

## ORIGINAL ARTICLE

# Reversing delegation? Politicization, de-delegation, and non-majoritarian institutions

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## Abstract

Elected governments and states have delegated extensive powers to non-majoritarian institutions (NMIs) such as independent central banks and regulatory agencies, courts, and international trade and investment organizations, which have become central actors in governance. But, far from having resolved the balance between political control and governing competence or removed certain issues from political debate, NMIs have faced challenges to their legitimacy by elected officials and sometimes attempts to reverse delegation through “de-delegation”. Our special issue studies the politicization of NMIs, and then whether, why and how it leads to de-delegation through reducing the formal powers of NMIs or increasing controls over them. In this article, we examine how to analyze de-delegation, how politicization of NMIs has developed, and how it has affected de-delegation. We underline not only institutional rules that constrain elected officials but also the actions of NMIs themselves and their relationships with other NMIs as part of multi-level governance systems. We find that politicization has varied, but even when strong, elected officials have not introduced widespread and long-lasting de-delegation; on the contrary, they

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have frequently widened the powers of NMIs. Insofar as elected politicians have sought to curb NMIs, they have often preferred to use existing controls and non-compliance. Finally, we consider the wider implications of the combination of politicization and lack of de-delegation for broader issues of governance such as the division of powers between the elected and unelected and democratic accountability.

## 1 | INTRODUCTION

Since the 1980s, elected governments and states have delegated extensive decision-making authority to Non-Majoritarian Institutions (NMIs) across many policy domains. NMIs have become central actors in governance and take a wide range of authoritative decisions. Today, central banks make monetary policy with implications for economic performance, markets and politics (Bodea & Hicks, 2015; Jones, 2019; McNamara, 2002; Schelkle, 2017); independent agencies regulate markets (Coen & Thatcher, 2005; Jordana et al., 2011; Thatcher, 2005); courts protect rights (Alter, 2014; Stone Sweet & Mathews, 2019); international organizations develop rules for international commerce and investment (Büthe & Mattli, 2011; Hoekman & Kostecki, 2009; Nielson & Tierney, 2003; Stone Sweet & Grisel, 2017; Quaglia, 2020); and supranational authorities manage complex multi-level governance relationships (Da Conceição-Heldt, 2013; Hooghe & Marks, 2001; Howarth & Quaglia, 2016; Pollack, 2003; Wilks & Bartle, 2002). Although wide variation in their institutional configuration exists, NMIs share some common features. They have been delegated formal authority to govern specific domains of activity; they are not directly elected; and their decisions are subject to override on the part of elected politicians only under strict conditions, if at all (Thatcher & Stone Sweet, 2002). Indeed, those who delegated to NMIs did so, among other rationales, to *de-politicize* governance, often as part of wider political strategies (cf. Burnham, 2001; Flinders & Wood, 2014; Hay, 2014).

Yet far from resolving governance problems concerning the balance between political control and governing competence or removing certain issues from political debate, the growing importance of NMIs has led to criticisms of “the rise of the unelected” and a move to “anti-politics” due to the reduction of the importance of elections for policy choices (cf. Abbott et al., 2020a, 2020b; Fawcett et al., 2017; Hay, 2007; Mair, 2013; Tucker, 2018; Vibert, 2007). Indeed, there have been episodes of “backlash” against new forms of governance that seeks a return to previous institutions and policies by sweeping challenges to the dominant discourses and norms and has become central to political debates in many polities (Alter & Zürn, 2020a, 2020b). It has become clear that NMIs make decisions that are not merely “technical” in nature, but involve policy choices and have distributional consequences. Independent regulatory agencies set prices and conditions for suppliers in politically sensitive sectors such as energy and communications. Independent central banks buy vast amounts of public and private debt and set interest rates, with effects on borrowers and savers. Regional human rights courts regularly adjudicate on highly contested matters concerning the powers and actions of governments. International organizations that deal with complex and technical matters have become politically prominent—from the World Trade Organization (WTO) to the apparently arcane Basel Committee. Today, even the most successful

NMIs appear to have been subject to politicization as they have come under challenge from their principals (henceforth referred to as P or Ps) who had delegated to them. Indeed, in some places, domestic politicians have not only attacked NMIs, but also curbed them outright, most visibly constitutional courts, or sought additional powers for themselves in areas such as regulation of markets. On the international plane, representatives of powerful states have advocated radical reforms of others, notably the European Court of Human Rights, the WTO and the International Monetary Fund.

Yet the backlash against NMIs and consequent “politicization”—used here as referring to public challenges to NMIs’ institutional legitimacy, not merely to their substantive decisions—can vary in intensity across NMIs and polities, as well as over time. Equally, we should not assume that politicization has always led to “de-delegation”—that is, the reversal of formal delegation. Yet, while today it is undeniable that the *politicization* of NMIs that threatens *de-delegation* is integral to the politics of delegated governance more generally, existing theories focus more on delegation and its reproduction than on institutional evolution. As a result, we know too little about how and why processes of politicization and de-delegation develop and are linked.

Our special issue examines the politicization of NMIs, and then whether, how and why it leads to de-delegation. In investigating the explanatory factors that shape links between politicization and de-delegation, it goes beyond functional demands and formal rules for alteration of delegation, to encompass the effects of NMIs as active actors and of their relationships with other NMIs as part of multi-level governance systems. It also brings in elected politicians using alternative ways of curbing NMIs to de-delegation, through applying existing controls and engaging in non-compliance. Empirically, the special issue examines courts, independent central banks, and regulatory bodies at international, regional, and national level in Europe, Africa, and Latin America. Comparison of NMIs of various types, at various governance levels, and in various policy fields and polities offers analytical leverage to the special issue valuable in responding to the core research question about the relationship between the politicization and de-delegation of NMIs.

