

# Civil Society and International Organizations: A Liberal Framework for Global Governance

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## Abstract

*Over the past decade, international economic organizations have come under attack as illegitimate and oppressive. The remedy, according to the critics, is civil society. Under this view, civil society—non-state associations—should have a right to participate in the policymaking activities of international organizations. But the moral grounds for giving civil society such a central role in global governance, together with the ramifications of those moral grounds for organizational reform in the international arena, have not yet been systematically analyzed. Why are associations outside the state better placed than trained, career civil servants and elected politicians to decide on international aid, the regulatory pre-requisites for free trade, and other issues of global governance? And even though we might all agree that associations outside the state have something to contribute to the work of international elites, what, precisely, should be their role? Writing press articles, lobbying, commenting on policymaking proposals, voting on committees, or suing in international tribunals?*

*This Article explores the contribution that the morality of liberal democracy can make to this set of questions. It first turns to the political theory of civil society. Liberal theorists have made four different types of claims for how civil society contributes to the good life, each of which generates a different understanding of the associations that count as “civil society” and the policy initiatives that should be undertaken in favor of civil society. Equipped with these insights, the organizational reforms under way in the international realm are evaluated. However, the literature review also demonstrates, somewhat surprisingly, that the political theorists and the civil society activists are talking past one another: the theory does not address directly the question of whether associations should take part in democratic governance. For the theory, the democratic value of civil society lies in collective life outside the state. Therefore, the Article turns to the practice of contemporary democracies. Comparative law shows that private associations can participate in public life in at least three different ways: pluralism, corporatism, and republicanism. In pluralism, multiple, competing interest groups have numerous opportunities to influence policymaking, irrespective of their size or aims, through the legislature, the bureaucracy, and the courts. In corporatism, certain intermediate organizations are afforded a special role in policymaking because they are*

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*believed to represent significant social and economic forces. In republicanism, citizen associations engage in the public life of the nation through debate and protest, but enjoy relatively few opportunities to influence legislators, bureaucrats, and judges. In light of the ideals underpinning these different cultures of democracy and the empirics of the international realm, the Article concludes that the law of corporatism is the most appropriate for some of today's international organizations.*

In 2000, Ken Livingston, the left-wing mayor of London, remarked "Every year the international finance system kills more people than the Second World War. But at least Hitler was mad, you know." Unlike some of Red Ken's comments, this one captured a broadly shared sentiment. The international economic organizations that were supposed to harness global capitalism to the benefit of the world's citizens had failed. The bill of particulars is by now familiar to most observers: the neo-liberal formula of open markets, export-oriented economic growth, low budget deficits, minimal state intervention in the economy, deregulation, and privatization had proved a disaster for most of the developing countries to which it had been applied.<sup>1</sup> And, according to the critics, the damage was not limited to the developing world: even democracies in the western world had suffered at the hands of international economic organizations. Allegedly, domestic policy promoting social justice and environmental protection had been sacrificed to the false imperatives of the global market.

The critique was accompanied by a call for greater participation, within international organizations, of civil society.<sup>2</sup> For some, civil society means all associations between the state and the market. For the most disapproving voices, however, civil society includes only social and environmental non-governmental organizations (NGOs) that strive to improve material conditions for the world's poor and to protect the environment, not economic interest groups. The remedy is to curb the broad powers exercised by national ministers, international bureaucrats, and multinational corporations with the right of civil society to participate in the decisionmaking of global institutions.

Civil society advocates have already triggered a host of reforms of international organizations. A number of other reforms have been proposed but not yet implemented. Yet the justification for such far-reaching change, apart from the impulse to replace the present, state-centered configuration of international organizations with something different, is unclear. Why are associations outside the state better placed than trained, career civil servants and elected politicians to decide on foreign aid, regulatory pre-requisites for free trade, measures necessary to protect the environment, and other, pressing issues of global governance? And even though we might all agree that associations

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<sup>1</sup> RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO 14 (2003).

<sup>2</sup> Miles Kahler, *Global Governance Redefined*, WASH. U. GLOBAL STUD. L. REV. 33 (forthcoming 2005).

outside the state have something to contribute to the work of civil servants and elected politicians, what, precisely, should be their role? If the principal contribution of non-state associations is rallying the citizens of the world on international issues so citizens may hold their governments accountable, the decisions of international organizations simply need to be visible to such associations and their members. In other words, all that is needed is greater transparency. But maybe--as most activists argue--non-state associations should also have certain, express rights to participate in the day-to-day decisions of international lawmaking bodies, bureaucracies, and tribunals. This Article seeks to fill the theoretical lacuna by exploring what the political theory of civil society and the comparative law of democracy can contribute to redesigning global institutions.

The first part of this Article sets the stage by exposing the breadth of the civil society phenomenon in three different international organizations: the World Bank, the World Trade Organization, and the European Union. Part Two puts forward the moral principle that serves as the basis for the constructive project: liberal democracy. The next part provides some historical background on the concept of civil society. Part Four critically examines the four dominant political theories of citizen associations and their contribution to the good life in democratic societies. These theories serve as the basis for evaluating the pro-civil society reforms that have been made to date in international organizations and for suggesting other institutional innovations. The review of the literature also demonstrates, somewhat surprisingly, that the political philosophers and the civil society activists are talking past one another: the theory does not address head-on the question of whether associations should take part *in* public decisionmaking. For civil society theory, the democratizing potential of civil society lies in collective life *outside* the state. Thus, Part Five explores the comparative law of contemporary democracies and shows that interest and identity groups can participate in public life in at least three different ways: pluralism, corporatism, and republicanism. The concluding section returns to the institutional reform of international organizations. In view of the premises and ideals that inform different cultures of democracy and the realities of politics in the international realm, I argue that the public law of corporatism is the most appropriate for today's international organizations.

### **Civil Society Reforms**

This section canvasses some of the recent initiatives to redesign international organizations in favor of civil society--defined as all interest and identity associations outside the state.<sup>3</sup> The purpose is not to provide an

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<sup>3</sup> This is a working definition for purposes of this Article. International organizations, governments, activists, and, as we shall see, political theorists, all define the term "civil society" differently. While the World Trade Organization and the European Union adopt the broad

exhaustive description but rather to bring to light the scope of the civil society phenomenon and the importance of developing a theoretical framework that can assist in evaluating current and future attempts at institutional innovation.

*The World Bank*

The World Bank is widely regarded as having made some of the most far-reaching reforms to accommodate civil society.<sup>4</sup> These innovations have transformed the Bank's policymaking, its implementation-review process, and its funding programs. As will be explained in the political theory section, most of these reforms find their roots in the communitarian and social capital lines of analysis. Namely, the theory is that giving local groups decisionmaking power will encourage the civic responsibility critical to democratization and will promote community values.

The Bank's most significant policymaking instruments are loans: loans for specific development projects and structural adjustment loans, linked to economic reforms such as exchange rate stability, low inflation, and privatization of state-owned sectors of the economy. Since the mid-1990s, the Bank has required government recipients of project loans to seek the advice of local residents and local NGOs on relocation plans, environmental protection, and other matters.<sup>5</sup> As for structural adjustment loans, in 1997, the Bank organized a major consultation exercise involving civil society and governments to evaluate the impact of such loans in seven recipient countries (Ghana, Uganda, Zimbabwe, Ecuador, El Salvador, Bangladesh and Hungary). The five-year exercise, called the Structural Adjustment Participatory Review Initiative (SAPRI), was conceived both as a vehicle for studying the effect of these loans on a number of welfare indices and as a general examination of "how the participation of local, broad-based civil society can improve economic policymaking."<sup>6</sup>

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definition used here, the World Bank's definition is narrower: the Bank excludes associations that further the market-related activities of their members. According to the Bank's website, civil society "[refers] to the wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations." See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK%3A20101499~menuPK%3A244752~pagePK%3A220503~piPK%3A220476~theSitePK%3A228717,00.html>.

<sup>4</sup> See PEET, UNHOLY TRINITY, *supra* note\_\_ at 134; Kumi Naidoo, *Civil society, governance and globalisation: The World Bank and civil society*, 3 TRANSNAT'L ASS'NS 173, 179 (2003).

<sup>5</sup> See Sabine Schlemmer-Schulte, *The Impact of Civil Society on the World Bank, the International Monetary Fund, and the World Trade Organization: The Case of the World Bank*, 7 ILSAJ. INT'L & COMP. L. 399, 404 (2001).

<sup>6</sup> SAPRI, *Project Description of the SAPRI*, available at <http://www.worldbank.org/research/sapri/saprdescnew.htm>. Unfortunately, SAPRI did not have a happy ending. After the Bank published its findings in July 2001, the NGOs involved in SAPRI issued their own, overwhelmingly negative report, criticizing the overall effect of structural adjustment loans on developing countries and accusing the Bank of having failed to address their

The Bank's most recent efforts to involve civil society in policymaking have centered on Poverty Reduction Strategy Papers (PRSPs). These country-specific papers present an overview of the country's economic policies, development programs, and external financing needs; the goal is to generate a comprehensive, country-based strategy for poverty reduction.<sup>7</sup> PRSPs aim "to provide the crucial link between national public actions, donor support, and the development outcomes."<sup>8</sup> They are drafted jointly by government officials, local World Bank officials, private sector actors, and NGOs.<sup>9</sup> Notwithstanding some criticism of national consultation procedures, PRSPs represent a dramatic change from the earlier practice of closed, bilateral talks between World Bank officials and recipient governments.<sup>10</sup>

NGOs can also influence the implementation-review phase.<sup>11</sup> In 1994, the Bank created an Inspection Panel to investigate complaints that World Bank officials responsible for project loans had infringed the Bank's procedures and rules. The multi-national, three-member Panel is appointed by the Board of Governors (composed of representatives of the member states) after consultation with the Executive Directors of the Bank (the principal governing body responsible for the day-to-day activities of the Bank) and with civil society.<sup>12</sup> More significant than civil society consultation in the appointments process, is the right of local NGOs to bring complaints to the Inspection Panel. In the absence of local NGOs willing to file such claims, international NGOs are permitted to do so.

In addition to allowing participation in loan decisions and implementation review, the Bank uses funding to promote civil society in developing countries. Through the Small Grants Program, the Bank's country offices distribute grants to local NGOs. These grants are for initiatives in areas such as the environment, micro-credit, post-conflict reconstruction, information technology, human rights, gender equality, and small-enterprise development.<sup>13</sup> According to the official line, the Program is aimed at "promoting dialogue, disseminating information for the empowerment of marginalized and vulnerable groups, and ... enhancing partnerships with key players in support of the

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concerns. SAPRIN, *THE POLICY ROOTS OF ECONOMIC CRISIS AND POVERTY* (2002), available at [www.saprin.org/SAPRI\\_Findings.pdf](http://www.saprin.org/SAPRI_Findings.pdf). Despite the attempts to resolve the dispute, the Bank-sponsored process collapsed. See PEET, *UNHOLY TRINITY*, *supra* note \_\_ at 144; see also SAPRIN, *Letter from SAPRIN Global Steering Committee to President Wolfensohn* (April 10, 2004), available at [http://www.saprin.org/SAPRIN\\_Wolfensohn\\_16April04.PDF](http://www.saprin.org/SAPRIN_Wolfensohn_16April04.PDF).

<sup>7</sup> See IMF, *Poverty Reduction Strategy Papers*, available at <http://www.imf.org/external/np/exr/facts/prsp.htm>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Naidoo, *Civil society, governance and globalisation*, *supra* note \_\_ at 180.

<sup>11</sup> See Schlemmer-Schulte, *The Impact of Civil Society*, *supra* note \_\_ at 405.

<sup>12</sup> See IBRAHIM F. I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* 89-90 (2000).

<sup>13</sup> *Id.*

development process."<sup>14</sup> The World Bank's new-found commitment to civil society participation is also reflected in various changes in administrative structure.<sup>15</sup>

*The World Trade Organization*

The WTO has done far less to open its decisionmaking to civil society.<sup>16</sup> Rather, greater transparency is the main achievement of the past decade. According to General Council guidelines, WTO documents are to be publicly available through an electronic, on-line data base.<sup>17</sup> And, in practice, it appears that WTO documents--from Ministerials, General Council meetings, dispute resolution proceedings, and the numerous, specialized committees that deal with individual trade agreements and policy areas--have become widely available.<sup>18</sup>

Civil society consultation has been much slower in the making. Member countries have been extremely reluctant to allow civil society groups to interfere with their control over WTO policy. Members still conceive of the organization as based exclusively on state sovereignty and as entirely intergovernmental:

Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the

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<sup>14</sup> See World Bank, *Small Grants Program*, available at

<http://lnweb18.worldbank.org/ESSD/sdvext.nsf/64ByDocName/SmallGrants>.

<sup>15</sup> This entails Civil Society Staff in the Bank's country offices and a Civil Society Group and a Civil Society Team at the Bank's Washington, D.C. headquarters. All are responsible for promoting NGO participation in Bank programs. See World Bank, *World Bank Staff Working With Civil Society*, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20093777~menuPK:20425~pagePK:220503~piPK:220476~theSitePK:228717,00.html>.

<sup>16</sup> The WTO defines "civil society" more broadly than does the World Bank: "Environmental groups, organised labour, commercial farmers and various other business lobby groups in fact all qualify for NGO status as long as they prove an interest in trade-related issues. According to one WTO official, 'Microsoft would not be allowed to attend but its industry group would be.'" Mattner, *Understanding NGO participation in the WTO*, *supra* note \_\_ at 136.

<sup>17</sup> Decision adopted by the General Council on 18 July 1996, *Guidelines for arrangements on relations with Non-Governmental Organizations*, WT/L/162, 23 July 1996; see also Decision adopted by the General Council on 14 May 2002, *Procedures for the circulation and derestriction of WTO documents*, WT/L/452, 16 May 2002 (deciding that all WTO official documents should be unrestricted and available to the public through WTO website).

<sup>18</sup> See Mark Mattner, *Understanding NGO participation in the WTO: history, nature and implications for developing countries*, 3 TRANSNAT'L ASS'NS 132, 134 (2003).

different elements of public interest which are brought to bear on trade policy-making.<sup>19</sup>

Civil society has been granted only two, limited avenues to participate in WTO decisionmaking. First, NGOs may send representatives to Ministerial Conferences. Beforehand, they must be accredited by the WTO Secretariat. The criteria, however, are not particularly demanding; the Secretariat has granted about 98% of all applications to date.<sup>20</sup> The number of accredited NGOs has grown exponentially since the practice first began--from 156 organizations in 1996 for the Singapore Ministerial Conference to 966 in 2003 for the Cancún Ministerial.<sup>21</sup> At Ministerials, NGOs are provided with meeting rooms and are debriefed by the WTO Secretariat on the progress of the informal working sessions of the Member States.<sup>22</sup> Presumably, by following the negotiations, civil society groups can exert greater influence. NGOs might be able to react through their national channels--if such channels exist--or they might be able to stage Seattle-style protests.

The second avenue for civil society participation is the amicus brief. Amicus briefs have been allowed in WTO proceedings since 1998, when the Appellate Body first accepted them in the Shrimp-Turtle case.<sup>23</sup> However, the Dispute Settlement Body's panels and Appellate Body retain complete discretion in deciding to admit amicus briefs and, of course, in permitting the views of amici to influence their decisions.<sup>24</sup>

Not content with this limited progress, a number of scholars have proposed additional civil society reforms. For instance, Dan Esty recommends establishing a new advisory committee on the environment, on which business, labor, consumer, and environmental groups would sit.<sup>25</sup> He would also give NGOs observer status at all formal sessions of the WTO's General Council and other governing bodies.<sup>26</sup> In a similar vein, Steve Charnovitz argues that the

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<sup>19</sup> *Id.* at para. VI.

<sup>20</sup> See Mattner, *supra* note \_\_ at 135. As specified in the Marrakesh Agreement, NGOs must demonstrate to the Secretariat that their work is related to WTO activities.

<sup>21</sup> World Trade Organization, *Non Governmental Organizations (NGOs)*, available at [http://www.wto.org/english/forums\\_e/ngo\\_e/ngo\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm).

<sup>22</sup> World Trade Organization, *Relations with Non-governmental Organizations/Civil Society*, available at [http://www.wto.org/english/forums\\_e/ngo\\_e/intro\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/intro_e.htm).

<sup>23</sup> See Appellate Body, United States--Import Prohibition of Certain Shrimp and Shrimp Products, para. 110, WT/DS58/AB/R (Oct. 12, 1998); see also Appellate Body, United States--Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (May 10, 2000) (holding that Appellate Body will accept and consider amicus briefs when "we find it pertinent and useful to do so").

<sup>24</sup> See Jeffrey L. Dunoff, *Civil Society at the WTO: The Illusion of Inclusion*, 7 ILSAJ. INT'L & COMP. L. 275, 277-80 (2001).

<sup>25</sup> Daniel C. Esty, *Why the World Trade Organization Needs Environmental NGOs*, 5 TRANSNAT'L ASS'NS 267 (1999).

<sup>26</sup> *Id.* at 275-76.

Committee on Trade and Development and the Committee on Trade and the Environment--committees that study rather than negotiate and decide matters--should allow NGOs to participate in their work.<sup>27</sup> In addition, Charnovitz proposes a consultative body composed of NGO representatives that would give opinions on Ministerial outcomes, General Council Decisions, and Dispute Settlement Body reports. As we shall see, some of these reforms and these proposals for further change find support in the political theory of civil society. Many, however, do not.

### *The European Union*

It might appear odd to speak of the European Union in the same breath as the World Bank and the WTO. The European Union is far more than a treaty and an international organization; indeed, many would argue that it is a quasi-federal political system. Yet the European Union has faced the same criticism, even harsher at times, as the World Bank and the WTO and it has come forward with a similar, though more far-reaching, civil society response.

