

# **Disassembling the Assembly: Congress and the Legislative Gap in Global Governance**

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## **I. INTRODUCTION**

Congress has long been the most skeptical branch of the federal government regarding US participation in international agreements and institutions. Whether with the Treaty of Versailles after World War I, the Havana Charter in the late 1940s (which would have created an International Trade Organization), or, implicitly, the Kyoto Protocol, Congress has been unafraid to wield its primary source of authority over international claims on US sovereignty—the rejection of agreements (formal treaties or otherwise) negotiated by the executive branch.

However, globalization has made this mechanism of Congressional oversight of the executive's conduct of foreign affairs increasingly problematic. As the United States becomes increasingly integrated into global markets and interdependent with other countries on a variety of issues, the costs of simply rejecting treaties intended to manage this interdependence have grown. At the same time, however, globalization in its current form has produced a political backlash against both the encroachment of international institutions on US legislative authority and the absence of clear mechanisms to ensure democratic control of these institutions.

This paper will look at the dilemmas globalization creates for existing mechanisms available to the US Congress to undertake legislative oversight of US

involvement in international institutions. It will argue that globalization has sharpened these dilemmas by creating tensions between the strong incentives to sustain American participation and leadership in international institutions and the capacity of Congress to sustain its constitutionally defined role of ensuring this involvement meets high standards of legislative oversight and democratic accountability. If we wish to sustain this role for Congress, we need new ways of thinking about how it can meaningfully participate in—rather than simply submit to or reject—international institutions in ways consistent with American political and institutional priorities. Existing alternatives—such as a world parliament or more ad hoc parliamentary assemblies—do not offer realistic *substitutes* for the treaty ratification process, but may provide a core set of principles for how to establish a foothold for ‘legislation by legislators’ in global governance.

## **II. CONGRESS, ‘LEGISLATIVE GAPS,’ AND THE RATIFICATION DILEMMA**

Though not irreversible, globalization—defined here as a process of international economic integration spurred by technological change and enabled by political choices to support, or at least not hinder, this process—is a reality. Although the executive branch negotiates international economic agreements and the private sector drives international commerce, US economic integration into the global economy is a result in part of a variety of Congressional actions since World War II to support, or to not stand in the way of, this integration. Congress’s tacit or explicit approval of the postwar Bretton Woods monetary system, a large number of multilateral and other trade agreements, and a generally open capital account have provided an important and necessary legislative imprimatur on the ever-growing integration of the US economy into the world economy.

Growing US integration into the global economy and the international institutions intended to manage this global economy have exposed ‘legislative gaps’ in the governance of the global economy at both the domestic (US) level and at the international level. These legislative gaps have raised questions about the oversight and democratic legitimacy of global governance, and of the possible negative implications for the distribution of power between the executive branch and Congress within the US federal government. Yet while Congress’ most powerful weapon to hold both the executive branch and international institutions to account remains its power to reject treaties and other agreements, the costs of wielding this power grow in concert with step with US integration into the world economy.

To establish the logic of this argument, we need to address the nature of (1) Congressional authority regarding US involvement in international institutions; (2) the aforementioned legislative gaps at the national and international levels; and (3) the dilemma that arises when Congress has insufficiently sensitive instruments available to redress these gaps. Each will be addressed in turn.

### **Congress and international institutions**

Two-thirds of the US federal government is inclined to be ‘internationalist,’ while one-third remains ‘sovereigntist.’ The executive branch conducts foreign policy, making international agreements and sending delegations to international institutions; and the Supreme Court, despite its domestic focus, increasingly takes into account foreign precedent in its decisions.<sup>1</sup> Meanwhile, the US Congress, like peer legislative institutions in countries around the world, is resolutely sovereigntist. That is, Congress assiduously,

even jealously, guards the sovereign authority of the United States government (including itself) from foreign encroachment. Because it has the constitutionally defined role as the sole legislative authority within the federal government, its members naturally look with a certain skepticism on rival sources of legislation that (unlike state legislatures) can override their own legislative authority—namely, international institutions and their associated treaties and agreements that, if ratified, become the law of the land within the United States. Institutionally, Congress does not have an incentive to encourage the executive branch to negotiate a large number of international agreements that circumscribe Congress’s role as the supreme legislative authority.

Congressional sovereignty also operates at the micro level in the incentives faced by its individual members. Members of the Senate and (especially) House of Representatives are elected specifically to represent the interests of their local constituents, and can be punished electorally by these constituents for devoting energies to foreign affairs rather than ‘bringing home the bacon.’<sup>ii</sup> While international economic agreements in particular can bring real benefits to these constituents, often they involve concentrated costs (to specific, locally-based interest groups) and diffuse benefits (to consumers in general)—making it more likely that those bearing the costs will mobilize effectively to punish their representative in Congress for supporting such agreements.

In their role as representatives, it is also incumbent on members of Congress to represent their constituents’ particular attitudes toward the US role in the world. The strains of isolationism and mistrust of foreign entanglements that have occasionally characterized American opinions regarding foreign affairs since the founding of the republic thus have generally found their representation in Washington via Congress.<sup>iii</sup> Up

to World War II, this Congressional sovereigntism helped sustain the US foreign policy priority of keeping the world at arm's length—as seen most notably in the Senate's rejection of the Treaty of Versailles (and thus participation in the League of Nations) in 1919, after World War I.

Though its sway over US foreign policy has generally weakened since World War II—thanks in large part to the dictates of US leadership in maintaining international security and order and the rise of the 'imperial presidency' at home—the US Congress remains a uniquely strong legislative institution compared to those in other advanced industrial countries. Because it stands independent of the executive branch—unlike in parliamentary systems, in which the leading party (or parties) controls both simultaneously—Congress has the autonomous authority (and, in periods of divided government, inclination) to challenge the president's conduct of foreign affairs. Therefore, its approval remains very much a necessary condition for the executive branch to commit the United States to participation in international agreements.

