against the use of the treaty ratification process, because it is not majoritarian.¹⁷⁵ But majoritarianism does not capture the genius of the American political constitutional system.¹⁷⁶ The process of constitution-making is not majoritarian.¹⁷⁷ Even the ordinary lawmaking process is not effectively majoritarian. While the vote required to pass a bill in the House and Senate is majoritarian, the effect of requiring bicameralism and either approval of the President or a two-thirds supermajority to override a veto requires more than majoritarian consensus to pass.¹⁷⁸ Moreover, as Michael Rappaport and I have argued previously, if the test for a political system is the welfare of citizens rather than adherence to an abstract principle, the American political system's rejection of simple majoritarianism is sound.¹⁷⁹

Thus, the policy question is whether the supermajority rule for international delegations promotes welfare. I have suggested that the supermajority rule *ex ante* compensates for the substantial democratic deficit and agency costs of international delegation *ex post*. Hathaway's abstract brief for majoritarianism does not undermine these arguments.

Hathaway also argues that treaties create less reliable international commitments than do congressional-executive agreements.¹⁸⁰ But her leading argument for this claim is simply inapplicable to treaties that create international delegations. She notes that treaties are often non-self-executing and thus require further implementing legislation. As a result, nations cannot rely on U.S. domestic law to enforce them. In contrast, congressional-executive agreements do not require implementing legislation and deliver on the

173. See Hathaway, *supra* note 42, at 1308-38.

174. I also do not believe that policy arguments, however strong, are sufficient to erase the Treaty Clause from the Constitution. See *supra* Subsection III.C.1.

175. Hathaway, *supra* note 42, at 1308.

176. See McGinnis & Rappaport, *supra* note 136, at 710-24.

177. *Id.* at 781-90.

178. *Id.* at 770-74.

179. See *id.* at 775-80 (showing how various supermajority rules are likely more efficient).

180. Hathaway, *supra* note 42, at 1316-38.

commitment to make international obligations binding domestic law.¹⁸¹ But international delegations as defined here are those that are domestically binding. Thus, treaties providing for them offer foreign nations the assurance of automatic domestic enforcement.

Moreover, by requiring a greater consensus, treaties signal a greater and likely more enduring commitment on the part of the polity.¹⁸² For instance, a two-thirds vote generally requires some substantial support in both parties, making the agreement less likely to be eliminated with a change in party control. Hathaway argues to the contrary that treaties may be easier to abrogate than congressional-executive agreements, undermining their reliability. She recognizes, however, that the law is quite unsettled on this point.¹⁸³ In any event, even if it were clear that it was formally easier to abrogate treaties than congressional-executive agreements, it would not necessarily follow that they would signal a less reliable commitment than a congressional-executive agreement.¹⁸⁴ Politicians are more likely to abrogate agreements with only the narrower support required by the congressional-executive process than those with the broader support required by the treaty process.

6. *The Effects of the Treaty Regime on International Delegations*

The treaty model would lead to a requirement of a two-thirds vote of advice and consent in the Senate for delegating domestic power to international agents. It could be consistently combined with the clear statement requirement of the administrative law model, because the President and the Senate would be using the treaty power to delegate power, which raises the concerns discussed in Part I. Thus, if combined with the clear statement rule of *Medellín*, the treaty model would require that the consent to international delegation be clearly and transparently given. This domestic regime in turn would affect the structure of international delegations.

The most obvious route to obtaining the consent of the United States to such a delegation would be to improve its quality, reducing some of the aspects

181. *Id.* at 1317-23.

182. See Setear, *supra* note 156, at S16-S17.

183. Hathaway, *supra* note 42, at 1323-31.

184. Hathaway at one point claims that “it is far from clear that a majority vote in the Senate and House requires any less of a consensus” than treaty ratification. *Id.* at 1337. I already have offered reasons to disagree with this assessment. See *supra* Subsection III.C.4. But this assertion seems in substantial tension with Hathaway’s own recognition that it “is clear that an extraordinary level of consensus is required to conclude an Article II treaty.” Hathaway, *supra* note 42, at 1312.

of the delegation that raise concerns, like lack of democratic accountability and interest group exactions. For instance, if the delegation of authority were to an international court, the appointment process to that court could be reformed, making it more transparent to the democratic citizenry throughout the world.¹⁸⁵ The discretion of international agents could be constrained by setting up councils of representative nations in the treaty that would be empowered under some qualified majority rule to overrule the agent.¹⁸⁶ That kind of reform would reduce the transaction costs among the multiple principals to an agreement, making it easier to control the discretion of their agents. More generally, the high hurdle to consent for international delegations by the nation-state the consent of which will generally be the most important to obtain may spur creative thinking in an area where creative thinking is needed—the construction of an international mechanism of separated powers.