The Danish referendum on the Maastricht Treaty, which contained an ambitious new set of commitments to monetary union, a common foreign policy, and cooperation on immigration and police matters, was a watershed moment for the European Union.<sup>28</sup> In their referendum of 1992, the Danes rejected the Maastricht Treaty, followed by an extremely narrow "yes" vote in the French referendum and widespread public debate in the United Kingdom and Germany. The Maastricht Treaty was eventually ratified, but this popular skepticism had the effect of triggering serious reflection on the normative and political underpinnings of European integration. Some objections to the Treaty were fairly remote from the global governance debate: the European Union had assumed many of the powers traditionally reserved to nation states, yet it did not possess the institutions typical of a democracy, nor did it enjoy the essential premise of a democracy--government identified with a group of individuals who recognize they share enough attributes and principles to constitute a single, deliberating, and consenting "people."<sup>29</sup> But other objections to the Maastricht Treaty tracked the anti-globalization movement's critique of international economic organizations: the neo-liberal European common market was undermining social welfare, environmental protection, and other areas of state intervention.

Since 1992, the European Union's institutions have undergone radical change, including additional, far-reaching powers for the European Parliament

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<sup>27</sup> See Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U.J. INT'L L. & POL. 299, 343-44 (2002).

<sup>28</sup> See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 22 (3d ed. 2003)

<sup>29</sup> See J.H.HWEILER, *THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 337 (1999).

and significant transparency and access to documents standards.<sup>30</sup> New channels for civil society participation have also been added. The principal one is the European Commission's duty to consult civil society—trade unions, employer federations, consumer organizations, environmental organizations, human rights organizations, charitable organizations, community-based organizations, and religious organizations—on proposals for European legislation.<sup>31</sup> These are the steps: The Commission describes the issues open for discussion, the public is invited to submit written comments, and the civil society responses are published.<sup>32</sup> This process is to take place largely through the Commission's website. Then, when the Commission issues the final legislative proposal, the Commission summarizes the comments and explains how the final proposal was or was not altered by the civil society responses.<sup>33</sup> Legislative outcomes, however, cannot be challenged in court on the grounds that the consultation procedure was defective. In other words, consultation does not confer legal rights. In 2003, the first year after the procedure came into force, the Commission held a total of twenty-one public consultations, evidence of the extent to which the new procedure has taken root in the Commission.<sup>34</sup>

The civil society idea has thus been critical in reshaping international organizations over the past decade. But it is also an idea in flux, whose implications have not been worked out fully in the multiple, overlapping arenas of global governance. The time is ripe for examining the theoretical justifications for civil society and developing the normative implications for today's policymakers.

### **The Morality of Liberal Democracy**

My analysis begins from the premise of liberal democracy. I employ a standard definition: terms of cooperation to which free, equal, and rational individuals living together in society would consent.<sup>35</sup> Although contemporary philosophers dispute the nature of such terms of cooperation, most would agree that constitutional arrangements in a liberal society include, at a minimum, basic individual rights (freedom of conscience, equal treatment, property, and other liberties) and majority rule in certain domains of public life.<sup>36</sup> The examination

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<sup>30</sup> See Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 COLUM. J. EUR. L. (forthcoming 2005).

<sup>31</sup> See Communication from the Commission, Toward a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final, December 11, 2002, at 6.

<sup>32</sup> *Id.* at 19-22.

<sup>33</sup> *Id.* at 22.

<sup>34</sup> European Commission, *General Report on the Activities of the European Union* 22, para. 17 (2004).

<sup>35</sup> See JOHN RAWLS, POLITICAL LIBERALISM 16 (1993).

<sup>36</sup> See Ian Shapiro, *The State of Democratic Theory*, in POLITICAL SCIENCE: STATE OF THE DISCIPLINE 235, 237-44 (Ira Katznelson & Helen V. Milner eds., 2002) (comparing deliberative democracy with Schumpeter's theory of democracy); Jeremy Waldron, *Justice*, in POLITICAL SCIENCE: STATE OF THE

below of the political philosophy is limited to those thinkers that subscribe to the liberal model.

This point of departure deserves a couple words of explanation. The law that would most naturally apply to international organizations and their relations with civil society--international law--does not recognize liberal democracy as a guiding principle. Over a decade ago, Thomas Franck famously argued that a right to democratic governance was emerging in international law.<sup>37</sup> In making his case, he looked to the practice of nations: their consent to international treaties and agreements; their willingness to respect the written rules within their territories and to monitor and enforce those rules against their nation-state neighbors; and customary international law. Yet Franck's assertion has been contested by many scholars, who point to the continuing existence of different regime types as evidence against an international consensus on democracy.<sup>38</sup> Furthermore, even if the better scholarly view is the one that sustains an emerging right to democracy, that right would still come up short when matched against the constitutional principles of even a minimalist form of liberal democracy. In international law, democracy entails elections for government officials, but without the separation of powers and the full array of individual liberties that are part of the liberal tradition.<sup>39</sup>

Why, then, liberal democracy? My objective in this Article is to reflect on the moral foundations of institutions of global governance—as opposed to the *modus vivendi* of contemporary international relations. The liberal tradition in political philosophy, complete with its moral intuitions and its arguments from logic, offers one starting point for such an inquiry. A familiar objection is that starting with liberalism devalues other social and political experiences--those places in the world that Rawls categorizes as "decent peoples," "outlaw states," "societies burdened by unfavorable conditions" and "benevolent absolutisms."<sup>40</sup> My response is that this Article represents but one attempt at uncovering the right and good organizing principles of international organizations; other attempts, based on alternative political traditions or on alternative readings of the liberal tradition, are welcomed. Moreover, this analysis is limited to one, narrow area of international relations: the common organizations and procedures through which today's emerging regional and global communities are governed. The normative framework developed below does not reach within

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DISCIPLINE 266, 278-79 (Ira Katznelson & Helen V. Milner eds., 2002) (discussing debate between Nozick and Rawls).

<sup>37</sup> See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L. L. 46 (1992).

<sup>38</sup> See generally Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism: Thomas M. Franck's Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the Twenty-First Century*, 35 NY.U. J. INT'L L. & POL. 291, 298 (2003) (discussing debate sparked by Franck's article).

<sup>39</sup> See Thomas Franck, *Democracy as a Human Right*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 73, 75 (Louis Henkin & John Hargrove eds., 1994); Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1 (1995).

<sup>40</sup> See JOHN RAWLS, *THE LAW OF PEOPLES* 4 (1999).

the state to prescribe how political life is to be ordered there; it does not carry the same threat of intervention in the affairs of sovereign nations as other universalist visions.

The phenomenon of international organizations that implicate directly the rights and duties of individuals—often without real consent or mediation by the state parties to those organizations—is undeniable. What are the ramifications of one political tradition for their relations with civil society?

### **The History of the Civil Society Idea**

Today, civil society means associational life free of the state. For most of the life of this concept, however, it meant the exact opposite: relations among citizens *through* the institutions of the state.<sup>41</sup> Political theorists trace the idea to classical political philosophy, most notably, that of Aristotle.<sup>42</sup> In the writings of the ancients, moral perfection was attained through collective life in a political community; all other human relations and allegiances were subsumed by that community.

Observation tells us that every state [*polis*] is an association [*koinonia*] and that every association is formed with a view to some good purpose. I say 'good', because in all their actions all men do in fact aim at what they think is good. Clearly then, as all associations aim at some good, that association which is most sovereign among them all and embraces all others will aim highest, i.e. at the most sovereign of all goods. This is the association which we call the state, the association which is 'political.' [*He koinonia politike* which certain contemporary thinkers also translate as "civil society."]<sup>43</sup>

The social contract theorists of the seventeenth and eighteenth centuries continued to use civil society to signify political life. Civil society referred to the individual living peacefully in society with other individuals through the constitution of legitimate political authority. In the writings of Hobbes, Locke, and Rousseau, individuals in the state of nature decided by social contract to constitute themselves as civil society by creating a superior authority that would govern their relations. The law set down by the superior authority would discipline the relations among those individuals who were parties to the social

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<sup>41</sup> See generally NOBERTO BOBBIO, CIVIL SOCIETY, IN DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER (Peter Kennealy trans. 1989); JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (1999); John Keane, *Despotism and Democracy The Origins and Development of the Distinction Between Civil Society and the State 1750-1850*, in CIVIL SOCIETY AND THE STATE: NEW EUROPEAN PERSPECTIVES 35 (John Keane ed., 1988).

<sup>42</sup> See, e.g., EHRENBERG, CIVIL SOCIETY, *supra* note\_\_ at 9.

<sup>43</sup> ARISTOTLE, THE POLITICS 54 (T.A. Sinclair trans. & Revised and Re-presented by Trevor J. Saunders, Penguin Books, 1992).

contract. The nature of political authority was very different in the thought of the social contract theorists--absolute in Hobbes, liberal in Locke, participatory in Rousseau--but they all agreed that political authority was the necessary, defining element of civil society. "In this old European tradition," John Keane writes, "civil society was coterminous with the state."<sup>44</sup>

Civil society [ *koinonia politiké, societas civilis, société civile, bürgerliche, Gesellschaft, Civill Society, società civile*] and the state [ *polis, civitas, état, Staat, state, stato*] were interchangeable terms. To be a member of a civil society was to be a citizen--a member of the state--and thus obligated to act in accordance with its laws and without engaging in acts harmful to other citizens.<sup>45</sup>

In the late 1700s and early 1800s, the meaning of the concept gradually shifted to the one employed today, that is, social relations separate from the state. The shift is associated with the rise of commerce and the growing capacity of markets to organize and shape human relations. In the thought of David Hume, Adam Smith, Adam Ferguson, and other figures of the Scottish Enlightenment, peaceful and good relations with fellow men were possible not only through politics but also through commerce.<sup>46</sup> According to this line of thought, civil society was possible both through politics and government *and* through the pursuit of individual aims in economic exchange. They had reservations about the new realm of commerce: the specialization of economic functions and the geographically distant relations associated with the age of mercantilism could bring about the corruption of man and the downfall of the community or prosperity for the nation.<sup>47</sup> Nonetheless, the sphere of peaceful and transformative human relations expanded to include both politics and commerce. By the time Hegel published his *Philosophy of Right* in 1821, the analytic distinction between state and society was complete, and the language of "civil society" had come to refer, almost without exception, to human relations outside the realm of monarchy, parliaments, administration, law, courts, and the police.<sup>48</sup>

It is important to avoid anachronisms in the telling of this brief history. Although social and political philosophers of the nineteenth century agreed on the distinction between state and society, they had very different theories of the dynamics of civil society. Especially for Marx, civil society was constituted exclusively by material relations of production. Human relations through

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<sup>44</sup> Keane, *Despotism and Democracy*, *supra* note\_\_ at 35-36.

<sup>45</sup> *Id.*

<sup>46</sup> See J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 44-53 (1975).

<sup>47</sup> See *id.* at 470-512.

<sup>48</sup> See Bobbio, *Democracy and Dictatorship*, *supra* note\_\_ at 23.

churches, voluntary associations, and social movements--considered the core of today's civil society--were insignificant in the historical materialist account of the transition from capitalism to communism and life in the communist utopia. Choral societies, gymnastic clubs, chambers of lawyers and doctors, clubs for the abolition of luxury clothing, and other such associations that existed in the Germany of Marx's day were irrelevant.<sup>49</sup> Like the state, associational life and culture were treated as products of their materialist substructure.<sup>50</sup> Moreover, for Marx, civil society in the here-and-now was not part of the good life. In capitalism, materialist relations of production were inherently oppressive, and it was only after revolution and the economy's transformation into a place where individuals could freely choose and combine pursuits--farmer, inventor, tradesman, and intellectual--that civil society would serve as an arena for self-expression and cooperative relations with one's fellow human beings.<sup>51</sup>

The account of civil society by Marxist theorist Antonio Gramsci--still influential in contemporary European intellectual circles--was more variegated than Marx's.<sup>52</sup> Gramsci posited that the civil sphere was distinct from the economic sphere and that this separation gave civil society a significant degree of autonomy from the relations of production in the economic sphere. Civil society encompassed a wide array of values, ideologies, beliefs and voluntary associations, not just those of the dominant economic class. Hence, even though the beliefs and ideologies of the bourgeoisie might be hegemonic, they were subject to challenge from other cultural forces. In stark contrast to the theories of Marx, this contention was vital to the fall of capitalism and the disappearance of the state.

Alexis de Tocqueville, influential in American political thought, attributed far more importance than Marxist theorists to associations outside the market. Tocqueville observed voluntary associations of all stripes in nineteenth-century American communities. These, he claimed in *Democracy in America*, were essential to the success of national and state government: they were the "great free schools to which all citizens come to be taught the general theory of association."<sup>53</sup>

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<sup>49</sup> See generally Klaus Tenfelde, *Civil Society and the Middle Classes in Nineteenth-Century Germany*, in *CIVIL SOCIETY BEFORE DEMOCRACY: LESSONS FROM NINETEENTH-CENTURY EUROPE* 83, 91 (Nancy Bermeo & Philip Nord eds., 2000).

<sup>50</sup> See Noberto Bobbio, *Gramsci and the Concept of Civil Society*, in *CIVIL SOCIETY AND THE STATE: NEW EUROPEAN PERSPECTIVES* 73, 82 (John Keane ed., 1988).

<sup>51</sup> See Karl Marx, *The German Ideology: Part I*, in *THE MARX-ENGELS READER* 146, 197 (Robert C. Tucker ed., 2d ed. 1978).

<sup>52</sup> See Bobbio, *Gramsci and the Concept of Civil Society*, *supra* note \_\_ at 88-96; Kai Nielsen, *Reconceptualizing Civil Society for Now: Some Somewhat Gramscian Turnings*, in *TOWARD A GLOBAL CIVIL SOCIETY* 41, 43 (Michael Walzer ed. 1995).

<sup>53</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 522 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1850).

## **The Political Theory of Civil Society**

Over the past fifteen years or so, the concept of civil society has experienced a revival.<sup>54</sup> It has surfaced in the analysis of government and public life in virtually all parts of the world: Eastern Europe, Latin America, Africa, Asia, Western democracies, and international regimes. Most scholars in the social sciences and political philosophy who analyze this phenomenon argue that associations outside the state are key to individual freedom and good government. Without civil society, they argue, individuals are incapable of fulfilling their essential capacities, and life with their fellow human-beings--society--is impossible or unsatisfactory. Scholars are divided, however, on what they consider to be "liberty" and the contribution of civil society and government to its pursuit. Their assessment of these fundamental questions leads to different definitions of civil society and different prescriptions for the public policy of civil society. This section reviews the four types of claims for how associational life outside the state contributes to liberal democracy, claims that can be loosely identified with four different theories of government: liberal, republican, communitarian, and cosmopolitan.<sup>55</sup> The purpose is three-fold: to bring to light the reasons for giving civil society pride of place in good, global governance, to draw out the policy implications of the theories, and to expose the shortcomings of the existing theories in addressing today's question of the appropriate role for civil society *in* global governance.

### *Liberal Theory*

The liberal strand of civil society thinking is inspired by the transition over the past three decades from dictatorship to democracy. This is what Samuel Huntington famously called the "Third Wave" of democratization in countries around the world: Spain and Portugal in the 1970s; Argentina, Brazil, and Uruguay as well as countries in Africa and Asia in the 1980s; the countries of Eastern Europe and the former Soviet Union in the 1990s. Much empirical analysis of new democracies makes the case that associational life outside the state was critical in enabling democracy to take hold. In these accounts of democratization, the collapse of dictatorship was preceded by a rise in the number of voluntary associations, churches, social movements, and other forms of organized social life, all subsumed under the category of "civil society." For

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<sup>54</sup> See MICHAEL EDWARDS, *CIVIL SOCIETY 2* (2004); OMAR G. ENCARNACION, *THE MYTH OF CIVIL SOCIETY: SOCIAL CAPITAL AND DEMOCRATIC CONSOLIDATION IN SPAIN AND BRAZIL* 18-20 (2003); John Keane, *CIVIL SOCIETY: OLD IMAGES, NEW VISIONS* 4 (1998).

<sup>55</sup> When examining the liberal strand in civil society theory, I draw upon scholarship from around the world. Otherwise, however, I rely heavily on empirical and normative theories developed by American scholars. Since this paper is aimed at the global sphere, scholarly literature from democracies other than the United States would also be highly relevant, but it does not appear that the vicissitudes of associational life have undergone the same empirical scrutiny or have inspired the same theorizing in European countries and other long-standing democracies.

instance, scholars of Polish politics link the fall of the Communist government in 1989 to the proliferation of underground dissident groups, the rise of the trade union movement "Solidarity," and the growing independence of the Catholic Church in the 1970s and 1980s.<sup>56</sup>

The liberal justification for civil society rests on a vision of politics in which the ability to choose freely one's life projects is critical to liberty and in which the possibility of conflict among different life projects is healthy, not cause for concern.<sup>57</sup> The fact that my desire to develop my capacities and use my resources can conflict with those very same desires in my neighbor does not pose an intractable problem for peaceful, public life or for the basic liberty of others to pursue their self-chosen ends. In the liberal theory of politics, organizations and groups independent of the state constitute arenas in which different interests, identities, and aspirations can flourish. A pluralistic civil society is an end in and of itself because the many associations of civil society enable individuals to pursue their self-chosen life projects; pluralism is necessary to liberty. Civil society also serves the consequentialist purpose of checking state power and thereby contributing to democracy. Private organizations constitute centers of power that compete with the state and can thus curb the excesses of electoral and bureaucratic politics. Furthermore, through associations, citizens can examine government policy critically and mobilize for and against the hundreds of choices made every day by elected and appointed public officials.

The importance liberal thinkers attach to pluralism and the different visions of the good life leads them to adopt a highly inclusive definition of civil society. As long as the organization is not part of the coercive apparatus of the state, it is civil society. All purposes and all modes through which individuals combine to further those purposes fit within the definition. Market-based organizations--corporations, labor unions, employer associations, and industry lobbies--as well as families, neighborhood watches, veterans associations, and environmental groups, all count as civil society.<sup>58</sup>

The liberal model generates a number of prescriptions for the public policy of civil society. Foremost among these, the state must guarantee the fundamental rights of free speech and free association.<sup>59</sup> Without these rights, individuals cannot pursue their diverse aims with other, like-minded

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<sup>56</sup> See, e.g., GREGOR EKIERT & JAN KUBIC, *REBELLIOUS CIVIL SOCIETY: POPULAR PROTEST AND DEMOCRATIC CONSOLIDATION IN POLAND, 1989-93*, at 44 (1999).