Our central empirical finding is that while some NMIs have been subject to wide-ranging questioning of their institutional position by elected officials, with pressures for drastic reductions in their powers or even for abolition, others have faced more specific or temporary challenges to their existing delegation arrangements. In short, politicization has varied. Equally, elected politicians have not always sought to reverse formal delegation. Most NMIs have survived, losing little of their institutional autonomy. Indeed, some have thrived, gaining increased powers and authority, including independent regulatory agencies in Europe and independent central banks in Latin America. Instead, elected politicians have sometimes chosen to use alternative modes of reining back NMIs to formal de-delegation, from maximum application of existing formal controls, exemplified by the US seeking to paralyze the WTO by blocking of appointments to its Appellate Body, to non-compliance with their decisions, such as European responses to the Basel Committee’s banking standards. Our findings on politicization and de-delegation have broader implications for responses to “the rise of the unelected”, notably tensions between delegation and “responsive government”, backlash to the (apparent or real) loss of importance of elected politics, as well as limits in the ability of politicians to introduce institutional change after delegation.

The article begins with a discussion of the lack of analyses of politicization and de-delegation; the analytical framework to address such a lacuna, notably defining the key concepts of politicization and de-delegation and setting out the soft Principal-Agent (P-A) approach applied overall; and the justification of the empirical scope of the special issue. The article then looks at how politicization of NMIs has developed, and in the following section, links it with de-delegation,

notably explaining why formal de-delegation has often been limited. Finally, it considers the implications of the combination of politicization and lack of de-delegation for wider issues of governance.

## 2 | ANALYZING POLITICIZATION AND DE-DELEGATION

### 2.1 | Existing analyses of delegation, politicization and de-delegation

Delegation to NMIs has been the focus of intensive scholarly activity by social scientists and academic lawyers. We build on our collaborative project published as a special issue of *West European Politics*—Thatcher and Stone Sweet, eds. (2002). The volume focused attention on the logics, processes, and impact of delegation. We surveyed different theoretical and methodological approaches to the topic, and took pains to contrast differences between “rationalist” (e.g., P-A modeling) and more “sociological” (emphasizing norms and institutional isomorphism) perspectives. We also stressed that there were good reasons to assume that NMIs, through their activities—and especially to the extent that they gained effectiveness over time—would participate in the construction of their own political environments. Under such conditions, the politics of delegation would not be static, but the product of historical contingencies, unforeseen circumstances, and the feedback of NMI decision-making on subsequent policymaking.

This latter point made, existing approaches to delegation are biased toward institutional reproduction and even expansion. Scholars in the rationalist tradition focus heavily on *ex ante* rationales for delegation, and on the details of institutional design; Ps create agents in order to resolve one or more specific governance dilemmas, that is, to supply an institutional solution to a functional problem. In the typical scenario, the former expect NMIs to deliver better outcomes than the Ps could produce on their own. Insofar as agents actually perform their tasks properly *ex post*, NMIs would accrue political legitimacy, helping to ensure their viability (Pollack, 1997; Thatcher & Stone Sweet, 2002). Historical institutionalists have produced a long list of studies demonstrating how “sticky” such institutions can be, once they become embedded in, and constitutive of, the domains they help to govern (following from Pierson, 2000). The basic lessons of institutional path dependence concern reproduction and expansion, not destruction or collapse into desuetude. Sociological institutionalists, too, emphasize factors favoring the diffusion of norms and forms that achieve the label of “best-practice” standards, precisely because such standards emerge only through the increasing support of powerful actors, public and private (following from DiMaggio & Powell, 1983; Fligstein & McAdam, 2012). Each of these analytical frameworks brings valuable insights to research on NMIs. And, because the underlying arguments overlap in crucial ways, they combine to explicate the conditions under which the authority of NMIs—as effective organs of governance—will be consolidated and “locked-in” over time. They are not, however, as well-suited to explaining re-politicization and de-delegation.

As a result, while there is an abundance of wide-ranging works that encompass several NMIs in the vast literature on delegation (see for instance, Delreux & Adriaensen, 2017; Hawkins et al., 2006; Maggetti & Papadopoulos, 2018; Pollack, 2003), the lack of a distinct approach to the politics of reversing delegation has meant that, thus far, only recent case studies of such attempts exist. Thus for example, studies have documented the increasingly aggressive use by US administrations of the power to block the reappointment of judges of the WTO's Appellate Body considered excessively activist (Dunoff & Pollack, 2017, pp. 267–270). Others have looked at how politicization due to nationalism has led to de-delegation for independent regulatory agencies

in Turkey, underlining how state traditions of distrust between politicians and the bureaucracy were important (Ozel, 2012). Research has also emphasized how delegation to NMIs in finance has come under increased public criticism after the eruption in 2007-8 of the great financial crisis (Pagliari, 2013), how governmental attacks against central banks' decisions have at times led to the early dismissal of the banks' heads (Binder, 2021; Dreher et al., 2010), and how the European Central Bank (ECB) has been frequently accused of unlawfully breaching the limits of its own mandate (Da Conceição-Heldt & Mueller, 2021).

Nevertheless, the approaches just mentioned contain, in themselves, relevant heuristics to study how the operation of NMIs might feed back into politicization and de-delegation. What would lead Ps to disinvest from delegated arrangements, assuming that the functional need for, say, the development and application of technical expertise to regulation would remain as acute? How does an NMI that was presumed to be locked-in, at  $t_1$ , become vulnerable at  $t_2$ ? What forces can undermine a stable normative consensus on a best-practice standard? The typical responses—a major crisis, political upheaval—are facially persuasive but border on the trivial (a crisis is a crisis because it undermines, or renders deficient, existing arrangements). Responses to such questions need both theoretical and empirical work.

