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“Democracy-Enhancing Multilateralism”

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Abstract

This paper argues that involvement with multilateral institutions can improve the working of democracy at home. Constitutional democracy includes institutional strategies designed to limit the power of special interests, protect individual and minority rights, and promote collective deliberation. Applying these three standards, we find that the democratic performance of well-established democracies can be improved by their involvement with multilateral institutions and networks. Trade institutions promote policies more favorable to diffuse publics as opposed to special interests. Human rights treaties and courts help to protect individual and minority rights. Multilateral institutions dealing with environmental and economic policies promote improved collective deliberation. The Madisonian strategy of moving governance up to a higher level to improve collective self-government often works at the level of multilateral institutions. Well-designed multilateral institutions can enhance the quality of democracy at home, but of course many actual multilateral institutions do not have this effect.

“Democracy-Enhancing Multilateralism”¹

Robert O. Keohane, Stephen Macedo and Andrew Moravcsik

We argue in this paper that participation in multilateral institutions, defined broadly to include international organizations and regimes governed by formal international agreements, can enhance the quality of domestic democracy. While we recognize that some instances of multilateralism may have undemocratic implications, we argue that in three very important ways, multilateralism often enhances domestic democracy in the contemporary world. It can restrict the efficacy of special interest factions, protect individual rights, and improve the quality of democratic deliberation. Under some plausible circumstances international cooperation can thus enhance the quality of democracy at home, not reduce or compromise it—even in well-functioning democratic polities.

Our argument proceeds in three steps. In Section I, we discuss conflicts and complementarities between multilateralism and democracy, summarizing current criticisms of multilateralism. In Section II, we outline a working conception of constitutional democracy on which our analysis is based, highlighting three democracy-enhancing constitutional functions: offsetting factions, protecting minority rights, and enhancing the quality of democratic deliberation. In Section III, we elaborate theoretically and illustrate empirically the ways in

¹ Philip Pettit played a major role in the formulation of our argument, for which we are grateful. For comments on an early draft the authors thank participants at the Fall 2006 Global Administrative Law Seminar at New York University School of Law, especially seminar co-chairs Benedict Kingsbury and Richard Stewart, and Rick Pildes, John Ferejohn, and Bernie Grofman. For comments on later drafts we thank participants at a workshop of Princeton’s Program on Law and Public Affairs, chaired by Kim Lane Scheppele, and participants at a workshop of the Institute for Law and Philosophy at Rutgers School of Law, Camden, chaired by Jon Oberdeik. We have benefited from written comments by Mark Brandon, Allen Buchanan, Ruth Grant, Andrew Hurrell, Nico Krisch, Jamie Mayerfield, Walter F. Murphy, Joseph S. Nye, Jr., and Leif Wenar, and by oral discussions of democracy with Nannerl O. Keohane. We are indebted to Sarah Goff for invaluable research assistance.

which multilateral institutions can enhance domestic democracy by bolstering these constitutional functions.

We do not address the question of how international institutions may help further the cause of global justice. Nor do we suggest an agenda for the reform of global institutions, although we believe that the democratic standards we discuss are relevant to any reform agenda. We limit ourselves to supplying and defending some criteria for distinguishing between democracy-enhancing and democracy-degrading multilateralism, and argue that multilateral institutions may (and frequently do) enhance the workings of domestic democracy even in well-established democracies. Our argument provides a *critical standard* by which to evaluate the activities of multilateral institutions as well as a demonstration that in many situations, the implications of multilateralism for democracy are benign. Insofar as the activities of multilateral institutions degrade the quality of democracy, they should be criticized, reformed when possible, and only accepted when the countervailing benefits for values such as international peace and cooperation clearly outweigh the democratic costs.

I. Multilateralism vs. Democracy?

A. Conventional Criticisms of Multilateralism

Do multilateral institutions and networks threaten domestic democracy in the advanced industrial democracies like United States, Japan and Europe? Most analysts, regardless of their disciplinary background or political allegiance, appear to believe so. Global governance may pursue important goals, says political scientist Robert Dahl, but its bureaucratic character, separation from domestic democratic institutions, and lack of participation by ordinary citizens invariably undermine democratic accountability and deliberation (Dahl 1999). Yale law professor Jed Rubenfeld concurs. International organizations, he argues, “are famous for their

undemocratic opacity, remoteness from popular or representative politics, elitism, and unaccountability.” He contrasts international organizations that are “bureaucratic, diplomatic, technocratic—everything but democratic” with the American constitution, enacted through a uniquely democratic “process of popular deliberation and consent” (Rubinfeld 2004, pp. 1977, 2003). Public law scholar Jeremy Rabkin speaks for many conservatives when he argues that domestic democratic institutions make and enforce law with high levels of legitimacy, even in large, disparate and contentious communities, while multilateral institutions are, in comparison, illegitimate and ineffective (Rabkin 2005, 244-248). They are illegitimate due to their elite-driven agendas and absence of explicit democratic delegation and direct popular accountability (Rabkin 1998, 45). They are ineffective because the global arena is characterized by such wide and deep forms of diversity that the authoritative resolution of political controversies is impossible.