<sup>57</sup> See Michael Walzer, *The Idea of Civil Society: A Path to Social Reconstruction*, in *COMMUNITY WORKS* 123, 132 (E.J. Dionne ed., 1998); Michael Walzer, *The Concept of Civil Society*, in *TOWARD A GLOBAL CIVIL SOCIETY* 7, 18, 25 (Michael Walzer ed. 1995); Terry Nardin, *Private and Public Roles in Civil Society*, in *TOWARD A GLOBAL CIVIL SOCIETY* 29, 30, 33 (Michael Walzer ed., 1995) (identifying "liberal" and "communitarian" strands in Walzer's exposition of civil society and putting forward a pure liberal argument).

<sup>58</sup> Walzer, *The Concept of Civil Society*, *supra* note \_\_ at 19.

<sup>59</sup> See, e.g., Mark Tushnet, *The Constitution of Civil Society*, 75 *CHI.-KENT L. REV.* 379, 398-99 (2000) (analyzing importance of First Amendment rights of speech and association for civil society).

individuals. And civil society is not free to oppose and check state authority. Some thinkers in the liberal tradition go further. Michael Walzer, for instance, praises the associational life of civil society as "the actual ground where versions of the good are worked out and tested . . . and proved to be partial, incomplete, ultimately unsatisfying."<sup>60</sup> But he also cautions that "civil society, left to itself, generates radically unequal power relationships, which only state power can challenge."<sup>61</sup> Thus, unlike others in this tradition, Walzer is concerned that the exercise of liberty by some might diminish that of others; he believes that the state can mediate among conflicting liberty claims without degenerating into authoritarianism. Hence, Walzer adds redistributive public policy recommendations to the basic package of liberal rights: measures to enable those voluntary associations disadvantaged by the inequitable distribution of resources in contemporary societies--working families, consumer cooperatives, labor unions, organizations of ethnic minorities--to further their ends and participate in democratic life.<sup>62</sup>

### *Republican Theory*

The republican justification for civil society is tied to the experience with associational life in old, western democracies. In contrast to the studies of new democracies, those of old democracies, mostly notably Robert Putnam's magisterial review of American associational life in *Bowling Alone*, have shown that membership in voluntary organizations is on the decline.<sup>63</sup> In *Bowling Alone*, Putnam demonstrates that, since the 1960s, membership in all types of organizations has dwindled; both organizations directly engaged in civic life, such as the League of Women's Voters, and those with purposes that have little apparent connection to civic life, such as local singing clubs, have been shrinking.

This phenomenon is troubling to Putnam and others because, in their view, joining and participating in voluntary organizations trains men and women for citizenship. In contrast to the liberal vision of democracy, the republican model perceives a tension between the fulfillment of self-chosen aims and the peaceful and prosperous ordering of public affairs. The pursuit of self-interest and particularistic identities can precipitate the breakdown of community—through civil war or, less dramatically, through ineffective government, unable to provide basic public goods such as clean water and healthcare. This in turn compromises liberty. In the republican vision, for society to be possible and for government to work, individuals must learn certain skills and virtues of citizenship—skills and virtues that redefine the concept of

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<sup>60</sup> Walzer, *The Concept of Civil Society*, *supra* note \_\_\_ at 17.

<sup>61</sup> *Id.* at 23.

<sup>62</sup> *Id.* at 23.

<sup>63</sup> ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). For a critical examination of Putnam's findings see RICHARD POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* 311 n. 63 (2001).

individual liberty. And, according to Putnam and others, the voluntary associations of civil society is where this learning occurs. Putnam articulates this understanding of the relationship between liberty and good government as social capital: in the small-scale setting of the bowling league or the local union organization, individuals learn the habits of cooperation, reciprocity, and trust that are necessary for all collective endeavors, including good government. These habits, critical for organizing soccer games and neighborhood watches, are likewise critical for voting for national representatives and engaging in public debate with fellow citizens on the pressing matters of the day.<sup>64</sup>

Modern day civil society enthusiasts might be surprised to hear that they fit within a republican tradition that can be traced back to the classical Greek and Roman republics, the civic humanists of the Italian Renaissance, and Rousseau.<sup>65</sup> The analytical concept of social capital, based upon contemporary game theory and the strategies necessary for overcoming the collective action dilemma identified by game theory, appear a long way off from the republican virtue of active citizenship. Perhaps even more puzzling than this identification of republican virtue with social capital is the well-known republican suspicion of intermediate groups: in the republican tradition such associations command the loyalties of citizens at the expense of their loyalties to the association of the whole, namely the state. Nevertheless, the new idea of civil society as the incubator of the cooperation skills necessary for democracy shares basic, common premises with the old concept of republican democracy. In both, the individual pursuit of particularized interests creates difficulties for government. The answer for both is the creation of a common reservoir of values and aspirations, albeit through slightly different means: experience in the voluntary associations of civil society in the social capital school of thought, and education in civic and moral virtues in the republican one.

Republican theory is more selective than liberal theory in defining the ambit of civil society. Two types of associations are generally excluded because their aims and internal structure are such that they cannot serve as incubators of cooperation skills. The first are market actors: corporations, partnerships, other profit-seeking entities, and the small, specialized pressure groups that represent their interests in public life.<sup>66</sup> Maximizing profits in capitalist markets and influencing politics to the material advantage of corporations do not require reciprocity and cooperation and hence do not lead to the creation of social capital. In collective behavior oriented towards markets, the material rewards of success are immediate enough that the participants need not develop the norms

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<sup>64</sup> See *id.* at 18-24; ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993).

<sup>65</sup> See DAVID HELD, MODELS OF DEMOCRACY 36 (2d ed. 1996); NOBERTO BOBBIO & MAURIZIO VIROLI, THE IDEA OF THE REPUBLIC 8-14 (Allan Cameron trans. 2003).

<sup>66</sup> See PUTNAM, BOWLING ALONE, *supra* note\_\_ at 91-92 (describing features of employment relationship that undermine social capital).

necessary to achieve success in other spheres. Furthermore, the rigidly hierarchical internal structure of most large economic entities enables them to pursue goals without developing social capital among their employees. Hierarchy exists because those at the top have numerous material incentives to induce compliance from those at the bottom. In other words, hierarchical organizations can rely on the concentration of material resources among their governing members--the power to hire and fire, set salaries, and decide on office space--to induce others to further the organization's aims. Therefore, these organizations can survive without the social capital that is vital to other associations.

The second type of association that republican theorists exclude from the ambit of civil society is the specialized organization that focuses on political advocacy and that has neither a rank-and-file membership nor the capacity to mobilize large numbers of individuals when necessary.<sup>67</sup> Like firms, the internal dynamics of small pressure groups--whether they fall into the private or public-interest categories--are not conducive to building social capital and nurturing good citizens. That is because the professionals who staff the national offices of organizations such as the Center for Science in the Public Interest (a foundation-funded, pro-consumer group) or Citizens for a Sound Economy (a corporate-funded, anti-big government group) have very little daily connection to the individuals and the interests they represent. Citizens might agree with their political aims and even donate money to their causes, but it is unlikely that their sympathy for such causes will spur them to other forms of civic action.

The republican justification for civil society, like the liberal one, gives rise to a number of public policy recommendations. Many of them are directed at individual citizens, rather than at government policymakers, on the theory that social capital must be rebuilt from below. Citizens must make the personal choice to join and participate in community life and voluntary associations.<sup>68</sup> Some of the recommendations, however, are directed at statesmen too. In *Better Together*, the policy-oriented book that followed on the heels of the empirical case in *Bowling Alone*, Putnam makes a number of pro-civil society suggestions:<sup>69</sup> The tax code, through deductions and other incentives for donations to voluntary organizations, can promote civil society. Smart urban planning can enable individuals to spend less time commuting and more time participating in associations. Employment and labor laws that would allow working parents to demand flexible work schedules can help citizens spend more time with their children and become involved in community initiatives. Public investment in

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<sup>67</sup> PUTNAM, *BOWLING ALONE*, *supra* note\_\_ at 52 (discussing low social capital value of lobbying groups ranging from the American Association of Retired Persons, the American Automotive Association, the National Wildlife Federation, and the National Rifle Association).

<sup>68</sup> See *Saguaro Seminar: Civic Engagement in America, 150 Things You Can Do To Build Social Capital*, available at <http://www.bettertogether.org>.

<sup>69</sup> See ROBERT PUTNAM, *BETTER TOGETHER* 271-79 (2003).

education creates one of the important pre-conditions for participating in associational life and developing social capital. Local government institutions and procedures that give grassroots associations a say in public decisionmaking can create incentives for such associations to form in the first place. Reflecting on a civil society experience in Portland, Oregon, Putnam says: "By opening up to local organizations and giving them responsibility, government created an incentive for local organization. On the other hand, the fact that activists pressured the city government to give them a voice was integral to that development."<sup>70</sup> Most simply, government can promote civil society by giving citizen associations legal powers and tax dollars that ordinarily would be used and spent by public officials. For example, Putnam cites these pro-civil society government policies: the decision of the City of Boston to delegate the power of eminent domain to allow a local neighbor association to purchase and develop land in central Boston; state and federal funding for a tutoring program in Philadelphia sponsored and run by a local volunteer group; state funding for a jobs program and a sewer system that were the object of a grassroots faith-based campaign in Texas.

Harvard sociologist Theda Skocpol has developed an important critique of Putnam's thesis and has put forward her own--still fundamentally republican--model of civil society.<sup>71</sup> Skocpol argues, contra Putnam, that what is troublesome about the history of twentieth-century American civic life is not the decline in the absolute number of associations and members. Rather, what is disturbing is the decline in a certain type of association: nationwide organizations with local chapters that mobilize citizens from many different walks of life in the pursuit of common goals, such as the Order of the Sons of Temperance, the Young Men's Christian Association, and the National Congress of Mothers (PTA).<sup>72</sup>

The decline in large membership associations is troubling to Skocpol because, for national government to work, citizens must develop solidarities and institutional structures that enable them to press for common causes with their counterparts across the nation. As in the standard republican account, Skocpol believes that civil society can overcome the tension between the pursuit of self-chosen aims and public life. However, Skocpol argues that in a political system that is national in scope, civil society must also be national, for otherwise elites will be able to act without any contribution from the broad mass of citizens scattered throughout the nation. Associations provide the necessary connective tissue for nationwide citizenship. Without truly national citizenship, elites will inevitably make public decisions to further their own ends and not those of ordinary people. According to Skocpol, this critique goes for associational elites

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<sup>70</sup> See PUTNAM, *BETTER TOGETHER*, *supra* note\_\_ at 273.

<sup>71</sup> See THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* (2003).

<sup>72</sup> See *id.* at 26-27.

as much as for economic and government ones: professionalized citizen advocacy groups--and the post-material values of the upper-middle class individuals who staff and fund those groups--have drowned out the distributional concerns of the working class.<sup>73</sup>

Skocpol's understanding of the contribution associations make to national democracy leads to a somewhat different definition of civil society from that employed by social capital theorists. Like them, she excludes profit-making entities and their associations as well as small, professionalized pressure groups without a membership base. But she also excludes purely local groups that have no ambition to engage in public debate or to take part in civic life beyond the neighborhood or town.<sup>74</sup>

As for the prescriptive part of Skocpol's analysis, she makes a number of recommendations "designed to *get broadly organized groups of people into politics*."<sup>75</sup> In marked contrast with Putnam's approach, her proposals are designed to foster associations that pursue a particular type of aim--political--and that do so by mobilizing and involving citizens on a nation-wide basis. This, Skocpol argues, might be accomplished by repealing laws currently on the books that prohibit associations from donating to political campaigns and that discourage associations from fostering political debate and engaging in partisan politics.<sup>76</sup> Skocpol also recommends procedures that give associations with broad memberships a special place in Congressional deliberations; this type of access would create incentives for such associations to form in the first place.<sup>77</sup>

### *Communitarian Theory*

Communitarian theories of civil society, like republican ones, have become salient in contemporary debates because of the impoverished state of associational life in modern-day America.<sup>78</sup> For communitarians, a good society depends on good individuals, who, in turn, are constituted by the social and political community to which they belong. The distinction between collective prosperity and individual liberty is far less pronounced than in the other strands of thought. Communitarian thinkers care about the types of life projects that

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<sup>73</sup> See *id.* at 240.

<sup>74</sup> See *id.* at 12-13, 227.

<sup>75</sup> See *id.* at 283.

<sup>76</sup> Skocpol also puts forward a series of bottom-up proposals, aimed at citizens and activists. Chief among them is to mobilize locally and develop a solid, nationwide following, while at the same time lobbying at the federal level, in Washington, D.C. See *id.* at 266-76.

<sup>77</sup> See *id.* at 289.

<sup>78</sup> See, e.g., COUNCIL ON CIVIL SOCIETY, *A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998); Jean Bethke Elshtain, *Will the Real Civil Society Advocates Please Stand Up?*, 75 *CHICKENT L. REVIEW* 583 (2000); JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* (1995); WILLIAM GALSTON, *LIBERAL PURPOSES* (1991); Michael S. Joyce & William A. Schambra, *A New Civic Life*, in PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 11, 27-29 (Michael Novak ed., 2d ed. 1996) (expounding a conservative communitarian view).

individuals pursue with others in civil society because those life projects constitute the moral foundation of the liberal political order. As leading communitarian theorist Amitai Etzioni puts it:

[A] well-functioning society, let alone a good one, requires a core of substantive (rather than merely procedural) shared values, which in part define not only public but also private proper behavior. These values are transmitted from generation to generation by the family, schools, and the community (including its places of worship and civic associations). Moral dialogues then recast values bequeathed by earlier generations.<sup>79</sup>

Because of this theory of individual liberty and political community, the decline of associational life in contemporary American is an especially urgent problem for communitarians. The personal and collective good lives are inextricably intertwined, and both are inconceivable without a civil society that nurtures and imparts certain core values.

Given this view, civil society in communitarian thinking is mainly local--family, neighborhood, and town--for only in those settings are relations with others so thick and frequent that personhood is shaped by community. The public policy recommendations made by communitarians are designed to foster this form of local associationalism. Some communitarian reformers argue that the tax dollars and legal powers of the state should go directly to local charities, churches, and communities. Concretely, this might take the form of tax deductions for donations to charities and federal grants to churches and local philanthropic associations that provide social services.

As Skocpol notes, the communitarian and social capital schools of thought share a certain affinity.<sup>80</sup> Both communitarians and social capitalists argue that good government is predicated upon the thick, civil society relations that are found most often at the local level; therefore both gravitate to many of the same prescriptions for individual action and government reform. Nonetheless, a critical difference separates the two. Communitarians identify a specific list of values that the associations of civil society are to promote--values such as devotion to one's children and parents, giving to the less fortunate, and belief in God. By contrast, republicans avoid privileging one set of ends over another, except for the fundamental civic virtues of cooperation and trust.<sup>81</sup>

### *Cosmopolitan Theory*

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<sup>79</sup> See Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355 (2000).

<sup>80</sup> See SKOCPOL, DIMINISHED DEMOCRACY, *supra* note\_\_ at 9.

<sup>81</sup> See Etzioni, *Law in Civil Society*, *supra* note\_\_ at 366, 367, 375, 376.

Cosmopolitan theorists--analysts of political systems that extend beyond the nation-state--make yet a fourth set of arguments on the interrelated issues of the democratizing effects of civil society, the organizations that count as civil society, and the policy measures that should be adopted in favor of civil society. Just as liberal theorists are impressed by the resurgence of civil society in the Third Wave of democratization, and republican and communitarian theorists are troubled by the decline of civic life in the United States, cosmopolitan theorists are stirred by the rise of associations and social movements that span the globe. Associations and informal networks that mobilize individuals across national borders, focus on global issues, and target multiple countries and multilateral regimes in order to achieve their goals, are spreading.<sup>82</sup> This phenomenon includes long-standing organizations, such as Amnesty International and the World Wildlife Fund, as well as more spontaneous social movements, such as the anti-globalization networks responsible for the protests at the WTO ministerial in Seattle. Cosmopolitan theorists hope that the new, world-wide mobilization from below will serve as the catalyst for the democratization of global regimes.

The case for global civil society has not been made with the same analytic precision as the arguments for civil society at the domestic level. Nevertheless, many of the same themes can be discerned. The liberal vision of associations as vehicles for the pursuit of individual life projects and as checks on state power is implicit in much of the writing on global civil society.<sup>83</sup> The literature on international aid relies heavily on social capital and communitarian theories: today the common wisdom is that aid should be given to local associations, not only to governments. Why? Because by giving such associations responsibility for implementing development projects and providing social services, international aid will build citizenship skills, improve the capacity for self-government, and strengthen communities.<sup>84</sup>

Notwithstanding some overlap with the literature on national democracy, the literature on global governance also reflects a distinct theory of civil society. Thinkers like Daniele Archibugi, Richard Falk, David Held, Mary Kaldor, and John Keane argue that a global society is necessary to curb the forces of global capital.<sup>85</sup> According to this line of analysis, severe hardship has resulted from

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<sup>82</sup> See RICHARD FALK, *ON HUMANE GOVERNANCE* 106, 199, 253 (1995); JOHN KEANE, *GLOBAL CIVIL SOCIETY* 8-20 (2003); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 10-11 (1998).

<sup>83</sup> See JOHN KEANE, *GLOBAL CIVIL SOCIETY*, *supra* note\_\_ at 169, 202.

<sup>84</sup> See World Bank, *2003 Annual Report*, 13, 18, 71; UN Development Programme, *Partners in Human Development: UNDP and Civil Society Organizations*, 17, 22, 23, available at <http://www.undp.org/cso>; UN Development Programme, *Partners in Human Development: UNDP and Civil Society Organizations, A Policy of Engagement*, available at <http://www.undp.org/cso/policies.html> ("Possible entry points for UNDP-CSO collaboration").