## 2.2 | Analyzing politicization and de-delegation

Our project focuses attention on institutional politicization and de-delegation, in order (i) to trace their development, and (ii) to refine the theoretical materials we use to explain delegation more generally. While private actors and organized interest groups do work to politicize NMIs, and to push for de-delegation, we focus primarily on those state officials who are the immediate Ps of any NMI.

We specify a set of relatively general concepts, tailored to our topic, notably politicization and de-delegation. “Politicization” is a much-used term, with definitions that range from increased public attention and contestation to greater polarization to elected politicians expanding their formal powers and discretion at the national or EU levels (De Wilde, 2011; de Wilde and Zurn, 2012; de Wilde et al., 2016; Hay, 2007; Kriesi, 2016; Schmidt, 2020). Here, by “the politicization of delegation”, we mean any sustained, public challenge to the legitimacy of an existing NMI by officials who possess some authority to override, curb, or abolish it. Today, elected officials as well as firms, organized interest groups, and the media, among other elites, routinely question the institutional legitimacy of many NMIs, as well as specific policy outcomes that NMIs produce. We are therefore interested in “institutional politicization” by Ps that concerns alteration of the formal “delegation contract”.

Indeed, in looking at the preferences of the officials who either presently comprise the P(s), or seek to become the P(s) in the future, it is crucial to distinguish *institutional* from *policy* preferences. In the present context, a *policy preference* expresses the acceptable outcome, from the standpoint of such officials, of any decision to be taken by an NMI. By contrast, *institutional preferences* include those interests, commitments, and dispositions related to the structure of the governance arrangements being analyzed. The P(s) may broadly accept the legitimacy of delegated arrangements, while disagreeing with many substantive outcomes actually produced by the NMI. Thus for instance, elected politicians may criticize court rulings or the decisions of independent regulatory bodies or central banks and seek to alter the substantive rules governing the decision but not attack the legitimacy of the NMIs themselves. But P(s) may also decide to oppose the NMI openly, challenging its utility and legitimacy, or seek to destroy it altogether.

Here they want to alter the institutional framework, for instance by reducing or removing the ability of the NMIs to make such decisions or by increasing their own legal powers to control the functioning of the NMI. Of course, an NMI that routinely produces unwanted *policy* may well undermine its own *institutional* support. Indeed, the larger the divergence between the policy preferences of Ps and NMIs, the more likely is politicization (cf. Bodea & Garriga, 2022). For these reasons, sophisticated P-A approaches typically consider questions of whether and how an agent might “constrain itself”, not least, to avoid antagonizing Ps and risking “punishment”.

“De-delegation” refers, first, to the authoritative alteration – or annulment – of an existing delegation contract, in order to reduce the formal authority of the NMI to make law, regulate, or govern in other ways.<sup>1</sup> A decision by a P to abolish an NMI is an act of total de-delegation. It includes a state that exits an international regime, as it de-delegates for itself, while leaving the NMI intact for other members. De-delegation may also take place through a reduction in the powers of an NMI and/or by strengthening controls over it; in both, the P shrinks an NMI’s “zone of discretion”. In short, de-delegation involves changes in the formal delegation contract. It must therefore be distinguished from Ps using existing controls over an NMI such as appointments or budgets, as well as from informal pressures, such as threats or blandishments that constrain the NMI in fulfilling its functions. Of course, as we will see, de-delegation and these other forms might relate to one another, for example, because Ps may turn to the latter when the former is impossible or too costly.

We adopt a soft P-A approach,<sup>2</sup> using its basic concepts and vernacular to broadly frame the project, derive appropriate concepts, and sharpen the research questions that, taken together, demarcate the project’s nature and scope. In making this choice, we neither exclude other approaches nor proclaim P-A’s explanatory superiority. Indeed, we have taken care to ensure that the framework proposed here can accommodate historical-institutionalist or more sociological dispositions to the same questions, as well as more formal, game theoretic P-A modeling. Further, it does not displace relevant bodies of theory and findings (e.g., of regulation, judicial politics, politicization, institutional isomorphism, and so on) that fall outside the P-A framework and apply in specific papers.

We use the framework to identify Ps who formally delegate powers to NMIs. Given our focus on governance, P is a state actor, or a group of state actors, that possesses the authority and resources to establish and maintain NMIs. We also analyze the rules over decision-making and institutional change under that framework which are vital to post-delegation politics and provide a powerful starting point for analysis. These rules affect the zone of discretion. This zone is constituted by (i) the sum of delegated powers (procedural autonomy and policy discretion) granted by P to an NMI, minus (ii) the sum of control instruments, available for use by the P to shape (influence, constrain) or annul (override) policy outcomes generated by the NMI (Thatcher & Stone Sweet, 2002, pp. 4–7). The rules governing revision of the delegation contract itself—including abolishing the NMI altogether—delineate the outer margins of the zone. The zone of discretion is closely linked to de-delegation. Since the latter involves a change in either powers delegated and/or controls imposed on an NMI, we are interested in changes that alter the zone. Moreover, potential “agency loss” varies, growing as the zone expands.

