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Sovereignty Mismatch and the New Administrative Law

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SOVEREIGNTY MISMATCH AND THE NEW ADMINISTRATIVE LAW

DAVID ZARING*

ABSTRACT

In the United States, making international policymaking work with domestic administrative law poses one of the thorniest of modern legal problems—the problem of sovereignty mismatch. Purely domestic regulation, which is a bureaucratic exercise of sovereignty, cannot solve the most challenging issues that regulators now face, and so agencies have started cooperating with their foreign counterparts, which is a negotiated form of sovereignty. But the way they cooperate threatens to undermine all of the values that domestic administrative law, especially its American variant, stands for. International and domestic regulation differ in almost every important way: procedural requirements, substantive remits, method of legitimation, and even in basic policy goals. Even worse, the delegation of power away from the United States is something that our constitutional, international, and administrative law traditions all look upon with great suspicion. The resulting effort to merge international and domestic regulatory styles has been uneven at best. As the globalization of policymaking is the likely future of environmental, business conduct, and consumer protection regulation—and the new paradigm-setting present of financial regulation—the sovereignty mismatch problem must be addressed; this Article shows how Congress can do so.

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INTRODUCTION

The worst financial crisis in a generation has inspired both domestic and international reform—reform that the heads of state and chief financial regulators of the world's largest economies think should work together. "[G]iven the high interdependence among our countries in the global economic and financial system," the world's most important finance ministers have declared, "[o]ur cooperation is essential."[1]

The President appears to agree. Last year, he issued a new executive order directing his subordinates to pursue "international regulatory cooperation" to "meet[] shared challenges involving health, safety, labor, security, environmental, and other issues . . . ."[2] Regulation by cross-border cooperation has become the priority, in short, both at home and abroad.

But in the United States, making international policymaking work with domestic administrative law is extremely challenging.[3] The two styles

1. The full text of this communiqué may be found at G-20, COMMUNIQUÉ: MEETING OF FINANCE MINISTERS AND CENTRAL BANK GOVERNORS (Oct. 23, 2010), *available at* http://www.g20.utoronto.ca/2010/g20finance101023.html.

2. Exec. Ord. No. 13,609 § 1, Promoting International Regulatory Cooperation, 77 Fed. Reg. 26,413, 26,413 (May 1, 2012).

3. It remains, however, a building block of American financial policy. *See* Daniel Hemel, *Regulatory Consolidation and Cross-Border Coordination: Challenging the Conventional Wisdom*, 28 YALE J. ON REG. 213, 215 (2011) ("Throughout the regulatory reform process, the Obama Administration has emphasized that its twin goals of domestic regulatory consolidation and cross-border regulatory coordination are 'consistent' with one another.").

differ in procedural requirements, substantive remits, methods of legitimation, and even basic policy goals.

Moreover, their interplay is only proceeding over strenuous dissent. Justice Antonin Scalia has argued that, on constitutional grounds at least, the idea "that American law should conform to the laws of the rest of the world ought to be rejected out of hand."[4] Over two-thirds of Oklahoma voters voted to amend their state constitution to provide that "[t]he courts shall not look to the legal precepts of other nations or cultures," especially "international law or Sharia law."[5]

And yet, international policymaking and domestic administrative law have increasingly, and—as this Article argues—inevitably, been charged with complementing one another in a very particular way. Across the regulatory spectrum, the formulation of policy is being done at the international level, under the auspices of negotiated arrangements among a confederacy of agencies, while execution of policy remains the province of domestic regulators. It is a change that is having significant but unresolved effects on domestic law. This Article will examine those effects, which are substantial enough to, it argues, require legitimation by the legislature—an International Administrative Procedure Act, if you like.

The need for a congressional solution stems from the seriousness of the problem, as Justice Scalia and those Oklahoma voters have recognized, which is that the delegation of power away from the United States—the very definition of international regulatory cooperation—is something that our constitutional, international, and administrative law traditions all look upon with suspicion.[6] It is a suspicion that has only been exacerbated by

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4. Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

5. OKLA. CONST. art. VII, § 1, cl. C. *See* OKLA. ST. ELECTION BD., SUMMARY RESULTS: GENERAL ELECTION (Nov. 2, 2010), *available at* http://www.ok.gov/elections/support/10gen.html (noting that Oklahoma State Question No. 755, Legislative Referendum No. 355, passed with 70.08 percent voting in favor of the proposal). For a discussion of the Oklahoma ballot initiative, see generally Yaser Ali, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CAL. L. REV. 1027 (2012).

6. Justice Scalia has been understood to posit that "[f]oreign law isn't ours." Mary Flood, *Scalia Criticizes Courts Citing Foreign Trends*, HOUSTON CHRON., Nov. 18, 2008, *available at* http://www.chron.com/news/houston-texas/article/Scalia-criticizes-courts-citing-foreign-trends-1766787.php. The courts, especially the D.C. Circuit, the nation's premier administrative law court, have frequently evinced a similar suspicion. *See, e.g.*, Natural Res. Def. Council v. EPA, 464 F.3d 1, 8 (D.C. Cir. 2006) ("If the 'decisions' [of an international organization, in this case the implementing body of the Montreal Protocol designed to combat depletion of the ozone layer,] are 'law'—enforceable in federal court like statutes or legislative rules—then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution."); Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 927 (D.C. Cir. 2008) ("[I]f the Coast Guard had delegated some or all of its decisionmaking

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the Supreme Court's recent, and controversial, willingness to entertain foreign precedents as guidance for domestic constitutional interpretation.[7]

The effort to merge the international and domestic regulatory styles represents what I call the *sovereignty mismatch problem* in modern administration. Sovereignty mismatch is a way of characterizing the fundamental challenge to the growing internationalization of domestic administrative law, putting a negotiated cross-border process, where sovereignty is exercised by dealmaking, on top of a routinized and regulated domestic one, where sovereignty is exercised by rulemaking.[8] As the globalization of policymaking is already the new paradigm-setting reality of financial regulation, and is the future of environmental, business conduct, and consumer protection regulation, the sovereignty mismatch problem must be addressed.[9]

But addressing it is very difficult. While domestic regulation must follow the rules of ordinary administrative law, the emerging new form of

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authority under the Ports and Waterways Safety Act to an outside body not subordinate to it, such as the International Maritime Organization, the delegation would be unlawful . . . ."). *See also* John O. McGinnis, Medellín *and the Future of International Delegation*, 118 YALE L.J. 1712, 1720–25 (2009) (comparing the problems of international cooperation with the growth of the administrative state).

7. *See, e.g.*, *Roper*, 543 U.S. at 577 (2005) ("The United Kingdom's experience bears particular relevance here . . . . [It] has abolished the death penalty in its entirety; but, decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty; and it abolished that penalty as a separate matter."); Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction."); Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."). Scholars, on the other hand, have supported this turn. Bruce Ackerman, for example, has advocated "world constitutionalism." *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997) (supporting the examination of foreign sources to give content to domestic constitutional rights). *See also* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005) (comparing various constitutional provisions).

8. *See infra* notes 42–47 and accompanying text (discussing the Kyoto Protocol, an international treaty to decrease CO2 omissions by country, and the political and legal difficulties China and the U.S. face in implementing the treaty's mandate).

9. As Edward Swaine has observed, "Despite its continuing mistrust of international engagements, the United States continues to vest new authority in established organizations . . . and to create new institutions . . . that exercise considerable power over U.S. affairs. The march seems inexorable." Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1495 (2004) (footnote omitted). *See also* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1560–61 (2003) (analyzing the constitutionality of treaty delegations to international bodies and suggesting that those delegations would violate separation of powers principles); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1701 (2003) (arguing that "[t]he Founders were neither committed to a principle of exclusive national democracy nor were they opposed in principle to treaty-based delegations of governmental authority to international bodies, including delegations").

global regulation, where agencies cooperate with one another on basic policy approaches, is—and again, this is the mismatch—negotiated and informal, and so lacks procedural safeguards.

There is, for example, no judicial review on the international level, and only voluntarily offered administrative process. Judicial review is a paradigmatic feature of domestic administrative law, as are requirements such as publication in the Federal Register, concise statements of the basis for rules, and—at least as a matter of practice, if not one of formal doctrine—increasingly elaborate responses to comment.[10] International rulemaking dispenses with these requirements.

And therein lies a problem. Under American law, the fact that the international role is the prescriptive one implicates the nondelegation and delegation doctrines, due process concerns, Appointments Clause problems, and basic questions about whether notice and comment requirements are met if the important policymaking was done at the international level.[11]

Americans have particular reason to be worried about these developments. In a number of different contexts, the international delegation of policymaking authority has resulted in policy formulation that the United States has either traditionally opposed or carefully debated:

- America's global warming policy, rather than being expressed by commitment to a treaty like the Kyoto Protocol, is increasingly being set through informal comparisons with Chinese emission levels.[12] "The reality," then-Senator John Kerry (D-MA) has said, "is that a robust American partnership with China will do more than anything else to ensure a successful global response to the urgent threat of climate change."[13]

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10. For a black letter discussion of these requirements, the customary reference works are Richard J. Pierce, Jr.'s three-volume ADMINISTRATIVE LAW TREATISE (4th ed. 2002) (revising Kenneth Culp Davis' earlier editions), and the ABA's rulemaking overview, JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 160–79 (4th ed. 2006) (setting forth the basic reviewability requirements).

11. *Cf.* Barbara Koremenos, *When, What, and Why Do States Choose to Delegate*, 71 LAW & CONTEMP. PROBS. 151, 168–69 (2008) (describing the reasons why states might look to international cooperation to solve their regulatory problems).

12. *See infra* notes 42–47 and accompanying text. As Jonathan Nash has observed, "[t]here has also been much public debate on a second issue—whether, even if global warming is validly a matter of world concern, the United States should act to reduce its greenhouse gas emissions when other countries do not." Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 507 n.62 (2008).

13. *Challenges and Opportunities for U.S.-China Cooperation on Climate Change: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 1 (2009) (statement of Sen. John Kerry,

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- American competition policy, with its traditional focus on consumer (and only consumer) protection, is under increasing pressure to be modified to comport with a more European standard that balances consumer interests with those of other interested parties.[14]
- Although both President Obama and the Chairman of the Federal Reserve, Ben Bernanke, have made noises about engaging in stricter executive compensation regulation,[15] the United States has traditionally taken a laissez-faire attitude towards the pay packages that companies offer their employees.[16] But the transnational Basel Committee on Banking Supervision ("Basel Committee") has instructed its member agencies,[17] including the Federal Reserve Board ("the Fed"), to adopt a laundry list of new tools to scrutinize executive pay.[18]

Chairman, S. Comm. on Foreign Relations). For an analysis of the issue, see John Copeland Nagle, *How Much Should China Pollute?*, 12 VT. J. ENVTL. L. 591 (2011).

14. These other interested parties include, most notably, competitors of firms engaged in allegedly anti-competitive conduct or pursuing anti-competitive acquisitions. *See infra* notes 48–53 and accompanying text.

15. *See, e.g.*, *Bernanke: Executive Pay Must Be Monitored*, ASSOCIATED PRESS (Mar. 20, 2009, 1:55 PM), http://www.msnbc.msn.com/id/29792546/ns/business-stocks_and_economy/t/bernanke-executive-pay-must-be-monitored/#.TuETrGMk6so; Jonathan Weisman & Joann S. Lublin, *Obama Lays Out Limits on Executive Pay*, WALL ST. J. (Feb. 5, 2009, 11:59 PM), http://online.wsj.com/article/SB123375514020647787.html (laying out plans to restrict executive compensation for the seven firms that received large bailouts during the financial crisis).

16. Randall S. Thomas, *Explaining the International CEO Pay Gap: Board Capture or Market Driven?*, 57 VAND. L. REV. 1171, 1182–83 (2004) ("When it comes to compensation, American executives stand out as exceptional on an international basis and U.S. chief executive officers have particularly distinctive arrangements. . . . [One survey shows that total annual remuneration for U.S. CEOs] was more than twice the average pay for CEOs in all of the other 25 countries surveyed, and . . . more than three times the average CEO pay in all but seven countries (Argentina, Brazil, Canada, China/Hong Kong, Mexico, Singapore and the United Kingdom).") (footnote omitted).

17. These member agencies include the banking regulators of the G20. *See* BASEL COMM. ON BANKING SUPERVISION, HISTORY OF THE BASEL COMMITTEE AND ITS MEMBERSHIP (Aug. 2009), *available at* http://www.bis.org/bcbs/history.pdf.

18. *See* Lucian A. Bebchuk & Jesse M. Fried, *Paying For Long-Term Performance*, 158 U. PA. L. REV. 1915, 1918 (2010) ("At the international level, the Basel II framework has been recently amended to require banking regulators to monitor compensation structures with a view to aligning them with good risk management."). This has been supported by a declaration encouraging such oversight by the G20 as well. *See* Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 250 (2010) ("[I]n their recent September 2009 meeting, the G20 leaders 'committed to act together to . . . implement strong international compensation standards aimed at ending practices that lead to excessive risk-taking . . . .'") (quoting G-20, LEADERS' STATEMENT: THE PITTSBURGH SUMMIT 2 (2008), *available at* http://ec.europa.eu/commission_2010-2014/president/pdf/statement_20090826_en_2.pdf)).

- The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[19] designed to be the centerpiece of reform of the American financial system, requires bank regulators to develop alternatives to the use of credit ratings in evaluating the quality of bank reserve assets.[20] But such alternatives are difficult to reconcile with the Basel Committee's commitment to credit ratings of capital reserves.[21] As the white shoe law firm, Sullivan & Cromwell, has observed in a client memo, "two documents . . . issued by the Basel Committee on Banking Supervision . . . make extensive use of credit ratings, and thus raise issues under Dodd-Frank."[22]
- After the U.S. Securities and Exchange Commission (SEC) rejected an effort to harmonize accounting standards across jurisdictions in the 1990s, a European-based network of accountants, with the support of the continent's capital market regulators, devised the International Financial Reporting Standards (IFRS) that have since been adopted by almost every jurisdiction in the world.[23] IFRS is a principles-based method of

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19. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

20. For an overview of the issue, see Melvyn Westlake, *Dodd-Frank Bar on Ratings Hinders Basel III Adoption*, 9 GLOBAL RISK REGULATOR (Jan. 2011), *available at* http://www.globalrisk regulator.com/ article.php?pgkey=2483.

21. For the Committee's continued reliance on credit ratings, see BASEL COMMITTEE ON BANKING SUPERVISION, BASEL III: THE LIQUIDITY COVERAGE RATIO AND LIQUIDITY RISK MONITORING TOOLS (2013), *available at* http://www.bis.org/publ/bcbs238.pdf. For commentary, see also Felix Salmon, *Dodd-Frank vs Basel III*, REUTERS (Jan. 20, 2011), http://blogs.reuters.com/felix-salmon/2011/01/20/dodd-frank-vs-basel-iii/.

22. SULLIVAN & CROMWELL LLP, RISK-BASED BANK CAPITAL GUIDELINES (Aug. 31, 2010), *available at* http://www.sullcrom.com/Risk-Based-Bank-Capital-Guidelines-08-31-2010/. *See also Sullivan & Cromwell on What's Next for Credit Ratings*, SEC. LAW PRACTICE CENTER, (Sept. 13, 2010, 4:19 PM), http://seclawcenter.pli.edu/2010/09/13/sullivan-cromwell-on-whats-next-for-credit-ratings/.

