

INTERNATIONAL DELEGATION AND STATE DISAGGREGATION

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ABSTRACT: Following Voigt and Salzberger (2002) this paper considers the tradeoff between international and domestic delegation devices, and argues that the two are largely complements rather than substitutes. It then explores the domestic separation of powers as an explanatory factor in understanding different levels of international delegation across states. It argues that the domestic separation of powers is a driving factor in propensity to delegate, and provides some empirical evidence in this regard. Federal states and those with bicameral legislatures are more likely to sign treaties and join international organizations. Presidential systems, however, are no more likely to do so than parliamentary ones.

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I. INTRODUCTION

In 1920, the United States Supreme Court decided the landmark case of *Missouri v. Holland*, holding that the federal government could conclude a treaty with Canada and Britain regulating the hunting of migratory birds.¹ Previously, Congress had attempted to pass similar rules by statute, only to be told by a lower court that it had no power to do under the enumerated powers of the Constitution. When Congress then authorized the conclusion of a treaty accomplishing virtually the same policy, Missouri challenged the statute on the grounds that the federal government had no power to conclude a treaty in this area. The decision by Justice Holmes, rejecting Missouri's argument, stands for the proposition that the federal government can accomplish by treaty what it cannot by statute, and that such treaties will bind states under the Supremacy Clause (Spiro 2000; Bradley 1998; Golove 2000; Healy 1998).

The case illustrates how the possibility of international delegation can modify constitutional allocations of powers once thought to be sacrosanct. Previous understandings of the balance of power between state and federal government had to give way to the exigencies of foreign relations. The Bricker Amendment controversy in the early 1950s demonstrates the high stakes: amendment proponents sought to re-establish a pre-*Missouri* understanding of the constitutional authority (Tananbaum 1988). They ultimately failed, however, and the centralizing logic of the decision carried the day.²

¹ 252 U.S. 416 (1920).

² In many ways, *Missouri* simply presaged the world that emerged after the Commerce Clause cases of the 1930s. After the New Deal, Congress would have had no problem

Missouri suggests that international delegation may at times be utilized strategically by particular actors seeking to escape domestic constraints on their power. Such constraints are not limited to those of federalism: so-called horizontal separation-of-powers' schemes are also affected by the possibility of international delegation. For example, the decision to delegate authority to an international body can shift power from the legislature to the President, who negotiates international agreements and is also in a better position to monitor and enforce them, and away from legislative actors who can at best approve or ratify the treaties already concluded (Brewster 2004). We know that agenda control is a powerful factor in dictating policy outcomes in general, and the assignment of agenda control over treaties to a single actor will tend to shift power toward that actor. Delegation may also lead courts to be more deferential, if they have adopted notions of executive supremacy in foreign affairs.³

International delegation is the subject of a rapidly growing literature in international relations, international law and domestic constitutional law, particularly in the United States (Bradley and Kelley 2005; Lake, Nielson and Tierney 2005). Naturally, in the parochial United States, the literature is largely focused on domestic constitutionality of delegations and tends to be critical (Swaine 2004; Ku 2000, 2006; Bradley 2003; Rabkin 2005). But there are tremendous functional pressures driving even (or especially) the United States to delegate authority to international mechanisms and bodies. Delegation remains alive and well despite the emergence of a robust sovereigntist critique reflected in the highest corridors of power.

achieving its desired policy for the protection of migratory birds through ordinary statute. Arguably, then, *Missouri* only mattered for about a decade and a half.

³ *U.S. v. Curtiss-Wright*, 299 U.S. 304 (1936).

Europeans, with a long history of delegation to supranational institutions, tend to be more optimistic about the benefits of international delegation. The literature recognizes that the shift toward policymaking at the European levels has strengthened national executives at the expense of national legislatures, and European institutions at the expense of national ones (Comella 2004). Some have observed a kind of backlash, so that legislatures are increasingly empowering committees and sub-committees to exercise oversight over European policies (Hamerly 2007).

International delegation is especially common in areas like environment, consumer safety, and public health, which require expert knowledge to be deployed in fast-changing conditions to meet broad demands from the public. These are precisely the areas in which the administrative state dominates in the domestic sphere. This suggests that there may be great benefits to treating international and domestic delegation in the same framework. In their foundational paper, “Choosing Not to Choose: When Politicians Choose to Delegate Powers” Voigt and Salzberger (2002) introduced a framework that integrated international and domestic delegation, implicitly treating the two as substitutes. This launched a research program that these two and others have exploited in a series of papers (Voigt 2004; 2005a; 2005b).