In situations in which the P is a composite of multiple Ps, the efficacy of controls is in doubt, in that we expect P’s policy and institutional preferences to be relatively heterogeneous and unstable. Where the decision rule governing override and institutional revision is consensus or unanimity, an NMI’s zone of discretion is virtually unlimited. In 2002, building on the arguments of Majone (2001) and Moe (1990), we called such NMIs “trustees” which are a type of “super-agent” that possesses authority over P, and whose decisions are difficult or, in practice,

impossible to override. Most important international courts, for example, are in a position of trusteeship which, in itself, has created tensions with the states whose decision-making they oversee. A state that wishes to influence such courts may well turn to weaponized existing procedures in order to influence the NMI, or to persuade other states to join efforts to reform the regime. Situations that cannot be characterized in trusteeship terms, such as the relationship between a parliamentary majority (the P) and an independent agency created by statute may nonetheless exhibit similar characteristics, depending on political context. For example, a political party that governs in parliament under a minority or coalition government may be incapable of deploying controls if it cannot muster a majority vote, or if its coalition partner opposes curbing the NMI. In addition, Ps may parcel out control functions—among multiple NMIs. In the USA and the EU, for example, Ps have conferred powers on the courts to supervise the lawmaking of otherwise independent agencies. In such cases, the linkages between P's preferences, the NMI's performance, and control mechanisms may be diluted.

Rules about the ability of Ps to override the decisions of NMIs or alter the delegation contract affect the politics of de-delegation. They influence whether those Ps engage in de-delegation or seek to use their formal controls and/or informal pressures. The rules provide the controls that Ps have, and hence the form and scope for reducing agency loss. When the NMI is a trustee, it has the capacity to alter its own zone of discretion and hence the delegation contract itself, since it makes decisions that govern the P that the P cannot override; in contrast, Ps have much greater capacity to override agents' decisions and reduce agency loss.

Equally, the rules about Ps altering the delegation contract, including through de-delegation, matter. Decision rules such as whether unanimity is needed for revision or the processes for withdrawal from an international treaty influence the costs of de-delegation for Ps. If Ps have created trustees and cannot alter the contract, for instance, because change is not permitted or because Ps are composite and their unanimous agreement is required, Ps may only de-delegate for themselves by withdrawing from the agreement. Alternatively, they may refuse to comply with NMI decisions. Indeed, we recognize that there may be functional equivalents to altering the formal delegation contract, which we label "*de facto* de-delegation". This refers to situations in which, within existing delegation arrangements, politicians can use existing appointment and/or budget controls to hinder an NMI, at the extreme, preventing it from operating. They may also apply informal pressures and incentives that can range from informal discussions to bribes and threats, to alter an NMI's ability to act. Refusal by the P or other relevant bodies to implement NMI decisions can disempower the NMI. Use of existing formal controls and informal mechanisms of restricting NMIs may be less costly, and more immediately accessible, than making changes to the formal delegation contract. Our interest is when, how and why Ps decide to alter that contract, or else decide to remain within it, accepting NMI decisions or using functional equivalents to de-delegation.

The foregoing analysis of the structure of delegation guides our empirical investigation in the evolution of politicization and de-delegation by providing directions of analysis. Exogenous factors can change the original factors that led to delegation, be these functional benefits or norms and ideas. But endogenous factors also apply as NMIs are active agents who can affect both politicization and de-delegation. Trustees or agents over whom Ps cannot use their controls have great scope to follow their preferences or indeed expand their own zone of discretion for instance by awarding themselves additional powers, which in turn can result in greater politicization. We might expect Ps to have greater incentives for de-delegation for such agents or trustees than for agents over whom they have greater controls and who hence have smaller zones of discretion. However, such incentives are also subject to the conditions governing de-delegation,

notably the rules about altering the initial institutional design. The combination of formal rules and the availability of functional alternatives to formal de-delegation will influence P's decisions: we would expect that the more difficult de-delegation is and/or the easier *de facto* de-delegation is, the more Ps will avoid de-delegation and seek alternatives.

Formal rules set the framework within which Ps and NMIs operate, including the conditions under which Ps can de-delegate by altering powers or controls or abolishing the NMI. But while the formal rules about altering the delegation contract influence the costs of institutional change, they do not determine them. Ps must decide whether and how to pursue formal de-delegation, and then its extent and form. They weigh up estimated costs and benefits (for themselves) of changes. They also compare taking the path of formal de-delegation with alternatives, such as using existing controls and engaging in non-compliance. These costs, benefits and alternatives are likely to be affected by the political context as well as formal rules on institutional modifications to NMIs.

Thus the use of those rules must be examined in relation to substantive preferences and behavior. The zone of discretion is a purely formal construct; it does not tell us how any specific NMI will actually use its authority. An NMI may operate in the context of a wide zone of discretion but choose not to deploy its powers aggressively, leaving policy relatively unchanged. On the other hand, some NMIs (most notably, trustees) have asserted implied authority to grant themselves new, or to extend existing, policymaking powers. Indeed, NMIs may be more or less "effective". An NMI is effective to the extent that (a) it takes decisions (that regulate, enforce rules, resolve disputes, etc.) on the important issues arising within its mandate, and (b) these decisions are treated as authoritative by the P and other relevant elites. An authoritative decision is one that generates an expectation, among those actors subject to it, that the decision will be complied with and enforced by state officials. Put negatively, an NMI cannot be considered effective if it takes few or no decisions of consequence (for whatever reason), or if its decisions are routinely ignored or left unenforced. Effectiveness is a variable; it varies cross-nationally with regard to comparable NMIs, and it varies across time with regard to a specific NMI. If an NMI becomes more effective, expanding its range of authoritative decisions, this may affect politicization and changes in delegation. Conversely, if it is ineffective and fails to perform the functions for which it was created, this may also affect politicization and de-delegation.

Hence, we need empirical analysis to examine how zones of discretion, controls, and formal rules about alteration of delegation contracts are used and their effects on de-delegation. More generally, how NMIs govern is rarely static, but evolves in ways that can be tracked and hence an analysis over time after an initial delegation is essential. We do so by using cases that vary in terms of politicization and delegation arrangements.