Redressing a perceived “democratic deficit” has become a central issue among Europeans as well. With regard to the EU, the contemporary world’s most extensive and ambitious multilateral institution, many have come to share the view of sociologist Ralf Dahrendorf, himself a former European Union Commissioner, in arguing that internationalization “almost invariably means a loss of democracy” (Dahrendorf 1999, 16). The Laeken Declaration of 2001, which officially launched the EU’s recent, contentious and still inconclusive effort to promulgate a “constitution,” identified the major internal challenge as that of bringing the EU “closer to its citizens” and providing “better democratic scrutiny” over its activities (Ludlow 2002, 215-233).

Three distinct criticisms of multilateral institutions are discernible: 1) they are remote, bureaucratic, elite-driven, and unresponsive to popular will; 2) they have acquired powers without adequate popular consent or formal democratic delegation; and 3) the trans-national

diversity of values makes it impossible to develop coherent and authoritative policies. Critics charge that international law and multilateral institutions allow elites to bypass the onerous processes of persuasion and consensus-seeking that democracy requires. Unelected non-governmental organizations and special interest advocacy groups network across borders and lobby for new rules, sometimes without normal legislative deliberation and formal lawmaking. Commitments made through the treaty power may be expanded incrementally through the operation of international legal processes, without being ratified at home. American conservatives criticize human rights lawyers, activist judges, and environmental groups, for seeking to import “progressive” foreign standards—for instance limiting the death penalty, or extending protections for homosexuals—without running the gamut of normal legislation (Rabkin, 1998, 2005). From the left, the anti-democratic complaint is directed at corporate interests for using global administrative bodies, like the World Trade Organization (WTO), to push a free trade agenda at the expense of core domestic concerns, such as health, safety, and environmental quality (Braithwaite and Drahos 2000; Wallach and Woodall 2004). In these ways and others, it is claimed, multilateral institutions are permitting elite internationalists of various political stripes to leverage their own values without the consent of the American people.

Underlying all these criticisms are two basic assumptions. One is that multilateralism threatens the sovereign independence of the domestic political community, thereby undermining an essential pre-requisite of democracy. Cooperation with other states for limited purposes via treaties is fine, but clear channels of domestic sovereignty should be preserved, because sovereignty is essential to the power and effectiveness of domestic governance: it represents no less than our collective capacity and obligation, as a political community, to make our own decisions regarding our own law (Nagel 2005). Critics also assume that domestic democratic

institutions enjoy a legitimacy deriving from elections and other forms of popular engagement and deliberation that is often degraded and never improved by involvement with multilateral institutions. We challenge both of these assumptions.

B. Conventional Defenses of Multilateralism

There are three conventional responses to the charge that multilateral institutions undermine domestic democracy—each of which is compelling on its own terms. These responses stress accountability, consent, and pragmatic benefits, respectively.

The first response is that everyday policy decisions in multilateral institutions are *directly accountable to its member states, and thus indirectly accountable to publics in the democracies among them*. As compared to states, multilateral institutions possess extremely limited coercive, fiscal or administrative powers. Nearly all multilateral institutions afford national governments control over supranational appointments, require supermajority, consensus or unanimity decisions in order to act; respect national procedures for legislative oversight; rely on decentralized implementation by national means; and contain internal checks and balances. The EU even sponsors direct elections to the European Parliament. Accordingly, it is nearly impossible for international organizations to legislate effectively without consensual support from diverse groups, while the broader impact of their adjudication or direct administrative functions is significant only in exceptional circumstances. These mechanisms add up to a high level of accountability, albeit mostly indirect, and render the arbitrary exercise of power by international institutions far less likely (Grant and Keohane 2005; Moravcsik 2002).