23. Tyler Weigel, Comment, *A New Universal Language?: An Overview of Adopting the International Financial Reporting Standards in the United States*, 80 UMKC L. REV. 1239, 1239 (2012) ("The majority of the world-approximately 120 countries-currently use IFRS when preparing corporate financial statements."). For more discussion, see William W. Bratton, *Heedless Globalism: The SEC's Roadmap to Accounting Convergence*, 79 U. CIN. L. REV. 471, 474 (2010) ("Ironically, a switch to IFRS would also allow management to reclaim some of the lost territory while simultaneously enhancing rents collected by its auditors."); Lawrence A. Cunningham, *The SEC's Global Accounting Vision: A Realistic Appraisal of a Quixotic Quest*, 87 N.C. L. REV. 1, 3 (2008) (noting the "revolutionary" nature of "the [SEC]'s willingness to jettison rules requiring companies to apply recognized U.S. accounting standards by inviting use of a new set of international standards created by a private London-based organization"). For a history of the International Accounting Standards Board, told from the perspective of a former SEC Commissioner, see Roberta S. Karmel &

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> accounting, differing strikingly from the American, rules-oriented Generally Accepted Accounting Principles (GAAP).[24] The SEC has grudgingly planned to permit companies to file their returns using the non-GAAP rules beginning in 2014, despite having played almost no role in devising the rules.[25]

Climate change, financial regulation, and antitrust are American regulatory obsessions, but they are by no means exclusive examples of the growth of regulatory globalization.[26] As problems globalize, policymakers

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Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT'L L. 883, 901–03 (2009).

24. *See, e.g.*, Lance J. Phillips, Note, *The Implications of IFRS on the Functioning of the Securities Antifraud Regime in the United States*, 108 MICH. L. REV. 603, 608 (2010) (arguing that "the principles-based approach of IFRS, which provides companies with increased flexibility in financial reporting, will threaten the current level of success enjoyed by plaintiffs bringing claims under the various federal securities antifraud laws").

25. *Accounting Rules: The New Convergence Workplan is Looking Challenged*, LEX FIN. TIMES (June 28, 2010, 8:35 AM), http://www.ft.com/intl/cms/s/4b92173e-8214-11df-938f-00144feabdc0,Authorised=false.html ("It was thought that the financial crisis would make convergence of accounting standards easier. After all, Lehman Brothers' infamous Repo 105 transactions, which boosted the failed bank's balance sheet, were permitted in the US but would have been disallowed under international standards. Ironically, one of the main areas of disagreement preventing the convergence of standards concerns one of the rules most instrumental in the crisis: mark to market, whereby assets and liabilities are valued at market prices."). The dispute between the American and foreign ways of accounting continues. *See, e.g.*, Tammy Whitehouse, *FASB, IASB Part Ways on Netting Derivatives*, COMPLIANCE WEEK (June 21, 2011), *available at* http://www.complianceweek.com/fasb-iasb-part-ways-on-netting-derivatives/article/205748 (noting disparate standards for "netting" derivatives on the balance sheet).

26. For other examples, see Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 358 (2008) ("[T]he role played by third party assurance may be a merging of private law contractual mechanisms for organizing production with public law activities of standard setting and enforcement."); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1542 (2006) (discussing the "policymaking practices of organizations working in three supranational realms: international trade, global public health, and environmental protection"); Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1548 (2008) (book review) ("The state's loss of its architectonic role and the corresponding multiplication of 'partial, specialized, and applied normative orders' create the challenge of realizing the values of rule of law and democracy in contexts removed from the classic institutional structure of the state: a unified judicial system, formal representative institutions, and so on."); Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT'L L. 575, 576 (2009) (The WTO's committee system, it seems, "apparently operate[s] on the basis of premises which are quite different from those which characterize formal dispute settlement. Indeed, [the committees] seemed to reveal a picture of the WTO which is at least potentially more dynamic, more cooperative, more reflexive, and more regulatory re-enforcing than is nearly always thought to be the case, based exclusively upon an examination of the dynamics of multilateral trade negotiations and dispute settlement."); Mario Savino, *Global Administrative Law Meets "Soft" Powers: The Uncomfortable Case of Interpol Red Notices*, 43 N.Y.U. J. INT'L L. & POL. 263, 264 (2011) ("Despite its growing importance, Interpol is still structured in many respects as an informal network of national officials. It is established outside an intergovernmental convention. Part of its activities are informal and based on non-binding rules. The fundamental principle is voluntary

must respond, and that response will have distributional consequences—winners and losers in the developed and developing worlds—in addition to substantive effects.[27] But in considering any response, large problems of legality remain unaddressed, let alone resolved.

What is to be done?[28] There is a way to begin to resolve the sovereignty mismatch problem and to make regulatory globalization legal and responsive—not a perfect way, but a tested one. Paired with sensible legislation, it might just legitimize an only questionably legitimate, but absolutely necessary, phenomenon.

The way forward begins with recognizing financial regulation's early steps toward solving the sovereignty mismatch problem.[29] That form of international regulatory cooperation—as the most advanced of these global regulatory enterprises, and probably the most important of them—illustrates some principles of decent regulatory design and some pretty good workarounds for doctrinal problems posed by the mismatch between the styles of sovereignty. It also illustrates, less fortunately, some of the rights that we are likely to give up to regulatory globalization.

In the aftermath of the financial crisis, financial regulation has been transformed from a technocratic enterprise into something more coordinated, and with a larger degree of political oversight. It offers process at the bottom of the international framework, with regulatory policymaking being done more openly. And it offers some legitimacy at the top, given the enhanced roles played by the politicos of the G20, an informal grouping of large-economy heads of state and finance ministers. In addition, of course, it offers the fallback of domestic administrative

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participation and cooperation of its members. Judicial review is absent and political control is, at best, quiescent.").

27. However, it is not yet clear how, precisely, those distributional consequences will play out. For some views on this issue, *see, e.g.*, Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 5 (2012) ("unilateral regulatory globalization explains why the EU has become the predominant regulator of global commerce"); B.S. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 799, 800 (2005) ("By focusing exclusively on [regulatory globalization], a false impression may arise that existing international institutions are becoming more participatory and responsive to the concerns of developing countries and their peoples."); Jonathan R. Macey, *Regulatory Globalization As A Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1353 (2003) ("the trend toward regulatory globalization reflects a basic survival response on the part of bureaucrats whose regulatory power is threatened by increased competition and private-sector globalization").

28. Vladimir Ilyich Lenin wrote *What Is to Be Done*? in 1901, one of a series of tracts by Russian intellectuals and politicians with that title.

29. *See infra* Part III.A (discussing international financial regulators' move towards organizing themselves similarly to a domestic agency, with political oversight at the top, a watchdog group in the middle, and policymaking by expert groups below that).

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process to those aggrieved by the policies set internationally–even if it does so a little late in the game.

That is good, but it is not good enough. Congress can solve some of the delegation and due process problems of the sovereignty mismatch by broadly authorizing international regulatory cooperation, but conditioning that authorization on procedural protections. American agencies should go forth into a globalized world, but only if they do so through a process that notices international policymaking, receives comment on that notice, considers it, and publicizes the entire process on the Internet. There should be no mystery about what is being done on the international level, and no ambiguity about whether domestic authorization to act across borders has been given.

In what follows, I describe the impulses that have generated the sovereignty mismatch, the legal and democratic challenges created by those impulses, and sketch the emerging efforts to address them. Part I lays the groundwork by examining the impetuses towards regulatory cooperation—it is cheap, regulators like it (for self-interested reasons), and once it starts, it is often hard to stop.

Part II, the heart of the Article, addresses the sovereignty mismatch problem itself, and the serious legal questions it poses for the domestic implementation of a policy designed outside American borders. Because the sovereignty mismatch problem poses procedural, delegation, Appointments Clause, and due process challenges to American regulators, some time is spent considering each of these problems.

Part III looks for a solution to the sovereignty mismatch problem by examining the way that financial regulatory globalization has muddled through its serious legal problems. Global financial regulation has tried to embrace the spirit of administrative good governance, even as it cannot hope to measure up to every legal punctilio of American governance requirements.

Is spirit alone enough? Part IV acknowledges that American judges may need to make their peace with regulatory globalization—it does, after all, address critical problems—but also argues that some targeted hard law from Congress would do an even better job of solving the sovereignty mismatch problem.

I. THE PROBLEM AS PROMISE

Part I of this Article explains why regulatory globalization has been such an attractive recourse to the problems posed by an increasingly interconnected world, which in turn underscores the seriousness of the

sovereignty mismatch problem. This Part establishes that policymaking is globalizing apace, offers examples of that globalization, and identifies some of the dynamics that foster regulatory globalization.

Three related fundamentals underlie the regulatory turn to the international. First, international regulatory cooperation is a comparatively easy response to globalization. Second, it is preferred by regulators, who—at least so far—have found it to be a technocratic exercise consistent with their own preferences. Third, it has generated a momentum in many cases that encourages politicians, regulators, and citizens to commit to it. The result is that governance is now, in so many areas, an international project.[30] It crosses borders as people, businesses, and regulatory problems increasingly do the same.[31] And the recent economic cataclysms in the United States[32] and Europe,[33] as well as the responses to them, only illustrate that interconnectedness.

Cross-border regulatory cooperation is, of course, not a bad thing for lots of reasons, and it is increasingly difficult to imagine a world without it. Global cooperation is promising; it may even be inevitable. But as the governance response to problems crosses borders, the rules about governance have not, creating the problems that I will analyze further in Part II. This Part of the Article explores that critical initial step—the case for the turn abroad.

A. Regulatory Cooperation Costs Little

International cooperation is often essential, but the alternatives to the regulatory turn are difficult. Kal Raustiala is one of a number of observers

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30. This international governance reaches domestic courts and domestic agencies. *See* Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 4 (2006) ("Litigants are increasingly asking U.S. courts to enforce judgments by international tribunals and courts."). *But see* Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693, 1695 (2008) ("In reality, examples of non-trivial international delegations are quite rare."). For a discussion of these opposing views, see Note, *International Delegation As Ordinary Delegation*, 125 HARV. L. REV. 1042 (2012).

31. Indeed, the "failure to permit international delegations could leave the United States (and potentially the world) helpless to address pressing global problems." Note, *supra* note 30, at 1043.

32. For a discussion of the financial crisis, and the regulatory response to it, see Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009).

33. The European sovereign debt crisis has already generated a good popular history from MICHAEL LEWIS, BOOMERANG: TRAVELS IN THE NEW THIRD WORLD (2011), and fascinating legal accounts from Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 930–31 (2012), and Lee C. Buchheit & G. Mitu Gulati, *Greek Debt—The Endgame Scenarios* (Apr. 18, 2011) (unpublished working paper), *available at* http://ssrn.com/abstract=1807011.

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who has suggested that states turn to regulatory cooperation where the transaction costs of alternative legal approaches, such as treaties, are high.[34] And the costs of those alternatives grow ever higher. As Jacob Cogan has shown, formal treaty conclusion has become a rather demanding exercise: "[w]hereas once international law substantially deferred to states in the enactment and implementation of individual duties, it now specifies those duties more and more, and leaves less and less room for state discretion."[35]

Treaties take time and energy to conclude, are difficult, especially in the United States, to ratify, and have become quite directive and specific. In light of their costs, it is perhaps unsurprising that regulators have cast around for alternatives. They have found an attractive one in "going it alone," without the guiding hand of diplomats or politicians (or without much of it, at least). Cross-border regulatory cooperation has reached deeply into quite partisan American policy, without involving the parties and officials thought to be most engaged in partisanship.

Consider two examples of this phenomenon: America's settlement with Europe on data privacy, and America's inclination to parallel its response to global warming with that of China. Both illustrate the attractively low costs of regulatory cooperation compared to alternative forms of governance while also illustrating that regulatory globalization can remove matters from domestic participation.

Data privacy protections regulate the ability of companies and governments to use the personal information—ranging from credit card purchases to browsing history to passenger lists—collected and processed by industry and government.[36] Europe has always protected the privacy of this data, and restricted the abilities of firms to use it, more than has the United States: the United States has no independent regulatory authority charged with monitoring privacy and has never promulgated comprehensive data privacy regulations for the private sector.[37]

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34. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

35. Jacob Katz Cogan, *The Regulatory Turn in International Law*, 52 HARV. INT'L L.J. 321, 370 (2011).

36. As Daniel Solove has put it, rather pessimistically,

> [d]atabases alter the way the bureaucratic process makes decisions and judgments affecting our lives; and they exacerbate and transform existing imbalances in power within our relationships with bureaucratic institutions. This is the central dimension of the database privacy problem, and it is best understood with the [metaphor of Franz Kafka's *The Trial*].

Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1399 (2001).

37. *See* ABRAHAM NEWMAN, TRANSATLANTIC COOPERATION AND CONFLICT OVER DATA

Europe's privacy rights, by contrast, were written into its Lisbon Treaty and expressed through a privacy directive on data protection that has been in effect since 1998.[38] The directive offers substantially more protection of consumer data than does the United States, most notably through its opt-in provisions regarding the disclosure of information, which requires explicit consent by consumers before the information may be disclosed.[39]

Accordingly, reconciling European and US rules on data protection has proven very difficult, but crucial in an age where big companies do business in both jurisdictions. And so reconciliation was pursued, not by treaty, but by regulatory cooperation.

The United States Department of Commerce, in consultation with European data protection regulators, has developed a "safe harbor" framework. This framework allows firms like Google, that have collected data on European citizens, to commit to a level of data protection that is otherwise unrequired by American law, but that the European Union is willing to permit as a substitute for its own efforts.[40]

PRIVACY RULES: LESSONS FOR INTERNATIONAL MARKET REGULATION (2007), *available at* http://www.gmfus.org/archives/transatlantic-cooperation-and-conflict-over-privacy-rules-lessons-for-international-market-regulation/. For a discussion of the American approach to data privacy, see Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1816 (2011) ("Information privacy law rests on the currently unstable category of Personally Identifiable Information . . . .").

38. [T]he evolution of privacy as a fundamental right is reflected for the EU member states

> in the adoption of the Lisbon Treaty and the Charter of Fundamental Rights, which added the protection of individuals' fundamental rights and freedom with regard to the processing of personal data ('data protection') as a fundamental right.

Marc Rotenberg & David Jacobs, *Updating the Law of Information Privacy: The New Framework of the European Union*, 36 HARV. J.L. & PUB. POL'Y 605, 608 (2013). *See* Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, *available at* http://www.ec.europa.eu/justice/policies/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf. For a discussion, see Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 2–3 (2000).

39. For an analysis of the welter of European data privacy regulation, see Lothar Determann & Robert Sprague, *Intrusive Monitoring: Employee Privacy Expectations Are Reasonable in Europe, Destroyed in the United States*, 26 BERKELEY TECH. L.J. 979, 1018–31 (2011).

40. As the Department of Commerce has explained, "[i]n order to bridge these [different privacy approaches] and provide a streamlined means for U.S. organizations to comply with the [European Data Protection] Directive, the U.S. Department of Commerce in consultation with the European Commission developed a 'Safe Harbor' framework and this website to provide the information an organization would need to evaluate—and then join—the U.S.-EU Safe Harbor program." *Main Safe Harbor Homepage*, EXPORT.GOV, http://export.gov/safeharbor (last visited Oct. 9, 2013). For more analysis, see Chuan Sun, *The European Union Privacy Directive and its Impact on the U.S. Privacy Protection Policy: A Year 2003 Perspective*, 2 NW. J. TECH. & INTELL. PROP. 99 (2003). Or, as one regulator has put it, "We were looking for a political green light, but have to defer to the institutional

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This regulatory arrangement has meant that American companies are forced to follow much more stringent data privacy protection arrangements than those required by American law. But what is the alternative? As Graham Greenleaf has observed, a UN data privacy treaty "from scratch is unrealistic."[41]

As for global warming, while most countries have committed to the Kyoto Protocol, a treaty limiting global CO2 emissions, the United States and China, the two largest emitters in the world, have been unable to muster the political will to join them.[42] The US, for one, is a signatory to the treaty without intention to ratify, while China is categorized as a developing country not subject to binding CO2 emission targets; it has steadfastly resisted any effort to adopt more developed country types of emissions controls.[43] For the United States, as we will see, the problem is also a legal one. The protocol creates a carbon market overseen by an executive board, which is capable of revising the emission limits with which the members of the protocol must comply;[44] that delegation to a

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demands of the EU." Ayla Jean Yackley, *Safe Harbor Vote Delayed*, WIRED (Apr. 17, 2000), http://www.wired.com/politics/law/news/2000/04/35406.