<sup>85</sup> See Daniele Archibugi, *Principles of Cosmopolitan Democracy*, in *RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY* 198, 222 (Daniele Archibugi, David Held, & Martin Köhler, eds., 1998); COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBOURHOOD*:

globalization. The heads of state and international bureaucrats in control of international regimes have failed to respond to globalization's injustices; these elites cannot ensure that the forces of global capital are harnessed to the advantage of ordinary people. Thus, in the cosmopolitan line of reasoning, global civil society must seize control of international organizations. To this end, it is critical that citizens of one country come to identify with citizens of other countries based on their shared human experiences. Transnational groups based on common circumstances of poverty, environmental depredation, and other injustices should interact with other transnational groups to influence global decisionmakers. For cosmopolitans, global civil society is the key to creating a truly democratic international order; only when world citizens organize and identify with other world citizens can they can assert control over global capitalism and illegal state action.

Transnational social forces provide the only vehicle for the promotion of the law of humanity, a normative focus that is animated by humane sustainable development for all peoples, North and South, and seeks to structure such commitments by way of human geo-governance . . . . To suggest the political dynamics associated with these conceptions, I propose the terminology of 'globalization-from-below' to identify these *transnational democratic forces, and their implicit dedication to the creation of a global civil society* that is an alternative scenario of the future to that of the global political economy being shaped by transnational market forces. The hopes of humanity depend, in my view, upon the capacities of globalization- from-below to challenge effectively the prevailing dominance of globalization-from-above in a series of key arenas that can be identified in very general terms as the UN (and other international institutions and regimes), the media, the orientation of states.<sup>86</sup>

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THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 56 (Oxford: Oxford University Press, 1995); Richard Falk, *Global Civil Society: Perspectives, Initiatives, Movements*, 26 OXFORD DEVELOPMENT STUDIES 99, 100 (1998); RICHARD FALK, ON HUMAN GOVERNANCE: TOWARDS A NEW GLOBAL POLITICS: THE WORLD ORDER MODELS PROJECT REPORT OF THE GLOBAL CIVILIZATION INITIATIVE, 106 (1995); KEANE, GLOBAL CIVIL SOCIETY, *supra* note\_\_ 2, 173; David Held, *Democracy and Globalization*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 11, 22-23 (Daniele Archibugi, David Held, & Martin Köhler, eds., 1998); Mary Kaldor, *Global Civil Society*, in THE GLOBAL TRANSFORMATIONS READER 559, 560 (David Held & Anthony McGrew, eds., 2000); P. Wapner, *The Normative Promise of Nonstate Actors: A Theoretical Account of Global Civil Society*, in PRINCIPLED WORLD POLITICS: THE CHALLENGE OF NORMATIVE INTERNATIONAL RELATIONS 261, 267 (P. Wapner & L.E. J. Ruiz eds., 2000).

<sup>86</sup> Richard Falk, *The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions*, in COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER, 63, 170-71 (Daniele Archibugi & David Held eds. 1995) (emphasis added).

Cosmopolitans define civil society very differently from liberal, republican, and communitarian thinkers. For cosmopolitans, non-state associations are not, taken by themselves, civil society. The global *people* is global civil society. The citizens of the world, together with their non-state associations, constitute civil society. This definition is markedly different from that employed in domestic political theory. At the domestic level, "civil society" is separate from "the people": "civil society" refers exclusively to organizations outside the state; "the people" refers to long-standing national identities embodied in national constitutions, electoral politics, and the representative institutions of democracy. Further, cosmopolitans depart from their liberal counterparts in excluding large market actors--namely, multinational corporations and organizations representing multinationals--from their definition of civil society. Given that global capital is one of the forces to be curbed by civil society, organizations and individuals that serve the interests of capital cannot be part of civil society.

A cosmopolitan, integrated public sphere in which national borders disappear does not yet exist.<sup>87</sup> To fill this void, thinkers like John Keane, Richard Falk, and Mary Kaldor urge social activists to mobilize transnationally and to fight for a more just, peaceful, and environmentally sound world. This prescription echoes the republican and communitarian calls for citizens to organize from below.

In addition, a number of cosmopolitan theorists have called for a directly elected world parliament that would represent global civil society in international lawmaking. They believe that elections and a legislative assembly would ensure that the voice of civil society is heard by international elites. For instance, Richard Falk and Andrew Strauss advocate a "Global Peoples Assembly."<sup>88</sup> Strikingly, voluntary associations and intermediate organizations are absent from this single institutional reform proposed by cosmopolitans.<sup>89</sup>

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<sup>87</sup> See, e.g., Marie-Josée Massicotte, 'Local' Organizing and 'Global' Struggles: Coalition-Building for Social Justice in the Americas, in *GLOBAL CIVIL SOCIETY AND ITS LIMITS* 105, 105-06 (Gordon Laxer & Sandra Halperin eds., 2003); Lisa Sundstrom, *Limits to Global Civil Society: Gaps Between Western Donors and Russians NGOs*, in *GLOBAL CIVIL SOCIETY AND ITS LIMITS* 146, 146-47 (Gordon Laxer & Sandra Halperin eds., 2003). Steve Charnovitz and I have found that civil society in the transatlantic context also comes up short when this demanding definition is used. See Francesca Bignami & Steve Charnovitz, *Transatlantic Civil Society Dialogues*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 255 (Mark A. Pollack & Gregory C. Shaffer eds., 2001)

<sup>88</sup> See Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 *STAN. J. INT'L L.* 191, 193 (2000).

<sup>89</sup> Richard Falk and Andrew Strauss have suggested that, as a first step towards the Global Peoples Assembly, representatives of civil society organizations should constitute the Assembly but that, shortly thereafter, civil society organizations and their representatives should draw electoral districts, decide on a voting system, and hold elections. See Andrew Strauss, *Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a Peoples Assembly*, in *REFRAMING THE INTERNATIONAL: LAW, CULTURE, POLITICS* 83, 83 (Richard Falk et al. eds., 2002). Expedience, however, is the only justification for giving this task to civil society organizations and it is far from

While Falk and Strauss argue that citizens and their associations should have the right to lobby the Global Peoples Assembly, they do not recommend a direct role for private organizations, nor does the logic of representative democracy suggest such a role.

The ambition expressed in the proposals for a world parliament is admirable but, on closer examination, such proposals reveal a fundamental inconsistency. In instituting a world assembly, cosmopolitan thinkers assume into being precisely that which they lament is lacking from world politics: a global civil society or global people. That is, cosmopolitan thinkers assume the existence of a global people that would mobilize during elections, vote, and then follow and monitor the decisions of their global representatives. Yet it is not obvious that simply instituting elections and a world parliament would lead to the formation of such a global consciousness.<sup>90</sup> The European Parliament is a legislative assembly that operates in what was previously a classic international organization, with powers beyond the wildest dreams of even the most optimistic cosmopolitans. Yet the European public has displayed a stubborn indifference to elections for the European Parliament and the daily activities of their parliamentarians.<sup>91</sup> Cosmopolitans do not have a clear vision of how public policy can promote an integrated, global public sphere. Nor do they squarely address the question of how associations outside the state can contribute--and, through public policy initiatives, can be encouraged to contribute--to the creation of such an integrated public sphere.

The arguments and implications of the theories of civil society are summarized below.

**Table 1: Theories of Civil Society: Justifications, Definitions, and Policy Prescriptions**

	Justification	Definition	Policy prescriptions
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self-evident that, once their representatives had taken their seats in the Global Peoples Assembly, they would be willing to relinquish their seats in favor of elected representations or be able to organize such elections.

<sup>90</sup> Hassan El Menyawi has recently put forward a interesting proposal that combines global representation with the necessary first step of creating a global people that selects representatives and thus is represented. He propose one general assembly for each nation. Each such assembly would be composed of 191 representatives, which would be elected jointly by the electorates of two different nations: the nation where the general assembly is located and one of the other 190 nations in the world. This process, according to El Menyawi, would foster deliberation across national borders and hence would improve democracy in an interdependent world. See Hassan El Menyawi, *Toward Global Democracy: Thoughts in Response to the Rising Tide of Nation-to-Nation Interdependencies*, 11 *IND. J. GLOBAL LEGAL STUD.* 83, 96, 125, 130-31 (2004).

<sup>91</sup> See DAVID JUDGE & DAVID EARNSHAW, *THE EUROPEAN PARLIAMENT* 70-76 (2003).

*Civil Society and International Organizations*

Liberal	Allow individuals to realize diverse life projects and check government power	All associations	Liberal rights
Republican <ul style="list-style-type: none"> <li>• Robert Putnam</li> <li>• Theda Skocpol</li> </ul>	<ul style="list-style-type: none"> <li>• Build social capital among citizens</li> <li>• Encourage mobilization of citizens on a national scale</li> </ul>	<ul style="list-style-type: none"> <li>• All associations except corporations, corporate lobbies, and professionalized pressure groups</li> <li>• Large, nationwide federations engaged in national political debates</li> </ul>	<ul style="list-style-type: none"> <li>• Tax code reform to encourage private donations, urban planning to reduce sprawl, employment regulation to allow workers to spend more time with family and participate in community organizations, public investment in education, opportunities for participation in local government, transfer of public powers and tax dollars to associations</li> <li>• Provide incentives for associations to engage in partisan politics, afford large membership associations a special role in Congressional deliberations</li> </ul>
Communitarian	Mores inculcated by civil society essential to self-identity and good government	Family, churches, local associations	Transfer some responsibility for social services from federal government to local charities and churches
Cosmopolitan	Assert popular control over forces of globalization	Integrated, global public sphere, i.e., "the global people," excluding capital	Global Peoples Assembly

*The Implications of Political Theory for Global Governance*

How can these different visions of civil society be used to transform international organizations? First, the liberal theory of civil society. It is undeniable that, by banding together in associations, citizens pursue their diverse life projects and check the power of the state. Contemporary democracy

is inconceivable without a vibrant public sphere in which citizens and their associations have the right to criticize government actors. This is true as much at the international level as in national political communities. Of course, comparative constitutional law demonstrates that contemporary democracies part ways over where the rights to free expression and association end and the rights to privacy and against discrimination begin. However, it is not necessary to dwell here on any of these thorny debates of constitutional law. It is enough to observe that citizens and their organizations must enjoy a core of speech, association, and other liberal rights if the different sites of global governance are to be democratic.

Liberal theory's policy prescriptions are largely in place in the global realm; they are firmly established in the European Union. The Covenant on Civil and Political Rights, which contains provisions on freedom of opinion and expression, and freedom of assembly and association, has been ratified by over 130 countries. Together with the Universal Declaration of Human Rights, the Covenant serves as a source of law binding upon international organizations when they deal directly with citizens and associations.<sup>92</sup> In the European Union, the Court of Justice has guaranteed freedom of expression and freedom of association since the 1980s; these rights have since been codified in the European Charter of Fundamental Rights.<sup>93</sup>

One of the prerequisites of the liberal right to oppose global policies--transparency--is also, gradually, becoming standard practice in global regimes.<sup>94</sup> Transparency is the right of citizens to know what government has decided. Or, from the government perspective, it is the duty to broadcast, in a timely fashion, public decisions in language accessible to the ordinary citizen so that citizens and their associations can debate, criticize, and hold public officials to account. Among the international organizations canvassed earlier, the European Union has made the most far-reaching transparency innovations: it has adopted a system of access to government documents that is as comprehensive as any national system. The WTO and the World Bank have also made significant transparency improvements. And additional changes are in order. For instance, the Catholic development organization CIDSE-Caritas Internationalis

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<sup>92</sup> Universal Declaration of Human Rights 71, arts. 19 & 20, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, arts. 19 & 21, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976); see IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 575, 576 (5<sup>th</sup> ed. 1998).

<sup>93</sup> Case 100/88, *Oyowe and Traore v. Commission*, 1989 E.C.R. 4285 (freedom of expression); Case C-274/99P, *Connolly v. Commission*, 2001 E.C.R. I-1611 (freedom of expression); Case C-415/93, *Union Royal Belge des Sociétés de Football v. Bosman*, 1995 E.C.R. I-4921, para. 79 (freedom of association); European Charter of Fundamental Rights, art. 11 (freedom of expression) & art. 12 (freedom of assembly).

<sup>94</sup> See *supra* text accompanying nn. (describing transparency measures in World Bank and WTO); Bignami, *Creating European Rights*, *supra* note \_\_ (describing transparency in the EU).

recommends that the World Bank and the International Monetary Fund make the transcripts and minutes of board meetings available to the public.<sup>95</sup>

Even though this liberal tradition is widely accepted, there are substantial incentives at the international level for statesmen to ignore their constitutional duties. Transparency, speech, and contestation are not in the short-term interests of decisionmakers. The deals reached in international negotiations might not survive vigorous public scrutiny; rights to speech and association are risky, and when given the choice, politicians and bureaucrats would prefer to do without them. In sum, while the liberal rights necessary for a vibrant civil society might figure prominently in the rhetoric and written law of the international realm, the realities of international organizations suggest that such rights are fragile and that vigorous advocacy is necessary for them to take hold.

Now consider the republican and communitarian models. Although their understanding of how civil society contributes to good government differs, their practical policy recommendations converge. They would promote civil society by allowing citizen groups more opportunities for participating in policymaking and transferring certain public powers to such groups. Somewhat less vigorously, they recommend indirectly subsidizing private associations through tax code reform.

Republican and communitarian theories also agree on which non-state associations should *not* benefit from such measures: corporate actors and professionalized pressure groups without significant memberships. In other words, pro-civil society policies should *not* extend to corporations, corporate lobbies, and public interest advocacy groups without a membership base. Thus, based strictly on the logic of civil society theory, the indiscriminate civil society reforms of the last decade are misguided. WTO ministerials and dispute settlement proceedings should *not* be open to all associations because some of those associations—corporations and small pressure groups—do not deserve such advantages. Likewise for European Commission consultations.

While this indifference to profit-driven actors is not particularly surprising, the absence of any analytical or empirical basis for institutional reform targeted at small groups of social activists is striking. This is because those who advocate most stridently opening international doors to civil society are small, public interest NGOs. Yet liberal democracy theory would shut them out because they fall into the pressure group camp, not the civil society one. Not to say that activists without a rank-and-file cannot, on other grounds, make claims on global institutions. For instance, some groups can argue that they promote substantive ends that have been unfairly excluded from global politics. Or, they might claim that small networks of activists help build an integrated, global public sphere and that public resources and powers should be allocated to

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<sup>95</sup> CIDSE-Caritas Internationalis, *Time to reform: The International Monetary Fund and World Bank, 60 Years After 5* (Sept. 2004).

such networks to support their initiatives. But it is important to note that the prevailing political theory—including cosmopolitan theory—does not articulate such hypotheses. The moral case for networks and associations of activists focused on promoting their public interest agendas, rather than building broad-based, grassroots constituencies, has not been made.

Where republican and communitarian theories disagree is on *which* non-state associations should benefit from pro-civil society policies: Local or national associations? Service-oriented or politically active associations? While thinkers like Robert Putnam and Amitai Etzioni stress local associations focused on community-building, Theda Skocpol emphasizes large, diverse membership organizations that mobilize to change national public policy. There is some tension between these two views. Incentives in favor of local associations might detract from the efforts of large, nationwide organizations; tax dollars and policymaking influence might be given to one at the expense of the other. But for our purposes, it does not seem that a choice is necessary. The reality of political life in international regimes is so distant from either model--it is closed to associations of all sorts--that it is difficult to imagine that measures promoting one brand of association would be so far-reaching as to disadvantage the other brand. Associations in all their possible permutations would appear to contribute, in distinctive ways, to democratizing international regimes.

International organizations like the World Bank have already begun to build on the insights of the social capital and communitarian schools. Most of the World Bank reforms examined earlier are targeted at local NGOs. Funding local associations, giving them a voice in loan decisions, and allowing them to criticize project implementation render such associations important players in the Bank's public sphere. By encouraging the formation local civil society, these World Bank policies not only contribute to democratization of domestic polities, but also to the democratization of the international aid regime.

The European Union has also taken up the issue of local civil society. The European Commission has encouraged Member States to do more to promote local voluntary associations.<sup>96</sup> Moreover, some of the European Union's funding for social programs is distributed through local NGOs.<sup>97</sup>

International organizations could do more in favor of local civil society. Many critics complain that the World Bank has been too passive in the face of recipient government resistance to civil society; they also claim that the Bank's own decisionmaking processes have failed to live up to the high standards for civil society participation set for developing countries.<sup>98</sup> Furthermore, as the reader will have remarked, the WTO has been absent from this discussion. Even though most trade issues have significant consequences for local communities,

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<sup>96</sup> See Stijn Smismans, *European Civil Society: Shaped by Discourses and Institutional Interests* 9 EUR. L.J. 473, 478.

<sup>97</sup> See *id.* at 475.

<sup>98</sup> See Naidoo, *supra* note \_\_ 180-82.

not much has been done to use this as an opportunity to involve local associations and thus foster grass-roots democracy. One possible innovation would be WTO funding for local civil society in developing countries, similar to the World Bank's Small Grants Program. This would enable local groups to consider and to influence the trade issues being decided by the WTO. Notwithstanding all the possibilities for innovation, the institutions of global governance are headed in the right direction; the social capital and communitarian ideas of civil society should serve as an impetus for further institutional reform.

And what of Skocpol's republicanism? While Skocpol limits her analysis to the United States, it can be extended by analogy beyond the nation-state. In the global sphere, nationwide membership organizations translate into transnational associations, organizations with numerous members spread across different countries. For some of the very same reasons that nationwide membership organizations are important to American democracy, we might expect that transnational associations will be important to democracy in global polities. Skocpol focuses on a historical phenomenon—the development of a national economy and polity in the United States—that bears some resemblance to today's accumulation of economic and political power in new sites of global governance. She chronicles the simultaneous rise of a national government and national voluntary associations in nineteenth and early twentieth-century America. And she notes the vital role of such associations in enabling ordinary citizens to participate in democratic politics:

Directly, therefore, as well as in a number of indirect ways, America's traditional voluntary membership federations fostered active citizenship and made a difference in politics and governance. Federations were especially vital in building an American democracy in which ordinary people could participate, gain skills, and forge recurrent ties to one another--not just locally but also across communities, states, and regions of a vast and expanding nation. . . . Over the long run of U.S. history, voluntary membership federations have both complemented and rivaled political parties in setting the course of politics and government. By coordinating and inspiring so many people across the myriad districts that elect representatives to U.S., state, and national legislatures, voluntary federations have been able to exert democratic leverage. Federations combine state and national reach with local presence, the best way to influence U.S. elected officials.<sup>99</sup>

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<sup>99</sup> SKOCPOL, DIMINISHED DEMOCRACY, *supra* note\_\_ at 124.