This paper seeks to contribute to this literature in three ways. First it considers the tradeoff between international and domestic delegation devices, and asks whether they are complements or substitutes. That is, do countries that delegate externally also delegate internally, or does external delegation minimize the need for internal delegation? It argues that the two are largely complements. The paper then explores the domestic separation of powers as an explanatory factor in understanding different degrees of

delegation across states. It argues that the domestic separation of powers is a driving factor in propensity to delegate, and provides some preliminary empirical evidence in this regard. International delegation serves as a power in addition to the domestic division, whatever it may be.

Finally, the paper considers the implications of this argument for international relations theory. A complete account of the relationship between domestic and international delegation would, I believe, force us to confront the weakness of contemporary international relations theory and offer a new framework to advance international relations scholarship. While I do not offer a complete theory here, I make some suggestive comments at the conclusion of the paper.

II. DEMAND FOR DELEGATION AND DOMESTIC/INTERNATIONAL TRADEOFFS

We begin by adopting a broad definition of delegation. Most scholars have conceived of delegation in narrow terms, focusing on the assignment to an actor of authority to create or enforce binding rules. In their recent treatment, Bradley and Kelley expand the concept of delegation past a narrow focus on binding authority. Rather they define international delegation as “a grant of authority by a state to an international organization or another state to make decisions or take actions.” This definition is not limited to the issuing of binding decisions, but can also involve rule formation (the International Law Commission); serving as an intermediary (the Algerian role in the Iranian hostage crisis); adjudication (the International Court of Justice); exercising powers on behalf of another state (India’s exercising foreign affairs powers for Bhutan) and several other roles. While this definition has been criticized as being overly broad

(Guzman and Landside 2008), it suits present purposes. It essentially treats international delegation as incorporating a wide range of devices to help produce public goods, including rule articulation, enforcement, information and monitoring, and a range of other governance functions.⁴ Besides these primary activities, delegation can serve to make commitments credible, send signals and serve other functions the principal may not be able to accomplish on her own.

Domestic delegation is more familiar, but also involves a wide range of phenomena. Using a broad definition similar to that of Bradley and Kelley, it is clear that it would include delegation to both non-governmental and governmental actors, including foundations, contractors, courts, bureaucracies, state governments, and independent commissions. The literature on the so-called new governance focuses on the expanding range of tools and delegates used by states in achieving their public objectives, as they shift to softer and more complex forms of regulation (Gunningham 1998: 38; Freeman 1997, 2000a, 2000b). Without exploring the various permutations, we ignore variation in particular types of delegation, but focus on the tradeoffs between domestic and international delegation.

Our focus here is on the *number* of bodies involved in governance, rather than the *depth* of delegation to already existing bodies. One might imagine that different government bodies can combine myriad types of functions, and incorporate a broad scope of delegated authority within one organizational body. Alternatively, a principal might

⁴ Other definitions include those of Abbott, Keohane, Moravcsik, Slaughter, and Snidal (2000) (authority to implement, interpret, and apply rules); Swaine 2004 (authority to produce binding rules with legal effect); Hawkins et al, 2005 (conditional grant of authority to an agent to act on behalf of a principal); and Ku 2000 (transfer of constitutionally-assigned federal powers to an international organization).

choose to segment government functions to a large number of bodies with fairly discrete tasks. These are considerations for the study of the industrial organization of international society. In this paper, I consider only the number of bodies, adopting the simplifying assumption that the amount of delegation is the same for any particular body. I recognize the formalism in this approach, but utilize it in the absence of reliable cross-national metrics for measuring depth of delegation.

A. The Domestic/International Tradeoff

Why would states differ in their willingness to engage in international or domestic delegation and what tradeoffs are involved? One standard answer is driven by functional considerations and involves the production of public goods. Public goods can include information, adjudication, rules or other governance technologies as well as primary goods like national security and environmental protection. Public goods can be produced at a variety of levels, and international delegation allows states to produce those goods at an appropriate supra-national scale, be it bilateral, regional or global. Because states are differently situated with regard to public goods demanded by their citizenry, they will have different propensities to cooperate. This is implicitly an optimistic story in which states will respond to demands for public goods and cooperate when their production requires it.

In a recent pair of papers on constitutional incorporation of international law, I and co-authors approached the problem from the perspective of commitment theory, viewing the delegation of law-making to the international community as a device in which politicians entrench their particular policies against preference shifts (Ginsburg 2006).

From this perspective, demand for international delegation will itself be a product, in part, of internal constitutional arrangements that incentivize politicians (Scott and Stephan 2005). We might imagine, for example, that democracies would have greater demand for international cooperation than dictatorships because of the need for credibility given that leaders will certainly leave power after some time. We found some supportive evidence for this conjecture. In particular, we found new democracies more willing than established democracies or autocracies to delegate the law-making function to the international community as a constitutional matter, for example by incorporating specific treaties or customary international law into the domestic constitution.