41. Graham Greenleaf, Powerpoint from SCRIPT Seminar, Edinburgh: *The Global Trajectory of Data Privacy Laws* (Dec. 8, 2011), http://www2.austlii.edu.au/~graham/publications/2011/SCRIPT_trajectory_1211PPT.pdf. *But see* Ariel E. Wade, Note, *A New Age of Privacy Protection: A Proposal for an International Personal Data Privacy Treaty*, 42 GEO. WASH. INT'L L. REV. 659, 660 (2010) ("[M]odern society needs an International Personal Data Privacy Treaty to secure privacy on a world-wide basis.").

42. Indeed, the United States has considered unsigning the Kyoto Protocol. *See generally* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2063 (2003) ("International lawyers also regarded the mere act of unsigning [the treaty establishing the International Criminal Court] as significant in itself."). The Clinton Administration promised to put Kyoto to ratification before the Senate, and the Bush Administration that followed it ended those plans. *See* Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L., Summer 2003, at 207, 210 ("As to climate change, President Clinton signed the Kyoto Protocol but would not submit it to the U.S. Senate for ratification, and President Bush later withdrew from the Kyoto negotiations entirely.").

Part of the problem with the Kyoto Protocol from an American perspective was not just political but touched on the legal delegation that might be made under Kyoto. For a more general discussion of China-US relations and climate change, see Michael P. Vandenbergh, *Climate Change: The China Problem*, 81 S. CAL. L. REV. 905, 908 n.11 (2008) ("China and the United States, the two largest emitters, not only have declined to commit to reductions but have attempted to undermine the efforts of other governments to date.").

43. Deepa Badrinarayana, *The Kyoto Protocol's Emissions Trading Scheme: Realistic or Unjust Solution for Potential Developing Nation Signatories?*, 42 ENVTL. L. REP. 11,157, 11,157 (2012) (noting the fact that developing countries, including China, are not subject to binding emissions reductions obligations under the Kyoto Protocol); Liana G.T. Wolf, *Countervailing A Hidden Subsidy: The U.S. Failure to Require Greenhouse Gas Emission Reductions*, 19 GEO. INT'L ENVTL. L. REV. 83, 88 (2006) (mentioning the United States' signing of the Protocol in 1998 and subsequent withdrawal from participation in 2001).

44. For an overview of the regulatory implications of the mechanism set up under the Protocol,

freestanding multinational body given the power to change American law raises particular fears over the separation of powers. Daniel Abebe and Jonathan Masur have concluded that the Chinese central government may be in a similarly hands-tied situation with respect to implementing and enforcing climate change rules in the People's Republic.[45]

Rather than joining Kyoto, or attempting to conclude another treaty to deal with global warming, American global warming policy appears to have shifted away from the project of formal international legal obligation and toward a regulatory approach to limiting emissions. This regime might be thought of as a wink-and-nudge non-binding comparative commitment.[46] American rules reducing greenhouse gas emissions appear to be contingent, at least in degree, to commitments by the other major emitters, especially China, to do the same.[47]

Negotiating climate change priorities with the Chinese, or data privacy with the Europeans, sounds quite cosmopolitan. But it has costs as well. Issues deeply important to many Americans, as well as citizens of other countries, have been taken out of the sphere of lawmaking and put in the sphere of regulatory cooperation and parallelism, or, at least, increasingly appear to be moving toward that sphere. There is a potentially alarming ease to this change. As it turns out, regulatory cooperation simply costs less than do treaties.

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see Charlotte Streck and Jolene Lin, *Making Markets Work: A Review of CDM Performance and the Need for Reform*, 19 EUR. J. INT'L L. 409 (2008). These sorts of international delegations can be problematic.

45. Daniel Abebe & Jonathan S. Masur, *International Agreements, Internal Heterogeneity, and Climate Change: The "Two Chinas" Problem*, 50 VA. J. INT'L L. 325 (2010) (characterizing China's reluctance to join the Kyoto Protocol as "directly related to its internal political, economic, and social dynamics," including uneven growth and income disparity between the East and West sides of China which might be further exacerbated by agreeing to limit CO2 emissions).

46. As one scholar has observed, "[t]he United States and China may have greater success than the global community as a whole in identifying an agreement that is acceptable to them." Nagle, *supra* note 13, at 632; *see also* BRUCE AU ET AL., BEYOND A GLOBAL DEAL: A UN+ APPROACH TO CLIMATE GOVERNANCE, GLOBAL GOVERNANCE 2020 26 (2011), *available at* http://www.gg2020.net/fileadmin/media/gg2020/GG2020_2011_Climate_Beyond_Global_Deal.pdf.pdf ("China's decisions, along with those of the United States, will largely determine the shape of global climate institutions in the post-Kyoto era.").

47. As one American negotiator observed after the failed Cancun negotiations on climate change, the likelihood that the largest creators of greenhouse gases will be willing to sign a treaty reducing emissions is unlikely, even though the largest of those emitters, the United States and China, might be willing to consider less formal alternatives. *See* Video: Jonathan Pershing, *What Happened in Cancun and Where Do the Climate Negotiations Go from Here?* (Center for Strategic and Int'l Studies Jan. 5, 2011), *available at* http://csis.org/event/post-cancun-update (begin at 23:30).

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B. Regulators Like Regulatory Cooperation

A second, and not entirely unrelated, reason to think that regulation across borders will grow—and grow rapidly—turns on the relationships among regulators. Those relationships have been easier to manage than would be other legal or political arrangements between countries. Sometimes this leads countries to default to regulatory cooperation to solve their transnational problems. And sometimes it incentivizes regulators to look to their counterparts abroad to maximize their own interests, given that their regulatory ambits are globalizing anyway.

Antitrust may exemplify this dynamic—though its global coordination remains in its early stages. Europeans and Americans have long differed on the sort of scrutiny appropriate to apply to new business combinations—Americans prefer to look only at the effect on consumers while Europeans have steadfastly examined the effects on consumers *and* competitors in mergers.[48] Reconciling these two paradigms and many of the other basic questions of international antitrust has never been easy to do.[49] Despite these distinct differences, the International Competition Network (ICN)—comprised of most of the antitrust regulators in the world—has declared somewhat hopefully that American and European merger visions are moving "towards convergence."[50]

The amazing thing about the ICN's statement is that it may be correct. Since the aborted Honeywell-G.E. merger of 2000 (the United States was willing to permit the two American companies to merge, but the EU

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48. Of course, a change in the American approach may only happen more quickly as large developing countries such as India, Brazil, and China increase the intensity and quality of the competition regulation to which they can commit.

49. As James Whitman has observed:

> [I]t is surely the case that Microsoft must act in a world in which there will be two different regimes for years to come. In this dual world, its decisions must be justified in the United States in terms of "consumers' interest" and the benefits of competition, while those same decisions must be justified in Europe, at least in part, in terms of the interests of "all companies." Europe may have moved somewhat in the direction of U.S. law, but at a minimum it remains *more* oriented toward the producer interest of competitors.

James Q. Whitman, Consumerism Versus Producerism: A Study in Comparative Law, 117 YALE L.J. 340, 376 (2007).

50. Stanley M. Gorinson & Robert Pambianco, *U.S. and European Merger Policies Move Towards Convergence*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER (Aug. 9, 2002), *available at* http://www.wlf.org/upload/080902LBGorinson.pdf; *see also* Press Release, International Competition Network, International Competition Network Advances Cooperation and Convergence at 12th Annual ICN Conference (Apr. 26, 2013), *available at* http://internationalcompetitionnetwork.org/uploads/library/doc897.pdf.

blocked the effort),[51] there has been little of the high-stakes conflict on antitrust matters that marked the 1990s.[52]

Moreover, as Chad Damro has found, managing the regulatory relationship between the United States and Europe, despite these fundamental disagreements on policy, has been easier to do through the regulators themselves, especially when their political overseers disagree: "[I]nstead of seeking a treaty to establish a formal cooperative framework, the competition regulators preferred using their own discretionary authority to pursue a non-treaty agreement. This behavior is explained by the regulators' desire to reduce the likelihood of political intervention."[53]

There is more to the pull of regulatory cooperation, of course. Political scientists have often speculated that "epistemic communities" of regulatory elites can ease the process of harmonization across borders, as these communities speak a common language and feel comfortable with one another.[54] There is also the matter of protecting regulatory turf through a "two-level game" with the body politic and foreign interests.[55] All of this means that, in addition to the mere fact of globalization, and the ease of turning to regulatory cooperation to address it, there are agency-level incentives pushing regulators to solve international problems on their own.

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51. For a discussion of the Honeywell-G.E. fiasco, see Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 705 n.87 (2009) ("[T]he European Community blocked a merger between General Electric and Honeywell that U.S. antitrust authorities had allowed, raising the ire of both antitrust authorities and the business community in the United States.").

52. Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627, 631 (2001) ("The question for many, in consequence, is why greater international cooperation has not transpired, or if it ever can . . . .") (footnote omitted); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 323 (2004) ("[T]he prominence of the conflict should not be allowed to obscure the remarkable record of 'cooperative relationship[s] on regulation' between E.U. and U.S. antitrust regulators.") (quoting Editorial, *Merger-Busting in Europe*, N.Y. TIMES, June 21, 2001, at A24, *available at* http://www.nytimes.com/2001/06/21/opinion/merger-busting-in-europe.html).

53. Chad Damro, *Transatlantic Competition Policy: Domestic and International Sources of EU-US Cooperation*, 12 EUR. J. INT'L REL. 171, 173 (2006).

54. *See, e.g.*, Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining "epistemic community"); Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377, 384–85 (1989) (describing the successful efforts of an ecological epistemic community).

55. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988) (describing two-level game theory); *see also* Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 22–23 (applying Putnam's two-level game framework to international law); Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 312 (2010) (applying Putnam's two-level game framework to climate change legislation).

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C. Regulatory Cooperation Institutionalizes Well

The third, and also related, reason why the regulatory turn to international governance is likely to expand is because, once institutionalized, that cooperation gradually can develop its own momentum.

This institutionalization story is supported more by observation of practice than by theory; it is essentially a slippery slope account, and there is nothing inevitable about slippery slopes.[56] But time and again, when regulators go overseas and create institutions, they find ways for those institutions to mean something. And while not every effort at regulatory globalization has been a success, enough have prospered to create occasionally uncomfortable situations where things have gone much further than anyone ever thought they would, or could.

For example, financial regulators have continued to institutionalize and elaborate the sort of work they have been doing, even in the face of a terrible financial crisis where they were arguably quite ineffective.[57] Tim Büthe and Walter Mattli have documented the way that cooperation on accounting rules developed through the International Accounting Standards Board and its predecessor networks even in the face of sharp disagreement between countries on the appropriate accounting standards to use.[58] And while it is obviously the case that not every cross-border interaction inevitably results in a sovereignty mismatch problem, there are

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56. As Eugene Volokh has observed, "[t]he slippery slope is in some ways a helpful metaphor, but as with many metaphors, it starts by enriching our vision and ends by clouding it." Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1137 (2003). For further discussion, see Ruth E. Sternglantz, *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in* Lawrence v. Texas, 153 U. PA. L. REV. 1097 (2005).

57. "The Group of 20 (G20) has, following the financial crisis, created some sort of order in international financial regulation, with one network of NETWORKS meant to oversee many of the others, engaged in their own task-specific work." David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 692 (2012).

58. TIM BÜTHE & WALTER MATTLI, ASSESSING THE IASB: RESULTS OF A BUSINESS SURVEY ABOUT INTERNATIONAL FINANCIAL REPORTING STANDARDS AND THE IASB'S OPERATIONS, ACCOUNTABILITY, AND RESPONSIVENESS TO STAKEHOLDERS (2008), *available at* http://www.iasplus.com/en/binary/resource/0811assessingtheiasb.pdf. Moreover, "[t]he entities, although they began as informal regimes, have developed into recognizable forms of international administration over the last decade." David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 548 (2005). As Henry Hansmann and Reinier Kraakman have observed, "uniform accounting standards are rapidly crystallizing out of the babble of national rules and practices into two well-defined sets of international standards: the GAAP accounting rules administered by the Financial Auditing Standards Board in the U.S. and the International Accounting Standards administered by the International Accounting Standards Committee in London." Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 457 (2001).

reasons to think carefully about the ways that international regulators can leave their domestic supervisors behind.

The accounting story is particularly instructive. It is a cautionary tale for Americans because American regulators, by abandoning an already ongoing harmonization effort in the 1990s, lost their ability to affect the effort, and now must begin the process of conforming to it.[59]

International accounting standards—the idea that companies listed on stock exchanges from Stockholm to Shanghai might report their results in the same way—have always been an attractive regulatory goal. In the 1980s, capital market regulators agreed to endorse an effort by professional accounting organizations to try for global harmonization of accounting rules.[60] But the effort proved controversial, as American regulators comfortable with the unique American approach to financial statements withdrew their support for the enterprise in the early 1990s.[61]

That exit, however, did not stop the process of devising common accounting standards. Instead, the international efforts moved to Europe; the creation of international accounting standards after the SEC's rejection of the prospect of them, has been managed by the International Accounting Standards Board (IASB), a public-private arrangement based in London created in 2001.[62] The IASB has devised a set of accounting standards, the International Financial Reporting Standards (IFRS), which has enjoyed quick adoption in European and other countries. IFRS was essentially created without American participation.[63]

And therefore, perhaps unsurprisingly, IFRS is rather different from American accounting rules. It is a principles—rather than rules—based accounting system, in that it is less technical than traditional American accounting, and relies more on the gestalt of a company's returns to assess

59. As James Cox has observed, "[i]ncreasingly, the SEC's regulatory posture on financial reporting issues is one of accommodation to foreign issuers rather than its historical position of demanding obeisance to the U.S. way." James D. Cox, *Coping in a Global Marketplace: Survival Strategies for a 75-Year-Old SEC*, 95 VA. L. REV. 941, 944 (2009).

60. For a basic overview of the back and forth, see William W. Bratton, *Heedless Globalism: The SEC's Roadmap to Accounting Convergence*, 79 U. CIN. L. REV. 471, 472 (2010) (observing that "[t]he Securities and Exchange Commission (SEC), long the backer and protector of GAAP and the FASB, lately changed course, defecting against them in favor of IFRS and its generator, the International Accounting Standards Board (IASB)").

61. *See* Cox, *supra* note 59, at 944.

62. For an overview, see *About the IFRS Foundation and the IASB*, IFRS FOUNDATION, http://www.ifrs.org/The+organisation/IASCF+and+IASB.htm (describing the history of the IASB).

63. *See, e.g.*, Bratton, *supra* note 23, at 472 ("The Securities and Exchange Commission (SEC), long the backer and protector of GAAP and the FASB, lately changed course, defecting against them in favor of IFRS and its generator, the International Accounting Standards Board (IASB).").

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its accuracy.[64] The United States had—and, for the moment, still has—a unique rules-based and reputedly challenging set of accounting standards that differ greatly from those of any other nation, the Generally Accepted Accounting Principles (GAAP).[65]

But, faced with a cascade of adoptions of IFRS, those GAAP principles are on the verge of being abandoned, despite the SEC's doubling down on their necessity in the 1990s.[66] As foreign jurisdictions have gained more and more of the business of floating stocks and bonds and raising capital, American capital market regulators have given up hope that they might do so in ways consistent with the complicated GAAP.[67] The SEC has permitted foreign companies that list on American stock markets to use IFRS to file their American annual and quarterly reports.[68] And the SEC will surely accede to IFRS soon.[69]

Accounting is technical, and acronyms like GAAP and IFRS daunt almost as much as they reveal what, exactly, the distinction between rules-based and principles-based accounting really amounts to. But the import of the triumph of IFRS can be gleaned by abstracting away from it, and from the details of accounting. The commitment to an international effort in accounting has worked a sea change in the way that companies report their results, and the sea change has come without much American

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64. For an overview, albeit a skeptical one, see Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1486–91 (2007).