This explanation of the importance of nationwide federations is instructive for cosmopolitan reformers in the global sphere. As mentioned earlier, cosmopolitan thinkers have not developed a specific theory of how non-state associations might democratize global politics. They focus more broadly on the global people. Cosmopolitans oppose the concentration of economic and political power in the hands of the elites running multinational corporations and international economic organizations. But cosmopolitans also recognize that the global people cannot exercise their democratic will because citizens are still separated by national borders. The voluminous literature on the democratic deficit in the European Union repeats this complaint. Without a Europe-wide political consciousness, citizens will not engage on the everyday questions settled in Brussels and Europe cannot be truly democratic. One remedy to the cosmopolitan and European dilemma, suggested by Skocpol's analysis, is the formation of large membership organizations that span entire regions or, indeed, the globe. Far-flung organizations that routinely bring together their national members might enable citizens and activists to mobilize across state lines, just as nationwide organizations with local chapters did in early twentieth century America. Transnational associations might be one means of overcoming the tension between central political and economic power and local democracy.

Among the international organizations surveyed at the beginning of this Article, only the European Union encourages transnational associations. The European Commission reserves seats on various advisory committees for representatives of transnational associations, not national or local organizations.<sup>100</sup> An international organization not considered specifically here--the United Nations--also has a long-established practice of privileging transnational associations. Before associations may participate in UN activities, they must satisfy certain size and breadth criteria. Only large, international NGOs whose policy agendas cover multiple issues qualify for general consultative status before the UN's Economic and Social Council.<sup>101</sup> This special status entitles NGOs to receive provisional agendas, place items on the agenda, sit as observers at public meetings, submit brief written statements, consult with members of the Secretariat, and request to make oral presentations at public meetings.

Building on this precedent, other international organizations could privilege transnational associations in their policymaking activities, with a view to encouraging their formation and their corresponding transnational solidarities. Not in policymaking with mainly local effects, such as the

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<sup>100</sup> See STIJN SMISMANS, LAW, LEGITIMACY AND EUROPEAN GOVERNANCE: FUNCTIONAL PARTICIPATION IN SOCIAL REGULATION (2004).

<sup>101</sup> See UNITED NATIONS NON-GOVERNMENTAL LIAISON SERVICE (NGLS), THE NGLS HANDBOOK OF UN AGENCIES, PROGRAMMES, AND FUNDS WORKING FOR ECONOMIC AND SOCIAL DEVELOPMENT 6-7 (2d ed. 1997); Peter Willetts, *The Rules of the Game: The United Nations and Civil Society*, in WHOSE WORLD IS IT ANYWAYS 247-82 (John W. Foster, Anita Anand, Jing de la Rosa eds. 1999).

management of World Bank project loans. Rather, transnational associations might be called upon to advise on policies of concern to multiple countries or regions. Furthermore, some of the same initiatives undertaken to promote local civil society could be targeted as well at transnational civil society. Direct funding of associations could go to organizations that meet certain threshold requirements of membership numbers and geographic distribution. Moreover, heeding Skocpol's call to politics, such funding could go not only to associations devoted to economic development or social welfare, but also to those engaged in partisan, political activities.

In making these reforms, policymakers should not lose sight of the local. It is important to remember Michael Sandel's admonition that in a globalizing world, local community will and must continue to shape self-identities, inculcate moral virtues and foster social learning:

It is difficult to imagine a [cosmopolitan] world in which persons were so virtuous that they had no friends, only a universal disposition to friendliness. The problem is not simply that such a world would be difficult to bring about but that it would be difficult to recognize as a human world. The love of humanity is a noble sentiment, but most of the time we live our lives by smaller solidarities. This may reflect certain limits to the bounds of moral sympathy. More important, it reflects the fact that we learn to love humanity not in general but through its particular expressions.<sup>102</sup>

But even though a global neighborhood lacks the intimacy of the local, the current historical circumstances of globalization and the vital role of cosmopolitan solidarities in democratizing international regimes cannot be ignored.

Before turning to some of the questions left unanswered by political theory, it is worthwhile pointing out the peculiarities of applying, to the global arena, ideas developed in the context of national political orders. In one, limited respect, it is easier to apply liberal ideas to current global political arrangements than to domestic politics. The approach in this Article is eclectic. It draws freely from what I have called the liberal, republican, and communitarian strands in civil society thought. A critic might very well object that it is necessary to take sides. What if the classic liberal freedom of expression is used to attack the substantive values underlying communitarian associations? Or if the transfer of tax revenues and public powers to local associations is so extensive as to undermine the broader republican solidarities necessary for citizens to act nationally? These are hard questions but they are so unlikely to arise in the near

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<sup>102</sup> MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

future of the--undemocratic--global realm, that we do not need to address them right now. Liberals and communitarians agree that a certain degree of freedom of expression is fundamental; communitarians and republicans agree that it is important for citizens to band together in associations to achieve common purposes, both local and national, service-oriented and politically contentious. These basic elements of a functioning, democratic political order are not firmly established in any international system. It is premature to pick sides.

The major hurdle in transposing liberal ideas to international organizations is the uneven acceptance, among their nation-state members, of the morality of liberalism. Earlier, I was a bit disingenuous when I claimed that a liberal framework for relations between civil society and international organizations would not reach within sovereign states to prescribe how political life should be organized there. For citizens and their associations to contribute to a more democratic global order, they must themselves subscribe to the liberal premises of this imagined order. If transparency, free speech, and freedom of association are to help democratize international organizations, the associations that avail themselves of those rights must themselves be established under liberal conditions. The entire exercise would be pointless if the citizen groups that took part in contestation were, in reality, just power holders in illiberal polities. The same is true if the promise of local and transnational civil society is to be achieved. The hope must be that by creating opportunities for citizens and groups to participate in a liberal political order, even though it is not necessarily that of their own state, they themselves will come to subscribe to the tenets necessary for the functioning of such an order. This is explicit in the efforts, in international development organizations like the World Bank, to promote the growth of local civil society through funding. This evangelical streak also underpins initiatives to impose a liberal set of rights on international organizations and to promote transnational associations. The best one can do is to acknowledge frankly the liberal ambition and to encourage those who disagree to devise other possible, possibly better, ambitions for international organizations.

The different theories of civil society contain important lessons for the organization of global political life. Yet, the political philosophy of civil society is also strangely disconnected from the contemporary movement promoting civil society participation in global governance. The theories explain the importance of voluntary associations for political life in a democracy, exhort citizens to join such associations, and recommend government measures designed to promote their preferred forms of voluntary associations. They advocate more opportunities for civil society participation, with the expectation that such opportunities will prompt the growth of associations. But their target is associational life free of the state, *not* the organization of a democratic state. The theories are agnostic as to the political institutions of democracy and the appropriate role for private associations *in* those political institutions. In other

words, the theories do not elaborate a democratic scheme—with particular attention to private associations—that might serve as a source of inspiration for replacing state-centered international organizations with something else. Should associations demonstrate and write press articles, run election campaigns, lobby legislators, sit on government committees, comment on proposals for legislative and administrative action, or sue government officials in court? The political philosophy does not address this series of questions. Yet this is what the political debate in the different systems of global governance is all about: how should associations outside the state, acting in an integrated, cosmopolitan political space, inform public decisionmaking? For guidance we must look elsewhere.

### **The Comparative Law of Democracy**

For inspiration on civil society's place in global governance, we should look beyond the political philosophy to the comparative law of democracy. Standard constitutional theories focus on elections, legislative assemblies, the executive branch, administration, and the judiciary. The channels—set down by law—through which private associations participate in democratic governance are largely ignored. And yet such legal channels have always existed, albeit in vastly different forms depending on the democracy. By analyzing this aspect of national democracy, we can begin to think constructively about how to reinvent international organizations.

The constitutions of contemporary democracies follow at least three different patterns: pluralism, corporatism, and republicanism.<sup>103</sup> In pluralism, multiple, competing interest groups have numerous opportunities to influence policymaking, irrespective of their size or aims, through the legislature, the bureaucracy, and the courts. In corporatism, certain intermediate organizations are allowed to influence policymaking because their membership figures or their objectives are believed to warrant giving them a special place—alongside

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<sup>103</sup> See, e.g., Paul S. Adams, *Is There a New Century of Corporatism?* in *NEW DIRECTIONS IN COMPARATIVE POLITICS* 17, 28 (Howard Wiarda ed., 3d ed. 2002); DAVID HELD, *MODELS OF DEMOCRACY* 197-232 (1996); Arendt Lijphart, *Patterns of Democracy: Government Forms and Performance*, in *THIRTY-SIX COUNTRIES* 171 (1999); YVES MÉNY, *GOVERNMENT AND POLITICS IN WESTERN EUROPE* 151-56 (Janet Lloyd trans. 2d ed. 1993); Philippe C. Schmitter, *Still the Century of Corporatism?*, 36 *REV. OF POL.* 85, 93-94 (1974); GRAHAM K. WILSON, *INTEREST GROUPS* (1990). Most political scientists distinguish only between corporatist and pluralist systems. However, some go further and differentiate between systems in which interest groups are assured access to official decisionmaking (pluralism or corporatism) and systems in which interest groups are heterogeneous and competitive but generally are not allowed to influence government policymaking (called here "republicanism"). See Vivien A. Schmidt, *Europeanization of National Democracies: The Differential Impact on Simple and Compound Polities*, 13 *POLITIQUE EUROPÉENNE* 113, 115-116 (distinguishing between "compound" and "simple" polities); *POLICY STYLES IN WESTERN EUROPE* (Jeremy Richardson ed., 1982) (characterizing French government as closed to interests and ready to impose policy choices and German government as open to interests and eager to obtain social consensus).

legislators, bureaucrats, and judges--in making public decisions.<sup>104</sup> In republicanism, citizen associations enable individuals to engage in the public life of the nation through debate and protest, but those associations are not allowed to take part directly in making public decisions.

International policymakers should appreciate that even though their historical circumstances are novel, they do not act in a political or institutional void in deciding on associational participation. Their predilections for interest accommodation in the global realm are shaped by their experiences in their distinct pluralist, corporatist, and republican democracies. Even more important than self-awareness of national bias is what policymakers can learn from the different national experiences with interest and identity groups in public life.

The following sections elaborate on pluralism, corporatism, and republicanism by analyzing the constitutions, laws, and regulations of three democracies that typify these distinct patterns of interest participation: the United States, Germany, and France. The ambition of this Article is to speak to policymakers, hence the need to enter into the law to understand the implications of the different models for global governance. In exploring these legal systems, however, the reader should bear in mind that even in a single, national system, the law of interest participation differs among policy areas and often departs from the ideal type. Moreover, my claim is not that only pluralist democracy, corporatist democracy, and republican democracy exist. The world's political systems undoubtedly contain many others laws and models of democracy. But three is a good start in bringing to light the different possibilities of associational participation in the institutions of global governance.

The following discussion of the public law of interest accommodation also examines the popular theories of democracy behind the law. Specific theories of democracy informed the American, German, and French constitutions at their beginnings and related, evolving popular ideas of democracy continue to sustain these constitutions. In other words, public law reflects culturally specific norms about how public affairs should be conducted; public law is also grounded on certain beliefs as to the consequences for collective prosperity and individual well-being of different institutional arrangements, including those for associational participation.<sup>105</sup> That the comparative law of interest accommodation embodies culturally specific norms and beliefs suggests that the differences must be taken seriously indeed. However, that certain beliefs,

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<sup>104</sup> While most corporatist theorists focus on intermediate associations of capital and labor, the corporatist relationship between state and society extends to the associations that have become salient in the era of what Ronald Inglehart calls "post-material" values: environmental protection groups, consumer groups, and identity groups based on national origin, sex, and race. *See generally* RONALD INGLEHART AND CHRISTIAN WELZEL, *MODERNIZATION, CULTURAL CHANGE, AND DEMOCRACY: THE HUMAN DEVELOPMENT SEQUENCE* (forthcoming).

<sup>105</sup> *See* PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 38-40 (2004) (analyzing relationship between institutions and preferences, identities, and ideologies).

although perfectly credible at home, cannot survive the realities of the global realm while others can, shows that a principled choice among the competing theories can be made for international organizations. The Article concludes by suggesting how this choice might be made.

*Pluralist Democracy*

The United States is the only clear example of pluralist democracy.<sup>106</sup> The Constitution establishes a fragmented system of lawmaking which guarantees interest groups of all kinds numerous opportunities to influence policymaking.<sup>107</sup> Legislative power is shared among the Senate, the House of Representative, and the President, each of which is elected by different constituencies and serves different terms. In the lawmaking process, therefore, interest groups have multiple opportunities to shape outcomes.<sup>108</sup>

When legislation is sent to the bureaucracy for implementation, the law continues to afford interest groups a central role in the policymaking process. In the American presidential system of government, administrators are accountable to both the President and legislators on Congressional oversight committees and, through them, to multiple interest groups.<sup>109</sup> Furthermore, the public has a right to receive advance notice of rules, give their view on such rules, and receive a detailed response to their objections from the administration.<sup>110</sup> Because any

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<sup>106</sup> Although many other western democracies have a multiplicity of interest groups that are not organized into peak associations and that compete among one another for influence, their political systems do not afford the competing interest groups the same opportunities to influence policymaking. Among the democracies covered in Arendt Lijphart's overview of political systems around the world, it appears that Costa Rica and Columbia qualify as pluralist: they both score relatively high on the interest group measure (2.50), they both are presidential systems (which is related to high interest group access because of the division of power between the presidency and the parliament), and they both score low on the executive dominance measure (which is related to the presidential-parliamentary distinction). See Lijphart, *supra* note \_\_, at 177, 119, 138.

<sup>107</sup> See GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 78-79, 139-43 (2002) (describing fragmentation caused by American presidential and federalist system of government). For the sake of brevity, this Article does not cover two other dimensions of political organization that can contribute to more or less interest group access to government decisions: federalism and two-party vs. multi-party systems. *Id.* at 105, 135.

<sup>108</sup> It appears that the relationship between American political parties and interest groups is very similar to the relationship between American lawmaking institutions and interest groups. One study found that American political parties, in contrast with political parties in other democracies, can often function as amalgams of interest groups rather than across-the-board vote maximizers. See Clive S. Thomas, *Toward a Systematic Understanding of Party-Group Relations in Liberal Democracies*, in POLITICAL PARTIES AND INTEREST GROUPS 286-88 (Clive S. Thomas ed., 2001).

<sup>109</sup> See ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 158 (describing system of "multiple principals" under U.S. Constitution); Lijphart, *Patterns of Democracy*, *supra* note \_\_ at 117 (on differences between parliamentary and presidential systems of government); JAMES Q. WILSON, BUREAUCRACY 257-58 (describing competition between President and Congress for control of administration).

<sup>110</sup> See 5 U.S.C. § 553(c) (setting down requirements of notice and comment rulemaking).

individual or interest association may go to court to enforce the right to notice, comment, and a detailed explanation of the rule's basis and purpose, the bureaucracy heeds the views of all associations, regardless of the association's purposes or membership numbers. Moreover, courts require that administrators apply what Thomas McGarity calls "comprehensive analytical rationality" to regulatory problems: administrators must conduct a thorough and definitive assessment of the costs and benefits of all possible regulatory options before choosing the one that best fulfills the statutory mandate, even though such an assessment is sometimes impossible in the face of scientific and political realities.<sup>111</sup> Comprehensive analytic rationality guarantees that the bureaucrats will take seriously any objections made by the parties to the rulemaking proceeding—including interest groups.

American law rarely entrusts private associations with public authority. Interests and the associations through which they are expressed are considered too partial and self-regarding to be able to handle matters of public concern. Numerous industry associations set product and processing standards, but they generally compete with other industry associations—they do not set "the" standard for all the United States.<sup>112</sup> Unlike other countries, private associations are not empowered by statute or regulation to set standards for the entire industry.<sup>113</sup> State governments allow organizations of professionals such as lawyers, architects, and engineers to set rules of conduct for their members and police compliance with those rules. This regulatory practice, however, does not extend beyond professional services to other sectors of the economy. Thus, local chambers of commerce represent the interests of member firms and tradesmen but do not assist the state in regulating their members. This stands in marked contrast with France, Germany, and Italy where chambers of commerce are entrusted with public functions.<sup>114</sup>

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<sup>111</sup> See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 531 (1997); Thomas O. McGarity, *Public Participation in Risk Regulation*, 1 RISK: ISSUES HEALTH & SAFETY 103, 112 (1990).

<sup>112</sup> See Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1, 23-25 (2003).

<sup>113</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking National Industrial Recovery Act as unconstitutional delegation of power to the President, based in part on de facto delegation of power to industry associations to set codes of fair competition). *But see* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 159 (2000) (discussing new practice of negotiated rulemaking, in which "stakeholders" given decisive role); *Industrial Union Department, AFL-CIO v. American Petroleum Industry*, 448 U.S. 607, 656 (1980) (discussing OSHA's reliance on standards of private standard-setting bodies in promulgating government standards); Federal Trade Commission, *90<sup>th</sup> Anniversary Symposium* 6 (Sept. 22-23, 2004), available at [http://www.ftc.gov/ftc/history/90thAnniv\\_Program.pdf](http://www.ftc.gov/ftc/history/90thAnniv_Program.pdf) (discussing "trade practice conference" procedure in which Federal Trade Commission adopted rules approved by industry members, violation of which constituted "unfair method of competition" under Federal Trade Commission Act).

<sup>114</sup> See Mény, *supra* note \_\_ at 146.