Of course, a long tradition has analyzed domestic constitutional arrangements, including the separation of powers, as commitment devices (Holmes 1995: 135; Sunstein 2001: 241; Hayek 1960: 179; Pritchard or Zywicki 1999:447-49; Boudreaux and Prichard 1993). When Congress and the President must cooperate to make new law, over-turning prior outcomes is difficult, enhancing the value of those earlier bargains. Commitment can also be obtained through assignment of power to internal actors such as bureaucrats or an independent judiciary. By delegating authority to insulated actors, such as the federal reserve or independent regulatory agencies, the legislature and executive can ensure that their policies will be safe from partisan tinkering long after the particular parties to the original bargain are out of office.

In short, both international and domestic institutions can be the target of delegations. This leads us to ask about the relative costs and benefits of international as opposed to domestic delegation.

B. Advantages of International Delegation

From a commitment perspective, international delegation would seem to have significant advantages relative to assigning powers to an independent judiciary, or specialized independent regulatory agencies. Independent regulatory commissions and national judiciaries are well and good, but a party cannot credibly promise *never* to interfere with them. A party that wins overwhelming support in a national political process over an extended period of time will be able to influence the composition of independent regulators and courts. In contrast, international agencies are more difficult to control for any single nation. Only a handful of countries are in a position to unilaterally influence outcomes on any issue at all, and no country, even the United States, can *dictate* outcomes confidently, consistently or cheaply. Thus international delegations may have more value in signaling commitment.

In addition, international delegations *may* be more enduring. Because commitments are made by states rather than governments on the international level, embodying obligations in treaties is one way to ensure their survival past the current government. Indeed, the doctrine of state succession means that commitments may outlast not only the current government, but even the decline of the state itself.⁵ It is no accident that President Bush has recently concluded an agreement with the Iraqi government to provide security for some time into the future, shortly before he leaves office.⁶ Endurance should enhance credibility, and international delegation should enhance endurance.

⁵ Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

⁶ Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America, The White House, Nov. 26, 2007, available at <http://www.whitehouse.gov/news/releases/2007/11/20071126-11.html> (last checked January 7, 2008).

Available empirical evidence is consistent with this notion. Voigt (2005) shows that countries which are members of more international organizations have better risk ratings than those with less. He suggests that the key factor is that international organizations provide increased credibility, relative to domestic commitment devices. Assuming for the moment that all countries have the same domestic commitment technologies available to them, more or less, credibility is enhanced chiefly by international delegation.

International delegation, however, may have its *disadvantages* as well. First, we note how the value of commitment goes hand in hand with increased agency costs. International delegation has commitment value precisely *because* agents will be insulated from the immediate control of the principal. Agency costs are the flip side of commitment and can dominate the benefits of credibility in some cases. International bodies by definition have multiple principals, a feature associated with greater slack in principal-agent theory. More generally, the chain of delegation is by definition longer to the international sphere than to the domestic one. In the domestic sphere, citizen-principals delegate to politician-agents, who in turn delegate to expert bureaucracies and courts. In the international sphere, citizen-principals delegate to politician-agents who delegate to an association of states parties who in turn assign tasks to international bureaucrats. In other instances, the delegation to an international organization is conducted by domestic bureaucrats. In either case, there is at least one extra step in the chain of delegations; *ceteris paribus*, longer delegation chains mean greater agency problems.

In addition, the point about endurance is not certain. International delegation requires ongoing consent of the state-principal doing the delegating. As a formal matter,

states are nearly always free to withdraw delegations they made at an earlier period.⁷ So long as they do not formally withdraw, the obligations will be quite enduring. But states may have a difficult time committing not to withdraw. We have several prominent examples of states exiting international arrangements (Helfer 2002, 2005).⁸ Furthermore, the possibility of simply ignoring the international obligation is always present. Though such behavior may have some costs, it may also be beneficial in terms of the domestic political calculus.

Contrast domestic delegation. Once a government sets up an agency, it will likely incentivize the development of regime-specific interest groups that will fight to maintain the regulatory scheme. Such groups can act as brakes on changes. It is telling that, in the entire history of the regulatory state in the United States, we have decommissioned exactly one agency: the Interstate Commerce Commission, the very first independent

⁷ Epstein and O'Halloran (2007) point out that what distinguishes internal from external delegation is the easy availability of exit from international obligations. Most international obligations are still based in the theory of state consent, and consent, of course, can be withdrawn at any time. This means that, so long as withdrawal costs are not too high, exit is possible. We do have, obviously, examples of international delegations that are effectively irreversible, such as the European Union or WTO, where the network benefits of the international organization essentially lock in the delegation of power. Cf Guzman and Landside (2008).