### 2.3 | Empirical scope of the special issue

The special issue compares across a sample of NMIs, including international human rights courts (Sandholtz & Stone Sweet, 2022), national regulatory authorities (Rangoni and Thatcher, 2022), independent central banks in Latin America (Bodea and Garriga, 2022), the WTO (Pollack, 2022), the ECB (Tesche, 2022) and the Basel Committee (Quaglia, 2022). Several papers are comparative across polities, notably those on independent central banks, independent regulatory authorities, and constitutional courts, permitting the inclusion of contextual factors. They cover not only Europe but also Latin America and Africa. Moreover, while some papers are primarily at the national level and others at the international or supranational, most actually include multiple levels.



Our choice of which NMIs to study is guided by three factors. One is their importance for governance. Human rights courts are crucial for state power; independent central banks and regulatory agencies are at the heart of economic policy; and the WTO and the Basel Committee have grappled with the most important issues of international trade and regulation. The second, relatedly, is the potential for high levels of politicization and de-delegation. All the NMIs studied have taken decisions that have been subject to strong political contestation and faced severe criticisms and challenges. They offer “most likely” cases for de-delegation. The third is variation in the nature of Ps and the reasons for delegation and its design. Ps vary along dimensions that bear upon the politics of politicization and de-delegation, notably whether they are unified or composite, and in terms of their preferences. The functional pressures for delegation also vary, as do the institutional form of delegation, the tasks performed by NMIs, or their age, strategies and effectiveness (actual and perceived). Thus, we examine both unified Ps such as national governments and composite Ps, notably for delegation to international organizations. Equally, we look at the (changing or stable) preferences of Ps over time as NMIs take decisions and evolve. The NMIs also vary in terms of whether delegations can be reversed relatively easily, such as the cases of independent regulatory agencies, and those where it is very difficult due to the rules governing institutional change such as unanimity or entrenchments that have left agents as trustees (e.g., constitutional courts). These features offer the possibility to be consequential for institutional change.

We now present our central findings on the rise of politicization and whether, how and why it has led to de-delegation or failed to do so for each part of the analysis. We focus on NMIs and the state officials who are their Ps and who must undertake de-delegation.

### 3 | THE POLITICIZATION OF NMIs

All the different NMIs examined in this volume have been subject to political scrutiny and attack over their policy decisions. But the degree to which this has translated into politicization has varied. It has been strongest for the WTO and regional human rights courts, both of which are trustees, where governments have actively challenged the legitimacy of unelected officials (Pollack, 2022; Sandholtz & Stone Sweet, 2022). In particular, the US under President Trump engaged in a systematic campaign to impugn the workings and institutional basis of the WTO, while governments in Europe, Africa and Latin America have all argued that regional human rights courts have exceeded their mandates. In contrast, the international Basel Committee, independent regulatory agencies in Europe and independent central banks in Latin America have seen lower levels of politicization, as their Ps, national elected politicians, have only questioned the institutional framework in specific cases and at certain periods of time, rather than across the board (Bodea & Garriga, 2022; Quaglia, 2022; Rangoni & Thatcher, 2022).

There are many reasons why politicization may occur. There can be exogenous factors such as crisis or new challenges that NMIs are less well placed to deal with, reducing the value of delegation. The P's preferences for delegated governance may change over time as power changes hands, and is assumed by officials holding different institutional and policy preferences than those at the time of delegation. The election of leaders such as Berlusconi, Trump and Johnson who seek to break with previous governance arrangements, would appear to offer an important potential cause of politicization. Certainly, such changes in government saw attacks on NMIs and questioning of delegation. In our cases, Trump fiercely criticized the WTO and sought to

undermine its legitimacy through multiple false statements, while certain leaders such as Mugabe or Chavez denounced regional human rights courts (Pollack, 2022; Sandholtz & Stone Sweet, 2022). In Latin America, new left-wing governments in Ecuador and Nicaragua attacked the institutional independence of central banks which was seen as responsible for undesired “liberal” economic policies (Bodea & Garriga, 2022). More generally, Ps can adopt new ideas and “learn” from previous experience. Thus, for instance, attacks on the WTO began before Trump as ideas about trade rules were debated; similarly, as monetarist theories about inflation and growth were questioned policymakers and academics blamed independent central banks in Latin America for mistaken choices.

But politicization can also be due to endogenous factors, arising from evolution of the original delegation contract, especially if the NMI is a trustee and has a wide zone of discretion. Thus, it can arise from the actions of the NMI itself and its effectiveness. The effectiveness of NMIs is directly related to politicization to the extent that how an NMI performs its tasks will affect the institutional preferences of its P(s), and every other actor seeking to influence outcomes in the domain of delegated governance. NMIs may become more effective and in so doing, go beyond their zone of discretion or at least what Ps had thought was the zone that they had established. Trustees are particularly able to grant themselves new powers since their Ps find it almost impossible to reverse their decisions. The most prominent example we have are international human courts, which have extended their effectiveness, with increasing dockets and the possibility for individuals to bring cases before them, thereby increasing politicization as states have threatened to withdraw or attempted to do so claiming that the courts have gone beyond their legal mandates (Sandholtz & Stone Sweet, 2022). The WTO too has asserted its abilities to set binding rules for members through its dispute settlement mechanism, leading it to be characterized as highly “activist” (Pollack, 2022; Stone Sweet & Brunell, 2013). Another prominent example is offered by the ECB which has greatly extended its activities beyond setting interest rates to buying vast amounts of government debt, participating in the Greek bailout and offering “advice” to governments about their domestic economic reform programs, resulting in public debates about its legitimacy, including in national parliaments (Tesche, 2022).