To be sure, international agreements can offer alternatives to international delegation reform to secure the consent of the United States. Sometimes, as discussed above, international delegations without domestic effect can provide a plausible alternative, but often they will not. Nations might also be able to give the United States some other benefit under the treaty—a kind of side payment—to get the United States to agree to an international delegation that otherwise would be blocked. But that alternative would be costly and might well not succeed because the requirement of express consent to the delegation would tend to make that consent visible and salient. Because of this focus, it would be harder to take a side payment for approving a delegation that would otherwise be unpopular. Moreover, if democratic accountability and interest group exaction are a cost for other nations as well, agreements that improve the quality of delegation represent an improvement for the citizens of other democratic states. In other words, the United States's process for consent may become a focal point for foreign citizenry who want to force their legislatures to take more account of democratic accountability and the potential power of interest groups. Thus, at least at the margin, the treaty model might lead to incremental reforms of international delegations.

185. See Dorf, *supra* note 38, at 158-68 (suggesting representative courts as a partial solution to the delegation problem).

186. There is a wide range of ways to constrain international agents. See Eyal Benvenisti & Ariel Porat, *Implementing the Law by Impartial Agents: An Exercise in Tort Law and International Law*, 6 THEORETICAL INQUIRIES L. 1, 2 (2005) (“These mechanisms include rules setting the agents’ composition and decision-making procedures (procedural rules) and rules prescribing the outcomes the agents should reach or how they should conduct themselves prior to making their decisions (substantive rules).”).

It is of course true that the United States will use any advantages it has in the ratification process in its national interest. But to a greater degree than other nations, the national interest of the United States is the global interest. The United States is focused on the peace and prosperity of the world, precisely because it is the world's hegemon and thus stands to gain more from such goods.¹⁸⁷ Thus, insofar as delegations that reflect a more democratic pedigree and are structured to resist interest group exactions will better contribute to global public goods in the long run, the United States is the nation most suited to perfecting such delegations.

CONCLUSION

International delegation of domestic power stands at the intersection of an enduring constitutional issue—the delegation of government authority—and a new one—global governance. *Medellín* represents the first modern case to address the issue and it did so with appropriate caution. It required that Congress at least be clear that it is intending to delegate such authority—a clear statement requirement that responds to the substantial risks of international delegation by raising the legislative cost of enacting it.

But *Medellín* is unlikely to be the last word on international delegation. Structural provisions of Article II and Article III might seem to call for absolute prohibitions on the practice of delegating power outside of that policed by our normal process of appointments and outside of the usual requisites for exercising that power, whether it be life tenure in the case of the judiciary or some degree of presidential supervision in the case of administrative agents. But there are also powerful formal arguments against such categorical restraints—arguments, however, that by their logic would permit delegation of any degree by ordinary legislation, despite the potentially large costs of such delegation.

A treaty model would mediate between a categorical restraint and categorical permission model by policing international delegations of domestic power through a supermajority rule. Whatever its other attractions, it has one important advantage over more categorical constraints on delegation: a supermajority rule disciplines delegations without ultimately preventing them if they have very substantial democratic support. Categorical restraints on the deployment of government power in basic economic matters have often not stood the test of time. For instance, in the New Deal the Court finally gave up

187. See McGinnis & Somin, *supra* note 22, at 1241-43 (discussing the reasons why the United States is likely the best provider of many global public goods).

on trying to enforce the categorical restriction that Congress's power was limited to interstate commercial matters, because the strength of popular opinion in favor of economic regulation became too powerful.¹⁸⁸ Once the Commerce Clause was gutted, it became a dead letter in the future even on matters for which there was far less support for the exercise of federal power. In contrast, a popular consensus for an international delegation is likely to translate into broad legislative support satisfying the Treaty Clause's supermajority rule. The Court thus need never choose between enforcing the Treaty Clause and enduring untenable political isolation. Because the Constitution can bend, it need not break.¹⁸⁹

188. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1452 (1987) ("The New Deal's change in attitude toward the commerce clause thus depended upon a radical reorientation of judicial views toward the role of government that in the end overwhelmed the relatively clean lines of the commerce clause.").

189. See John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 438 (1999).