⁸ Indonesia withdrew from the United Nations in 1965 in response to the seating of Malaysia in the Security Council, rejoining some 15 months later. The United States and United Kingdom withdrew from UNESCO in 1984, rejoining in 2002 and 1997 respectively after reforms to the organization (Helfer 2005). Caribbean nations withdrew from the jurisdiction of the Privy Council in response to decisions on the death penalty (Helfer 2002). The U.S. withdrew from optional clause jurisdiction of the ICJ after the adverse decision in the *Nicaragua* Case. See *United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, Jan 18, 1995, 24 I.L.M. 246. More recently, it withdrew from the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 596 UNTS 487 (1963). See communication to the UN Secretary-General, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp> #N1.

agency established in 1887. It was abolished in 1995, roughly a decade after deregulation largely deprived it of a rationale. But history is littered with defunct and “exited” international organizations.

Exit is thus easier on the international arena. This is appropriate, in part because exogenous change is likelier at the international level, in which persistent uncertainty is the only constant. The variation in conditions over time means that it is difficult to determine in advance the costs that will be associated from violating an international obligation. Some of these costs depend on other states voluntarily punishing the violating state through bilateral retaliation or third-party reputational sanctions. These decisions will be made in accordance with the particular political situation of the potential enforcer at the time of violation, as well as the relative power of the violator. From the point of view of a domestic interest group seeking to entrench its policies in international obligations, this reduces the certainty of an externally imposed cost.

Still, exit may not be practicable in every instance. As Brewster (2004: 518) points out, exit is an all-or-nothing proposition. Complex multilateral treaties involve lots of different issues, so that withdrawal will affect many different groups and impose many costs. Network effects may also put exit out of reach as a practical matter. The multi-sectoral, networked nature of the WTO, for example, likely prevents exit from being a real threat. For some international delegations, then, there will be conditions that prevent exit and enhance entrenchment.

Another consideration is the presence of third parties to monitor agency slack. In the domestic sphere, interest groups organize around agencies to monitor their behavior and provide information to legislative principals. It seems likely that as a general matter,

there are fewer third parties willing and able to monitor international agents, for the costs of doing so may be higher and the organization of such monitors is subject to complex cross-border collective action problems.

The point is that there are tradeoffs across domestic and international delegation. International delegation involves a greater release of control and correspondingly higher agency costs. These features directly enhance the value of the delegation as a commitment device. On the other hand, the costs of exit may in fact be lower, depending on the issue area and network quality of the public goods created through the delegation.

C. Substitutes or Complements?

Thus far, we have implicitly followed the trend in the literature to treat international and domestic delegations as substitutes. The assumption is that there is a single principal applying comparative institutional analysis to select between alternative agents. The key distinguishing characteristic among agents is that they are located in the domestic or international arena.

We conclude this section with a question: are international and domestic delegations really to be treated as substitutes, as we have implicitly done? Perhaps international and domestic delegations are in fact complements, so that delegation on one level is made more effective by delegation on another. In this conception, delegating power to one domestic body opens up new possibilities for further delegation that would otherwise be unavailable. Rather than serving as a substitute agent to whom a particular task will be entrusted, the international agent may be given a task in addition to or even because of an assignment to a domestic agent.

The most straightforward example flows from the politics of expertise. By empowering administrative agents, governmental principals create the possibility of providing new public goods that could not be provided by the principals on their own. For example, politicians cannot set the number of parts per million of a particular pollutant to be allowed into the domestic atmosphere, for they lack information and expertise on the relevant considerations. Once they hire an agent in the form of an environmental ministry, improved environmental quality is possible. Furthermore, the agent can produce new public goods beyond the nation-state. The ministry, for example, can coordinate and negotiate with counterpart ministries to try to reduce the number of CFCs produced globally. This would be impossible were not the experts hired in the first place. Delegation to subnational agents creates new possibilities for international public goods produced by governmental networks.