Politicization may also occur for the opposite reason, namely that an NMI has been ineffective, being incapable of producing measurable policy change and/or expected benefits. NMI ineffectiveness may be the product of changed circumstances or failed policies. One example is provided by independent regulatory agencies for energy in the UK and Italy, which have often been unsuccessful in reducing prices through greater competition, leading governments to seek to question their institutional position (Rangoni & Thatcher, 2022). However, ineffectiveness may also be due to the express actions of Ps. Hence, even an NMI that performs its assigned tasks in good faith will fail to build effectiveness if Ps and other relevant state organs resist compliance and block enforcement mechanisms. This is particularly important if Ps have strong incentives to make NMIs ineffective and/or the NMI relies on the P to do its job. Thus, governments which have “national champion firms”, especially if state owned, may wish to prevent independent regulatory authorities from being effective in enforcing competition. Equally, independent central banks with an inflation target may need governments to adopt particular fiscal policies, creating powerful tensions and the temptation for politicians to attack the legitimacy of the unelected central bank, as seen in the case of the ECB (Tesche, 2022).

In our project, most if not all of the NMIs selected for analysis have self-consciously sought to enhance their effectiveness, not least, because they have been placed under an explicit obligation to do so. However, outcomes and politicization have varied. International NMIs that are trustees or close to being so, such as international courts, the WTO, and the Basel Committee, have been

successful in expanding their effectiveness thereby triggering politicization by national governments, to greater or lesser degrees, on the grounds that they have gone beyond the original delegation and therefore their zone of discretion. In contrast, politicization of independent regulatory agencies in Europe and independent central banks in Latin America has been more limited, and occurred either because these NMIs have pursued their original objectives, contrary to politicians' preferences, or due to the means whereby they have applied, or occasionally because the NMIs have failed to achieve objectives in the first place (such as lower prices for key industries such as energy).

When the gap between the policy preferences of Ps (whether altered from the original delegation or stable) and the net benefits for them of current delegation arrangements becomes too wide, those Ps look at institutional change. But while politicization involves sustained public attacks by Ps on the legitimacy of NMIs, these may not be followed by de-delegation, and hence its institutional consequences must be investigated empirically and not assumed.

#### 4 | DE-DELEGATION—THE REVERSAL OF FORMAL DELEGATION

When we examine institutional responses to politicization, we find several episodes of de-delegation. Yet notwithstanding important variations, overall, de-delegation has been limited. We offer an explanation based not only on functional reasons that limit the desire of Ps to de-delegate but also political reasons. These include the initial institutional design, notably the rules governing de-delegation and functional alternatives to formal de-delegation. In addition, NMIs have developed strategies and relationships that protect against de-delegation. A common theme is the expansion of multi-level networks, both formal and informal, that constrain Ps and aid NMIs in resisting de-delegation.

We identify considerable variations in de-delegation. National agents have experienced a much higher number of de-delegations than international trustee NMIs. Thus, governments in Europe have transferred certain powers from independent regulatory agencies back to ministries, especially those over pricing, in order to protect domestic incumbent firms or avoid unpopular price rises (Rangoni & Thatcher, 2022). In Latin America, they have reduced the independence of central banks by tasking them to fund fiscal deficits (Bodea & Garriga, 2022). De-delegation for international trustee NMIs has been much rarer—unsurprisingly, given that it requires unanimity among heterogeneous national Ps. But even for such NMIs, Ps have undertaken de-delegation and on several occasions, it has been more sweeping than for national agents. Thus, states have denounced international human rights courts, notably in Africa as well as Latin America, while when the US attacked the WTO, other member states put forward proposals to reduce the powers of the Appellate Body (Pollack, 2022; Sandholtz & Stone Sweet, 2022).

But despite considerable politicization and de-delegation episodes, overall, formal de-delegation has been limited. Although several European governments challenged the Basel Committee because its decisions could damage their national banks, they did not attempt de-delegation (Quaglia, 2022). National governments either abandoned or quickly reversed plans to reduce the powers of international trustee courts (Sandholtz & Stone Sweet, 2022). Surprisingly, de-delegations were also relatively limited for national NMIs, which are much less legally entrenched than international trustee NMIs. National governments in the five largest European countries did not entirely abolish any independent regulatory agency – at most, they merged them into new agencies (usually with more extensive powers than their predecessors); furthermore, those governments often abandoned de-delegations after initial attempts, introduced

time-limited temporary losses of powers for agencies, or reversed de-delegations over time (Rangoni & Thatcher, 2022). Governments in Latin America undertook several de-delegations of independent central banks; but most of these reforms were small and overwhelmingly concerned with the central bank being tasked to finance government deficits (Bodea & Garriga, 2022). Indeed, quite the reverse has occurred with extensions of delegation for several NMIs. Thus, many Latin American governments have increased the independence of many central banks while European governments have given extensive new powers to independent regulatory agencies (Bodea & Garriga, 2022; Rangoni & Thatcher, 2022). Equally, international human rights courts were able to extend their powers into new domains (Sandholtz & Stone Sweet, 2022), while the Appellate Body of the WTO was able to formalize its Disputes Settlement Mechanism so that in fact its decisions became precedent-based, transforming itself into an international court (Pollack, 2022).

Functional demands may constrain de-delegation. Independent regulatory agencies, independent central banks and the Basel Committee provide credible commitment that is important for investment and longer-term decisions in markets. The WTO and courts respond to the incompleteness of contracts. All NMIs can take blame for unpopular decisions. De-delegation may reduce the competence of NMIs and hence the benefits for Ps (Abbott et al., 2020a, 2020b). So Ps may politicize NMIs and consider de-delegation but when confronted with the costs of losing the functional advantages of the NMI, draw back.