In one sense, Congress's unique strength lies not so much in its oversight of the executive's conduct of foreign affairs—this is a standard legislative function in all countries, usually undertaken by opposition parties—but rather in its role in supplying such agreements with a stamp of legitimacy. In a country whose founding governing principles involve constraining executive power, Congress's official imprimatur on international agreements negotiated by executive officials is essential to the functioning of American democracy as specified in the Constitution. This point is further underlined by the fact that Congress is more 'democratic' than the elite-driven executive and judicial branches, meaning that, absent a national referendum on international agreements (which

never happens), its approval comes closest to confirming that such agreements are consistent with the ‘will of the people.’ Moreover, Congressional ratification of international agreements may make American commitments to adhere to these agreements more credible to other countries than if no such ratification process were required.<sup>iv</sup>

However, this last observation can be turned on its head: what if checks and balances within the US government prevent the United States from being able to make commitments in the first place? The decision of the Clinton administration to not even submit the Kyoto Protocol, which President Clinton had signed, to the Senate for ratification in the face of certain defeat is only one of many examples in which Congressional hostility has torpedoed American involvement in important international agreements. Such a scenario becomes even more likely in times of divided government—i.e., when Congress and the White House are controlled by different parties. Thus the need for Congress’s approval of US participation in international agreements presents a relatively larger hurdle than it does in other countries, particularly those with a parliamentary system in which the executive is controlled by the party with a majority in the legislature.

Congress has several formal and informal mechanisms to provide or withhold approval from the executive’s commitment of the United States to observe international agreements. The two mechanisms of greatest interest in this chapter are the *delegation* of authority to negotiate agreements and the *ratification* of any resulting treaties or agreements.<sup>v</sup> The delegation of authority to negotiate—for example, providing the president ‘fast-track authority’ to negotiate trade deals, as discussed below—is a

(temporary) transfer of power from Congress to the executive to undertake negotiations that Congress, though the supreme lawmaking authority, is ill-suited to undertake as a collectivity. Ratification involves an up-or-down vote in the Senate for treaties (requiring a two-thirds majority) or in both houses of Congress for international agreements (requiring a simple majority).<sup>vi</sup> Other means of Congressional influence over US participation in global governance is its power of the purse (through which it funds—sometimes conditionally—the operations of international organizations such as the United Nations and World Bank); through laws placing conditions on US observance of international commitments (such as conditioning China’s enjoyment of World Trade Organization- (WTO-) mandated ‘most-favored nation’ status on its human rights record); through its approval of presidential nominees to posts such as US ambassador to the United Nations (UN) (who, as in the recent case of John Bolton, can have significant implications for US relations with the organization); and through other means of oversight such as holding hearings to hold key executive officials to account.<sup>vii</sup>

With these mechanisms available to it, Congress has not simply rolled over as globalization has increased the incentives for the United States to attempt to manage its interdependent relationships with other countries at the global level. As of this writing, significant opposition remains in Congress (and the White House, for that matter) to binding commitments in any successor to the Kyoto Protocol, and Congress continues to withhold fast-track negotiating authority from the president despite ongoing negotiations in the WTO. These maneuvers involve certain costs to the United States, as discussed below, but they also call into the question the viability of global governance in these issues. Whether or not the United States is the ‘indispensable nation,’ as Madeleine

Albright called it, it remains the case the multilateral agreements in these areas are essentially meaningless without cooperative American involvement. In other words, other countries may bear the costs of Congressional recalcitrance more than the United States itself.

The point here is that growing US involvement in international institutions to manage globalization has resulted in not only a semi-permanent delegation of legislative authority to the executive branch but also an increase in the potential costs for both the United States and the international community to rejecting commitments to participate in and be bound by international law. This situation has laid bare the aforementioned legislative gaps and the dilemmas they create.

### **Legislative gaps**

The US Constitution created a strong Congress to confer democratic legitimacy on national policies and more generally uphold a tradition of constraint on federal executive power in the United States. However, in the context of increasingly intensive globalization and global governance, gaps are emerging between a stable, constitutionally mandated status of Congress's legislative supremacy in the United States and the decreasingly supreme authority it wields as the enactor of law applicable to Americans. Legislative authority is shifting from Congress in two directions: horizontally to the executive branch of the federal government, and vertically, via the executive branch, to international institutions.

Because this flow of legislative authority away from Congress is addressed in detail elsewhere in this volume (see the Ku and Yoo chapter), I do not do so here, except



to make a few relevant points. Domestically, when Congress delegates power to the executive branch to negotiate international agreements, it does more than simply hand powers to the president temporarily. It also augments the executive branch's status as a focal point for domestic interest group activity vis-à-vis those agreements—which, as they constrain American law and regulation in areas as diverse as investment, the environment, and intellectual property—have increasingly important consequences for these groups. In other words, the executive is able to use its position as negotiator as a means to design international agreements that reward its political supporters and/or 'winning coalitions' of interest groups.<sup>viii</sup> Of course this privileged (and privileging) role for the executive is not new; but as the United States negotiates and becomes party to an ever-increasing number of international agreements, the delegation of authority from Congress to the executive has increasingly permanent implications for the centrality of executive power in American politics.

Perhaps less well understood is how Congress's delegation of legislative authority to the executive at the domestic level deepens a particular legislative hole at the international level: *the absence of legislation by legislators*. International organizations such as the World Trade Organization or World Bank have their own sources of executive and judicial authority: regulatory experts within their secretariats wield (limited) authority to draft and monitor international law, and legal experts within their arbitration mechanisms wield authority to resolve disputes among national members and/or private sector actors regarding compliance with this law. But international institutions in general do not have standing legislative bodies that are populated by legislators. That is, while the WTO, World Bank, and other international organizations do

have forums for the creation of international law and other agreements, they are populated by national delegations that consist of executive branch officials of their member states. Among the world's myriad international institutions, only the European Parliament features 'supranational' legislators with an authoritative role in international cooperation—and their authority is quite limited.