65. For a laudatory overview of GAAP, see Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335 (1996).

66. *See* Cunningham, *supra* note 23, at 1 ("In the most revolutionary securities law development since the New Deal, the SEC is poised to jettison rules requiring companies to apply recognized U.S. accounting standards by inviting use of a new set of international standards created by a private London-based organization.").

67. For a discussion, see William W. Bratton & Lawrence A. Cunningham, *Treatment Differences and Political Realities in the GAAP-IFRS Debate*, 95 VA. L. REV. 989, 989 (2009) ("[T]he globalization wave continues to rise and GAAP's days appear to be numbered . . . .").

68. SEC Staff have made their views known on the question in a recent work plan. DIV. OF CORP. FIN. & OFFICE OF THE CHIEF ACCOUNTANT, SEC, WORK PLAN FOR THE CONSIDERATION OF INCORPORATING INTERNATIONAL FINANCIAL REPORTING STANDARDS INTO THE FINANCIAL REPORTING SYSTEM FOR U.S. ISSUERS: AN ANALYSIS OF IFRS IN PRACTICE (Nov. 6, 2011), *available at* http://www.sec.gov/spotlight/globalaccountingstandards/ifrs-work-plan-paper-111611-practice.pdf.

69. For SEC Staff statements on the agency's cautious embrace of IFRS, see *id.*, and OFFICE OF THE CHIEF ACCOUNTANT, SEC, WORK PLAN FOR THE CONSIDERATION OF INCORPORATING INTERNATIONAL FINANCIAL REPORTING STANDARDS INTO THE FINANCIAL REPORTING SYSTEM FOR U.S. ISSUERS: EXPLORING A POSSIBLE METHOD OF INCORPORATION (May 26, 2011), *available at* http://www.sec.gov/spotlight/globalaccountingstandards/ifrs-work-plan-paper-052611.pdf. *See also* Michael Cohn, *Investors Predict U.S. Will Adopt IFRS*, ACCT. TODAY (Nov. 16, 2012), http://www.accountingtoday.com/news/Investors-Predict-US-Adopt-IFRS-64689-1.html.

involvement—even though it will, in the near future, affect American companies as much as anyone else.

Thus, this story of accounting standards illustrates what those who worry what happens when regulators meet in a room have always suspected. Regulatory cooperation is easy to institutionalize—even when it crosses borders. Its propensity towards momentum is not a universal law, to be sure, but regulators ignore cross-border efforts at their peril, because those efforts can set the standards for even the most independent and recalcitrant jurisdictions, if the circumstances are right.

D. Conclusion

The three comparative advantages of regulatory cooperation—that the alternatives are costly, that regulators prefer cooperation to those alternatives, and that, once institutionalized, regulatory cooperation has the potential to obtain momentum—are, of course, related. They are also testable, although this Article will stick to hypothesis generation, and leave the testing to future work.[70] The hypotheses will be borne out (or falsified) by the actual practice of states, bureaucrats, and interest groups across borders in the coming decades.

Moreover, to be sure, skeptics of these comparative advantages exist. Indeed, there are still skeptics about the potential for international cooperation as a regulatory matter in any sphere. Pierre-Hugues Verdier has expressed doubt about the potential of financial cooperation across borders to really be significant beyond possible coordinative interests in economic liberalization and the reduction of trade barriers.[71] Realists like John Mearsheimer argue that state cooperation is always likely to be elusive and fleeting in an anarchic world, where survival is never guaranteed and like-mindedness is accordingly suborned by ruthless competition.[72] Lawyers such as Jack Goldsmith and Eric Posner have adapted these realist insights to international law and international relations, and generally found the bindingness of international legal arrangements to be wanting in a world where states constantly compete.[73] It is fair to say that, to these observers, the inevitability of regulatory collaboration is in doubt.

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70. The prediction that regulatory cooperation will prosper disproportionately as the world grows ever more interconnected is an empirical one.

71. Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 171–72 (2009).

72. JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001).

73. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

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But the burgeoning degree of cooperation that exists even now—a significant transformation from the post-World War II legal settlement that is hard to explain in realist terms, wherein state interests and degrees of cooperation should *never* change[74]—suggests that these observers ignore the mechanisms of regulatory cooperation at their peril. Broad skepticism, at any rate, permits lawyers to ignore real problems with the kind of cooperation that actually is being pursued, if they simply assume that it will not last. Given the degree and amount of regulatory cooperation on the most important issues confronting countries today, such a strategy would be unwise.

II. THE SOVEREIGNTY MISMATCH PROBLEM AS A PROBLEM OF DOMESTIC ADMINISTRATIVE LAW

Two rulemakings and a judicial decision illustrate a gap in legal thinking about the international forays of American regulators that exemplifies the sovereignty mismatch problem in the United States.

First, on June 17, 2011, the Federal Reserve Board observed in a notice of proposed rulemaking that it "and the other federal banking agencies continue to work on implementing Basel III in the United States."[75] Its notice suggested that the decision had already been made: banks were getting Basel III (the term refers to the third iteration of an international agreement by the banking agencies to require that the banks they supervised keep a minimum amount of capital on hand). The question was what the banks should be required to do about it. Accordingly, the Fed sought comments from bank holding companies as to how they would meet the terms of the international agreement.[76]

Then, on June 28, after finalizing a separate rulemaking, the primary U.S. banking agencies warned banks that "with the joint efforts of the U.S. banking agencies and the Basel Committee to enhance the regulatory capital rules applicable to internationally active banking organizations, the agencies anticipate that their capital requirements will be amended" in the following years, as Basel refined its banking requirements.[77]

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74. For a TRADITIONAL version of this realist take, see John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY, Winter 1994–1995, at 5, 7.

75. Capital Plans, 76 Fed. Reg. 35,351, 35,355 (proposed June 17, 2011) (to be codified at 12 C.F.R. pt. 225).

76. *Id.*

77. Risk-Based Capital Standards: Advanced Capital Adequacy Framework—Basel II; Establishment of a Risk-Based Capital Floor, 76 Fed. Reg. 37,620, 37,625 (June 28, 2011) (codified at 12 C.F.R. pts. 3, 208, 225, and 325).

Meanwhile, a court granting a motion to dismiss a "Basel III accord violations" claim had recently complained that it was not clear "how or if Basel III applies or has regulatory effect in the United States. Upon the Court's own research, it has found that the United States is not even a signatory to Basel III."[78]

How can an agency pledge fealty—indeed, ongoing fealty—to the work of a grouping of regulators that the United States has neither signed nor ratified?

The question admits of no easy answer. International policymaking, while increasingly elaborate and welcome in those contexts where domestic regulation is likely to fail or be insufficient to resolve global problems, is not without its doctrinal difficulties. Basel III exemplifies the problem.[79] Basel III is a set of rules, in that its standards are legislative in nature and regulate the future conduct of financial institutions.[80] Once the Basel Committee agreed on those rules, its American members are obligated to return to their jurisdiction and implement them.[81] But rules, at least in the United States, are subject to a variety of constraints, culminating in judicial review; Basel itself offers none of these constraints. As a matter of American administrative law, procedural specialists seem

78. Feller v. Indymac Mortg. Servs., No. 09-5720 RJB, 2010 WL 342187, at *3 (W.D. Wash. Jan. 26, 2010) (omitted capitalizations).

79. For an example of this critique, see Pierre-Hugues Verdier, *U.S. Implementation of Basel II: Lessons for Informal International Law-Making* (June 30, 2011), *available at* http://ssrn.com/abstract=1879391. (arguing that the Basel Committee is likely to both fail to meet its goals and to transgress American good governance principles in doing so). This is not to suggest that the American response to Basel II was the only problem with that particular accord. *See, e.g.*, Jeffery Atik, *Basel II: A Post-Crisis* Post-Mortem, 19 TRANSNAT'L L. & CONTEMP. PROBS. 731, 734–35 (2011) (identifying three weaknesses in Basel II: (1) "the illusion of safety that Basel II engendered—an illusion that compliance with Basel II meant that bank capital would be 'adequate' to withstand a crisis"; (2) "the use of credit ratings (as a proxy for credit sensitivity) to determine the regulatory capital needed to support the holding of particular financial assets"; and (3) "the negative spiral effect resulting from the interplay between asset value declines occasioned by market-to-market accounting and Basel II's rigid capital demands, generally (and perhaps incorrectly) described as procyclicality").

80. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 683 (D.C. Cir. 1973) (Wright, J.) (noting differences between rulemaking and adjudications and claiming the existence of a "judicial trend favoring rule-making over adjudication for development of new agency policy"). For discussions about the nature of a rule, and its comparative advantage (or not) over adjudication, see Ronald M. Levin, *The Case For (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1080-83 (2004); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390–98 (2004) (describing the implications of agency rulemaking versus adjudication); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 954–58 (1965).

81. The Basel Committee has created a set of procedures to monitor this implementation. BANK FOR INTERNATIONAL SETTLEMENTS, BASIL III IMPLEMENTATION ASSESSMENT PROGRAMME, http://www.bis.org/bcbs/implementation.htm (last visited Oct. 10, 2013).

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likely to find the arrangement between the international standard setters and the domestic implementers to be unworkable.

The administrative law problems with the new role of the international regulatory architecture are fourfold: there are procedural and delegation problems, as well as due process and Appointments Clause problems. Together these doctrines provide legal bases for a more instinctual commitment to democratic governance at odds with the internationalization of oversight. What is there to make of a regulatory process that has gone global, when no democratic process has joined it? This is the problem of the democratic deficit, and it is a hardy concern for every international administrative effort; the mismatch between transnational and domestic regulatory styles creates a procedural deficit that contributes to the democratic one.

In what follows, I discuss these four doctrinal problems and the democratic deficit that they are designed to guard against. These problems pose serious difficulties at the interface of domestic and international administrative process. In the next Part, I identify the ways in which the international financial regulatory initiatives have sought to get around them. The bottom line is one that is more legally realist than doctrinally unambiguous—it is that domestic administrative law, at least in finance, is hardly so nuanced when it comes to observing the procedural niceties that the Administrative Procedure Act (APA) would lead us to suspect are required, while the international regulatory process is not without some real, if voluntary, procedural protections of its own.[82] In this sense, although we may not be entirely happy with the way the sovereignty mismatch problem has been resolved so far, the way that financial regulators have addressed it provides a start to bringing international regulatory cooperation within the law's domain. In the final part, I offer a recommendation that can finish the job.

A. Procedural Challenges

The procedural problems with the regime of global rulemaking, followed by domestic implementation, are particularly thorny. American administrative law requires the publication of proposed rules, the receipt and evaluation of public comment, and the issuance of a final rule before

82. The APA may be found at 5 U.S.C. §§ 551–559, 701–706 (2000). For a discussion, see *infra* note 171 and accompanying text.

its citizens may be subjected to the tender mercies of its agencies.[83] Ernest Gellhorn has summarized the process as follows:

> [a]s an unelected body, an agency is not as free to adopt rules as Congress is to adopt laws. An agency must give the public notice, an opportunity for comment, and justify its results with a concise statement of the rule's basis and purpose, including a reasoned explanation of why the rule is authorized and necessary.[84]

Judicial review is the final step in the process of rulemaking. Such review, if perhaps not as aggressive as some scholars of administrative rulemaking have been inclined to suggest,[85] results in the reversal of the agency's proposed promulgation approximately one-third of the time.[86] Indeed, many scholars argue that the threat of judicial review, and the desire to avoid reversal, have changed the character of American rulemaking, leading to a vast expansion in the detail set forth in notices of proposed rules, final rules, and response to comments, all of which appear in the Federal Register.[87]

It is not clear whether any of these requirements are met through the bifurcated international regulatory process, where the decision is made by a body outside of the purview of the APA (and certainly one that does not publish in the Federal Register, as is required by 5 U.S.C. § 553 unless there is "actual notice" of the proposed rule), and then is presented as a fait accompli by the domestic agencies that belong to the international process during their own implementing rulemakings.

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83. JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING §§ 4.01–7.06 (1983).

84. Ernest Gellhorn, *Shaping Administrative Law*, 43 ADMIN. L. REV. 1, 5 (1991).

85. *See* Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261, 261 (2009) (utilizing "data that cover all active federal rule-writing agencies from 1983 to 2006," and concluding that the "results largely disconfirm the ossification thesis").

86. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010) ("The outcomes of actual cases prove the point: whether the question is one of fact, law, or arbitrariness, whether the agency procedures were formal or informal, whether judicial deference is required or not, the courts—even though in theory they would apply different degrees of scrutiny to each of these questions—reverse agencies slightly less than one third of the time.").

87. The start date for this growth of detail varies, depending on the administrative law scholar. Some point to 1978, the date of the Supreme Court's decision in Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978) (limiting judicial review of rulemakings to the rulemaking record). *See, e.g.*, Gillian E. Metzger, *The Story of* Vermont Yankee*: A Cautionary Tale of Judicial Review and Nuclear Waste*, *in* ADMINISTRATIVE LAW STORIES 124, 126–29 (Peter L. Strauss ed., 2006) (describing the growth of rulemaking records in the wake of the decision). Others suggest that the relevant date is 1983, when the Supreme Court decided Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) (describing the nature of arbitrary and capricious review). Or one could look to the 1971 *Overton Park* decision. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (first case that mooted "hard look" review of agency action).

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The problems with this process are twofold. First, when agencies approach their foreign counterparts as negotiators over global solutions to cross-border problems, they do so absent warnings in the Federal Register and without any intention of publicizing the contents of their negotiations. Second, if those negotiations are successful, then the American agency will return from their negotiations with new rules, which may duly be subjected to notice and comment, followed by judicial review. However, at this point the jig is up, as the decision was already made, and the procedural requirements of the APA are mere routines that must be performed before promulgation and enforcement.

B. Delegation

The problem of the interplay between the domestic and the international also raises the fundamental, if often overblown, problem of the nondelegation doctrine, and the more serious problem of agency subdelegation absent congressional authorization. Both doctrines restrict the power to grant rulemaking authority to someone else: when Congress does it, it is almost always permitted; when agencies give up their rulemaking authority, however, judicial scrutiny is much more searching.

Nondelegation is the doctrine that limits congressional action,[88] while subdelegation is a Congress-protecting doctrine that prevents delegatees from abusing the privileges given them by the legislature.[89] "Nondelegation" is not the same thing as "no delegation"; the doctrine permits delegations, but only when Congress has provided an "intelligible principle" to guide its delegate's exercise of the authority given it.[90] The

88. In this way, the nondelegation doctrine "ensures . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *see also* Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."). For a recent discussion of the doctrine, and its survival as a canon of construction, see Michael C. Pollack, Note, Chevron*'s Regrets: The Persistent Vitality of the Nondelegation Doctrine*, 86 N.Y.U. L. REV. 316 (2011).

89. Jason Marisam has put it somewhat differently: "In the case of the subdelegation doctrine, Congress is the principal and a federal agency is the agent." Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 892 (2012) (footnote omitted). For further discussion, see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2176 (2004) ("The exclusive delegation doctrine suggests that the President and executive branch agencies can subdelegate only if and to the extent Congress has authorized subdelegation. The exclusive delegation understanding tells us the Executive has no inherent authority to exercise legislative power.").

90. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). *See also id.* at 401 (holding that a delegation of the power to change tariff rates did lay down an "intelligible principle,"

doctrine has rarely been used to actually countermand legislation, but it occupies a prominent place in the fundaments of American governance—Office of Legal Counsel opinions, for example, are replete with nondelegation doctrine references.[91] Scholars such as Cass Sunstein have suggested that recent delegations may fall afoul of the doctrine, and that it also affects policymaking as an interpretive canon that courts use to cabin very broad claims of authority by agencies.[92] Moreover, the intuition underlying the doctrine—that a rulemaking body given responsibility over a particular area should not be able to abandon the field and concede all the powers to some other outfit over that area—is not hard to discern.[93]

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because it specified that the tariffs could be adjusted within a statutorily prescribed range in order to "equalize the . . . differences in costs of production in the United States and the principal competing country"). Thus, in Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935), the Court rejected a statutory scheme where "[c]ongress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the [regulated act] is to be allowed or prohibited." For a recent discussion of the doctrine, see Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 981–1004 (2007).