Yet such functional pressures are insufficient to explain the limited extent of de-delegation. As seen, Ps have not just discussed institutional changes but actively sought and implemented several. Moreover, different institutional solutions to functional pressures may be possible, including those with lower levels of delegation. Most importantly, politicians are concerned with their own (private) gains and losses from delegation, which are often highly political. Even if the WTO aids world trade, Trump and others gained from attacking it; while independent regulatory agencies and central banks may support long-term investment and economic growth, elected politicians can enjoy short-term gains from recovering control over prices to aid their popularity and protect national champion firms or using the central bank to finance higher spending or lower taxes; human rights courts make rulings that reduce the political power of politicians who may also pursue strategies of demonizing “foreigners”. Our analysis of politicization shows that there are many reasons why Ps seek de-delegation even if there are strong functional pressures for having some form of NMI.

Rather, we see several other factors linked to institutional design and to politics that have limited de-delegation in the face of politicization. The most common are formal institutional rules that govern change in the delegation contract. In the case of trustees, when there are multiple Ps and unanimity is required, de-delegation is extremely difficult, especially when the Ps are heterogeneous. The clearest examples concern international organizations, such as the WTO, regional human rights courts or the Basel Committee. In these cases, the different Ps—national governments and sometimes also supranational ones such as the European Commission and Parliament—had diverse institutional preferences but would have had to find agreement on de-delegation (Pollack, 2022; Quaglia, 2022; Sandholtz & Stone Sweet, 2022). Supranational rules can also restrict national de-delegation. Thus, EU legislation, often passed after the original delegation, and intervention by the Commission have restricted or reversed de-delegation of independent regulatory agencies in Europe (Rangoni & Thatcher, 2022).

Another reason is that Ps use formal and informal controls to achieve *de facto* de-delegation, namely the NMI ceasing to operate or being unable to use its formal powers, as an alternative to

formal de-delegation, or as part of the process to subsequently force it through. Politicians can use existing appointment powers to hinder NMIs; they can reduce budgets; they can refuse to provide essential material and legal resources to allow NMIs to perform their duties. Thus, for example, the US under Trump refused to appoint new members of the Appellate Body, blocking its workings (Pollack, 2022). A similar strategy was taken by Zimbabwe under Mugabe against the South African Development Community, as the government refused to appoint new judges, which paralyzed the court and led first to its suspension and then a new protocol (although declared unconstitutional by South African courts, Sandholtz & Stone Sweet, 2022). Finally, a form of *de facto* de-delegation can be non-compliance, which several states have used against international NMIs such as the Basel Committee or human rights courts. Informal mechanisms of restricting NMIs can be less costly, and more immediately available than formal institutional change. *De facto* de-delegation can be not just easier than instigating formal de-delegation but also advantageous in terms of domestic politics, allowing leaders such as Trump or Mugabe to attack NMIs on grounds such as being “unfair” and decided by foreigners as well as offering visible and rapid action.

The actions and relationships of NMIs themselves also limit de-delegation. NMIs can be “active agents” and influence the political environment within which their P operates (Moe, 2006), and are also “permeable”, becoming part of wider networks of actors who have access to them (Hawkins & Jacoby, 2006). NMIs and their allies thereby resist de-delegation and make it more costly for their Ps. Thus, the Basel Committee engaged in a “defensive strategy” of mobilizing its supporters that made it more difficult for national governments to de-delegate. Indeed, faced with politicization and de-delegation, the Basel Committee and independent regulatory agencies in Europe were both defended by other NMIs, notably the European Commission (Quaglia, 2022; Rangoni & Thatcher, 2022). Equally, international human rights courts and the WTO have formed part of professional and epistemic communities that oppose threats to their independence (Pollack, 2022; Sandholtz & Stone Sweet, 2022). In similar fashion, independent central banks are often supported by other central bankers and the wider “epistemic” community of economists and policy commentators (Bodea & Garriga, 2022).

A common thread for these different factors is the growth of multi-level systems that link national, regional and international institutions. Sometimes these links are formalized. The most visible examples are the incorporation of international human rights courts into domestic legal systems, which mean the development of “systems of transnational justice” which prove to be highly resilient as domestic courts and wider professional and epistemic communities of lawyers protest and resist attempts by national politicians to de-delegate (Sandholtz & Stone Sweet, 2022). In Europe, the increasing role of the EU offers a powerful regional level of decision-making that affects de-delegation, for instance, with legal requirements for independent regulatory agencies or through restricting the ability of national governments to alter the role of the Basel Committee (Quaglia, 2022; Rangoni & Thatcher, 2022). But there are also less formal links through networks of organizations and professionals such as lawyers and economists that offer allies and protection to NMIs at different levels. Multi-level systems frequently require the agreement of multiple Ps for de-delegation which is often difficult to achieve, leaving NMIs closer to being trustees than agents.

## 5 | CONCLUSIONS AND WIDER IMPLICATIONS

NMIs have become central actors in governance in many domains and play ever more important roles in policymaking. At the same time, they have seen institutional politicization, in which elected politicians have publicly questioned their legitimacy and the original delegation contract.

Such politicization has varied over time and across NMI and polity, being strongest for international NMIs such as the WTO and human rights courts, and weakest for agents such as independent regulatory agencies in Europe and central banks in Latin America. “Populist” politicians and authoritarian leaders such as Trump, Mugabe, and Chavez have been the most strident. Nevertheless, all NMIs have faced degrees of institutional politicization.