The absence of legislation by legislators at the international level has a significant effect on the nature of negotiating international law: it is less messy, because it is less democratic. This claim of 'tidiness' might seem odd in the light of several high-profile failures in recent international negotiations—in various WTO negotiations and in finding a successor agreement to the Kyoto Protocol, among others—but in fact the absence of legislators generally facilitates international consensus. As Slaughter has argued, transnational networks have formed among executive officials—among both appointed and career officials—whose shared professional and/or principled norms and beliefs (which transcend national boundaries) facilitate consensus in international bargaining in their areas of expertise.<sup>ix</sup> By contrast, the one professional norm legislators around the world share is one of creating *dissensus* (particularly when in the minority)—of exposing governments and governing ideas to the greatest possible scrutiny. At a domestic level, members of Congress and other legislators around the world perform this task to keep executive policymakers, regulators, and technocrats honest. At the international level, legislators are not present to perform this role—which means that agreements become easier to reach, but that they also place the entire burden of democratic oversight and approval on countries' national ratification processes.

The absence of legislation by legislators, then, is a major contributor to what has often been referred to as the ‘democratic deficit’ in global governance—the absence of accountability mechanisms to make international institutions more responsive to their member states and private sector constituents.<sup>x</sup> The past two decades have seen an increase in ‘transnational civil society’ protests, conducted by networks of international nongovernmental organizations (NGOs), against this lack of accountability; international organizations have responded by increasing their transparency (via greater information available on public websites), accessibility (especially to NGO consultation), and responsiveness to feedback (via semi-autonomous internal evaluation offices).<sup>xi</sup> For better or worse, these attempts to redress the democratic deficit in international institutions may simply reinforce the absence of legislation by legislators, substituting these accountability mechanisms for the traditional role of legislators in providing oversight.

Yet even if such mechanisms in international institutions do align well enough with American traditions of pluralism and government accessibility to interest groups, they may conflict with the core constitutional principle of a strong and autonomous legislature underpinning a more general separation of powers. The framers of the US Constitution wanted lawmaking to be difficult, slow, and messy—because this is the essence of deliberative democracy and limited government. To the extent that US policymakers view global governance through the prism of their principles of domestic governance, the negotiation of international agreements should be similarly deliberative—and similarly difficult, slow, and messy. But because negotiations regarding the creation of standard international law are *not* particularly deliberative,

Americans are increasingly subject to laws whose creation offends one of their basic constitutional principles.<sup>xii</sup>

This last point is not meant to denigrate the value and/or quality of international law, whether in general or in particular cases, as a source of international order that provides benefits to Americans as consumers of global public goods. If anything, the reverse is true: this paper starts from the assumption that extensive and intensive multilateral cooperation to provide global public goods is increasingly essential in an era in which globalization makes Americans ever more dependent on stable and mutually advantageous relationships with those beyond our borders. Moreover, given the complexity and interrelated nature of the problems arising from interdependence—problems related to trade, foreign investment, development, the environment, and the like—there is good reason to encourage leading roles for those experts best able to understand these problems, such as the Nobel prize-winning Intergovernmental Panel on Climate Change. Instead, the upshot is that if such international agreements are necessary—and thus continued Congressional delegation of authority to the executive to create and sustain such agreements is necessary—then the abovementioned legislative gaps, at both the domestic and global levels, become ever more difficult to bridge.

### **The dilemma of the ratification process**

More specifically within the United States, these gaps create a sharpening dilemma for the other mechanism of Congressional control over US participation in international institutions, the ratification process. The up-or-down vote on international agreements negotiated by the executive is a blunt instrument: in general, Congress is forced to either

accept or reject an agreement *in toto*, despite the fact that its members are likely to endorse some provisions of the agreement but not others. This binary, yes/no choice imbues Congress's constitutionally defined role in enacting and legitimating international agreements with a categorical rigidity that contrasts sharply with the flexibility of the domestic legislative process within Congress.

This portrait of the ratification process as a blunt instrument is of course something of a simplification. Executive officials neither enter into nor sign international negotiations without some notion of the agreement's likely level of support within Congress, which in turn informs these officials' negotiating position.<sup>xiii</sup> Congress may at times be able to demand that the executive reopen closed negotiations to add provisions that it deems acceptable (though at a significant costs to the United States' reputation as a reliable and desirable partner in cooperation). Moreover, through the delegation mechanism Congress can place certain constraints on executive officials' negotiating authority as a condition for granting that authority—as is sometimes the case when Congress grants the executive 'fast track' authority to negotiate trade deals. The Bush Administration currently lacks this delegated authority, and if Congress does choose to delegate this power to this or a subsequent administration, it may include the condition that any trade agreements include strong labor and environmental protections to be observed by all parties to the agreement.

But while Congress can influence negotiations in these ways without actually participating in them, the up-or-down vote remains the primary basis of its power regarding international agreements—and one whose categorical nature presents real costs to Americans (and foreigners) whose enjoyment of global public goods is dependent on

Congressional approval. If Congress rejects free trade agreements, it may protect some domestic jobs or industries, but it also deprives both American and non-American consumers of the lower prices and greater availability of goods that generally result from such agreements. If Congress rejects environmental agreements—or, in the cases of the UN Law of the Sea Convention and the Kyoto Protocol, signals an intention to reject them—it may avoid constraining economic growth, but it also deprives both Americans and non-Americans of better stewardship of the global commons (and potentially incurs huge costs down the line in responding to environmental crises that may have been preventable). And if Congress rejects collective security agreements—as in the case of the League of Nations—it may avoid the ‘entangling alliances’ George Washington warned of, but it also deprives both Americans and non-Americans of the benefits of US leadership in maintaining international security and order.

Of course, some agreements are better than others—and none is perfect—in actually providing these global public goods. It would require a very complex counterfactual analysis to say for sure whether Americans (and others) would have been better or worse off if Congress had not rejected the Treaty of Versailles in 1919 or the Havana Charter in 1948. But what we can say is that as the United States becomes more interdependent with other countries around the world—a condition driven forward by globalization—the costs to *not* having sustained cooperation with these countries rises, both for Americans and for everyone else.