91. The term "nondelegation" or its like appears in fourteen publicly available Office of Legal Counsel opinions, including, most recently, one in 2011 (search conducted June 29, 2013; results *available at* https://a.next.westlaw.com/Search/Results.html?query=non-delegation&jurisdiction=ALLFEDS&contentType=ADMINDECISION&querySubmissionGuid=i0ad705210000013f126532d71f57d28f&categoryPageUrl=Home%2FAdministrativeDecisionsGuidance%2FFederalAdministrativeDecisionsGuidance%2FDepartmentofJusticeDOJ%2FUSAttorneyGeneralOpinions&searchId=i0ad705210000013f1264e95a1f57d26a&transitionType=ListViewType&contextData=(sc.Search) (login required)).

92. Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407, 1430 (2008) ("[A]s the doctrine now stands, it is necessary to ask how, if at all, OSHA limits the agency's room to 'roam.'"); *see also* Pollack, *supra* note 88, at 318 ("While the Supreme Court has relied explicitly on the nondelegation doctrine only twice in its history, some Justices and appellate courts have continued to show a strong sensitivity to the doctrine. Moreover . . . the Court has issued at least two major opinions that nominally deny *Chevron* deference but are more deeply grounded in nondelegation principles . . . .") (footnote omitted).

93. As the Supreme Court has explained:

> The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," U.S. Const., Art. I, § 1, and we long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution" mandate that Congress generally cannot delegate its legislative power to another Branch. Field v. Clark, 143 U.S. 649, 692 (1892). We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.

Mistretta, 488 U.S. at 371–72. One of the many ways to think about what the doctrine is supposed to do—and a popular one, at that—is to think of it in political scientific terms. Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 6 (1982) ("[Our] model postulates that an increase in delegated legislative authority will increase 'agency costs,' (costs engendered by a divergence of the agent's goals and those of the principal) but will also diminish the principals' (legislators') decisionmaking costs (the cost of securing agreement on a course of action). A justice's preferred position on delegation is attainment of the degree of delegation that minimizes the sum of these two costs.").

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The problem is particularly stark when posed internationally. The D.C. Circuit has said that treaties implemented by American agencies, whose status as a matter of American law is not entirely clear, pose "serious constitutional questions in light of the nondelegation doctrine . . . ."[94] As Julian G. Ku has argued, "Unlike delegations within the federal government, or to the states or private organizations, international delegations are made to international organizations largely independent of other mechanisms of federal control."[95] Curtis Bradley has agreed that "transfers of authority by the United States to international institutions could be said to raise 'delegation concerns.'"[96] The problem identified by both Ku and Bradley is rooted in the conception that international grants are different than domestic ones. While delegations to the states, or the executive, even if exceptionally broad, do not raise the specter of entirely undemocratic outcomes, delegations to foreign regulatory bodies remove the decision maker from the polity altogether.

The delegation concern most posed by the internationalization of policymaking is subdelegation by an agency to an outside body, rather than nondelegation. That doctrine is epitomized by the D.C. Circuit decision reversing an FCC order in which it subdelegated some of its rulemaking power under the Telecommunications Act of 1996 to state public utility commissions.[97] Specifically, the court concluded that a subdelegation of authority, when made to an actor outside of the federal government required "an affirmative showing of congressional

94. Natural Res. Def. Council v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006). Such a case might be presented by a treaty signed but never ratified. *See id.* (involving the methyl bromide exception to the Montreal Protocol).

95. Ku, *supra* note 30 at 59. Ku argues that there are "three functional justifications for applying the nondelegation doctrine to international delegations: (1) to force political accountability; (2) to bolster the political legitimacy of international adjudication; and (3) to ensure that the institutions with greater expertise in foreign affairs remain in control of compliance with international obligations." *Id.* at 66. *See also* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 2 (2008) (defining international delegation as "a grant of authority by two or more states to an international body to make decisions or take actions," regardless of whether those decisions or actions are binding).

96. Bradley, *supra* note 9, at 1558. Judge A. Raymond Randolph wrote, and Judge Karen LeCraft Henderson joined, an opinion casting doubt on the ability of the body designated by the Montreal Protocol on Substances that Deplete the Ozone Layer. *See Natural Res. Def. Council*, 464 F.3d at 8 (explaining that "because the Protocol authorizes future agreements concerning the scope of the critical-use exemption, those future agreements must define the scope of EPA's Clean Air Act authority," but "[i]f the 'decisions' are 'law'—enforceable in federal court like statutes or legislative rules—then Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification, in violation of Article II of the Constitution") (internal quotation marks omitted).

97. U.S. Tel. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

authorization."[98] The court's "affirmative showing" requirement rested on a few basic principles of good governance:

> When an agency delegates authority to its subordinate, responsibility—and thus accountability—clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective," and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.[99]

This subdelegation doctrine is not only a domestic matter; it has already been deployed to slow precisely the sort of international regulation subject to the sovereignty mismatch problem. In *Defenders of Wildlife v. Gutierrez*, the D.C. Circuit warned the Coast Guard against a subdelegation of authority to the International Maritime Organization.[100] Specifically, it warned that "if the Coast Guard had delegated some or all of its decisionmaking authority under the Ports and Waterways Safety Act to an outside body not subordinate to it, such as the International Maritime Organization, the delegation would be unlawful absent affirmative evidence that Congress intended the delegation."[101] While the nondelegation doctrine is not vibrant, at least as a winning argument in litigation against the government, the subdelegation of agency power to other sovereigns outside the federal government has a stronger track record.

C. Appointments

The Appointments Clause, at least as interpreted by the Supreme Court, forbids Congress, or anyone else, from interfering with the President's power to appoint senior federal officials—so-called "Officers of the United States," who must also be subject to Senate confirmation.[102] Appointments Clause problems have prevented the creation of a Federal Election Commission led by officials appointed by Congress, for

98. *Id.* at 565.
99. *Id.* at 565–66 (citations omitted).
100. Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 927 (D.C. Cir. 2008).
101. *Id.*
102. U.S. CONST. art. II, § 2, cl. 2.

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example.[103] The legal test turns on a functional inquiry, concerning whether constraining the ability of the President to nominate the officers for a particular office would impinge too much on the executive's core powers[104]—a pretty imprecise balancing test to be sure. Because the Appointments Clause anticipates that *some* federal officers will not need to be appointed by the President (it allows for appointments by the "Heads of Departments" and courts),[105] this test has not been a particularly difficult one to meet.

Nonetheless, it works, in reality, to bolster some of the principles behind the nondelegation doctrine. Just as Congress cannot give away a massive quantity of its legislative powers, nor can it create institutions that would supplant the powers that used to belong to the executive branch. John Yoo has accordingly argued that the Appointments Clause might be violated if the United States joined a treaty creating a secretariat staffed with officials who could then oversee Americans.[106] Curtis Bradley, who was particularly worried about treaty-style delegations like Kyoto, has explained the Appointments Clause issue with international delegation as follows:

> In addition to potentially falling within the formal terms of the Appointments Clause, international delegations may also implicate the functional policies of the clause. The requirements of the clause, the Supreme Court has explained, are designed both to prevent aggrandizement of power by one branch at the expense of another and to ensure public accountability in the appointments process. According to the Court, the clause "reflects [our] Framers'

103. *See* Buckley v. Valeo, 424 U.S. 1, 140 (1976).

104. The test was set out in Morrison v. Olson, 487 U.S. 654 (1988). For a definitive gloss on separation-of-powers issues, see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (describing functionalism as an approach which permits government flexibility while protecting "core functions," and formalism as an approach that holds constitutional provisions regarding structure as more absolute); *see also* Nick Bravin, Note, *Is* Morrison v. Olson *Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1144 (1998) (arguing that "the current appointment provisions for independent counsels are unconstitutional").

105. U.S. CONST. art. II, § 2, cl. 2.

106. *See* John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 117 (1998) ("First, the [treaty] grants the power to search American facilities and sites to officials of an international organization who are not appointed pursuant to the Appointments Clause, who are not members of the executive branch, and who are not accountable to the President. Second, the treaty grants the authority to select the locations to be inspected to the Technical Secretariat. Their decisions neither are made by officers of the United States subject to standards established by federal law, nor are they reviewable by an American official appointed by, and accountable to, the President.").

> conclusion that widely distributed appointment power subverts democratic government." Thus, even when there is no interference with executive branch prerogatives, the clause "prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint."[107]

One can, of course, imagine that the functional policies of the Appointments Clause appear with even greater effect when the party vested with the power is not even subject to the laws of the United States.

And so the Appointments Clause issues look a bit like the delegation, both sub- and non-, issues. The decision by Congress or an agency to give policymaking authority to informal international regulatory efforts could, if the grant is large enough, take core executive functions away from the President, and therefore implicate the clause similar to the way it could create delegation problems. If implicated, the clause would require presidential appointment and Senate confirmation of the international official, hard though it is to imagine such a scenario.

The Appointments Clause is no dead letter,[108] but its applicability to the international context, where the executive branch has special foreign affairs authority, is more problematic. Indeed, there has never been a case successfully brought against institutions like NATO, where foreign generals frequently command Congressionally-appointed American ones.[109] It is hard to imagine that the Congressional voice provided by the Appointments Clause must be vindicated in building complex relationships with foreign states in many international contexts. Regulation, however, is a more interesting question, given the importance of the Congressional voice in setting international economic policy. Accordingly, for the ever increasing cooperation in issues like money laundering (where the UN Security Council has the putative power to direct American officials to freeze the assets of American citizens suspected of terrorism),[110] let alone for cooperation in more lowly matters

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107. Bradley, *supra* note 9, at 1563 (quoting Freytag v. Comm'r, 501 U.S. 868, 880, 885 (1991)) (other footnote citations omitted).

108. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Court used the clause to undo a congressional effort to reform elections, and in Myers v. United States, 272 U.S. 52 (1926), the Court held that the President must retain the power to remove executive branch officials under an "implicit removal" correlate of the clause.

109. Though the matter has been raised by academics. *See* Bradley, *supra* note 9, at 1570 n.58 (cataloging such delegation concerns).

110. The UN Security Council adopted Resolution 1373, which requires nations to freeze terrorist assets, on September 28, 2001. *See* S.C. Res. 1373, para. 1, U.N. SCOR, U.N. Doc. S/RES/1373, at 2 (Sept. 28, 2001), *available at* https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.

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of financial stability, it is a question to which government lawyers will need to provide an answer.

D. Due Process

The Constitution's requirement that citizens, including corporations, not be deprived of their property without due process is also implicated by international rulemaking, which only occasionally offers such protections voluntarily. The problem is not hard to discern: as regulatory globalization involves policymaking affecting the property interests of American firms and citizens, those parties might expect to have a pre-deprivation notice of the scheme and "some sort of hearing" If their property turns out to be at risk.[111]

Determining the kind of process due in these cases usually requires a look at the oft-invoked three-factor test in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[112]

Due process's reach in international matters depends, as we will see, on the matter at issue. In American administrative law jurisprudence, it is invoked to protect citizens faced with individualized determinations of their rights and duties—and much of the sovereignty mismatch problem involves rules affecting the many, rather than adjudications affecting the few.

But American rulemaking procedures are meant to meet due process requirements, and regulatory globalization does not feature those

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111. The pre-deprivation notice and "some kind of hearing" requirements are usually traced to Goldberg v. Kelly, 397 U.S. 254 (1970) (dealing with the deprivation of government welfare benefits). As Henry J. Friendly discusses:

> Since [the *Goldberg* decision], we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another, an explosion which gives rise to many questions of major importance to our society. Should the executive be placed in a position where it can take no action affecting a citizen without a hearing? When a hearing is required, what kind of hearing must it be? Specifically, how closely must it conform to the judicial model?

Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1268 (1975).

112. 424 U.S. 319, 335 (1976) (citing *Goldberg*, 397 U.S. at 263–71).

requirements.[113] Rather than conforming to some American variant of the process required for rulemaking, the international versions are, if anything, orthogonal to it—they certainly make no claim that regulatory globalization pays any attention to domestic due process concerns, even though they clearly act in ways that affect the property rights of American citizens, and do so casually and informally regulated industry—the sort of industry most affected by regulatory globalization—is afforded the protections of the Due Process Clause.[114] If a process that has been tasked to international policymakers affects that industry's rights, then due process protections apply.

Moreover, although due process is not a particularly easy claim to win in aggregation, it is, as the baseline constitutional guarantee that underlies much of domestic administrative procedure, a doctrine that could broadly affect almost every instantiation of the sovereignty mismatch problem. And yet there has been no effort to reassure Americans that their constitutional rights are playing a role in regulatory globalization.

E. Conclusion

These legal doctrines underscore a problem with which all variants of regulation must contend, but that is often thought to be particularly severe in international enterprises—that is the problem of the so-called "democratic deficit."[115] While national institutions are politically responsive to the representative institutions of the people, as Peter Lindseth has explained:

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113. Some language in *Vermont Yankee* implied that 5 U.S.C. § 553 procedures were sufficient to satisfy due process requirements in some informal rulemaking proceedings. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 542 n.16 (1978).

114. For example, it is clear that the Fifth Amendment applies to banks. *See* FDIC v. Mallen, 486 U.S. 230, 242 (1988) (holding that the Takings Clause applies to banks, although it was not implicated by the resolution powers of the FDIC, given the highly regulated nature of the banking industry); Bd. of Governors of Fed. Reserve Sys. v. DLG Fin. Corp., 29 F.3d 993, 1001–02 (5th Cir. 1994) (using the *Mallen* factors to evaluate the sufficiency of due process in an FDIC takeover). For a discussion of the Takings Clause and Due Process implications of the post-crisis government's involvement in financial regulation, see David Zaring, *A Lack of Resolution*, 60 EMORY L.J. 97, 131–37 (2010).

115. The term is widely used to describe Europe's integration problems. *See, e.g.*, J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2472–73 (1991) (describing the democratic deficit as an impediment to the consolidation of the European Union); John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 564 (2000) ("The EU faces an intractable dilemma. It can wield largely unaccountable power from Brussels or make the elected European Parliament more politically active. The former option is antidemocratic. The latter has the disadvantage of displacing the authority of the democratic processes of individual nations, which are more responsive to the preferences and traditions of their respective polities.").

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> Institutions exercising supranational normative power . . . exist in an . . . attenuated "two step" relationship with the people, or rather the "peoples" of the various participating states. [But] supranational bodies lack the requisite direct connection to the perceived source of sovereign power upon which democratic legitimacy is based . . . .
>
> . . . .
>
> This persistent need for democratically legitimate, hierarchical-political oversight and control over administrative decision makers points to perhaps the most problematic aspect of supranational delegation.[116]

This two-step problem affects all international institutions, of course, but it is particularly severe in regulatory globalization: as the initial delegation of power from people to agencies reduces the popular voice (though in the same way that national administrative delegations do), the second delegation—by agencies through informal interaction with their foreign counterparts—only exacerbates the democratic deficit. In both cases, political oversight is substantially reduced. Moreover, the way that cross-border regulation works creates a procedural deficit that contributes to the democratic one.

While charges of insufficient democracy would ordinarily be thought of as challenges to the legitimacy of a regime, the democratic deficit accusation in regulatory cooperation raises two other issues.

The first issue is that the regulatory process, sans any responsiveness to majority will, is particularly likely to be captured by organized minority interests. The problem of regulatory capture of financial oversight, for example, is thought to be a substantial one, with charges that the banks have captured the government being levied by Simon Johnson and James Kwak, among many others.[117] Similar claims have been made about the influence of the energy sector on global warming policy.[118]

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116. Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 634 (1999) (footnote omitted). Elsewhere, Lindseth takes the following crack at the definition of the democratic deficit: "the transfer of normative power to agents that are not electorally responsible in any direct sense to the 'people' whose 'sovereignty' . . . the agents are said to exercise." *Id.* at 633. Of course, the term applies to all sorts of international delegations, but it is most widely associated with the European Union. For a discussion of the EU's democratic deficit by an American constitutional lawyer, see Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002).