Yet such politicization has rarely been followed by de-delegation that reverses formal delegation. Elected politicians have often decided not to proceed with de-delegation or have been unable to introduce it. Alternatively, many attempts have been temporary or undone subsequently, and even those introduced have frequently been limited. Ps seeking to de-delegate have found powerful opponents, both domestically and especially internationally. They have been strongly opposed not only by the NMIs themselves, but also by their allies at multiple levels of governance.

Indeed, far from politicization leading to a reduction in the formal powers of NMIs, it has accompanied an expansion of their roles. Elected politicians have incorporated human rights treaties into their domestic legal orders and delegated additional responsibilities to agents such as independent regulatory authorities. Trustees such as human rights courts have gained new possibilities for individuals to petition directly. Independent central banks have widened their actions to “unconventional” monetary policies that involve purchasing public and private sector debt. Such expansions have in turn contributed to politicization.

If dissatisfied with the delegation contract but unable to greatly alter it or finding that the costs to do so are too high, Ps may choose alternative modes of action to de-delegation, notably informal forms of control over NMIs and non-compliance. We have seen several examples of these actions. Thus, Ps may force out NMI heads and choose loyalists for independent regulatory agencies in Europe. They may negotiate with NMIs such as independent central banks. They can refuse to comply with the rulings of courts or the standards of the Basel Committee. Such actions represent a functional alternative to de-delegation.

The outcome seems paradoxical: we find increased politicization but little de-delegation. One explanation may be that Ps are unable to de-delegate. But another is that they choose alternative modes of curbing NMIs. The result may be more “responsible” governance as NMIs perform important functions such as regulating competitive markets, protecting rights, saving the world from financial disaster and adjudicating trade disputes so that cross-national exchanges can take place. NMIs offer specialization, expertise and credible commitment over significant periods of time to deal with complex problems that reflect interdependencies, frequently between national and international levels.

At the same time, NMIs form part of a wider liberal institutional framework that is questioned, notably in terms of the division of roles and powers between elected politicians and unelected officials. A central issue here concerns the effects of delegation on nation states. The combination of politicization and lack of de-delegation may de-legitimize national politics. Elected national politicians have attacked the legitimacy of their own creations, but have not followed through with formal de-delegation, exposing their unwillingness or inability to reclaim powers. Instead, insofar as they have reined back NMIs, they have acted through *de facto* de-delegation, such as applying informal controls or non-compliance, which can widen the gap between the theory and practice of governance arrangements, and hence create further issues of legitimacy. Moreover, NMIs have frequently been major actors in safeguarding and indeed extending economically and socially liberal policies from protecting human rights to promoting competition, international trade and low inflation, which have come under increasing attack in recent years, including by elected politicians.

Indeed, it has been argued that there is a conflict between responsible politics, of which NMIs are frequently key parts, and responsive politics: national politics are becoming increasingly divorced from policy, as elections fail to alter institutions and policies, because certain choices become too “radical”, difficult or dangerous for elected politicians due, *inter alia*, to delegation to NMIs. Hence politics becomes increasingly responsible but less responsive to popular opinion (Mair, 2013). NMIs play a key part in defining what are responsible policies. Moreover, bodies such as the European Commission and national courts are usually allies of other NMIs such as independent regulatory agencies, the Basel Committee, and international courts in de-delegation conflicts with elected politicians. They also form part of wider expert and professional communities such as lawyers, economists, central bankers and financial experts, with strong norms that favor decision-making on grounds that are presented as beyond or indeed above “party politics” such as economic efficiency or legal process, as well as substantive criteria such as protecting rights, preventing inflation and promoting competition. In turn, the gap between popular opinion and national politics on the one hand, and policies driven by NMIs at national and international levels on the other, is argued to contribute to a “technocratic challenge” to democracy, the “hollowing out” of Western democracy, distrust of “experts”, “anti-politics” and indeed a populist backlash against the existing order and “undemocratic liberalism” (Alter & Zurn, 2020a, 2020b; Bertou & Caramani, 2020; Bickerton & Invernizzi Accetti, 2021; Hay, 2007; Mair, 2013; Mudde, 2021). Multi-level delegation and decision-making have become key elements in protecting NMIs against national politicians and may thereby increase nationalism and populism.

The resilience of NMIs and difficulties for elected politicians in reversing delegation pose serious issues of democratic accountability and responsiveness. Yet on the other hand, the decision-making processes of NMIs are often more transparent than traditional national governments, providing greater “throughput” legitimacy (cf. Schmidt, 2020). They can aid learning as part of epistemic communities, contributing not only to better outcomes but also to enhanced understanding of policy choices (cf. Dunlop & Radaelli, 2020; Haas, 1992). They have frequently given voice to groups who were marginalized in majoritarian politics. They have increased their effectiveness and become central to dealing with difficult issues from rights to regulation of markets and responses to global economic crises. These functions have aided nation states and their politicians to deal with crises and enjoy the benefits of unpopular but valuable decisions. De-delegation of NMIs links to wider debates about the proper boundaries between institutional change that follows democratic elections and maintaining institutions that provide both stability and protection of economic and social rights, which themselves enhance liberal democracies. It may be a healthy sign that NMIs today attract considerable political debate about their legitimacy and powers.

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## CONFLICT OF INTEREST

No conflicts of interest to declare.

## DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analyzed in this study.

## ENDNOTES

- <sup>1</sup> The first use of the term we have found is by Ozel (2012), examining reductions in the independence of regulatory agencies in Turkey; it has also been used more recently with respect to reversal of delegation of private authority in sport (Geeraert & Drieskens, 2021).
- <sup>2</sup> We distinguish a soft approach from more formal applications of P-A theory that would require, for instance, game theoretic models. We did not exclude such applications from the project and they could be applied to de-delegation.

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