In sum, although the ratification process provides a necessary legislative stamp of legitimacy on international agreements, this process’s status as the main source of Congressional power over US involvement in international institutions involves

increasing costs in an era of globalization and global governance. Before considering different means to augment Congress's role in international institutions, the paper will briefly consider three examples to demonstrate different ways in which the delegation and ratification processes can be a flawed means to managing US involvement in international institutions.

### **III. DELEGATION AND RATIFICATION FOR TRADE AND ENVIRONMENTAL AGREEMENTS**

This section briefly discusses three cases relevant to this question of the utility of the ratification and delegation mechanisms, all of which center on matters of trade and/or the environment. The first, involving the World Trade Organization and US environmental regulations, is a case in which Congressional ratification of multilateral trade agreements ultimately had domestic environmental costs. The second, involving the Kyoto Protocol, is a case in which Congressional non-ratification of a multilateral agreement on climate change has incurred domestic and international costs. The third, involving Congress's fitful delegation of fast-track authority to the president to negotiate trade deals, is a case in which a more flexible delegation mechanism still generates significant domestic and international costs.

The intent of these case discussions is not to give a detailed description of events, but rather to provide a general illustration of how the rigidity of Congress's primary mechanisms—even in their most flexible incarnation, as in the fast-track case—affects Americans' capacity to enjoy national and/or global public goods, underlining the point

that existing US legislative processes are insufficient to cope with the growing American involvement in globalization and global governance.

### **The WTO and US environmental regulations**

The United States was a founding member of the General Agreement on Trade and Tariffs (GATT, 1947), the predecessor to the World Trade Organization (1995), and since the late 1940s has negotiated and ratified a series of multilateral trade deals that have established a global regime based on the principles of free trade (i.e., liberalization), nondiscrimination (most-favored nation trading status), and reciprocity.<sup>xiv</sup> These principles, and the specific rules they generated via these serial agreements, generally have reflected American commercial interests and priorities. Largely as a result, Congress has never rejected a multilateral trade agreement that emerged from the GATT/WTO framework.

Another result was a tremendous expansion in world trade—world exports grew by an average of over 10 percent between 1950 and 2005<sup>xv</sup>—which in turn begat tensions between free trade and the GATT/WTO rules designed to uphold it on the one hand and a particular American priority, environmental protection, on the other. In the early 1990s, a GATT dispute panel ruled that an American law banning the import of tuna from countries whose fishermen used nets that also snagged dolphins was illegal under international trade rules, because it discriminated against countries at similar levels of development. This ruling generated an outcry from US environmental groups, which both marched in protests in Washington and lobbied members of Congress to protect valued American environmental laws and regulations from a ‘GATTzilla’ bent on destroying



them. Yet while Congress did successfully insist on including environmental standards in a different free trade agreement (FTA) the Bush and Clinton administrations were simultaneously negotiating, the North American Free Trade Agreement (NAFTA), no such provisions were added to the agenda in the closing stages of the ongoing Uruguay Round of GATT negotiations. Congress passed the Marrakech Agreement establishing the World Trade Organization in 1994, *sans* labor and environmental standards.

Whereas the GATT had a nonbinding arbitration mechanism—meaning that there were few implications if the United States chose not to change its law regarding dolphin-safe nets—the new WTO had a binding dispute-settlement system that authorized retaliation against countries failing to comply with its rulings. Indeed, the creation of such a binding arbitration mechanism had been a key American demand in the negotiations. Although potential conflicts between WTO trade rules and countries’ environmental regulations had since reached the international agenda, in 1998 the WTO once again ruled against a similar US environmental law, this one banning the import of shrimp caught in nets that also trapped sea turtles.<sup>xvi</sup>

The point of this example is not to argue that international trade rules gravely threaten US environmental laws and regulations. Rather, the point is that, by ratifying GATT/WTO agreements in full in an up-or-down vote, Congress opened up aspects of popular US law to challenge from unelected international tribunals. In the absence countervailing environmental protections at the international level—whether in the WTO or via some other institution—both Congress and Americans more generally paid a significant cost to ratification in terms of their freedom of action to implement publicly supported environmental protections.

## **The Kyoto Protocol**

The United States (and Congress in particular) fits less easily into the role of environmental victim of international institutions with respect to climate change. The United States was a leading force behind the 1992 Rio ‘Earth Summit’ and the nonbinding targets for reducing carbon emissions that came out of the conference. However, five years later, when the agenda turned to binding targets for carbon emissions in the Kyoto Protocol—and some differential application of these targets to industrialized and developing countries—Congress balked. Although the Clinton administration signed the agreement, it did not submit it to Congress for ratification because members of Congress had signaled unequivocally that it would not pass.<sup>xvii</sup>

This is a case in which, in retrospect (and to many at the time), Congress’s unwillingness to ratify the agreement generated various costs—both for Americans and others—that might well outweigh those of attempting to limit carbon emissions. First, non-ratification ensured that the United States as a whole, and its businesses and consumers individually, would continue their overreliance on fossil fuels. Although many businesses and individuals have voluntarily sought to reduce their ‘carbon footprint,’ often in anticipation of future regulations, they will likely face higher costs of adjustment once those regulations arrive than they would have if they had been required to alter their behavior earlier. Second, non-ratification sustained regulatory inconsistencies for business—whether from country to country or across states within the United States—that increase their costs of operations. When a firm operates in different jurisdictions with different regulations of any type, it faces costly adaptation of its operations to comply

with these different regulatory standards.<sup>xviii</sup> Third, and less tangibly, the United States may face reputational costs for standing in the way of consensus among the world's major powers on the climate change issue. Although some aspects of American reluctance to sign on to binding targets have a defensible rationale—initially, the absence of a clear scientific consensus on global warming, and later the argument that large developing countries like China and India are necessary participants in a meaningful solution—Washington is beset by the impression of shirking its obligations as a wealthy country that has been the primary source of global carbon emissions. Widespread international frustration with US foot-dragging was palpable in the December 2007 climate talks in Bali, in which the US delegation was booed and shamed into joining a consensus for action achieved among the other attendees.