The reverse dynamic may occur in instances in which delegation to an international body serves to enhance assignment of tasks to particular domestic actors. The classic story of the evolution of the European Court of Justice (ECJ) seems to fit this model. According to conventional wisdom, the ECJ relied on national courts to enforce its policies through the doctrine of direct effect.⁹ The European Court held that its rulings on European law were directly effective in the national legal orders of the Member States. Judges in many of these countries had previously been low status actors who had not had much power vis-à-vis national governments. But with the toolkit of European law, and the ability to refer cases directly to the supra national level, the national judges were newly empowered; some even argue this had some spillover effect in their interpretation

⁹ *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (Case 26/62); [1963] ECR 1; [1970] C.M.L.R. 1.

of domestic law. This alliance of judges at both the supra- and sub-national levels needed each other to expand their power vis-à-vis other constitutional actors. Once empowered, the national courts were able to gradually take on more and more tasks once thought to be the province of legislators. International delegation begat empowered domestic agents.¹⁰

Benvenisti (2009) notes a collapse of domestic and international delegation, as domestic bureaucrats form networks or epistemic communities with their counterparts in other countries. Benvenisti notes that when agents are in touch with each other directly on a regular basis, there is no need to engage in formal agreements, as they can clarify expectations and communicate easily. This suggests that effective delegation at one level may be enhanced by delegation at another.

III. HOW THE SEPARATION OF POWERS BEGETS DELEGATION

This section extends the analysis to consider whether the separation of powers is an important determinant of international propensity to sign treaties. That is, states that have internally divided powers as a constitutional matter may be more likely to need to empower new powers through delegation. The suggestion is that a division of powers begets further division. International delegation is rarely the “second” power; but it may be the third, fourth or fifth. If two or more institutions already exercise distinct powers in the constitutional system, there may be a need to increase delegation to a new body, both domestically and internationally.

¹⁰ One might also assert that the domestic “delegation” to which I refer was not a delegation at all, but simply a case of increased agency costs associated with the domestic judges.

A. Aggregated vs. Disaggregated States and the Need for Monitoring

We begin with the key variable driving our analysis, namely whether a state is formally aggregated or disaggregated in terms of the concentration of institutional authority (Gerring 2005).¹¹ A pure parliamentary regime in a unified system of government exemplifies a formally aggregated state. The parliament and the government are closely linked, and there is no division of authority among the two, notwithstanding their different functional roles in the political system. There are no sub-governments with independent lawmaking authority. In contrast, a federal, separation of powers system exemplifies a formally disaggregated state. Different levels of government have independent zones of authority that are mutually exclusive. A horizontal division of powers between executive and legislature provides for a system of exclusive and shared competences that make government more formally complex.

My first suggestion is that disaggregated states, *ceteris paribus*, have greater need for particular types of delegation that are useful to resolve internal constitutional problems. Like aggregated states, disaggregated states need to delegate to resolve problems of technical complexity, hiring agents to make decisions that involve substantive specialization in various areas, such as the ministry of environmental regulation mentioned above. (We will call such delegates “primary agents.”) Unlike aggregated states, disaggregated states face additional governance problems resulting from the difficulty of monitoring the primary agents. This leads to demand for new agents to monitor and discipline the primary agents.

¹¹ This concept is similar to that of John Gerring, et al (2005), who distinguish what they call centripetal states from decentralized states.

Consider as an example the exercise of power by constitutional courts. Several have argued that the separation of powers increases the scope of judicial authority both in terms of initial decisions to empower the judiciary and in terms of the scope of judicial action thereafter. The logic of initial delegation of powers to courts is rooted in the universal logic of dispute resolution: when two parties have a dispute, a very common solution is to find a third party to help coordinate their behavior (Shapiro 1981; McAdams 2005; Law 2008). Thus a constitutional scheme that divides lawmaking authority among two different branches is very likely to create a third branch to help the first two resolve problems among them. Similarly, a federal system in which powers are divided into two different levels of government has inherent boundary-drawing problems. For areas in which it is not clear which lawmaker is to govern a particular issue area, there is demand for a “neutral” third party to resolve disputes and to make sure that neither lawmaker passes rules that intrude into the others’ lawmaking zones.

Examples of this phenomenon are easy to identify in domestic political systems. Constitutional review was nearly confined to federal states until World War II: the United States, Mexico, Australia, and Kelsen’s Austrian Constitution. In the United States, federalism issues dominated the 150 years of the Supreme Courts constitutional jurisprudence. The same logic appears in separation of powers systems. In France, for example, the Fifth Republic set up a scheme of divided lawmaking authority between an autonomous executive and the legislature. The divided lawmaking scheme required someone to determine on which side of the line particular issues were assigned, and the Constitution set up the *Cour Constitutionnel* to perform this function (Stone 1992). Importantly, it had NO function of protecting citizen rights, as it could only engage in *ex*

ante abstract review of legislation (pre-promulgation review). The courts in these examples were delegated with powers that were required by the initial assignment of powers to other branches. Disaggregation begat delegation.