Lastly, the courts are open to all individuals and interest groups to challenge statutes as unconstitutional, to complain that agency action violates principles of administrative law, and to enforce regulatory statutes against private parties when administrative agencies fail to take the lead.<sup>115</sup> Although legal doctrines such as standing, reviewability, and ripeness are designed to preserve legislative and administrative discretion and to limit the litigation burden on the courts, the reach of such doctrines is very limited compared to other legal systems.<sup>116</sup> To take the doctrine of standing in the administrative context, litigants must overcome two hurdles before a court will entertain their objections to administrative determinations. Litigants must satisfy the constitutional three-prong test of injury: injury-in-fact; a causal connection between the alleged injury and the administrative determination; and the possibility of redress through judicial intervention. Litigants must also show that they come "arguably" within the "zone of injury" that the drafters of the enabling statute intended to protect. But notice that the doctrine does not set the bar very high. As long as an individual can prove an economic, environmental, or, in some instances, aesthetic interest that is remotely connected to the public policy considerations underpinning the statute, she may challenge the administrative determination.

What are the preferences for public life and the beliefs about the consequences of interest accommodation that underpin American public law? In pluralist democracy, particular interests and identities are legitimate.<sup>117</sup> In other words, citizens wish to express themselves in public life through associations that attend to the specific and highly fragmented interests and experiences of economics, region, sex, race, age, and so on, and they believe that public life can prosper through this form of interest politics. Engagement in public life based on particularistic group affiliations is the premise of the political system. Yet, at the same time, the role of interest groups in exercising public authority is more limited than elsewhere. That is because associations based on interest are believed to function simply as conduits through which individual citizens express their differences. Interest associations do not themselves shape and

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<sup>115</sup> See Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1721 (1975) (analyzing expansion of standing to challenge administrative action in 1960s and 1970s); Richard Stewart & Cass Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (analyzing more liberal approach to inferring private causes of action to enforce public regulatory statutes).

<sup>116</sup> See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004) (describing different types of constitutional courts and more restricted access in the French and Italian models).

<sup>117</sup> See, e.g., Donald P. Kommers, *Comments on Part 1*, in *GERMANY AND ITS BASIC LAW* 207, 209 (Paul Kirchhof & Donald P. Kommers eds., 1993) (contrasting "theory of group conflict that undergirds the American perspective on political representation" with the German idea of "popular democracy" and the "strong anti-interest group orientation that informs this [German] jurisprudence").

express broader identities. They do not command the loyalties of their members as nations command the loyalties of their citizens.

The pluralist understanding of interest is rooted in Madison's political philosophy. Madison believed that passion, self-interest, and faction--impulses hostile to individual rights and the welfare of the nation as a whole--were inevitable among citizens and their elected representatives. A republican system of government would be viable in a country the size of the United States only because in such a vast territory a great number of interests would compete against and check one another in public life. The academic study of American politics after World War II drew on the Madisonian idea of interests as central to public decisionmaking. Not only did Robert Dahl and David Truman observe the role of competing organized interests in persuading government officials to allocate resources and enact laws and regulations, they also condoned the role of interests in American public life.<sup>118</sup> As long as the rules of the game--the institutions that decided which interests would prevail at any given point in time--enjoyed public consensus and as long as no element of society went unrepresented in the interest group fray, the system would flourish. According to Dahl and Truman, politics would be both stable and fair: no single group would be able to secure control over government and use that control to change the rules to its advantage.

The normative vision was explicitly questioned by subsequent generations. Congress and administrative agencies were being "captured" by "special interests" rather than representing all interests fairly and neutrally.<sup>119</sup> But the critique operated from a normative frame of reference in which interest was still supposed to drive politics, just a more representative, plural set of interests. For citizens in the corporatist and republican traditions explored in the following pages, the pluralist understanding of how democracy should be organized is literally and figuratively foreign. Yet this category of thought--groups based on interest and identity--dominates empirical investigations and theoretical analyses of American politics.

Public complacency in the face of pluralist interest group politics is related to a corresponding distrust of elected officials and government bureaucrats. The Constitution splits and shares legislative and administrative powers because of the Founders' misgivings as to government by elected officials, misgivings which today extend to the bureaucrats of the administrative state. In the view of the Founders, citizens and their representatives were not inclined toward public virtue, in marked contrast with the republican tradition of

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<sup>118</sup> See ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* (1961).

<sup>119</sup> See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (arguing that small groups have an easier time organizing to influence the political process); Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 *YALE L. & POL'Y REV.* 553 (discussing the phenomenon of capture).

Machiavelli, Rousseau, and Harrington. Thus, they believed it necessary to design an unconventional system of separation of powers. Legislative and executive powers were not allocated to different branches, but rather they were spread across both the legislative and executive branches so that one set of officials could check the other.<sup>120</sup> This checking and balancing was devised in response to the Madisonian perception of narrow interest rather than republican virtue as the motivating force in democratic politics; today, the system of checks and balances is itself a cause of the omnipresence of interest groups in American political life.

Distrust of public officials, in turn, is associated with limited government—together with the preferences and beliefs that sustain a system of limited government.

In the system that Madison envisages, the danger is action and the safeguard is stalemate, or, as he would have it, balance. Factious interests are to be "broken," "controlled," and "balanced" against each other to produce "stability."<sup>121</sup>

Interest groups enjoy multiple opportunities to block and stall government action. A government decision like the requirement that a coal-burning power plant be fitted with a scrubber represents a number of lost battles: the energy industry unsuccessfully lobbied members of the Senate, the House, and the President's administration, failed to persuade the civil servants in the Environmental Protection Agency to craft a favorable implementing rule, and lost in court. Because of the numerous opportunities for interest groups of all types to participate directly in public decisionmaking, they can check and constrain the exercise of public power. Interest group pluralism is part of, and contributes to, a culture of democracy in which limited government is thought to be the wisest system of government.

### *Corporatist Democracy*

Germany is a classic corporatist democracy.<sup>122</sup> The Basic Law establishes a parliamentary system of government, meaning that the winner of elections to

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<sup>120</sup> See Held, *Models of Democracy*, *supra* note\_\_ at 89-94; James Madison, *Federalist No. 10*, in *THE FEDERALIST PAPERS* 160 (Johns Hopkins University Press 1981) (1787); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 190-98 (1967); POCOCK, *THE MACHIAVELLIAN MOMENT*, *supra* note\_\_ at 513-25 (contrasting the American Constitution with the republican tradition of Machiavelli and the English Civil War and Augustan period); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 606-18 (1969) (calling the Constitution "the end of classical politics" and arguing that the Founders chose a liberal over a republican form of government).

<sup>121</sup> See Pitkin, *supra* note\_\_ at 195.

<sup>122</sup> Norway, Sweden, Austria, Denmark, Switzerland, Israel, the Netherlands, Belgium, Japan, Finland, and Luxembourg are some of the democracies that are generally identified as corporatist. See Lijphart, *supra* note\_\_ at 177.

the parliament (Bundestag) selects the head of the executive branch (Chancellor and cabinet).<sup>123</sup> The Basic Law follows Montesquieu's classic scheme in dividing legislative and executive power between the parliament and the executive branch. However, the combination of parliamentary government and a strong party system leads to the concentration of legislative and executive power in one set of hands: the coalition of parties that won the elections.

This constitutional concentration of power enables elected officials to filter carefully which private associations will influence lawmaking.<sup>124</sup> In drafting bills that touch upon issues such as pension reform and unemployment benefits, bills that are sent later to parliament for debate and voting, the Ministry of Economics regularly consults with peak organizations of management and labor. The same goes for the Ministry of Consumer Affairs and the Federation of German Consumer Organisations and the Ministry of the Environment and environmental organizations. Moreover, advisory boards composed of peak associations of business, labor, consumers, and environmental groups have been established under a variety of sector-specific statutes and ministerial orders.<sup>125</sup>

Private associations influence administrative decisionmaking too, but again the law restricts access to government officials. The same constitutional concentration of power in the executive branch that enables ministry civil servants to consult selectively on proposed legislation also allows them to consult selectively on administrative measures. Likewise, parliamentary laws guarantee certain associations, in specific policy areas, the right to participate in rulemaking and other forms of general administrative action. For instance, environmental associations certified by federal and state ministries of the environment can demand to be heard and to inspect expert evidence in

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<sup>123</sup> See Helmut Steinberger, *Political Representation in Germany*, in *GERMANY AND ITS BASIC LAW* 121, 137-55 (Paul Kirchof & Donald P. Kommers eds., 1993)

<sup>124</sup> See generally Adams, *supra* note \_\_ at 17 (stating that strong state capable of "organizing, recognizing and identifying what groups are to be included in the policy and decision making process" sets corporatist systems off from pluralist ones); Clive S. Thomas, *Toward a Systematic Understanding of Party-Group Relations in Liberal Democracies*, in *POLITICAL PARTIES AND INTEREST GROUPS* 269, 275 (Clive S. Thomas ed., 2001) (describing the role of strong parties in serving as gatekeeper to policymaking and importance of cultivating ties with party in order to influence policy process).

<sup>125</sup> For instance, in the 1970s, the Consumer Advisory Council (*Verbraucherbeirat*) was established; it included six consumer associations, three government representatives, three academics, three union representatives, and one member of the press. See Gunnar Trumbull, *The Contested Consumer: The Politics of Product Market Regulation in France and Germany* 91 (Jan. 2004, unpublished manuscript on file with author). In the environmental policy area, Carol Rose-Ackerman notes that the German government routinely consults advisory committees. See *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* 10-11 (1995). The recent German law on rights for the disabled creates an advisory committee composed of 48 members. Among those members, two are drawn from trade unions, two from employers' federations, and sixteen from NGOs focused on disability rights. See German Law on Rights of the Disabled § 64.

rulemaking conducted by nature conservation authorities.<sup>126</sup> The law, however, does not create a right, applicable in all policy areas and enjoyed by all individuals and associations, to be informed of rulemaking proposals, voice objections, and receive a reply as in the American system. Instead, German law draws a strict line between generally applicable rules and individual administrative acts (*Verwaltungsakt*).<sup>127</sup> When an administrative decision is classified as an "act," the law guarantees individuals extensive hearing rights before the administration. By contrast, when an administrative decision is classified as a rule (*Rechtsverordnungen* or *Verwaltungsvorschriften*), the law allows significant discretion and imposes minimal procedural requirements.<sup>128</sup>

In the German system, intermediate associations are not limited to influencing government policy decisions. The law confers upon certain associations the power to set rules with ramifications not only for their members but also for society-at-large--rules which are backed by the authority of the state.<sup>129</sup> For instance, a single industry association, the Deutscher Normenausschuss (DIN), sets technical product and process standards for all of Germany.<sup>130</sup> An agreement between DIN and the German government dating to 1975 recognizes DIN as Germany's only standard-setting body and as the national organization entitled to represent Germany in various international standard-setting organizations.<sup>131</sup> By adopting DIN standards, firms come into compliance with the safety requirements set down in consumer legislation.<sup>132</sup>

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<sup>126</sup> See THEODORA TH. ZIAMOU, RULEMAKING, PARTICIPATION AND THE LIMITS OF PUBLIC LAW IN THE USA AND EUROPE 131 (2001).

<sup>127</sup> MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 63 (2001). The German Administrative Procedures Act does not cover rules. The only procedural requirements are set down in the Basic Law and specific enabling laws. The Basic Law requires that rules be published and that, in certain cases, they be presented to the Bundesrat and/or the Bundestag. Moreover, enabling legislation frequently requires the government to lay rules before Parliament. See generally, ZIAMOU, *supra* note \_\_ at 15-18, 194-96.

<sup>128</sup> Both *Rechtsverordnungen* and *Verwaltungsvorschriften* are determinations made by the administration that legally bind an undefined number of persons. The difference is that while *Rechtsverordnungen* bind individuals outside the administration, the equivalent of a rule or regulation in American law, *Verwaltungsvorschriften* bind individuals within the administration. The latter are primarily orders issued by senior officials and directed at junior civil servants, the equivalent of certain types of informal rules in American law.

<sup>129</sup> See Steinberger, *Political Representation in Germany*, *supra* note \_\_ at 123-24.

<sup>130</sup> See Josef Falke, 3 RECHTLICHE ASPEKTE DER NORMUNG IN DEN EG-MITGLIEDSTAATEN DEUTSCHLAND 22 (2000). In 1997, DIN counted 5,734 member firms.

<sup>131</sup> See Harm Schepel & Josef Falke, 1 LEGAL ASPECTS OF STANDARDISATION IN THE MEMBER STATES OF THE EC AND EFTA: COMPARATIVE REPORT 76 (2000).

<sup>132</sup> See Schepel & Falke, *supra* note \_\_ at 77 ("DIN is given the task to support the Government by creating, by means of the elaboration of standards, acknowledged rules of technology that enable the reference to standards in legislation."). For instance, under the Law on Safety of Equipment (*Gerätsicherheitsgesetz* or *GSG*) equipment is considered safe and therefore liability-proof under the following circumstances: "The producer or importer of technical equipment may only display or circulate goods such that, in accordance with the generally recognized rules of technology as well as the labor protection and accident avoidance regulations, the user or third party to its specified

The agreement between DIN and the German government imposes certain conditions: consumers are represented in the organization through a five-member Consumer Council<sup>133</sup> and DIN standards must take into consideration certain public interest goals.<sup>134</sup> Thus, public power comes with state-imposed responsibilities.

As in the United States, associations of professionals such as lawyers, accountants, pharmacists, physicians, and veterinarians are entrusted with extensive rule-making and rule-enforcement powers over their members.<sup>135</sup> In Germany, however, this form of regulation also extends to businesses and trades. By law, to run a restaurant or any other business, or to work as a painter, builder, or in any of the other trades, one must be a member of a local chamber of commerce (*Industrie und Handelskammer* for businesses and *Handwerkskammer* for tradesmen). If, for instance, a painter is found by his local chamber to have breached a service obligation, he can be expelled from the chamber and thus be deprived of his livelihood.

The German collective bargaining regime also gives trade unions and employers' organizations public power by putting them in the position of deciding matters for workers and employers throughout the economy, not simply their members. Collective bargaining agreements (*Tarifverträge*) are governed by the Collective Bargaining Agreements Act (*Tarifvertragsgesetz, TVG*).<sup>136</sup> The Act regulates three components of all collective bargaining agreements: entry into the agreement (*Abschlußnormen*); employment conditions (*Inhaltsnormen*) such as wages, working time, and dismissals; and internal obligations (*Betriebsnormen*) such as workplace bans on smoking and limits on workplace surveillance of employees.<sup>137</sup> Thus, collective bargaining agreements cover a wide array of matters related to the workplace, not simply wages and working time, matters that in the United States are generally regulated by federal and state administrative agencies. Moreover, while, as a general rule, a collective bargaining agreement only binds those firms that signed the agreement through the intermediary of their employers' association, the Act permits, under certain

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application is protected against all kinds of risk to life and health, as specified by the manner of its particular application." The DIN standards were quickly recognized by the courts as the "generally recognized rules of technology." See Trumbull, *supra* note\_\_ at 189-90.

<sup>133</sup> See Falke, *supra* note\_\_ at 183.

<sup>134</sup> See Schepel & Falke, *supra* note\_\_ at 76; Normenvertrag, art. 1.2 and annotations.

<sup>135</sup> This area of law is called *Standesrecht*. The codes of conduct issued by the free professions (*Freie Berufe*) are known as *Ordnungen der Berufsstände* and violations of the codes are litigated before special courts of honor (*Ehrengerichte*). See, e.g., Federal Act for Attorneys-At-Law §§ 43 et seq. (*Bundesrechtsanwaltsordnung* or *BRAO*).

<sup>136</sup> See Basic Law, art. 9(3); Däubler, *Tarifvertragsrecht*, 3. AUFL. (1993); Löwisch & Rieble, *TARIFVERTRAGSGESETZ* (2<sup>nd</sup> ed., 2004).

<sup>137</sup> Collective bargaining agreements apply to all workers in the firm, regardless of whether they are members of the trade union.

circumstances, the Minister of Labour and Social Order to declare the agreement generally binding (*allgemeinverbindlich*) on all firms in the industry.<sup>138</sup>

Turning to the courts, there too German law gives certain intermediate associations the right to influence public policymaking. Unlike American law, pre-enforcement challenges to administrative rules are not allowed. However, certain intermediate associations are empowered to enforce public interest statutes.<sup>139</sup> This form of associational lawsuit is known as a "class action" (*Verbandsklage*) and enables associations to sue in their own right, without having to establish that an individual member has legally recognized rights that have been injured.<sup>140</sup> *Verbandsklage* have the advantage over individual lawsuits that a judicial remedy can be awarded to the entire class of individuals represented by the association, not simply the named plaintiffs. Since the 1940s, local chambers of commerce (*Industrie und Handelskammer*), competitors (*Gewerbetreibende*), and industry associations have had the right to sue businesses guilty of anti-competitive practices under the Unfair Competition Act.<sup>141</sup> The same associations, plus trade unions, also have had a long-standing right to sue for infringements of various consumer protection laws.<sup>142</sup> Then, in the 1970s, a number of statutes empowered consumer and environmental groups to bring lawsuits enforcing their terms. Accredited consumer associations with more than seventy-five members have the right to sue to obtain injunctive relief under the law on misleading advertising and unfair standard contracts.<sup>143</sup> In 1979, Bremen gave certain environmental organizations the right to sue for breaches of the Bremen Environmental Protection Act and, in 1980, the Land of Hesse did the same.<sup>144</sup> Under the Federal Nature Conservation Act, passed in 2002,

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<sup>138</sup> Collective Bargaining Agreements Act § 5.

<sup>139</sup> Only when the rule is enforced against an individual or firm does the law recognize an "administrative act" (*Verwaltungsakt*) that prejudices the rights of a party, which can then be challenged in the courts by that party. At that point, the party can claim that the rule upon which the enforcement action was based is illegal. Notice, however, that the range of parties that can object to the rule is limited by the requirement of an act directed against a specific party, and the arguments that can be used to oppose the rule do not include the procedural claims in American administrative law, given the lack of a right to participate in administrative rulemaking.

<sup>140</sup> Absent such statutory authorization, associations are not allowed to sue on the behalf of their members. A litigant must allege that the administrative act violated his or her own "subject rights." See VwGO § 42.2.

<sup>141</sup> Gesetz gegen unlauteren Wettbewerb (Act Against Unfair Competition) § 13.2.2; Köhler and Piper, Gesetz gegen den unlauteren Wettbewerb, 3<sup>rd</sup> ed., Munich 2002, § 13 note 11 (right to sue of *Gewerbetreibende*), § 13 notes 17 & 20 (right to sue of industry associations).