Once again, the point is not to blame Congress (or the Bush administration) for its inaction. Rather, it is to demonstrate that, when faced with an international agreement that had some provisions that its members had deep reservations about, Congress had only two choices: up or down. This stark choice not only incurred the costs noted above, but also prevented the US government from finding a more nuanced solution to dealing with US carbon emissions—leaving the job of innovation to the states and the private sector.

### **Fast track authority**

The first case discussion addressed the costs US ratification of international trade agreements, but we can also consider the delegation mechanism, fast track authority, through which Congress influences the executive's trade negotiation agenda. Although

this mechanism gives Congress influence over the trade agenda at the beginning of the process (i.e., prior to trade negotiations),<sup>xix</sup> it too is insufficiently flexible and creates significant costs for the United States with respect to international trade agreements.<sup>xx</sup>

Recognizing that US trade partners were wary of negotiating trade agreements with the United States if Congress were to decide to add conditions after negotiations were closed, Congress created the fast track mechanism in 1974 to delegate authority to the president (and the US Trade Representative) to negotiate agreements that it would then accept or reject as a whole—i.e., without adding conditions. Congress delegates fast-track authority for a fixed period of time—typically but not necessarily in conjunction with multilateral trade negotiations in the GATT/WTO. However, there have been periods—notably during the second Clinton and Bush administrations—when this trade negotiating authority has lapsed and Congress has, at least in the short term, declined to renew it—even though the United States was in the process of negotiating new agreements.

Although fast track ensures that the executive does not (and cannot) negotiate trade deals without addressing Congressional concerns, it nevertheless creates complications for the United States in both its external trade relations and domestically. One problem with fast track is that it makes the United States a less reliable or desirable partner in trade negotiations. It is less reliable because the lapse of this authority can generate sizeable swings in a US administration's positions in the negotiations and in its relative flexibility to make certain compromises, as Congress can inject new conditions as the price for renewed negotiating authority. It is less desirable a trade partner because Congress increasingly insists not simply on escape clauses to allow protection of certain

vulnerable or strategic industries within the United States—which can often be justified on a temporary basis—but also on using US power to project American priorities onto other countries. Although Congress’s recent enthusiasm for inserting labor and environmental provisions into trade agreements is understandable as a response to fears of a ‘race to the bottom’ in standards in these areas, the developing countries that are the ones that Washington is attempting to strongarm into changing their domestic regulatory regimes have understandably viewed this tactic as cultural or regulatory imperialism. Though smaller developing countries lack the leverage to parry US (and Congressional) demands on this front in bilateral negotiations, developing countries’ collective dissatisfaction with US (and European) demands along these lines have been a key stumbling block to progress in WTO negotiations over the past decade.<sup>xxi</sup> Deepak Lal referred to US and European promotion of environmental standards through the WTO as “a green variant of the nineteenth century white man’s burden.”<sup>xxii</sup>

The fast track mechanism—and its use by Congress as a lever against the executive—is also problematic specifically within the United States. As noted earlier, if we accept the basic premise that American consumers and the US economy benefit in the aggregate from global free trade, Congressional refusal to delegate power to the executive to negotiate free trade deals (especially multilateral deals), for reasons that may reflect partisan politics more than legitimate concerns about the domestic costs of international competition, may lead to higher prices for goods and slower employment growth in dynamic industries.<sup>xxiii</sup> Alternatively, Congress grants fast track authority to the president for a specific period of time rather than to negotiate specific trade deals. Therefore, the fast track mechanism offers Congress the leverage to influence the

executive's international trade agenda in general—particularly with respect to multilateral negotiations—but less so with respect to other trade negotiations that the executive might undertake while it has such authority. For instance, Congress granted the Reagan, Bush, and Clinton administrations fast track authority to negotiate a multilateral deal in the GATT's Uruguay Round, but during this period these administrations also negotiated FTAs with Canada (CUSFTA) and then Mexico (NAFTA). In these latter circumstances, Congress had to rely primarily on the blunt instrument—the possibility of non-ratification—to influence these administrations' negotiating agenda.

As these brief case discussions suggest, in the context of US international trade and environment policy, Congress's existing mechanisms for managing executive negotiating authority and legitimizing US participation in international agreements optimize neither Americans' provision nor consumption of global public goods. Of course, some of these costs derive from the inherent tensions between, say, free trade and environmental regulation. Nevertheless, relegated to the sidelines, Congress sees its legislative authority gravitate toward the executive branch and international institutions. And yet when it seeks to exercise this authority, its involvement often ends up being clumsy or unhelpful.

Hence, what remains are the aforementioned legislative gaps and a set of existing delegation and ratification mechanisms that are insufficient to allow Congress to undertake a more positive role in engaging international institutions. So, if innovation is the order of the day, what new institutional mechanisms are available?

One option for injecting more popular legitimacy and accountability into US participation in international agreements would be to submit international agreements to a

national referendum rather than Congressional ratification. Other countries have chosen this route with respect to important international agreements in recent years: Costa Rica submitted its participation in the Central American Free Trade Agreement to a popular vote, and many European countries held referenda regarding participation in the EU constitutional treaty. The result of these European referenda—including rejection by French and Dutch voters—points to one problem with this option: hard fought compromise agreements can easily fall prey to narrow national concerns, often related to a single aspect of the agreement, or to scare tactics by affected interest groups. Meanwhile, the United States has no tradition of national referenda because it is a *representative* democracy—the American people delegate their authority to decide such issues to their elected officials. It is not clear that complex international agreements—regarding which individual citizens have little information or direct experience—are well suited to be exceptions to this representative tradition.

So, what seems necessary is a new set of mechanisms to permit Congress to engage more directly with international institutions—not to challenge executive management of US foreign affairs at the national level, but rather to redress the growing legislative gaps at the national and international levels. One such option involves parliamentary assemblies.