117. *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 13 (2010) ("A central pillar of this reform must be breaking up the

Second, regimes which persistently indulge in democratic deficits—or at least come to be perceived as such—can find at some point that their technocratic accomplishments will be stymied by vociferous, and unpredictable, public outcry. The WTO, for example, was unready for the criticism and protests that have marked the recent meetings of its membership, beginning with the 1999 Battle in Seattle.[119] Since that public rebellion, the WTO has been unable to conclude its latest round of trade negotiation talks, the Doha Round.[120] Placing the blame for the delay

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megabanks that dominate our financial system and have the ability to hold our entire economy hostage."). Johnson & Kwak have also argued:

> [S]olutions that depend on smarter, better regulatory supervision and corrective action ignore the political constraints on regulation and the political power of the large banks. The idea that we can simply regulate large banks more effectively assumes that regulators will have the incentive to do so, despite everything we know about regulatory capture and political constraints on regulation.

Id. at 207. For a similar perspective from one of the leading American banking law scholars, see Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 1011 (2011) (noting that "analysts have pointed to strong evidence of 'capture' of financial regulatory agencies by [large, complex financial institutions (LCFIs)] during the two decades leading up to the financial crisis, due to factors such as (1) large political contributions made by LCFIs, (2) an intellectual and policy environment favoring deregulation, and (3) a continuous interchange of senior personnel between the largest financial institutions and the top echelons of the financial regulatory agencies"). Nobel Prize-winning economist Joseph Stiglitz has evinced sympathy for this perspective as well. *See, e.g.*, Joseph Stiglitz, *America's Socialism for the Rich*, GUARDIAN (June 12, 2009, 15:00 PM EST), http://www.guardian.co.uk/commentisfree/2009/jun/12/america-corporate-banking-welfare (contending that "[w]e need to break up the too-big-to-fail banks"). For further discussion, see David Zaring, *Fateful Bankers*, 159 U. PA. L. REV. 303 (2011) (responding to Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411 (2011)).

118. Though one lawyer representing clients in that sector has protested that "[e]nvironmental and energy issues, such as climate change, are heavily debated in the political sphere, so some form of lobbying is often necessary and common on both sides of the debate." Tristan L. Duncan, *The Past, Present, and Future of Climate Change Litigation: How to Successfully Navigate the Changing Landscape*, *in* THE LEGAL IMPACT OF CLIMATE CHANGE 12 (Aspatore 2012), *available at* 2012 WL 1200512.

119. For a discussion, see Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 61 (2001) ("On November 30, 1999, representatives of 135 countries in the World Trade Organization ('WTO') met in Seattle to agree on an agenda for the next round of negotiations. They were greeted by 30,000 to 40,000 protesters, primarily from labor, environmental, and human rights organizations who, for a time, blocked their entry into the meeting hall. The root of their protest was that the WTO, in developing its rules and procedures for promoting free trade, had not given adequate, or any, consideration to labor rights, environmental problems, or human rights."); and Robert A. Jordan, *Battle in Seattle Sent a Message*, BOSTON GLOBE, Dec. 7, 1999, at D4.

120. "As of March 2010, after nine years of talks, the Doha Round still has no framework (modalities) deal, let alone final national schedules." Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573, 574 (2010). For a prescient analysis of the difficulties in reaching an agreement on the Doha round, see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 256 (2004). For a comparison between the more formal trade system, and the more information-based

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solely at the feet of protestors would oversimplify those dynamics, but the difference in WTO talks is notable. The WTO's mission to reduce global trade barriers has been stymied. The European Union, for its part, has found the addition of referenda to its otherwise technocratic and elite-driven process to be very hard to pass.[121] The reasons for the delay in both lie largely in the perceived undemocraticness of both institutions.[122]

III. FINANCIAL REGULATION AS A WAY FORWARD?

The sovereignty mismatch problem is a serious one, but, to the extent that it can be solved, one instance of regulatory globalization provides a model for its solution: financial regulation. Financial regulation is the epitome of regulatory globalization, probably because it was the first instance where regulatory globalization prospered. Capital crosses borders extremely quickly, and the safety and soundness of financial institutions in one country is affected by a loss of confidence in that safety and soundness in other countries. Thus, financial regulators have a long tradition of cooperation across borders: the regulatory networks in which that cooperation has occurred have been around since 1974, making them the senior statesmen of the category, and central bankers have been collaborating since the beginning of the 20th century, as Liaquat Ahamed has shown in his Pulitzer Prize-winning history of that period.[123]

Financial regulation is unique, but the sort of nested regime that it represents, involving domestic and international administrative components and institutions, is likely to occur again and again. Nor would its like only occur when agencies are negotiating with their foreign counterparts. One could argue that even the fraught delegation to the

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system of financial regulation, see R. Michael Gadbaw, *Systemic Regulation of Global Trade and Finance: A Tale of Two Systems*, 13 J. INT'L ECON. L. 551 (2010).

121. For a discussion of the difficulty, see Renaud Dehousse, *The Unmaking of a Constitution: Lessons from the European Referenda*, 13 CONSTELLATIONS 151 (2006), *available at* https://www.um.edu.mt/__data/assets/pdf_file/0007/40966/dehousse_lessons_from_referenda.pdf.

122. *See, e.g.*, Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 244 (2000) ("Critics of the EU complain of a democracy deficit, labor and environmental activists claim that the WTO advances the interests of multinational corporations contrary to the public welfare . . . ."); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 32 n.117 (1999)(observing that "some of the concerns over the 'democracy deficit' in the WTO, EU, and other international bodies. . . [are because t]hese bodies are increasingly making THE sorts of trade-offs that are frequently made by national governments, but many question whether these bodies can appropriately make such decisions without greater democratic representation"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 392 (1997) ("The impact of international treaties like the WTO likely will mirror the democracy deficit emerging as Europe unifies . . . .").

123. LIAQUAT AHAMED, LORDS OF FINANCE: THE BANKERS WHO BROKE THE WORLD (2009).

International Criminal Court Prosecutor might be another example of a relatively political international institution (the United Nations) delegating a decision to a more legally and technically focused one (the Court and its Chief Prosecutor), with the attendant risks to democratic values.[124] It, and other classic examples of public international law may be more comparable to regulatory globalization than one might think.

As described below, financial regulators have (1) institutionalized the structure for political oversight of international regulatory cooperation, (2) offered administrative process protections to go along with its policymaking initiatives, and (3) least satisfyingly, made these steps in a context that compares pretty well to its unfortunately low-performing domestic variant. The inconsistencies between the global and the local in financial regulation are less severe than they might otherwise seem for two reasons. One reason is based on the voluntary but real procedural regularity of the international process. The other is based on domestic financial regulators' not-so-punctilious observance of administrative law.

This is a start, but there is much more that can be done. In the final Part of this Article, I will show how to improve on the start made by finance.

A. Reorganization and Proceduralization

First, financial regulation is turning into a recognizable regime with political oversight at the top, a watchdog in the middle, and policymaking (that nonetheless offer some procedural protections) by expert networks at the bottom. In this way—with political leadership, middle management, and bottom-rung rule-writers—the whole process has taken on a functional resemblance, if a disaggregated one, to a domestic agency.

As for political oversight at the top, the governance point of the G20's new role in global financial regulation is that it provides a political check on the operations of the bureaucrats pursuing international cooperation. While the democratic deficit problems faced in international financial regulation are real ones, the oversight arranged by the political leaders of the member countries whose agencies are ginning up the regulatory process is, of course, nothing less than a political endorsement of the effort

124. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (observing that "[t]he enforcement of international humanitarian law cannot depend on international tribunals alone"); *see generally* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 389, 403–21 (2000) (a reference work discerning "general principles underlying the jurisdiction of the Court, the effectuation and expression of the complementarity principle in the Court's Statute, and the manner in which cases will come to the Court and be decided").

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to create global rules. Though the G20's imprimatur does not eliminate the inherent two-step process of global rulemaking that Lindseth has identified and critiqued, it does offer a global, entirely political, and mostly democratically elected leadership review of international financial regulation (Russia and China are exceptions, and there is no question that the G20 institution, a modern day Concert of Europe, has opaque membership criteria).[125]

As for the watchdog in the middle, the G20 also created the Financial Stability Board (FSB), a network of networks that coordinates and encourages the work of the networks under it and is meant to also serve as an early warning system for financial instability.[126]

And as for policymaking at the bottom, the reinvigorated, remodeled, and expanded Basel Committee on Banking Supervision has been charged with promulgating the most significant and onerous (for banks, at least) reforms of the financial system in the wake of the crisis.[127] The Basel Committee is the leading version of the formerly siloed regulatory networks; its relationship with its new overseers, and its redoubled efforts,

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125. *See supra* note 116 and accompanying text. Verdier is skeptical of the likelihood that the G20 can constitute such an organized check. Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT'L L.J. 55, 61 n.16 (2011) ("[D]espite the substantial demand for stronger regulation generated by the financial crisis and the G-20's political coordination efforts, major differences are emerging between the United States and Europe on many of the issues covered by the G-20/Financial Stability Board effort.").

Other scholars, notably Claire Kelly and Sungjoon Cho, are more optimistic about the G20's political possibilities. *See* Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 CHI. J. INT'L L. 491 (2012); *see also* David Zaring, International *Institutional Performance in Crisis*, 10 CHI. J. INT'L L. 475, 485 (2010) ("The international governance mechanism that appears to be making policy is the G20, and such policymaking is the opposite of international law. The G20 is better understood as a Concert of Europe for a new era. Like the Concert, it embodies the classic international relations paradigm of heads of state making international policy for their subjects . . . .").

126. *See generally* FINANCIAL STABILITY BOARD, http://www.financialstabilityboard.org (last visited Oct. 9, 2013). "The FSB should collaborate with the IMF to provide early warning of macroeconomic and financial risks and the actions needed to address them." G-20, LONDON SUMMIT: LEADERS' STATEMENT ¶ 15 (Apr. 2, 2009), *available at* http://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf. For a discussion of the FSB's burgeoning relationship with the IMF, see Enrique R. Carrasco, *The Global Financial Crisis and the Financial Stability Forum: The Awakening and Transformation of an International Body*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 203, 220 (2010) (concluding that "[o]ne thing is certain: the FSB's legitimacy will depend significantly on whether the Early Warning Exercises performed in conjunction with the IMF have real substance and utility"); Mario Giovanoli, *The Reform of the International Financial Architecture After the Global Crisis*, 42 N.Y.U. J. INT'L L. & POL. 81, 108–09 (2009) ("The IMF has not only assumed the tasks relating to the overall surveillance of the global financial system and to the assessment of the implementation of international financial standards by individual countries, but also participates in the elaboration of [international financial standards] through its membership in the FSB.").

127. *See generally* BASEL COMMITTEE ON BANKING SUPERVISION, BIS.ORG, http://www.bis.org/bcbs/ (last visited May 8, 2013).

exemplify how those other financial regulatory networks (including IOSCO, IAIS, and others) have been given new kinds of marching orders.

Second, financial regulators have offered administrative process protections to go along with their new policymaking role. As it turns out, international financial regulation contains more procedural regularity than those searching for a more purely political process might expect. The Basel Committee, for example, an extremely powerful bank regulator,[128] ventilates its rules through comment,[129] provides information about its plans on its website,[130] and, even if it does not make its meetings open and is not subject to any open information requirements (as there is no international cognate to the freedom of information acts that allow citizens to monitor the domestic bureaucracy), it is an institution that has adopted many of the trappings of a regular administrative agency and more of a commitment to openness than is required by its own governing documents.

For example, Basel appears to have taken note of comments. In its July 2011 *Disclosure Requirements on Remuneration by Regulated Financial Institutions*,[131] it noted that it had made a consultative version of the rule available in December 2010 and that "[t]he comments received during the

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128. No less a financier than Jamie Dimon, the CEO and Chairman of JPMorgan Chase & Co., has accused it of trying to ruin American financial competitiveness. Dimon told the FINANCIAL TIMES that the proposed Basel III "capital rules are 'anti-American' and the US should consider pulling out of the Basel group of global regulators. . . . 'I'm very close to thinking the United States shouldn't be in Basel any more,'" he told the newspaper. Tom Braithwaite & Patrick Jenkins, *JP Morgan Chief Says Bank Rules 'Anti-US'*, FIN. TIMES (London) (Sept. 12, 2011, 12:01 AM), http://www.ft.com/cms/s/0/905aeb88-dc50-11e0-8654-00144feabdc0.html.

129. David Zaring, *Three Challenges for Regulatory Networks*, 43 INT'L LAW. 211, 212 (2009) (for example, Basel II "was put through most of a decade's worth of comment by hundreds of interested individuals and institutions and resulted in a correspondingly long and detailed regulatory product"). *But see* Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 26 (2006) ("[B]y posting comments on its website, the Basel Committee made it easier for the public to assess whether the Committee was being responsive to the concerns expressed by commentators. Most participants, however, were large financial institutions. The role of the broader public was relatively muted, which reflected in part the technical nature of the Basel Committee's work and the fact that for most public-interested organizations, the connection between banking standards and broader social concerns was not pronounced.").

130. The proposed rules may be found at http://www.bis.org/bcbs/. As one observer has put it, "[a]lthough the Committee's decision making has traditionally been secretive and substantially relied on personal contacts, it has become more formalized in recent years because of the considerable attention given to the deliberations over Basel II." Kern Alexander, *Global Financial Standard Setting, the G10 Committees, and International Economic Law*, 34 BROOK. J. INT'L L. 861, 871 (2009). This responsiveness view is not shared by all, however. *See, e.g.*, Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INT'L L. 480, 504–05 (2011) ("[T]he Basel Committee does not go out of its way to make it easy for commenters to make their views known. . . . The Basel Committee also has not typically recognized comments in its final articulations of standards.").

131. Basel Committee on Banking Supervision, *Pillar 3 Disclosure Requirements for Remuneration*, ISBN 92-9131- 873-6 (July 2011), *available at* http://www.bis.org/publ/bcbs197.pdf.

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process helped inform the final version of these requirements."[132] A simple comparison of the two documents reveals that changes were indeed made—213 changes, included occasions where the text was moved, 101 deletions, and 102 corresponding insertions—many of which were minor date changes, to be sure, but some of which made a degree of difference.[133]

In short, international comment is a real, if voluntary, phenomenon. Since the financial crisis the Basel Committee has opened no less than seventeen of its rules to public comment, and while the rulemaking process, from proposal to final rule, does not vary greatly, it usually does vary to some degree. One way to track the responsiveness is to use plagiarism detection software to compare the Committee's proposed rules to its final promulgations.[134] As it turns out, the final rule uses, on average, only eighty percent of the text of the domestic rule, suggesting that there is at least some variability to the comments, as FIGURE 1 depicts.[135]

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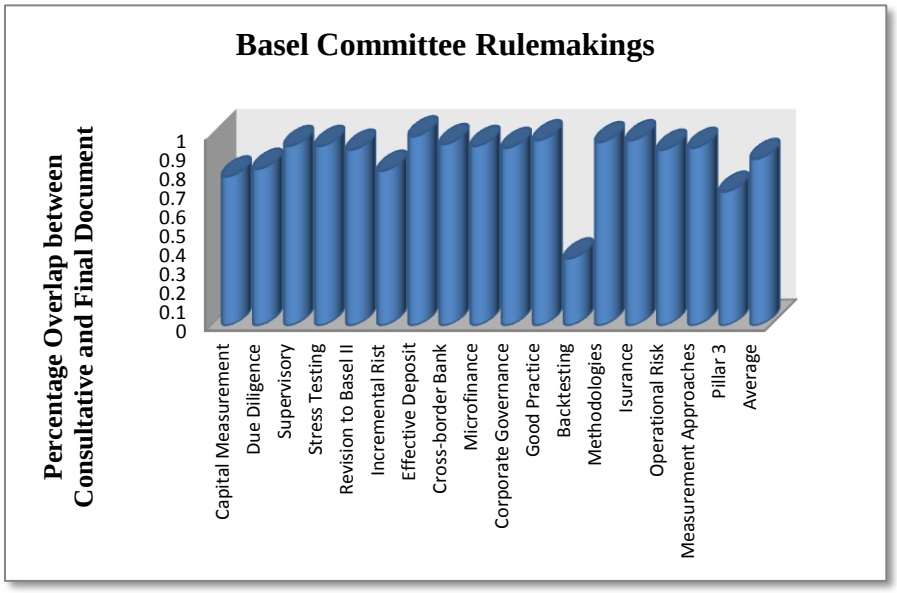
132. Press Release, Bank for International Settlements, Pillar 3 Disclosure Requirements on Remuneration Issued by the Basel Committee (July 1, 2011), *available at* http://www.bis.org/press/p110701.htm ("The comments received during that process helped inform the final version of these requirements.").