<sup>142</sup> Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Unfair Contract Terms Act) § 22.3.1.2

<sup>143</sup> See Unfair Contract Terms Act § 13.2.1.2; Trumbull, *supra* note\_\_ at 78, 96. Since January 1, 2002, the Unfair Contract Terms Act has been repealed and has been incorporated into a number of other laws. The provisions on *Verbandsklage* are now section 3.1.1.2 of the Prohibitory Injunctions Act (*Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen*).

<sup>144</sup> See Bremisches Naturschutzgesetz (Bremen Environmental Protection Act) §§43, 44; Hessisches Naturschutzgesetz (Hessian Environmental Protection Act) § 36.

environmental groups may sue to oppose public and private schemes with environmental effects and to contest administrative waivers from the requirements of the Act.<sup>145</sup>

In corporatist democracy, in contrast with pluralist democracy, the law permits only certain associations to take part in day-to-day lawmaking, rulemaking, and enforcement. The law also confers public authority upon those same associations. What are the cultural norms and beliefs that underpin the public law of associations in corporatist democracy? Industry, labor, the professions and trades, consumers, and environmentalists are believed to constitute society.<sup>146</sup> Membership in one of these groups is a matter of identity and belonging. The fabric of the nation has many threads, some that are ideological in nature and expressed through party affiliation and elections, others that are related to the structure of the market and production of wealth, others that are tied to family and community. In corporatism, when interest groups are consulted or when they are allowed to govern, they are conceived as acting in the public interest because, on certain matters, they are the public.

This ideology can be traced to different nineteenth-century and early twentieth-century theories of the state and society. The political scientist Philippe Schmitter identified a number of these strands in his now classic analysis of modern corporatist practices: the romantic, organic thought of Friedrich Schlegel and G.W. Friedrich Hegel; the Social Christian thought of Wilhelm von Ketteler, Karl von Vogelsang, Popes Leo XIII, and Pius XI; the fascist authoritarian thought of Giuseppe Bottai and Francesco Vito.<sup>147</sup> Some of the intellectual pedigree is suspect, but then again, some of it is not. This form of interest accommodation has co-existed happily with elections, legislative assemblies, and constitutional courts for over fifty years now. The less fortunate ideological origins of the public law of corporatist democracies should not prejudice contemporary attitudes towards corporatist forms of interest representation.

A corollary of the idea of intermediate association as building block of the nation is the necessity of distinguishing between associations that represent and constitute broader identities and those that simply serve as temporary conduits for the shifting preferences of individuals. In corporatist systems, not all associations are created equal. Just because an organization has a charter and

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<sup>145</sup> See Bundesnaturschutzgesetz § 61. Many of the consumer and environmental associations that are given the right to sue also receive large amounts of direct government funding. This is the case for the German Consumer Federation (Vzbv).

<sup>146</sup> Most political science studies of corporatism focus on peak associations of capital and labor and their influence on labor market, social welfare, and economic policies. See Lijphart, *supra* note \_\_ at 176. As new interests have emerged in areas such as consumer protection and the environment, corporatist democracies have extended the old patterns of representation to the new forms of interest and therefore I include these actors and policy areas as well.

<sup>147</sup> See Schmitter, *Still the Century of Corporatism?*, *supra* note \_\_ at 87.

members does not mean that it should be allowed to take part in policymaking or to set rules for its members, and by implication, all citizens who interact with its members. The organization must satisfy certain conditions before it will be recognized as representing broader social identities: a significant membership, recognition from other associations, longevity, and so on.

The importance that corporatist democracies attach to public identities other than nation does not mean that they denigrate the institutions of national citizenship. Although it is certainly true that corporatism has been used by authoritarian regimes--Mussolini in Italy, Franco in Spain, and a number of Latin American countries--corporatist interest representation is also an important feature of established democracies such as Sweden, Norway, and the Netherlands.<sup>148</sup> Part of why public law permits legislators and administrators to select the interest associations that will influence policymaking is because elected representatives are trusted institutional actors. Because of the choice made in favor of parliamentary government, the elected officials that head the executive branch wield significant powers.

A strong, elected executive branch that commands a professional bureaucracy has a high capacity for action. Once a choice is made in a general election in favor of a party and its platform, government faces fewer obstacles to carrying out that choice in corporatist democracy than in the pluralist variety. Legislation and implementing measures can be adopted with relative ease, given the relationship between coalition parties, the government cabinet, and the administration in drafting and shepherding the text through the government process. However, not as great a capacity for state action as in the case of French republican democracy, explored below, because of the need to include and accommodate important social and economic forces. Again, the ability to act decisively in public affairs and to pursue new policy initiatives is not simply a matter of the institutional mechanics of corporatist democracy; it also informs the expectations of the citizens who mobilize and organize within the world of corporatist democracy. In this idea of democracy, once officials are elected to office, they should be able to carry out their policy agenda, checked only by significant social forces, because those officials are considered representatives of the people and, as such, qualified to make the right decisions for the nation.

### *Republican Democracy*

In republican democracies, decisionmaking is dominated by the institutions of voting, political parties, elected leaders, and specialized administration, with little room for private associations. France is the paradigmatic case, although even there interest and identity associations are

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<sup>148</sup> *Id.* at 89-90.

becoming increasingly influential in day-to-day policymaking.<sup>149</sup> Like Germany, the origins of the French system are parliamentary. The Constitution of the Fifth Republic, however, establishes a semi-presidential system: a directly elected President appoints the Prime Minister, but the Prime Minister must also enjoy the support of the party or coalition of parties that wins the elections for parliament.<sup>150</sup> This might appear to create the possibility of divided government, with the concomitant multiple points of access for interest groups. Historical experience, however, has shown that during those periods in which the offices of the Prime Minister and the President are held by different parties, the Prime Minister dominates.<sup>151</sup> The Prime Minister and his cabinet work with an elite, professional administration to draft legislation. Unlike Germany, this concentration of legislative power in the hands of the Prime Minister, or the Prime Minister and President when they are both of the same party, is used more to exclude interest groups, and less to screen them.<sup>152</sup> Different ministries with historical ties to certain groups may call upon them to comment on draft bills, yet the process is less systematic than in the German system. The law also establishes a number of government bodies on which employers' associations, professional associations, labor, farmers, consumers, and other groups are represented. These bodies are consulted in the lawmaking process.<sup>153</sup> However, the influence and pervasiveness of such advisory bodies in public life is less significant than in the German case.<sup>154</sup>

Rulemaking and other forms of policy implementation follow a similar pattern. Drafting is a matter for the administration, with the exception of those cases in which civil servants seek guidance from outside groups because such groups are believed to have valuable experience or the issues are thought to be politically sensitive. Some of the same interest group bodies that advise on draft legislation also consult on important implementing rules (*règlements*). As in

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<sup>149</sup> Other such democracies are Greece and Malta. This classification is based on Schmidt and Lijphart. Schmidt groups France and Greece together as "simple polities." See Schmidt, *supra* note\_\_ at 115. In Lijphart's analysis, Malta score high on interest group pluralism (indicating that historical relations between state and society have not created incentives for interest groups to organize into a small number of peak associations) and executive dominance (indicating that the numerous interest groups do not have access to public decisionmakers because of the concentration of power in the executive branch). See Lijphart, *supra* note\_\_ at 138, 177. I have excluded common law countries like the United Kingdom and Australia from this list because, even though they share a number of features with France --a strong state that bars extensive interest group participation in public decisionmaking,--they do not share the same republican ideology.

<sup>150</sup> See FRENCH CONST., arts. 8 & 20; see generally Mark Kesselman, *France, in EUROPEAN POLITICS IN TRANSITION* 127 (Mark Kesselman & Joel Krieger eds., 1987).

<sup>151</sup> See Lijphart, *supra* note\_\_ at 121-22.

<sup>152</sup> See Andrew Appleton, *France, in POLITICAL PARTIES AND INTEREST GROUPS* 45, 54 (Clive S. Thomas ed., 2001) (describing ability of executive branch to control points of access of interest groups because of elite status and professional ethos of civil service).

<sup>153</sup> One prominent example is the Social and Economic Council, which, under the Constitution, must be consulted on all economic and social legislation. See FRENCH CONST., arts. 70 & 71.

<sup>154</sup> See Mény, *supra* note\_\_ at 144-46.

Germany and different from the United States, individuals and their associations do not have a general right to participate in rulemaking. The law draws a line between administrative decisions of general application (*acte réglementaire*) and individualized determinations (*acte individuel*).<sup>155</sup> Only individualized determinations are subject to significant procedural guarantees.

Private associations are also entrusted with regulatory powers, albeit with greater government participation than in Germany. The law authorizes a single standard-setting organization, the Association Française de Normalisation (AFNOR), to adopt industry standards. These standards are often incorporated in health and safety and consumer protection laws and therefore become legally binding.<sup>156</sup> AFNOR is composed mainly of sector-specific industry associations, but also includes representatives of trade unions, consumer groups, and environmental organizations. In contrast to the German case, the French government directly participates in the standard-setting work of AFNOR: a government representative (*commissaire du gouvernement*) sits on AFNOR's governing board and can initiate new standards projects, comment on proposed standards, and veto standards.<sup>157</sup> Similar to Germany, the law requires firms to join their local chambers of commerce (*chambre de commerce*), which exercise regulatory and disciplinary powers over their members.<sup>158</sup> Members of the professions must join their national association (*ordre*), which is responsible for drawing up professional codes of conduct (*codes de déontologies*) and enforcing the terms of the code through their governing bodies (*Conseil de l'ordre*).<sup>159</sup>

French law on associational litigation stands somewhere between American and German law. Like the United States and unlike Germany, standing (*intérêt à agir*) to bring pre-enforcement challenges to administrative regulations is liberal.<sup>160</sup> Associations are normally permitted to sue on the behalf of the general interest (*intérêt général* or *intérêt collectif*) that they are charged with protecting under their by-laws.<sup>161</sup> The grounds of review, however, are narrow since plaintiffs are not guaranteed procedural rights in the administrative process and therefore can only challenge the rule on the substance, not the procedure.<sup>162</sup> Furthermore, the degree of judicial interference with the

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<sup>155</sup> See JACQUELINE MORAND-DEVILLER, *COURS DE DROIT ADMINISTRATIF* 317 (7th ed. 2001); MARCEAU LONG, PROSPER WEIL, GUY BRAIBANT, PIERRE DELVOLVÉ & BRUNO GENVOIS, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE* 355, point 7 (14th ed. 2003).

<sup>156</sup> See Schepel & Falke, *supra* note \_\_ at 71.

<sup>157</sup> See *id.* at 72.

<sup>158</sup> See Mény, *supra* note \_\_ at 144-46.

<sup>159</sup> See JOËL MORET-BAILLY, *LES DÉONTOLOGIES* 99-126 (2001).

<sup>160</sup> See MORAND-DEVILLER, *supra* note \_\_ at 679. However, unlike citizens in Germany and the United States, French citizens and their associations cannot bring constitutional challenges to parliamentary laws. See Ferejohn & Pasquino, *supra* note \_\_.

<sup>161</sup> See *id.* at 679-80.

<sup>162</sup> See *id.* at 684.

government's findings on the substance is not particularly extensive since the government is allowed significant discretion in the rulemaking context.<sup>163</sup>

With respect to associational enforcement of public interest statutes, the French system also falls somewhere in between the American and German systems. Traditionally, associations were allowed to sue to protect their property rights and to represent the legal interests of their members--in common law parlance, a claim sounding in tort, contract, or property--but not to vindicate the broader public interest goals contained in laws. Only the public prosecutor was recognized as the legitimate spokesman for the public interest. As one standard text on the subject puts it:

Before, judges did not want to give to groups that were not necessarily representative the power to represent the collectivity. Generally speaking, they feared that civil actions, brought before the courts by single associations, would encroach upon the powers of the public prosecutor.<sup>164</sup>

Beginning in the early 1970s, however, judicial resistance to associational litigation gave way to a more liberal approach and now associations are allowed to sue if the interest being vindicated is consistent with their purposes under their by-laws (*statuts*) and as declared to the public authorities.<sup>165</sup> Since there are requirements, the litigation opportunities are not as significant as in the American system. However, since the requirements are cross-cutting, and not tied to particular regulatory statutes, the litigation opportunities are greater than in the German system.

As in the German case, a number of laws also specifically recognize the right of associations to litigate in the public interest: environmental organizations, consumer organizations, animal rights groups, and civil liberties groups.<sup>166</sup> These laws are not always as liberal as the case law. They can impose additional conditions beyond the judicial requirement of registration as a public purpose association whose aims are related to the interests being vindicated. For instance, national consumer associations must have at least 10,000 members while local associations must have a "sufficient" number of members.<sup>167</sup>

Before concluding this overview of the French public law of associations, one unusual feature should be noted, an anomaly which suggests a greater suspicion of private associations in public life than in the American or German

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<sup>163</sup> *Id.* at 261.

<sup>164</sup> See CHARLES DEBBASCH & JACQUES BOURDON, *LES ASSOCIATIONS* 82 (8th ed. 2002) (my translation).

<sup>165</sup> See DEBBASCH & BOURDON, *supra* note\_\_ at 83

<sup>166</sup> See DEBBASCH & BOURDON, *supra* note\_\_ , at 83-84.

<sup>167</sup> Loi no. 88-14 du 5 janvier 1988 (Loi relative aux actions en justice des associations agréés de consommateurs et à l'information des consommateurs), codified at Article R411-1, Code de la Consommation.

cases. The French have an unusually elaborate and demanding registration scheme for private associations.<sup>168</sup> In the 1800s, the Penal Code required that all associations with over twenty members obtain authorization from the state or face stiff criminal penalties.<sup>169</sup> In 1901, the Penal Code provision was replaced with a law, which still exists in a substantially modified form today. That law establishes three types of associations, each of which is subject to a progressively more stringent form of public supervision: non-declared, declared, and public purpose associations. Any group of two or more persons can form a non-declared association without registering with the authorities by adopting a set of by-laws to govern their activities. In the past, such associations were at a disadvantage because they could not appear in court to challenge administrative acts or enter into contracts; today, non-declared associations generally enjoy these basic rights before the courts. The second type--declared associations--can hold property, enter into contracts, and litigate in their own name. Such associations must file certain information with the local prefect<sup>170</sup> and must maintain a special register in which they note all significant acts of the association, to be presented on demand to the authorities.<sup>171</sup>

We have already seen the third type of association--public purpose associations--in the discussion of associational litigation. These citizen associations are significantly different from the previous two, both in the activities they can undertake and the degree of state supervision they undergo.<sup>172</sup> Public purpose associations are entitled to receive donations and bequests and may, depending on whether the law sets down additional requirements, bring the public interest litigation described earlier. To qualify, an association is required to file an application with the Ministry of Interior. The decision to grant the application is based on a number of criteria: the association pursues the general interest (*intérêt général*); its scope of action extends beyond the purely local; it has a significant number of members; it has sufficient resources; and it has existed for at least three years.<sup>173</sup> Once an association is approved, it must

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<sup>168</sup> In the United States, associations are generally not required to register with the public authorities unless they wish to claim tax-exempt status. In Germany, voluntary associations (*Vereine*)-- among the most common are sports clubs and singing clubs --are required to register with the local court (*Amtsgericht*), which keeps what is called the Register of Associations (*Vereinsregister*). Registration confers the association with legal personality, enabling the association to enter into contracts, buy property, appear in court, receive gifts and bequests, and engage in other legal relations under the Civil Code. The requirements are minimal: associations must have at least seven members and file articles of association that cover certain matters. See GERMAN CIVIL CODE, §§21, 55-79.

<sup>169</sup> See GILLES LEBRETON, *LIBERTÉS PUBLIQUE ET DROIT DEL'HOMME* 495 (5th ed. 2001).

<sup>170</sup> The prefect is the public official charged with representing the state and administering the law at the local level. See AGATHE VAN LANG, GENEVIÈVE GONDOUIN & VÉRONIQUE INSERGUET-BRISSET, *DICTIONNAIRE DE DROIT ADMINISTRATIF* 239 (3d ed. 2002).

<sup>171</sup> See DEBBASCH & BOURDON, *supra* note\_\_ at 111.

<sup>172</sup> See LEBRETON, *supra* note\_\_ at 502.

<sup>173</sup> See DEBBASCH & BOURDON, *supra* note\_\_ at 40.

keep its books and premises open for inspection and it must file annual reports with the authorities.<sup>174</sup>

The common wisdom among legal scholars is that the original statutory scheme was driven by the fear of "the triumph of particular interests over the general interest" and the desire to prevent private associations from competing with the state.<sup>175</sup> The intent was to curb the accumulation of property and power outside of the state. French politics has long since lost this Rousseau-tinted hostility towards citizen associations, but the fact of state regulation of such associations remains.

What, then, are the understandings, preferences, and beliefs that sustain the republican system of citizen associations in democratic decisionmaking? In republican democracy, the law, through liberal rights of speech and association, creates an ample public sphere in which citizens can join together and debate the issues of the day. The law, however, does not afford citizen groups the same opportunities to influence legislators, bureaucrats, and judges as in pluralism. Like the United States and unlike Germany, interest associations are believed to pursue narrow and selfish aims.<sup>176</sup> But unlike the United States, the response to this understanding of interest is to exclude private associations from lawmaking and administration, to ensure government representation on their regulatory bodies, and to screen them before they can appear in court. The response is not, as in the United States, to open the doors of government to all interests so that they can check and balance one another. In republican democracy, no matter how many different associations and interests are called to participate in politics, they are not believed capable of transcending their particularities and constituting the people.

The French idea of democracy can be traced to the political theory of Rousseau as popularized in the Jacobean phase of the French Revolution. According to this version of Rousseau, citizens owed their primary allegiance to the Republic and had to ratify, directly, all laws of the Republic. All other loyalties were considered illegitimate.<sup>177</sup> Obviously, French democracy has changed considerably since then. Yet, through public law and political thought, some of the basic principles have survived.<sup>178</sup> Citizens do not wish to participate in politics through the intermediary of interest groups and interest group elites

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<sup>174</sup> See *id.* at 111-12.