#### **IV. PARLIAMENTARY ASSEMBLIES: POTENTIAL, PITFALLS, PROSPECTS**

Parliamentary assemblies (PAs)—international forums in which national legislators meet to address a particular shared agenda—are the closest thing to legislation by legislators in global governance. International institutions such as the North Atlantic Treaty

Organization (NATO) and the Organization for Security and Cooperation in Europe (OSCE) feature standing parliamentary assemblies, and others such as the Organization for Economic Cooperation and Development (OECD) and the WTO hold forums for parliamentarians on an ad hoc basis. In addition, there are freestanding PAs unaffiliated with any specific international organization, such as the Parliamentarians for Global Action and the Inter-Parliamentary Union, which seek to build transnational networks among national legislators. These assemblies do not constitute anything like a standing ‘world parliament,’ but rather forums available to national legislators to meet occasionally and to ensure their voices are heard alongside those of their executive branch counterparts in setting agendas for international agreements.

One must begin consideration of parliamentary assemblies with a note of skepticism: they are rather underdeveloped mechanisms of global governance, perhaps for the reasons—*noted above*—that legislators in general and members of Congress in particular are inclined toward sovereigntism and representation of their local constituencies, and do not share professional norms in the same way that technocrats and regulators do. Nevertheless, given the democratic deficit in global governance both internationally and within the United States, could PAs be an idea whose time has come?

### **Potential**

Though PAs have not been a focus of much attention among scholars of international cooperation, some are comparatively bullish on them.<sup>xxiv</sup> We can consider their potential from two angles: from the perspective of increasing legislative involvement at the



international level, and from that of the benefits to the United States in general and Congress in particular.

As argued earlier, global governance suffers from a legislative gap in that ‘international lawmaking’—the negotiation of treaties—is conducted by executive officials. While this fact is unlikely to change—nor should we necessarily desire that it do so—one can identify several benefits to having legislators interact within PAs. For one, because they are and are likely to remain relatively low-key affairs—especially compared to, say, summit meetings—the absence of an intense spotlight may facilitate compromise on difficult issues. Second, if legislators’ lack of direct involvement in international institutions reinforces a somewhat provincial outlook, then increasing their involvement via PAs—thus giving them a direct voice and stake in global governance—might alternatively reinforce a more global outlook. Some scholars and practitioners have acclaimed the ‘glocalist’ vision of international NGOs that operate at both the global and local levels;<sup>xxv</sup> a similarly glocalist turn by legislators could lend a similar—and more official—legitimacy to global governance. Third, creating an international network of legislators could generate mutual support that could boost the prospects of parliamentary democracy around the world.<sup>xxvi</sup> For example, members of Congress have served on and led missions from the OSCE and other international institutions to monitor democratic elections in countries such as Ukraine and Georgia.

Greater participation in parliamentary assemblies could serve the interests both of Congress and US policy priorities. Most importantly, it could reduce Congress’s reliance on the blunt instrument of the ratification process as a means to influence the negotiation of international agreements. If members of Congress participated in a PA during talks to

establish, say, the agenda for a WTO round, it could better communicate the preferences of Congressmen at the outset of the process, perhaps reducing their need to threaten non-ratification—or to simply swallow—a deal that did not adequately reflect those preferences. Alternatively, as members of Congress learned more about the preferences of legislators elsewhere, they might be more inclined to accept that a deal that does not perfectly represent their preferences may have been the best deal possible under the circumstances. More generally, Congressional participation in PAs could help add a new dimension to American promotion of democracy abroad, both in generally supporting parliamentary democracy as noted above and as a bridge to more direct activities, such as monitoring elections (which could perhaps be a task for Congressional staffers).

Although these potential benefits to Congressional participation in an expanded menu of PAs are speculative, it is worth noting that the creation and mobilization of legislative networks is not foreign to Americans. Within the United States there is the National Conference of State Legislatures (NCSL), which generates networks among legislators from individual states and promotes collaboration on professional development and technical assistance.<sup>xxvii</sup> Although, like PAs, the NCSL is not a locus of major institutional influence, there is perhaps a greater need for bottom-up legislative mobilization globally than there is within the United States.

### **Pitfalls**

Parliamentary assemblies are far from a magic bullet solution to the legislative gaps in US and global governance. One needs only compare Congress—sovereigntist, democratic, and contentious—and the typical workings of international institutions—

internationalist, elite-driven, and consensus-oriented—to see the mismatch. Moreover, it is difficult to envision parliamentary assemblies—whether attached to specific institutions or freestanding—attaining real influence over the either agenda setting or negotiations for international agreements.

This mismatch seems particularly salient with respect to Congress. The House of Representatives in particular is not only localist by orientation (due to its members' relatively small constituencies and frequent elections), but it reciprocally features a strong anti-internationalist strain. Some of its members boast about not traveling outside the country or even possessing a passport, reflecting a previously noted tradition of American skepticism toward foreign entanglements and, at the extreme, isolationism. Such is not fertile ground for direct participation in global governance. Of course, the more relevant chamber is the Senate, which ratifies treaties and is less localist than the House (with its statewide constituencies and less frequent elections). One could imagine leading members of relevant Senate committees—the foreign affairs committees as well as those for agriculture, labor, and the environment, among others—participating in either parliamentary assemblies or even US delegations to negotiate certain international agreements. The problem here, however, is time and availability: while there are executive officials specifically employed to perform these tasks, senators and their staffs simply lack the time and resources to make open-ended commitments to parliamentary assemblies or similar bodies. While participation in a small number of closed-ended forums might be possible, the fact is that members of Congress already have a full-time job representing their constituents (and getting re-elected).