133. I used the plagiarism software package WCopyfind to compare the proposed rules to the final ones. *See WCopyfind Software and Instructions*, THE PLAGIARISM RESOURCE SITE (2013), http://www.plagiarism.bloomfieldmedia.com/z-wordpress/software/wcopyfind.WCopyfind was created at the University of Virginia and has recently been used in empirical legal research. *See, e.g.*, Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468, 471 (2008) (discerning which factors affect the extent to which parties' briefs influence the content of Supreme Court opinions). For a discussion of WCopyfind, and its application in a different, although internationally inflected, rulemaking process, see David Zaring, *CFIUS As a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 114 (2009).

134. *See* Zaring, *supra* note 133, at 114.

135. To be sure, this average is weighed down by a single rule that added an appendix to the final rule. Nonetheless, as Figure 1 suggests, most rules did vary from proposal to final version, and in most cases, somewhere between 10 and 20 percent of the text changed.

FIGURE 1



These comments come from a variety of sources, but domestic financial industry trade associations and global financial institutions have offered the vast majority of them. As bank associations submitted 57, and banks submitted 52, of the 147 total comments to the Basel Committee from 2009 to 2011, these groups accounted for a full seventy-four percent of the comments received. The British and Japanese banking associations were the most prolific commenters, weighing in on five of the Committee's first seventeen invitations to comment. The French, Canadian, and Australian banking associations followed with four comments each. The banking associations of Germany, Italy, Hong Kong, and numerous other countries also weighed in (the American Bankers Association is a notable exception, at least so far). Global banks like Barclays, Normura, BNY Mellon, and Credit Suisse also weighed in on occasion.[136]

Most notably, regulators and stock exchanges (which often perform a quasi-regulatory function) submitted few comments to the rulemaking process. Likewise, civil society has been less involved. While a trade

136. Data on file with the Washington University Law Review.

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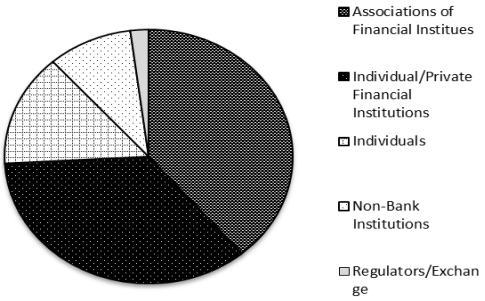
union association and the University of Reading filed one comment each, and regulators outside the committee filed a total of three comments between 2009 and 2011, the comment process is clearly dominated by regulated industry. Overall, these numbers suggest that financial institutions take the Basel process seriously, and, somewhat alarmingly, comprise the majority of the voice afforded to Committee outsiders.

COMMENTS FILED WITH BASEL COMMITTEE 2009–2011



Source: www.bis.org/bcbs

As a matter of domestic administrative law, it is irrelevant that the Basel Committee has adopted recognizable administrative procedures. The question would be whether the federal agencies subject to the constraints of the APA have met those constraints, not whether an international body did so. But nonetheless, it surely matters that the fait accompli problem is easy to exaggerate, given that regulated industry has influence on the international level.

B. Domestic Financial Regulation's Deficiencies

American financial regulators, for better or worse, are not typical domestic administrative agencies, and have never hewed to a strong form of domestic procedural requirements.[137] And if international financial

137. For example, as I have argued elsewhere:

> In crises, [The Treasury Department] acts quickly, and—although not unconstrained by law—interprets its legal authority flexibly and aggressively. In ordinary times, it acts in exactly the same way. It develops policy and makes rules without much attention to the Administrative

regulation no longer resembles the "smoke-filled room" of procedureless international arrangement, it is worth noting that the agencies that implement international financial rules—particularly the Treasury Department and the Federal Reserve—are not constrained in the way that classic administrative law would ordinarily prescribe.[138] This is not a model, but a cautionary story suggesting that perspective is important in thinking through the sovereignty mismatch problem.

Sometimes the alternatives to global regulation are no panacea. Andrew Moravcsik, in defending EU integration despite its democratic deficit, has pushed the "compared to what?" question to the fore of debates about pan-European legitimacy.[139] The same question is relevant in evaluating the appropriateness of any international regulatory endeavor. Its domestic alternative, if it is even viable, may, as it turns out, not be a compelling exercise in democratic legitimacy.

Perhaps the domestic limitations on financial regulation are exemplified by the fact that the agencies are rarely seen in court, the sine qua non of agency supervision, at least under the American model. For example, "Treasury has marched to the beat of its own drum" for a very long time, and it is rarely seen in the D.C. Circuit.[140] It issues few rules for

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> Procedure Act (APA). Treasury has created for itself an ambit of discretion beyond the reach of the judiciary, and only somewhat within the bounds of congressional oversight.

David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 190 (2010) (foonotes omitted).

138. *See id.*

139. Moravcsik's argument on behalf of the legitimacy of the European Union is premised on a comparison not between the EU's mechanisms and some ideal form of democracy, but between the EU's mechanisms and the forms of public participation and democratic legitimacy of administrative processes that we accept as democratically legitimate (such as the regulatory processes within each state). Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 606 (2002) (arguing, among other things, that the EU "simply specializ[es] in those functions of modern democratic governance that tend to involve less direct political participation"). For a recent discussion of Moravcsik's arguments, see David Schleicher, *What If Europe Held an Election and No One Cared?*, 52 HARV. INT'L L.J. 109, 134–35 (2011). Grant and Keohane have observed that given that *every* form of international governance is plagued with representation problems, second-best outcomes are the only ones that can be realistically expected, though the challenges for international governance are grave. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 30 (2005). For a legal scholar's take on that viewpoint, see Esty, *supra* note 26, at 1537 ("[T]he issues identified are not insuperable, particularly if one sees the global administrative law project as aimed not at full-fledged democratic legitimacy but, more modestly, at better functioning supranational global governance bodies with improved legitimacy.").

140. Zaring, *supra* note 137, at 190. At least, as compared to other agencies. As I have observed elsewhere:

> Between 1998 and 2008 the SEC was a party to fifty-five cases in the D.C. Circuit; the EPA was a party to 199 cases in the D.C. Circuit; and the Department of Transportation was a party to thirty-five such cases. In contrast, Treasury was a party to only fourteen cases during that decade, twenty-five percent the level of the SEC, and seven percent the EPA number.

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an agency of its size, and it generally has conducted administration in a way that reflects its longstanding practices and relative insulation from bureaucratization. And the dramatic actions of the Fed during the financial crisis, none of which were subject to notice, comment, or judicial review, revealed just how far the central bank has strayed from the conventional procedures of an APA-mindful domestic agency.

Instead, both institutions have developed their own way of doing things—ways that long preceded the 1946 promulgation of the Administrative Procedure Act. The Treasury Department was one of the four original departments in the executive branch, and so can trace its founding back to 1789, while the Fed was founded in 1913.[141] This historical uniqueness has been exacerbated by internal cultures that simply presume that each agency's financial regulation is not the sort of thing to be second-guessed by courts (the SEC is an admittedly different story).[142]

C. Sort of Solving Delegation

The prospect of an international nondelegation doctrine is likely to enjoy no more success than the domestic one, given that the United States will simply have no choice but to address global problems on a global basis.[143] Many of the problems of delegation can, and probably have thus far, been ameliorated by the right sort of domestic follow-on action.[144] The

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Id. at 201 (footnotes omitted).

141. *See History of the Treasury*, TREASURY.GOV (Dec. 1, 2010, 12:13 AM), http://www.treasury.gov/about/history/Pages/edu_history_brochure.aspx; *History of the Federal Reserve*, http://www.federalreserveeducation.org/about-the-fed/history/ (last visited Oct. 12, 2013).

142. Zaring, *supra* note 137, at 190 ("[T]he interesting thing about Treasury is that it . . . interprets its legal authority flexibly and aggressively . . . . Treasury has created for itself an ambit of discretion beyond the reach of the judiciary, and only somewhat within the bounds of congressional oversight."); Simon Johnson, *The Quiet Coup*, THE ATLANTIC, May 2009, at 46, 52–53, *available at* http://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/7364/ (arguing that banks captured the policymaking process during the financial crisis and that the Treasury Department and Federal Reserve engaged in "late-night, backroom dealing").

143. Lori Fisler Damrosch has suggested that this sort of practical inevitability is, well, inevitable:

> If the administration . . . advanc[es] . . . an "international nondelegation doctrine" in respect of the [Persistant Organic Pollutants] Convention, such a position might counterproductively disable the United States from exerting influence in international arenas. As the insights from comparative constitutional law suggest, constitutionalism and internationalism are not contradictory choices.

Lori Fisler Damrosch, *Treaties and International Regulation*, 98 AM. SOC'Y INT'L L. PROC. 349, 351 (2004).

144. Or so Kristina Daugirdas has argued. "[T]he legislation implementing regulatory treaties comports with the separation of powers: by passing such legislation, Congress neither aggrandizes its own authority nor encroaches on executive authority." Kristina Daugirdas, *International Delegations and Administrative Law*, 66 MD. L. REV. 707, 712 (2007).

nondelegation doctrine at any rate is one of those doctrines that is easier to invoke than to apply. Indeed, many domestic administrative law scholars think that the doctrine is dead—it was last invoked by the Supreme Court to invalidate agency action in 1935—and that only the political process limits the ability or the willingness of Congress to delegate broad swaths of rulemaking authority to someone else.[145]

Congress has tried to remedy the *subdelegation* problem in the Dodd-Frank Act. Section 175(a) of the Act allows the President or his designates to "coordinate through all available international policy channels, similar policies as those found in United States law relating to limiting the scope, nature, size, scale, concentration, and interconnectedness of financial companies, in order to protect financial stability and the global economy."[146] Section 175(b) of the Act requires the Chairperson of the Financial Stability Oversight Council to "regularly consult with the financial regulatory entities and other appropriate organizations of foreign governments or international organizations on matters relating to systemic risk to the international financial system."[147] Section 175(c) requires that the Board of Governors of the Federal Reserve System and the Secretary of the Treasury "consult with their foreign counterparts and through appropriate multilateral organizations to encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies."[148]

The SEC and the CFTC are similarly granted authorization to engage in international cooperation. Along with the prudential regulators, they

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145. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132–33 (1980) (describing the doctrine as dead, but hoping and urging its renewal). *But see* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000) ("Reports of the death of the nondelegation doctrine have been greatly exaggerated."). Indeed, the vibrancy of the doctrine is even more attenuated, at least as a matter of court vindication. The Supreme Court has struck down a statute on nondelegation grounds only twice, both times in 1935. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). Moreover, a court of appeals has only done so once, only to be quickly vacated by the Supreme Court, which upheld the delegating statute. *See* South Dakota v. U.S. Dep't of Interior, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); South Dakota v. U.S. Dep't of Interior, 423 F.3d 790 (8th Cir. 2005).

146. Dodd-Frank Act § 175(a), 12 U.S.C. § 5373(a).

147. Dodd-Frank Act § 175(b), 12 U.S.C. § 5373(b).

148. Dodd-Frank Act § 175(c), 12 U.S.C. § 5373(c). For a discussion see Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431, 1450 (2011) (reasoning that "[a]lthough the mandates of section 175 are vague, Congress's acknowledgement of the need for international coordination is admirable").

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> shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities and may agree to such information-sharing arrangements as may be deemed to be necessary or appropriate in the public interest.[149]

This legislation is explicable only as an effort to get around the problem of subdelegation. It is useful stuff, but it is quite narrow. While the Secretary of the Treasury appears to be empowered to do a great deal of international coordination on bank-shrinking plans, it is not clear whether this would reach some of the other, more creative efforts of the international networks—for example, scrutinizing executive compensation at financial intermediaries. The other authorizations tend to the consultation, which is not a delegation of rulemaking power at all. As we shall see, it would be better for Congress to more broadly and definitively authorize international cooperation going forward.

Nonetheless, the subdelegation problem is one that, while very live for the agencies, is going to be a difficult road to hoe for plaintiffs worried about such delegations (if they can even meet the serious hurdles of standing and ripeness,[150] which will always be an issue in these sorts of cases). It is the subdelegation issues that present perhaps the most complicated ones for the regulatory networks as they proceed.

D. Appointments and Due Process

Finance, like other efforts at regulatory globalization, has quietly ignored the Appointments Clause problems posed by sovereignty mismatch on the theory that courts would not dare to make it a principal issue. After all, plenty of international officials wield a great deal of potential power over the American government—the members of the WTO Appellate Body come to mind[151]—and they have never been brought to court for Appointments Clause improprieties. Indeed, if the Appointments Clause really did require presidential nomination and

149. Dodd-Frank Act § 752(a), 15 U.S.C. § 8325(a).

150. For a discussion of standing and ripeness, which limit the power of courts to hear lawsuits (standing limits the class of plaintiffs to those who have suffered a particularized injury caused by the government's action—in this case, the international action; ripeness limits the ability of courts to hear lawsuits against the government before enforcement of the rule), see RICHARD J. PIERCE, JR., ET AL., ADMINISTRATIVE LAW AND PROCESS 146–69, 208–21 (5th ed. 2009).

151. *See supra* notes 119, 122 and accompanying text.

Senate confirmation of all international officials that might, in some capacity, be supervising the work of senior American officials, international cooperation would be impossible. Other countries surely would not agree to such an arrangement, and so making the Appointments Clause a barrier to the entry into substantial foreign commitment, enforced by either tribunals or secretariats, would essentially freeze the United Sates in an environment where international agreement would be totally impossible.

Moreover, the problems of due process are easy to overstate, given that the Basel Committee is engaged in making generally applicable rules, while due process, at least in its American variant, requires procedures over and above rulemaking only when "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds . . . ."[152] Fairness in broad rulemaking is generally left to the political process, meaning that, as William Funk and Richard Seamon have put it, "due process is required when the proceeding is functionally an adjudication, as opposed to rulemaking."[153] It might be possible to argue that American courts should look to protect the due process institutions of financial institutions and those invested in them *because* there is no global democratic political process that can protect these individuals. But few observers believe that banks do not exert some influence on global financial regulation; if anything, the worry is that they exert too much of it.[154] And as no American court has yet granted a due process claim over a rulemaking process, it would be, at the very least, fair to say that such a claim would be speculative.

E. Finance's Unique Features

Finance, in short, begins to solve the sovereignty mismatch problem, but it cannot offer a simple template for the resolution of all of the

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152. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 446 (1915).

153. WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW EXAMPLES & EXPLANATIONS 111 (4th ed. 2011).

154. For examples of such views, see JOHNSON & KWAK, *supra* note 117 (arguing, at times shrilly, that the financial industry has captured the regulatory process); Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143, 159 (2009) ("[R]egulatory capture has manifested itself in a novel way in financial-services regulation: regulators who cater to financial institutions' concerns by promising lax regulation can benefit personally through career promotions."); Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part II: Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380, 410 (2002) (reviewing the financial regulation literature to see "whether regulation should be interpreted as serving the public interest, or understood as benefitting the interests of the regulated or a subset of the regulated").