Independent regulatory agencies provide another example. The conventional understanding of the birth of these institutions was to resolve internal divisions of power in a world of separated powers. Congress wanted to achieve certain goals but was unwilling to assign unrestrained powers to an executive that might have been controlled by another party. Thus they established a hybrid “headless fourth branch of government.”¹² Independent regulatory agencies called into question the Montesquiean separation of powers because they exercised adjudicative, legislative and executive powers at various times (Rubin 1991, 2000). They also were headed by agents who were appointed by the executive, but could not be removed.¹³ In this way, the initial separation of powers created a demand for delegation because of coordination problems among the divided lawmaking authorities. Once independent agencies were set up, however, a new fear arose: how to ensure accountability.

We now have a body of literature suggesting that independent regulatory agencies exercise greater authority during periods of divided government than in unified government (Epstein and O’Halloran 1999). This is a basic result from spatial models of delegation in which agents’ policy discretion increases with both the number of principals and the political divisions among the principles. Bernhard (2002), for example, finds this

¹²The President's Comm. on Admin. Mgmt., Report of the Committee with Studies of Administrative Management in the Federal Government (1937); see also, *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring) (condemning headless fourth branch).

¹³ *Humphrey's Executor*, 295 U.S. 602 (1935).

to be the case with central banks. These problems are inherently more severe in separation of powers than in pure parliamentary systems, in which legislative over-ruling and other devices to control agents are more easily available.

In response to concerns about agency costs in the administrative state, American lawmakers empowered another agent, namely courts, to review decisions of independent agencies.¹⁴ In this way, the initial delegation to agents created demand for a second round of delegation to a new set of agents, and judicial review emerged as a monitoring device, or more accurately, an arena in which private parties could call attention to administrative malfeasance (McCubbins, Noll and Weingast 1987, 1989; McCubbins and Schwartz 1984).

We need not stop the story there. As courts began to review the decisions of the expert agencies, they responded to broad currents in the polity and eventually became quite active monitors. But this led to accusations that the judges themselves were overstepping their bounds, substituting their own policy decisions for those of the agencies. To the question, “Who Guards the Guardians?”, at least one possible solution is to hire yet another agent to watch the second. Another might be to split the monitoring task, so that no single monitor had a monopoly. The point is that, in theory, the initial separation of powers can create a domino effect of continuing demands for new bodies to which to delegate monitoring the primary agents.

One view of international organizations is that they serve to help generate information for domestic interest groups, providing a monitoring function that might not be met with ordinary domestic institutions. One conventional example is the

¹⁴ See the Administrative Procedures Act, 5 U.S.C. §551 (2000).

international trade machinery. Domestic interest groups such as consumers may be unable to effectively monitor their own governments' performance. An international agreement limits the ability of government to adopt protectionist policies by allowing other states to challenge them before an effective international tribunal. One can view the other states as acting as agents of domestic interests that might be unable to ensure the desired policies on their own. Delegating internationally can put the policies beyond the reach of distrusted domestic actors, enhancing commitment and avoiding capture problems.

In other instances, the international delegate may take on tasks traditionally allocated to domestic institutions. This might occur because the domestic institutions are incapable of carrying out the tasks. A recent example is the UN International Commission Against Impunity in Guatemala, created to tackle the problem of illegal militias and organized crime that domestic justice institutions were unable or unwilling to prevent, in part because of infiltration of the state.¹⁵ (In a country with one of the highest per capita murder rates in the world, only 2% of murders are prosecuted, compared with 45% in neighboring El Salvador.¹⁶) The Commission, headed by a Spanish prosecutor, will assist in investigating these groups.¹⁷

B. Constitutional Structure and Propensity to Delegate

¹⁵ *A Test of Will*, Economist, March 22, 2008 at p. 40.

¹⁶ *Id.*

¹⁷ Political controversy over the role of the groups ended up *limiting* the delegation that actually materialized. The initial agreement with the United Nations called for an international role in prosecution of suspects; the country's Constitutional Court viewed this as an infringement of sovereignty and so the scope of the agreement was scaled down before actual agreement was obtained.

If the argument so far is plausible, we can imagine that different constitutional schemes will create more or less demand for international delegations. The separation of powers system associated with the disaggregated state seems to be delegation-intensive. Disaggregated states seem to be more likely to create independent regulatory agencies; they also seem to be more likely to demand third-party monitors to ensure delegations are properly implemented, and to create neutral institutions to resolve disputes among the central political institutions.

In her treatment of the issue, however, Brewster (2004: 541) argues that parliamentary systems will more likely to delegate internationally. Her argument is that parliamentary systems are unable to make credible commitments of various sorts, because of the ease of enacting legislation. Parliamentary systems may need other devices to ensure policy credibility and entrenchment, and the international arena can serve as a source of such devices. Separation of powers systems, by contrast, make legislation difficult to enact, so policies that are actually adopted may be more immune from subsequent over-ride, and therefore be more credible in the first instance.