More generally, any move toward Congressional involvement in parliamentary assemblies is likely to reflect political and institutional divisions at home rather than an earnest desire to bring legislative influence to global governance. Periods of divided government seem most likely to produce support in Congress for participation in parliamentary assemblies, specifically as a means to constrain executive power when the other party holds the presidency. The only major figure to support PAs in recent years was Newt Gingrich, who championed the idea while speaker of the House. While the ostensible rationale behind this (now defunct) project was to promote democratic procedures globally, one suspects that a key motivation was to rein in the Clinton administration's conduct of foreign policy. Alternatively, one hears few calls for the development of PAs when the same party is in power on both ends of Pennsylvania Avenue—and little support for the idea from the executive branch at any time. It is possible that Congressional involvement in PAs launched for partisan purposes could also help redress legislative gaps over the long term, but one is left to wonder whether members of Congress would be as active in PAs in a period of unified government.

### **Prospects**

Based on this analysis, it is difficult to be optimistic about the prospects of parliamentary assemblies. But it would be mistaken to judge them in terms of the level of influence they have over formal international agreements. Simply put, they are never likely to drive international negotiations, but what they might do—effectively—is to act as forums for global norm building, conferring legitimacy on negotiations whose agendas specifically respond to concerns raised by these legislators.

Nevertheless, because globalization is the background force that we are interested in here, three points bear mention on this front. First, a particular phenomenon associated with globalization—the proliferation of multinational firms and NGOs<sup>xxviii</sup>—may generate demand for more legislative representation at the global level. These actors are transnational interest groups, and they engage international institutions directly in an attempt to move these institutions’ rules and practices in their desired direction. The more they focus their lobbying and advocacy activities at the global level, the greater the incentive for Congress to establish a presence at this level as well—to ensure that it is not bypassed as a focal point for interest group representation. Second, globalization is a complex process that is breaking down barriers between previously segmented issue areas (e.g., trade, the environment, human rights). International institutions have traditionally been organized along the lines of segmented issue areas, which has privileged the role of experts in these particular issues. However, if these issues are indeed becoming ‘desegmented,’ then there may be increasing space for generalists, which legislators necessarily are, to help solve problems of how to manage and establish priorities among rules in these converging issue areas—as in the case of the WTO and US environmental regulations. Third, globalization and global governance reaches ever further ‘behind the border,’ affecting not just US national politics but also individuals and organizations at the local level. As a result, they create a new demand for the sort of ‘glocalists’ mentioned previously—political actors that are sensitive to the relationship between global forces and local politics. Once again, members of Congress are well placed to respond to this demand—though whether they *will* is another matter entirely.

## V. CONCLUSION

The United States faces two options as it confronts globalization's effect on the status of the legislative authority of Congress. It can retain this authority as intended in the Constitution by shutting itself off from globalization and global governance. Or it can continue to integrate itself into the global economy and international institutions, knowing that doing so leaches legislative authority from Congress and makes Congress's delegation and ratification mechanisms for constraining executive authority vis-à-vis international institutions more costly to use.

The choice is, of course, not quite this stark. No matter how US policy evolves vis-à-vis globalization and global governance, it is highly unlikely that there will be any tectonic shift in the constitutionally prescribed powers of the executive and legislative branches. Nevertheless, as this paper has argued, there is reason to be concerned about the emerging legislative gaps, both at home and in global governance—gaps that expose limits on democratic accountability and the separation of powers. Though they have promise, parliamentary assemblies are not the answer, at least not for the foreseeable future. For now, perhaps the proper response is not to seek overarching institutional solutions but rather to practice vigilance—which may be the price not only of liberty, to paraphrase Thomas Jefferson, but of the maintenance of the institutions that uphold it.

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<sup>i</sup> For example, in a 1999 death penalty case Justice Stephen Breyer cited foreign courts' decisions against executions, and in 2004 Justice Anthony Kennedy cited British law regarding the decriminalization of sodomy. Notably, several members of Congress protested that the justices were attempting to “substitute foreign law for American law or the American Constitution.” See Tom Curry, “A flap over foreign matter at the Supreme Court,” *MSNBC*, March 11, 2004, available at <http://www.msnbc.msn.com/id/4506232>.

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<sup>ii</sup> According to Slaughter, for members of Congress, “remaining resolutely ‘national,’ or even parochial, is their job.” Anne-Marie Slaughter, *The New World Order*. Princeton: Princeton University Press, 2004: 105.

<sup>iii</sup> On variations of the tradition of isolationism in US foreign policy, see Walter A. McDougall, *Promised Land, Crusader State: The American Encounter with the World Since 1776*. New York: Houghton Mifflin, 1997; and Walter Russell Mead, *Special Providence*. New York: Routledge, 2002.

<sup>iv</sup> See Douglas North and Barry Weingast, “Constitution and commitment: the evaluation of institutions governing public choice in seventeenth-century England.” *Journal of Economic History* 49 (December 1989): 803-832; and Peter Cowhey, “Elect globally—order globally: domestic politics and multilateral cooperation.” In *Multilateralism Matters*, edited by John Ruggie. New York: Columbia University Press, 1993.

<sup>v</sup> Both mechanisms derive from Article II, Section 2 of the Constitution, which declares that the president “shall have the power, with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur.”

<sup>vi</sup> On some implications of the difference between treaties and agreements, see Varellas’s chapter in this volume.

<sup>vii</sup> These mechanisms of course are not exhaustive of all the means Congress has to influence US foreign policy. Rather, they are the primary means through which Congress affects US participation in international institutions specifically.

<sup>viii</sup> On the executive’s privileged role as a player at both the domestic and international levels of this ‘two-level game,’ see Robert Putnam, “Diplomacy and domestic politics: the logic of two-level games.” *International Organization* 42, 3 (1988): 427-460; and Andrew Moravcsik, “Introduction: Integrating international and domestic theories of international bargaining.” In *Double-Edged Diplomacy*, edited by Peter Evans, Harold Jacobson, and Robert Putnam. Berkeley: University of California Press, 1993.

<sup>ix</sup> Slaughter 2004.