<sup>175</sup> See *id.* at 14-17.

<sup>176</sup> PETER A. HALL, *GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE* 165 (1986).

<sup>177</sup> See HANNA FENICHEL PITKIN, *REPRESENTATION, POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 132, 149 (Terence Ball et al. eds., 1989); Michael A. Walzer, *Citizenship*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 211, 211 (Terence Ball et al. eds., 1989).

<sup>178</sup> See, e.g., RENÉ CAPITANT, *DÉMOCRATIE ET PARTICIPATION POLITIQUE* 7-36 (1971) (linking contemporary institutions of French representative democracy to Rousseau and contrasting with the democratic tradition of Locke).

to the same extent as their pluralist cousins. Nor do they believe that a political community in which such interest politics prevail is a viable or good one.

The smaller role for interest groups in the daily government activities of lawmaking, administration, and judging is related to the importance attached to the democratic institutions of voting, parties, and elected officials. At the center of the French legal system is not the Constitutional Court but *la loi* (parliamentary statutes) because all citizens are believed to be able to participate in their making, either personally or through their elected representatives.<sup>179</sup> As Article 6 of the Declaration of the Rights of Man says:

The law is the expression of the general will. All citizens have the right to contribute personally or through their representatives to their making.

Glorification of *la loi*, like suspicion of interest groups, bears the heavy imprint of the French Revolution and the ideal of active citizenship. It certainly does not represent all of contemporary French democratic theory. Yet this understanding still informs the types of activities that French citizens value in public life—voting rather than lobbying. Moreover, the belief is that if elections and parliamentary assemblies were to be downgraded to just one, among many, forms of political activity, there would be dangerous consequences for the polity.

Finally, even more so than corporatist democracy, French citizens inhabit a political world in which the state has a high capacity for action. The ideology of *la loi* is combined today with a strong executive branch characteristic of parliamentary systems and a centralized bureaucracy. In France, the government is even more powerful than in Germany, where important social and economic interests can delay or stop public policy initiatives, and where the Constitutional Court and federalism impose considerable constraints. Once the French Prime Minister and President are elected into office, they can carry out their mandate rapidly, free from some of institutional checks that characterize the American and German systems.

My account of republican democracy, even more so than of pluralist and corporatist democracy, is highly stylized. As the French law of citizen associations illustrates, even the constitutional system that typifies republicanism today departs dramatically from the ideal type and allows private associations to influence significantly the daily workings of government. Yet that does not mean that the different law and culture of democracy has been eradicated. As the changing French law of associational standing demonstrates, even though a republican democracy might come to permit more associational participation in law enforcement, it does so through a uniquely republican set of legal practices:

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<sup>179</sup> See Etienne Picard, *Delegation of Legislative Power*, in FRENCH PUBLIC LAW, DELEGATED LEGISLATION AND THE ROLE OF COMMITTEES IN THE EC 67, 74-81 (Mads Andenas & Alexander Türk eds., 2000).

the interest that was considered particular is rendered general through the intervention of the state and the recognition that the association serves the general interest.

At the risk of slipping into caricature, the differences that separate contemporary democracies on the appropriate role for private associations in public life can be summarized as follows. When an American gazes across the Atlantic she sees capture by special interests in Germany, authoritarianism in France. When a German or Frenchman looks in the direction of her American cousins, she sees anarchy in which, ultimately, the most powerful economic interests prevail.

### **The Role for Civil Society in Global Democracy**

It is time to return to the questions from the beginning of the Article. Should the World Bank be required to consult civil society before approving new loans? Should the WTO's Committee on Trade and the Environment include representatives of environmental and other civil society groups? Should associations have a legal right to participate in European Commission consultations? In sum, what should be the role of civil society in a democratic system of global governance?

The comparative law of democracy shows that each of these questions can be answered in at least one of three ways: all, some, or none of the associations between the state and the market can be called upon to participate in the institutions of global governance. Appreciation and tolerance of legitimate differences on the civil society question and self-awareness of the inevitable bias that comes from being a citizen of one of the many cultures of democracy, is the first lesson to draw from this analysis. But for those wrestling with the issue in the global arena, for whom this conclusion is not particularly satisfying, we can go one step further.

One strategy for selecting among the models might be to identify the qualities that are essential to any liberal political community and to assess which form of interest accommodation best furthers those qualities. Take equality. Liberal institutions should not work to the systematic advantage of certain citizens at the expense of others. But these types of empirical assessments are fiendishly difficult. Take equality in one system—the United States—and in one piece of that system-- notice and comment rulemaking. Mark Seidenfeld and Cass Sunstein separately argue that American rulemaking furthers the equality-abiding ideals of deliberative democracy. According to Seidenfeld and Sunstein, rulemaking serves as a forum for reasoned public deliberation among citizens, bureaucrats, and judges.<sup>180</sup> Affected citizens put forward their concerns,

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<sup>180</sup> See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 60-64 (1985); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271 (1986); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV.

administrators listen and respond based on the universal grounds of good scientific evidence and the enabling statute's overall policy goals, and courts oversee the entire process to ensure that the bureaucrats are deciding based on public reason. This procedure stops citizens from putting forward narrow, self-interested arguments and stops bureaucrats from striking deals that satisfy the most powerful participants in the process.

Not so, argues Thomas McGarity. American rulemaking in his view "works to the advantage of powerful entrenched economic interests."<sup>181</sup> Why is this the case? Regulated business is more likely to take part in rulemaking in the first place.<sup>182</sup> The interest of economic actors is to delay the promulgation of rules since the later they must comply, the less they must spend. Moreover, trade associations and firms have the resources necessary to participate effectively, resources which are generally lacking in the public interest sector. Lastly, the American judges that enforce such procedural rights on judicial review impose the demanding standard of "comprehensive analytical rationality." Regulators can rarely meet this standard because they operate in the real world of scientific uncertainty, unquantifiable benefits, and practical and political difficulties in pursuing certain policy alternatives. To return to the initial point, understanding which law of democracy best advances certain liberal goals is no simple task.

Another strategy for making a principled choice among the different models is to compare the feasibility of transplanting them to the global realm. Recall that, in the discussion of the public laws of interest accommodation, the values and beliefs sustaining those laws were identified. While it may very well be impossible to say whether these popular theories of democracy are right or wrong when they operate in the native soil of a national community, we can inquire whether their beliefs find support in the empirics of emerging global communities.

Citizens in pluralist democracies value competition among multiple interests and identities; they believe that public welfare can emerge from this

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1511, 1560 (1992); Steve P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 156-58

<sup>181</sup> See Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 531 (1997). McGarity accepts public participation in rulemaking. See Thomas O. McGarity, *Public Participation in Risk Regulation*, 1 RISK: ISSUES HEALTH & SAFETY 103, 112 (1990). However, it appears that he would do away with cost-benefit analysis and most judicial review, including judicial review of an agency's fulfillment of the procedural requirements of rulemaking.

<sup>182</sup> A number of studies document the greater presence of trade associations and regulated firms as compared to consumer groups and environmental protection groups in rulemaking. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 127-33 (1998); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON. ORG. 180, 186 (1999) ("formalized procedures advantage organized interests, which makes possible the frequent observation that regulated firm sometimes capture regulatory agencies").

form of political engagement. In the global realm, however, it appears that commercial interests mobilize more than other types of interests and that citizens of northern countries band together in associations more than their counterparts in southern countries. Many observers believe that multinational corporations and business lobbies, with their superior financial resources, are better organized than public interest groups.<sup>183</sup> Similarly, northern NGOs significantly outnumber southern NGOs.<sup>184</sup> To speak in the language of the pluralist tradition, special interest not pluralist competition is the reality of global politics. Pluralist procedures would result in capture by corporate interests and public interests from the North. In the new terrain of global governance, adopting the public law of pluralism would fall short of the aspirations of that law.

Citizens in republican democracies believe that directly elected officials should be at the center of public life, with little interference from private associations or other institutional actors. Research on regional and global regimes, however, has shown that when power is transferred to the global realm, national voters, parties, parliaments, and even leaders of executive branches, lose control.<sup>185</sup> Regulators and politicians who make decisions in international

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<sup>183</sup> See Maura Blue Jeffords, *Turning the Protester into a Partner for Development: The Need for Effective Consultation Between the WTO & NGOs*, 28 *BROOK. J. INT'L L.* 937, 982 (expressing concern that freely allowing amicus briefs before the WTO's Dispute Settlement Body will work to the advantage of "well-funded industry or corporate groups"); Riva Krut, *Globalization and Civil Society: NGO Influence in International Decision-making*, United Nations Research Institute for Social Development Discussion Paper No. 83, text at nn. 60-62 (Geneva, April 1997); Mattner, *supra* note\_\_ at 137-39 (noting the disproportionate influence of commercial lobbies in the WTO).

<sup>184</sup> See Jeffords, *Turning the Protester into a Partner for Development*, *supra* note\_\_ at 954 (noting that, over the course of the WTO's first four Ministerial meetings, 1195 of the 1533 NGOs attending were from North America or Europe and only 70 were from Latin America or Africa); Krut, *Globalization and Civil Society*, *supra* note\_\_ text at nn. 40-44; Mattner, *supra* note\_\_ at 137-39 (noting the disproportionate influence of northern NGOs in the WTO); Andrea Kupfer Schneider, *Unfriendly Actions: The Amicus Brief Battle At The WTO*, 7 *WID. L. SYMP. J.* 87, 105 (arguing that a system of amicus briefs in WTO dispute resolution proceedings will work to the advantage of northern NGOs and the cause of "ecoimperialism").

<sup>185</sup> See Robert O. Keohane & Joseph S. Nye, Jr., *Redefining Accountability for Global Governance*, in *GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION* 386, 388, 397 (Miles Kahler & David A. Lake eds., 2003) (stating that electoral accountability in international governance is weak because of long chain of delegation running from national voting publics to heads of state and international organizations); Antonio F. Perez, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law*, 14 *WIS. INT'L L. J.* 463 (1996) (lamenting lack of democratic control of informal transnational networks); Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 *IND. J. GLOB. L. STUD.* 369 (2001) (noting lack of national executive branch control over transnational regulatory networks); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 *Colum L. Rev.* 1492, 1563-65 (noting that delegations to international institutions are further removed from national voters than delegations to national administrative agencies). See also CAROL HARLOW, *ACCOUNTABILITY IN THE EUROPEAN UNION* 79-92 (2002) (analyzing lack of national parliamentary control over EU decisionmaking); Juliet Lodge, *The European Parliament*, in *THE EUROPEAN UNION: HOW DEMOCRATIC IS IT?* (Svein S. Anderson & Kjell A. Eliassen eds., 1996) (blaming national executives for intentionally marginalizing national parliaments in EU policymaking).

organizations do so largely free of party and parliamentary oversight. Under these conditions, republican laws and institutions that would permit global policymakers to exclude non-state actors could not hope to achieve the ideals of representative democracy that underpin such constitutions.

Corporatist democracy's balance between associationalism and elected officials is better-suited to the global politics of today. Given the separation between public officials in the global sphere and voters and elected politicians in the national realm, such officials should be required to solicit the views of associations. The case for interest representation in international organizations would hold even in the face of a cosmopolitan Global People's Assembly. A directly elected assembly, or a series of such assemblies in specific international regimes, would be unlikely to satisfy current understandings of democratic representation. A global assembly's world-wide scale, together with the practical limits on the assembly's size, would mean that each legislator would represent an enormous constituency. Such a distance between voters, their representatives, and the assembly's collective output would test severely the contemporary concept of representative democracy. Therefore, even a cosmopolitan international order--one that served global citizens, not states--would need to supplement the public law of French-style republican democracy with other institutions. One possibility would be an elaborate, federalist system of local, national, regional, and global assemblies with carefully allocated powers. Another is the one explored in this Article--representation of citizens based not on territory, but on common interests and identities.

Representation of interest should follow a corporatist, not pluralist, mold. Unlike pluralist democracies, resources are so unevenly distributed in global politics that we cannot assume all will be able to mobilize and to compete, thereby generating the public good. As in the corporatist tradition, international officials should seek to understand which associations represent significant social and economic forces and to take their views into account. Public officials should take pains to ensure balance among those associations that can legitimately claim to represent large number of citizens, united by common social and economic interests. Just because certain businesses, in some sectors of the economy, can command the profits necessary to organize at the international level, does not signify that they should have a special voice in global governance. The same is true for professional advocacy groups that have the skills necessary to apply for foundation funding but do not have large memberships. Not to say that such interest groups should be excluded from international policymaking. Their views, however, should be moderated by those of other groups that do not have the resources to attend international treaty negotiations, lobby international regulatory committees, and file briefs before international tribunals.

What shape might this form of mediated civil society participation take? Let us conduct a thought experiment. As the reader will recall, the corporatist model--illustrated by the German system--enables intermediate associations to

participate in policymaking through a number of procedures: lawmakers consult committees of associational representatives; regulatory functions are entrusted to industry and professional associations, subject to various public interest requirements; public interest statutes are enforced in court by certain associations. For purposes of the thought experiment, let us transpose one piece of the corporatist model to one international organization: advisory committees of associational representatives to the WTO. Such committees could be created in areas such as manufacturing, agriculture, consumer policy, the environment, and development. One possibility, introduced in the beginning of the Article, is Dan Esty's proposal for an advisory committee on the environment that would sit alongside the intergovernmental Committee on Trade and the Environment. These civil society committees could be consulted on revisions to the WTO Agreements and on interpretations of those agreements. They could meet with government officials about proposals, submit written papers on proposals, and publish their reactions to the policies ultimately adopted. Government officials could reject their views but, to the extent that such views were well-substantiated, at the peril of public opprobrium.

Imagining this form of corporatist interest representation at the global level is difficult for a number of reasons, some of which are unique to an international setting, others of which are intrinsic to the corporatist model wherever it operates. The most significant conceptual hurdle in making the transition from the domestic to the international realm is settling on a system for selecting associations. How would the associations sitting on WTO advisory committees be chosen? The most natural device—giving each state the right to appoint a national association—is risky. Many societies do not recognize liberalism's limits on state authority, limits that are vital to the existence of civil society. Such societies are less likely to have interest and identity associations. Moreover, illiberal states might appoint associations that represent state interests, not independent social actors. But neither is the solution to give the selection task to an official in the WTO secretariat. The whole point of corporatist interest representation is to enable significant social and economic forces to take part in public decisionmaking. What is "significant" cannot be decided by a civil servant sitting in Geneva, removed from the complicated social realities of different parts of the world.

One provisional solution would be allow the choice to be made by regional organizations: the African Union, the Organization of American States, the Association of South East Asian Nations, and others. Most regions of the world contain a number of different regimes, some more liberal than others. By requiring a group of states to come to agreement, the difficulty of creating liberal global governance out of illiberal states is reduced somewhat. Moreover, this arrangement has the advantage of giving the choice to government officials familiar with the local cultures to be represented. Politicians and bureaucrats at

the regional level should have a better understanding of their social and economic realities than civil servants in international bureaucracies.

Another set of challenges is related to the defects of corporatism domestically and the importance of attempting to avoid such defects at the international level. Again, at the heart of the matter is the selection of associations. At any historical moment, it might be clear which social forces have mobilized successfully in democratic politics and hence are entitled to influence directly public policy. But societies change. The special rights fairly granted to certain groups and their associations at one point in time, might become unjust privileges at a future point in time. As citizens develop new interests and identities and form new organizations, corporatist systems of interest representation can become obsolete. One oft-cited example of this phenomenon is the continuing prominence of blue collar unions in European politics notwithstanding their dwindling membership figures. Furthermore, any system that allows private associations to participate in policymaking, even a pluralist one, will lend state resources to those associations that succeed in advancing their goals through the process. To avoid these defects, corporatist procedures at the international level should be designed to facilitate adaptation and flexibility. Every five to ten years, on a staggered basis, regional organizations might be asked to review their roster of associations. And to combat the danger of empowering, unfairly, one set of social actors over another set, regional organizations could be required to replace some of their associations during this periodic review.

The thought experiment can also incorporate some of the insights of the political philosophy covered in the first part of this Article. In designing WTO advisory committees, a number of seats could be reserved for transnational associations. Selecting these associations could be the task of the WTO Secretariat. Its civil servants are particularly well-placed to determine which associations are genuinely transnational in their activities and will promote civic consciousness across national borders. To guide the Secretariat, formal criteria related to associational size and geographic scope should be devised.

In designing civil society participation, global policymakers should bear in mind that just as patterns of interest representation vary significantly within national systems of government, different forms of accommodation might be appropriate across international organizations or international policy areas. For instance, certain issues might provoke such extensive global mobilization that pluralist institutions are appropriate. Or national legislatures and executive branches might track certain forms of global governance so carefully that it might be proper to limit the role of civil society, as in the republican model. Or the public's desire for swift and decisive government action might be such that civil society participation should be restricted.

## **Conclusion**

For global politics to become democratic politics, it is critical that citizens throughout the world debate and band together on the issues being decided in the many sites of global governance. Yet that basic liberal intuition does not necessarily support the conclusion that the associations through which citizens mobilize should participate in policymaking. This Article demonstrates that liberal theories of civil society advance the cause of specific types of associations: local associations with grassroots followings in the social capital and communitarian schools of thought and transnational membership associations for cosmopolitans. Ongoing reform efforts in organizations like the World Bank and the WTO should pay special attention to these forms of civil society.

Architects of international organizations can also draw inspiration from national experiences with democracy. Democratic societies have devised at least three ways of accommodating interest and identity groups in public life: pluralism, corporatism, and republicanism. Each embodies a specific set of values and beliefs about public life. Proving these popular theories of democracy right or wrong in their native soil is not feasible. It is possible, however, to discern whether their belief systems have any purchase on the contemporary realities of politics in the international realm. In a global world of poorly organized interests and ineffective electoral politics, the premises of neither the pluralist nor the republican models are satisfied. The laws and institutions of pluralist and republican democracy, when transposed to this new global terrain, would fall short of the ideals and aspirations of those political communities. The public law of corporatist democracy is a good alternative. Corporatist democracy's belief that a balanced set of intermediate associations should participate in policymaking, alongside elected officials and civil servants, is better-suited to some of the realities of contemporary global politics.