I agree that disaggregated states with separated powers have domestic mechanisms of obtaining commitment. But if we treat international delegation as a *complement* rather than a *substitute* for domestic delegation, Brewster's argument may not hold. If domestic delegation generates heightened demand for international delegation, because new kinds of public goods are possible and because of domestic agency costs, then it is at least plausible that separation of powers systems should exhibit *higher* levels of international delegation.

Another form of state disaggregation is federalism. Brewster makes no direct claim about federalism, but Swaine (2004) provides a normative account of international delegation in federal systems, arguing that delegation has the potential to complement the values of federalism by diffusing federal authority. But it seems equally likely that international delegation could be used, as in *Missouri v. Holland*, to undermine federal values by agglomerating national power (Swaine 2003). Because sub-national law is irrelevant in terms of compliance with international legal obligations, international delegation will tend to constrain sub-national units. The prediction is that this type of device will be used more frequently to bypass domestic constitutional constraints, so we ought to observe more delegation by such states. The delegation of power at issue in *Missouri v. Holland* would not have occurred in a unitary state, since the federal government was in fact concerned with birds in Missouri rather than those crossing an international border.

c. Countervailing Forces

The argument so far is that disaggregated states will demand greater levels of international delegation than will aggregated states. There is, however, a set of countervailing considerations. Even if they *demand* more delegation to solve functional pathologies in the political system, disaggregated states will often be unable to *effectuate* these delegations for the same reasons they need delegation in the first place. When powers are separated in the legislative process, for example, legislation is more difficult to pass. Separation of powers systems may have more actors with veto power over the conclusion of treaties, which are needed to effectuate delegations. Thus as an empirical matter we might observe relatively weak associations.

IV. EVIDENCE FROM TREATY ACCESSION

This section provides some empirical evidence in support of these conjectures. My suggestion is that disaggregated states will have a greater propensity to embed policies at an international level. We test this hypothesis with an examination of the effect of the separation of powers on the incentives of states to cooperate with others in treaty relationships.

Of course, one would ideally like to control for the state's objective need for public goods. Some states may simply have less need for certain public goods, and thus have less objective incentive to enter into treaty relationships that delegate production in part to a counterparty. We do not have an obvious proxy here. In the analyses that follow however, we do draw on the findings of Miles and Posner, who find that the number of treaties increase in size, wealth and state age.¹⁸ We include these variables as controls.

Data

We analyze two separate dependent variables to capture international delegation: the number of treaties a state enters into, and the number of international organizations the state has joined. For each, we treat elements of state disaggregation as the primary independent variables of interest.

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Our data on treaties comes from Miles and Posner, who are in the process of collecting data on state propensity to sign international agreements, both bilateral and multilateral. Miles and Posner use the United Nations Treaty Database, supplemented with the Washington Treaty Index, to generate a comprehensive set of data on all treaties since 1946. They report a data set of 35,186 bilateral treaties between states; 8,513 bilateral treaties between a state and an international organization; and 667 multilateral treaties with 19,897 parties. Data are reported as of 1998. Their effort is ongoing and the present data is preliminary, so results should be treated with caution. We use as our dependent variable the *total* number of treaties the state has entered into.

Our data on the number of international organizations a state has entered into comes from Voigt (2005). We use his indicator INTDEL I which represents the simple figure for total number of international organizations the state has joined. He also has other indicators which weight organizations by importance. We set these issues aside for now, as we do not have a theory ranking different types of delegation by importance.

To capture the separation of powers, we consider three separate models for each dependent variable. First we examine the number of houses in the legislature, which indicates bicameralism. Second, we use a dummy coded 1 if the country is formally a federal system. Third, we use a proxy for pure presidential systems. This is constructed using data from the Comparative Constitutions Project variable EXECNUM and takes value 1 if the constitutional system has only a single executive, as opposed to two.¹⁹ This is a feature of “pure” presidential systems. Dual executive systems are more likely to be parliamentary, as they include both a prime minister and another head of state (typically a

¹⁹ See generally, Comparative Constitutions Project, www.comparativeconstitutionsproject.org

monarch or president) whose powers vary. Some of these systems feature two truly powerful executives, as the discussion of France earlier made clear. Others, however, have a figurehead executive: the UK would be coded as having two executives in our scheme.²⁰ Note that we do not include all variables in a single model because of likely collinearity: federal systems tend to have upper houses of parliament to represent constituent units.