<sup>x</sup> On the role of legislatures in providing legitimacy to international agreements, see among others Slaughter 2004 and Ian Hurd, “Legitimacy and authority in international politics.” *International Organization* 53, 2 (1999): 379-408. For a skeptical view of the democratic deficit, see Andrew Moravcsik,

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“In defense of the ‘democratic deficit’: reassessing legitimacy in the European Union.” *Journal of Common Market Studies* 40, 4 (2002): 603-24.

<sup>xi</sup> On NGO challenges to international institutions and these institutions’ attempts to respond, see among others Robert O’Brien, Anne Marie Goetz, Jan Aart Scholte, and Marc Williams, *Contesting Global Governance*. Cambridge: Cambridge University Press, 2000; Sidney Tarrow, *The New Transnational Activism*. New York: Cambridge University Press, 2005; Ruth W. Grant and Robert O. Keohane, “Accountability and abuses of power in world Politics.” *American Political Science Review* 99 (2005): 29-43; Sanjeev Khagram, James Riker, and Kathryn Sikkink, eds., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms*. Minneapolis: University of Minnesota Press, 2002; Alexandru Grigorescu, “Internal investigative units in intergovernmental organizations: tools of accountability?” Paper presented at the APSA Annual Conference, Chicago (August 30, 2007); Edward A. Fogarty, “*E Pluribus Pluribus?* Global Governance in an Era of Nonstate Actors.” Ph.D. diss., University of California, Berkeley, 2007.

<sup>xii</sup> Of course, many international institutions—both traditional intergovernmental institutions such as the UN Security Council and new, nonstate actor-driven mechanisms such as the Global Compact, which tries to build consensus on corporate social responsibility—are quite deliberative. However, these mechanisms of global governance are more geared toward norm building than the creation of formal international law, which still generally takes place among experts and national delegates behind closed doors.

<sup>xiii</sup> Congressional opposition to certain demands made by other parties to a potential agreement, and thus its likely non-ratification of any agreement in which US negotiators gave in to those demands, can serve as a source of power for these US negotiators. These negotiators can credibly claim that their ‘hands are tied’—they would like to accede to their interlocutor’s demands, but cannot do so because of Congressional opposition. On this ‘tying hands’ strategy, see Moravcsik 1993.

<sup>xiv</sup> On the principles and norms underpinning the multilateral trade regime, see Kenneth Dam, *The GATT: Law and International Economic Organization*. Chicago: Chicago University Press, 1970; and Jock A. Finlayson and Mark W. Zacher, “The GATT and the regulation of trade barriers: regime dynamics and functions.” In *International Regimes*, edited by Stephen D. Krasner. Ithaca: Cornell University Press, 1983.

<sup>xv</sup> World Trade Organization, “World Trade Statistics,” available at [wto.org](http://wto.org).



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<sup>xvi</sup> Neither the dolphin-tuna and shrimp-turtle rulings were specifically intended to take away the right of the US (or any other) government to enact such laws or regulations. The rulings more narrowly invalidated the *discriminatory application* of such laws—i.e., applying the law to some countries but not others, particularly countries at similar levels of development.

<sup>xvii</sup> This was not the first time that the United States participated in international environmental negotiations but did not submit a resulting agreement for ratification. The United States did not even sign the 1982 UN Law of the Sea Convention because, according to *The Economist*, “some senators fear[ed] a loss of American sovereignty.” “Drawing lines in the melting ice,” *The Economist*, August 18, 2007.

<sup>xviii</sup> This logic underlies the Bush administration’s decision in January 2008 to not grant California a waiver from federal air quality standards (which as of this writing do not recognize carbon dioxide as a pollutant, despite a 2007 Supreme Court ruling requiring the Environmental Protection Agency to redress this omission) to enforce stricter controls on carbon dioxide emissions.

<sup>xix</sup> According to Jackson, “When Congress grants [fast-track] authority...it usually extracts some price, requiring certain procedural or judicial restraints on executive action or mandating certain trade policy activity which may have important consequences.” John Jackson, *Restructuring the GATT System*. London: Royal Institute of International Affairs, 1990: 32. See also Cowhey 1993.

<sup>xx</sup> Bailey, Goldstein, and Weingast argue that the transfer of agenda-setting power in international trade policy from Congress to the executive, beginning with the passage of the Reciprocal Trade Agreements Act of 1934 and through the establishment of the USTR in 1962, came as a result of a political choice by leading Democratic leaders to strengthen support for free trade within their party. Michael Bailey, Judith Goldstein, and Barry Weingast, “The institutional roots of American trade policy: politics, coalitions, and international trade.” *World Politics* 49, 3 (1997): 309-338.

<sup>xxi</sup> Indeed, a key cause of the collapse of the Seattle WTO ministerial in November 1999 was developing countries’ refusal to accept Western countries (and many NGOs) demands that labor and environmental provisions be on the agenda for negotiations toward a new multilateral trade agreement.

<sup>xxii</sup> Deepak Lal, “Trade blocs and multilateral free trade.” *Journal of Common Market Studies* 31 (1993): 349-358.

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<sup>xxiii</sup> For a variety of perspectives on the effects of free trade in the United States, both on the aggregate on prices and at the micro level on employment in particular industries, see the ‘business and economics’ companion to this volume.

<sup>xxiv</sup> See Slaughter 2004.

<sup>xxv</sup> See John Gerard Ruggie, “Taking embedded liberalism global: the corporate connection.” In *Taming Globalization: Frontiers of Governance*, edited by David Held and Mathias Koenig-Archibugi. Cambridge: Polity Press, 2003; and Thomas Princen and Matthias Finger, *Environmental NGOs in World Politics*. New York: Routledge, 1994.

<sup>xxvi</sup> Slaughter 2004.

<sup>xxvii</sup> See the NCSL website, at <http://www.ncsl.org>.

<sup>xxviii</sup> Between 1970 and 2003, the number of international NGOs grew from roughly four thousand to over twenty-eight thousand, and the number of multinational firms grew from approximately eight thousand to more than sixty-four thousand. See *Yearbook of International Organizations*. Munich: Union of International Associations (Brussels), 2006; and *The Economist*, 31 January 2004, p. 72.