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problems of regulatory globalization. It is too imperfect and too unique to play such a role. There are three ways in which the functional relationship between the domestic and the international alleviates rather than exacerbates the problems posed by the outsourcing of administrative rulemaking.

First, in both domestic and international financial regulation, politicians view finance as something that is mysterious and difficult to oversee, yet critical and therefore unamenable to political point-scoring.[155] In their view, finance must be regulated well, for the safety and sake of the economy, but it is something that, at least at the granular level, and in the fast moving context of a financial crisis, simply is not amenable to committee oversight.[156] It instead must be delegated to technically competent officials who operate relatively independently of the political supervision.[157] Financial regulation's special place in the administrative firmament may be seen in the independence of most modern central banks;

155. This point is, of course, a controversial one, given that many scholars, and many citizens, suspect that financial regulation is fraught with politicized rent-seeking. *See supra* note 116 for an account of that case. Nonetheless, the desire to leave financial regulation alone is reflected in the fact that it has been vested in independent agencies and the Treasury Department, perhaps the least politically constrained of all the departments in the executive branch. *See* Zaring, *supra* note 137, at 190 (observing that "Treasury has marched to the beat of its own drum since the founding of the current administrative state in the aftermath of World War II"); James B. Watt, *Administration Plan Would Not Preserve Dual Banking System*, 13 NO. 2 BANKING POL'Y REP. (Prentice Hall L. & Bus.), Jan. 17, 1994, at 4, 6 (describing some of the advantages of apolitical oversight).

156. *See* Zaring, *supra* note 137, at 190 ("In crises, [Treasury] acts quickly, and—although not unconstrained by law—interprets its legal authority flexibly and aggressively. In ordinary times, it acts in exactly the same way.") (footnote omitted).

157. Of the independent agencies that oversee finance, the FDIC and Federal Reserve Board are self-funded independent agencies, while the Office of the Comptroller of the Currency is a self-funded agency within the independent-minded executive branch Department of the Treasury. *See, e.g.*, 12 U.S.C. § 243 (2006) (authorizing the Fed to set fees for regulated banks to pay for the agency's expenses); *Administrative Law-Agency Design-Dodd-Frank Act Creates the Consumer Financial Protection Bureau—Dodd-Frank Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (To Be Codified in Scattered Sections of the U.S. Code), 124 HARV. L. REV. 2123, 2127 n.38 (2011) ("Although an independent survey identified a number of additional self-funded agencies, such as the Farm Credit Administration, Farm Credit System Insurance Corporation, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Federal Reserve System, Federal Prison Industries, Inc., National Credit Union Administration, Office of the Comptroller of the Currency, Bureau of Engraving and Printing, and the Office of Thrift Supervision, the list is a short one.").

The CFTC and SEC are independent agencies, but both depend on congressional appropriations, which makes them more subject to political control, for better or worse. Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 253–58 (2004) (arguing that the SEC would be better served by levying fees on regulated industry than it is by relying on federal appropriations). More generally, see Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) (noting that "[s]everal of the financial independent agencies have funding sources, usually from users and industry, which frees them from dependence on congressional appropriations and annual budgets developed by the executive branch.").

an independence that is challenged only by extremists in American political discourse.[158]

Second, the international financial industry itself may be inclined to view the prospect of international financial regulation in particular, and the regulatory enterprise more generally, as at least somewhat aligned to its interests. This in turn minimizes the importance of political, and especially judicial, oversight. After all, regulators are charged with ensuring safety and soundness of the system, and the managers and owners of banks have every interest in ensuring that their own institutions do not go bankrupt.[159] Moreover, the financial system is one that both financiers and financial supervisors know is prone to bank runs, panics, and tragic herding instincts, which means that subpar institutions can put the solvency and liquidity of their innocent counterparts at risk.[160] It is an unavoidable consequence of the maturity mismatch that defines what financial institutions do. So while regulators seek to ensure that the financial system is safe and sound, financial institutions want the same thing; they do not wish to be beggared by their neighbors, and effective regulators are better positioned to supervise those neighbors than are the financial institutions themselves. It is accordingly possible to see how the existence of an international administrative process, in a world where Lehman Brothers' solvency may affect that of Deutsche Bank and UBS, may not be as threatening to critical stakeholders as it might appear.

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158. Former Texas congressman Ron Paul, for example, has long campaigned to "end the Fed," but is also thought to lie on the outer fringes of the Republican party. RON PAUL, END THE FED (2009); David Weigel, *The Parallel Universe of Ron Paulistan*, GUARDIAN (Sept. 4, 2008, 1:00 PM), http://www.guardian.co.uk/commentisfree/2008/sep/04/uselections2008.ronpaul ("As Paul has become a cult figure, he's exerted less influence on the Republican party he wants to change. The party's platform was written with no virtually [sic] input from Paul's energetic activists.").

159. *See* Dain C. Donelson & David Zaring, *Requiem for a Regulator: The Office of Thrift Supervision's Performance During the Financial Crisis*, 89 N.C. L. REV. 1777 (2011) (discussing some implications of capture theory for financial regulators); Levitin, *supra* note 154, at 156 (analyzing the alignment of interests between the banking industry and its regulators in the context of proposals to make the regulators responsible for consumer protection as well); Binyamin Appelbaum & Ellen Nakashima, *Regulator Let IndyMac Bank Falsify Report*, WASH. POST (Dec. 23, 2008), http://articles .washingtonpost.com/2008-12-23/business/36812232_1_darrel-dochow-john-m-reich-indymac-bank (noting regulators' conference calls with bank officials, and describing federal financial regulators as behaving more like "consultants, not cops"); Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 689–90 (1988) (exploring the theory of agency capture by the banking industry).

160. *See* CHARLES P. KINDLEBERGER & ROBERT ALIBER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES 24–37 (5th ed. 2005) (describing the proneness of the financial sector to these sorts of problems). Often, these bank runs are countered by system-wide bailouts by the government (as was the case in the housing crises of the 1980s and 2008) or the private sector (as was the case in the panic of 1907 and the bailout of the Long Term Capital Management hedge fund in 1998). *See id*. at 100–02.

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Third, the procedural limitations of international financial regulation lie in policy formulation, but the application of internationally devised policy to domestic regulated industry is, at least to some degree, a question of enforcement. The distinction matters. Although separating policy formulation and enforcement by every jot and tittle would be an unproductive exercise,[161] it is at least worth noting that good governance aficionados are particularly worried about the application of the law, rather than its development.[162] Due process considerations enter into the fray at the point of enforcement, after all; they classically include the right to a hearing, the right to petition, and the like, while the policy formulation process presents the possibility of somewhat less stark forfeitures.[163] For example, not even the most punctilious of domestic administrative law scholars will deny that there may be some point at which a small number of members of the Board of Governors of the Federal Reserve—say, the chair of the board and some of his trusted advisors—meet informally to plan their regulatory agenda.[164] Such policy formulation may not be open to outsiders, but if it is followed by the appropriate promulgation of the procedure, with sufficient ventilation of the policy scheme for comment and critique, then there is little argument with its legality in the end. Indeed, many meetings by political officials must be open to the public in the American administrative system, but many other such gatherings are exempt.[165] Similarly, the international process is where the policy formulation happens while the domestic process is where that formulation

161. For the seminal realist take to this effect, see Shapiro, *supra* note 80, at 922.

162. As Ronald Allen observed, "[a]s a result of this realization that the police are not simply ministerial officers, we have been forced to face some very hard questions that have been ignored until recently. The most obvious of these questions is the propriety, both as a legal and as a policy matter, of the police exercising discretion in enforcing the criminal law." Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 63–64 (1976) (footnote omitted).

163. In some ways this implicates the standard due process difference between the individual application of a law and the formulation of a rule that will affect the many. *Compare* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 443–46 (1915) (holding no due process right attached to a property tax assessment that was generalized across the citizenry), *with* Londoner v. Denver, 210 U.S. 373, 385–86 (1908) (holding due process was implicated by individualized tax assessments).

164. Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 644 (2010) (describing the "the financial market's close attention to Alan Greenspan's every word during his tenure as chair of the Federal Reserve Bank, and to the Kremlin-esque minutes of the Fed's Open Market Committee"); *see also* ELLYN BOUKUS & JOSHUA V. ROSENBERG, FED. RES. BANK N.Y., THE INFORMATION CONTENT OF FOMC MINUTES 1–5 (July 6, 2006), *available at* http://ftp.ny.frb.org/research/economists/rosenberg/Boukus_and_Rosenberg_072006.pdf (analyzing the content of Greenspan era FOMC meeting transcripts).

165. The Government in the Sunshine Act establishes these boundaries. *See* 5 U.S.C. § 552b(b) ("Except as provided in [§ 552b(c)], every portion of every meeting of an agency shall be open to public observation.").

is enforced. Thus, the legitimacy of the domestic formulation may not be so onerous.

So although this paradigm would seem to posit a clash between a procedural approach to policymaking and one with no required procedure at all, the reality in finance is a compromise which represents a hybrid between arbitrary policymaking and routinized, law-governed procedure.

Perhaps for these reasons, finance is a particularly fertile ground for a new paradigm of global regulation—one represented by networks like the Basel Committee and networks of networks like the FSB. But although that paradigm is usefully applied in international finance, and although finance is likely to be a pioneer in global administrative law, it is extraordinarily unlikely to be an outlier or a lone example of the new public law. Instead, when we see international financial regulation interact with domestic administrative law, we can see the future of regulation—not just of finance, but of many other areas as well.

IV. IMPROVING THE SOVEREIGNTY MISMATCH SOLUTION

Financial regulation has taken some useful steps to deal with the sovereignty mismatch problem, but there is more that could be done. One step in particular would be attractive: congressional passage of an International Administrative Procedure Act that would broadly sanction American participation in regulatory globalization (as it must do) but condition that participation on familiar procedural protections (as it should do).

But before discussing what such a statute might look like, the alternatives to addressing sovereignty mismatch should also be considered. Brief reflection shows that they will not be as effective.

The most straightforward way to add legitimacy, and to constrain some of the most vigorous pursuers of regulatory globalization, would be to internationally promulgate some principles to which countries agree. For example, an International Administrative Procedure Convention could be a formal treaty version as to what is expected from international regulatory cooperation. If passed, it could bind the countries that ratify it as to the processes they offer when engaged in regulatory collaboration, and in this manner bind those countries' agencies.

But treaties are hard to promulgate, and the United States may never ratify a treaty again.[166] Perhaps thankfully, however, treaties are not the

166. Other than tax treaties. *See Treaty Actions*, Department of State of the United States of America (Jan. 2012), http://www.state.gov/documents/organization/204054.pdf. For a discussion of

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only way to both create protections and facilitate authorization of regulatory globalization.

The other international alternative is to rely on the regulatory globalizers themselves to address the problem. In finance, for example, the Financial Stability Board could promulgate procedural standards and best practices, which would be followed after G20 endorsement. This approach could keep matters completely informal. But, on the other hand, it trusts regulators to pass their own constraints on themselves, which is no certain guarantee. Those standards would likely be imprecise, and might vary wildly by issue area. For these reasons, relying on regulatory globalization itself to provide the constraints—and therefore the legitimacy—to regulatory globalization is a second best option.

But this sort of guidance could be provided domestically through congressional passage of an International Administrative Procedure Act, and, because of America's power in regulatory collaboration, could guarantee a common international approach. Congress could set forth rules about how agencies should collaborate with their counterparts abroad and what kind of procedural protections they should bring to the process. One can also imagine that Congress could take the opportunity to bless foreign cooperation broadly (solving some of the subdelegation problems posed by the sovereignty mismatch), or, of course, authorize foreign cooperation in a way that limited agency freelancing.

One way that the congressional authorization could achieve these ends would be to insist that regulators go through notice and comment *before* engaging in international negotiations with their counterparts, rather than after. Establishing a bargaining range before entering into the international agreement avoids the fait accompli problem—that the notice and comment process done at the domestic level is a sop offered after the policy has been fashioned internationally—and parallels some innovative suggestions that Jean Galbraith has made concerning Senate ratification of treaties.[167] Or the agencies involved could issue Advanced Notices of Proposed Rulemaking (ANPRMs), Federal Register notices not required by the APA, but utilized to put regulated industry on notice that regulation is

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the skepticism with which the Senate has approached treaties recently, and a proposal to facilitate authorizing them in the future, see Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247 (2012).

167. Galbraith, *supra* note 166, at 249, 298 (arguing that the Senate might prospectively consent to treaties subsequently negotiated by the executive branch by offering, in addition to ratification, a zone of agreement acceptable to the legislative body *ex ante*).

being contemplated.[168] A series of ANPRMs were issued, in fact, for the second iteration of the Basel capital adequacy accords (Basel II).[169]

One can see some merit to an authorizing statute which clearly states that agencies should contemplate collaborating with foreign counterparts on global problems, but which also preconditions American commitment to precise rules (like Basel's capital adequacy accord) on the availability of some procedural protections in the international arena. More specifically, the statute could require a series of procedures: an international comment process, a website, perhaps annual meetings, at least part of which are open to the public, and so on.[170] In sum, if American agencies were told by Congress to go forth and collaborate—with conditions on process—it would be a good way of adding some procedural regularity to the process without going to the trouble of concluding an international agreement.

The attractiveness of this congressional solution is based in part on a fundamental feature of international regulatory cooperation: the law at issue in the sovereignty mismatch problem is not public international law (for which a treaty might be attractive), but domestic administrative law done across borders. In other words, the phenomenon subject to the sovereignty mismatch problem is surely an international one, but the legal obligation contained therein is not the same thing as international law. Rather, it is better thought of as extraterritorial—and coordinated—domestic administrative law.

Nor is an International Administrative Procedure Act something for which the time has come and gone. The original Administrative Procedure Act, passed in 1946, ratified a number of judicially created procedural requirements levied upon agencies, although it also gave those

168. For a paean to the potential of the ANPRM, see Andrew Emery & Fred Emery, *Maybe the Experts Were Wrong About the ANPRM*, 34 ADMIN. & REG. L. NEWS, Winter 2009, at 10.

169. *See* Michael E. Bleier, *Operational Risk in Basel II*, 8 N.C. BANKING INST. 101 (2004) (describing the steps taken in one Basel II ANPRM in some detail).

170. This sort of pressure helped to make international institutions like the World Bank more accountable. IBRAHIM F.I. SHIHATA, THE WORLD BANK INSPECTION PANEL: IN PRACTICE 4 (2d ed. 2000) (discussing external criticism, which led the World Bank to create its Inspection Panel process, that was "driven by a broader concern that international organizations were not adequately accountable for their activities and by the perception that the Bank, as an important instrument of public policy in areas of international concern, needed to be more open and responsive."); *see also* Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT'L L. REV. 1321, 1327–28 (2000) (further discussing accountability in the World Bank); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 4 (2006) (observing the tendency of institutions to create administrative procedures).

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requirements an agency-friendly, New Deal feel.[171] In this way, the APA took the landscape of domestic administrative law and ratified and rationalized it through a single statute.

A similar process is upon us in the globalization context. We know from financial regulation, the most established form of regulatory globalization, what kind of procedures agencies and networks may be willing to take on and how those networks can perform. Congress's use of that experience to guide the content of its statutory authorization would also help to solve its sub-delegation problem—agencies would have the authorization they need to engage in regulatory globalization—as well as promote the cause of multi-national solutions to multi-national problems.

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171. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1602 (1996) (a leading history of the APA which suggests that the bill "merely codified existing common law"). For other discussions of the history of the APA, see generally Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452–53 (1986) ("The law of the APA is thus largely a congressional affirmation of the scheme worked out by the executive branch's New Deal lawyers. They formulated a modified and softened version of the prewar vision of [Roscoe] Pound and the American Bar Association and fitted it into a basically New Deal plan."); Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986) (discussing the history of the APA).