Our hypothesis is that all of these features, federalism, bicameralism and pure presidentialism will be associated with greater levels of international delegation. The competing hypothesis is that of Brewster, which is that parliamentary systems will generate greater levels of international delegation. Brewster makes no prediction about federalism, but her argument certainly extends to bicameralism and presidentialism. Furthermore, the logic of her argument, which centers on commitment and signaling value of international delegations, would seem to be generally consistent with an association between state disaggregation and international delegation.

²⁰ An extension would involve distinguishing which dual-executive systems are better characterized as semi-presidential and which as parliamentary. For now, we treat single executive systems as a proxy for pure presidentialism.

Table 1: Regression Results (standard errors in parentheses): Treaties predicted by disaggregated structure

	Model 1	Model 2	Model 3
Dependent Variable	Total Treaties	Total Treaties	Total Treaties
Constant	91.45(100.68)	13.55(115.05)	-188.82(185.01)
GDP/capita	.04 (.007)***	.05 (.007)***	.05(.007)***
Population	2.32e-06(3.98e-07)***	2.67e-06(3.96e-07)***	2.59e-06(3.97e-07)***
State age	.64 (1.00)	.42 (1.04)	.36 (1.05)
Federalism	578.89 (192.51)***		
Presidential		176.55(117.45)	
Bicameralism			199.96(112.51)*
R-squared	0.45	0.42	0.44
N	139	135	134

* significant at 10% level; ** significant at 5% level; *** significant at 1% confidence level

Table 2: Regression Results (standard errors in parentheses): International Organization membership predicted by disaggregated structure

	Model 4	Model 5	Model 6
Dependent Variable	Total International Organizations	Total International Organizations	Total International Organizations
Constant	42.58(1.30)***	42.53 (1.49)***	37.75 (2.41)***
GDP	.0007(.0001)***	.0009(.0001)***	.0008(.0001)***
Population	1.31e-08(5.01e-09)***	1.64e-08(4.98e-09)***	1.59e-08(4.91e-09)***
State age	.007 (.01)	.005(.01)	.005 (.01)
Federalism	7.60 (2.44)***		
Presidential		-1.04(1.51)	
Bicameralism			3.18(1.41)**
R-squared	0.53	0.49	0.49
N	129	125	125

* significant at 10% level; ** significant at 5% level; *** significant at 1% confidence level

Discussion

The results do provide suggestive support for our hypotheses. Bicameralism and

federalism are strongly associated with international delegation. In Model 2,

Presidentialism approaches statistical significance but does not reach it ($P > t = .13$). We

also find, consistent with Miles and Posner, that larger and richer states are more likely to conclude treaties and join international organizations. We do not, however, find any effect for state age.

These results provide some insight into the issues raised in Parts II and III. It suggests that demand for international delegation is not constant across states, but largely dependent on the internal institutional setup. In particular, we provide some counter-evidence for Brewster's (2004) conjecture that parliamentary systems will have a *greater* demand for commitment and hence exhibit a greater propensity to delegate. This is because we observe no statistically significant effect in either direction for presidential systems. Brewster's argument may in fact be true, *ceteris paribus*, but all else is not in fact equal. Disaggregated states may have a greater baseline demand for delegation, not purely for commitment reasons but because the internal division of powers creates agency problems that can only be resolved with further delegations. Even though such states may have more difficulty *effectuating* delegation, in that bicameralism and federalism increase the transaction costs of delegating, they still exhibit a greater propensity to delegate.

These results call into question the implicit assumption of much normative work in this area that international and domestic delegations are substitutes, not complements. International delegation does not so much reflect the abandonment of domestic sovereignty so much as functional demand for commitment, and states are differentially situated in their need for commitment.

V. CONCLUSION: THE GAPS IN TRADITIONAL INTERNATIONAL RELATIONS THEORY

We conclude by considering some of the implications of the analysis for international relations theory as applied to international law. In recent years there has been a boom in work in this area, mostly using the institutionalist framework associated with Robert Keohane (1984). This framework follows the realist school in treating states as unified actors with a single preference, but is optimistic about the possible of cooperation.

Our approach bears some similarity to the “liberal” school in that it unpacks states to examine their internal characteristics as determinants of their international behavior. As Moravcsik’s (1997) foundational article articulated it, the liberal theory of international relations relies on three methodological propositions. First, societal actors are primary: “The fundamental actors in international politics are individuals and private groups, who are on the average rational and risk-averse and who organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence.” (516). Second, states represent some subset of domestic society. Third, states act purposively in an interdependent world. As incorporated into legal theory by Slaughter, this implies an attention to domestic legal institutions and actors. This paper extends the analysis to suggest that internal state *constitutional* characteristics may matter for creating incentives to delegate. These internal characteristics are important mediating institutions for domestic society, and suggest systematic differences in the incentive and willingness of states to delegate to international bodies.

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