The second conventional response is that even if multilateral cooperation does constrain everyday national control in some ways, the sovereignty pooled in multilateral institutions is legitimate because it has been *delegated democratically and could also be rescinded that way*—

just as with national political systems (Buchanan and Keohane 2006). This is the classic position of international lawyers, who point out that multilateral treaties generally require unanimous consent of existing member states, with domestic ratification by whatever means a country deems fit. Unanimous consent is a more demanding standard than any contemporary democracy requires for constitutional amendment, let alone legislation—perhaps rightly so, given the diversity of the international community. Delegation to multilateral institutions can engender intense legislative and executive debate, as has occurred around US negotiation and ratification of the World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) in the 1990s. Moreover, governments generally retain the right to withdraw from international institutions or, in some cases, specific policies of such institutions—though of course it might be costly to actually do so. Insofar as *ex ante* authorization and *ex post* options to withdraw are present, and both are open to national democratic contestation, one might presume that international institutions and policies pass the test of consent.

The third conventional response is that even if democracy is degraded in the process, *the ends justify the undemocratic means, because the pooling of sovereignty allows states to achieve policy goals none could realize alone*. Multilateralism is a necessity because interdependence is a fact of life in the modern world. Without reciprocal cooperation, governments cannot reach many domestic goals: slowing global warming, liberalizing the international economy, standardizing goods and services, integrating communication systems, combating terrorism, controlling criminality, and regulating multinational corporations, to name a few. It is thus worthwhile to sacrifice some degree of domestic democratic control in order to render national governance more effective in terms of policy outputs, thus also, ultimately, maintaining domestic political support. Although the move from national to international governance may indeed

reduce each citizen's direct influence on national policies, sensible governments may enter such arrangements if the expanded substantive scope of each decision, which now governs policies of other governments that influence the realization of domestic goals, more than offsets the loss. Multilateralism permits national publics to trade an increment of sovereign control over domestic policy in exchange for *de facto* control over the policies of other nations. Abram and Antonia Chayes go so far as to argue that the distinctive utility of modern sovereignty lies precisely in the ability to participate in such transactions (Chayes and Chayes 1995).

This tripartite conventional defense of multilateralism—namely that multilateralism is accountable indirectly, delegated democratically, and useful pragmatically—is persuasive and widely accepted. Even those philosophically hostile to multilateralism, such as the Bush Administration or Professor Rabkin, seek to bolster institutions conducive to their purposes—such as some military pacts, the World Trade Organization (WTO) and multilateral means to combat terrorism (Moravcsik 2000a, 298-303). We believe these arguments are compelling, but here we aim to advance a more novel argument.

We argue that, in addition to indirect accountability, sufficient consent, and the pragmatic advantages of multilateral policy solutions, *multilateralism may actually improve the functioning of domestic democracy*. We admit that under some conditions multilateral cooperation can undermine valuable democratic practices. But we view such tradeoffs as merely *contingent*, not as necessary elements of multilateral cooperation in a world of democratic states. We argue that in certain situations, multilateral institutions can *enhance* democracy, properly conceived—even in the most advanced democratic polities. In order to establish this claim, however, we must first elaborate our understanding of constitutional democracy.

II. CONSTITUTIONAL DEMOCRACY AS DEMOCRACY

Popular elections are essential to democracy. We agree with Madison that all the powers of government should derive “directly or indirectly from the great body of the people,” either through direct election, or by appointment for a limited tenure or during good behavior (*The Federalist* #39). Electoral selection endows representatives with a powerful claim to democratic legitimacy. Institutions remote from direct electoral authorization can be good for democracy, but they would not be democratic without the constraint of periodic elections for lawmakers.

We do not, however, follow those who define democracy in minimal terms: as elections and majority rule, or the selection of rulers by competitive elections (Elster 1993; Schumpeter 1947). On that view, elections provide the majoritarian motor, and non-electoral, constitutional arrangements serve as necessary “liberal” restraints on “populist” inputs (Riker 1982). Thus, constitutionalism is regarded as in inherent tension with democracy (Murphy 2006, 4-12). We reject that account of the relationship. Constitutional arrangements can enhance democracy—the power of the people to rule themselves—by promoting a political system’s stability and effectiveness, its inclusiveness, and its openness to criticism and self-correction (Ely 1980; Holmes 1995; Eisgruber 2001).

For the people to be able effectively to make political decisions and to be assured of continuing to make them, democratic systems require constitutional rules and institutions that enable and constrain the power of governments and temporary majorities. Democratic deliberation and decision require prior agreement on settled rules to establish periodic and fair elections, to determine eligibility for voting and for service in office, to define the responsibilities of various elected officials, and to govern the appointment of non-elected officials (Przeworski 1999). Democracy requires that the powerful are held in check by the

prospect that abuses of power will be detected and publicized, which implies public access to information. Arbitrary actions of government, which could instill fear of free expression, must be limited by the rule of law, a wide variety of rights, and impartial enforcement mechanisms.

Constitutionalism creates the possibility that a democratic system will endure.

The moral attractiveness of democracy depends upon its constitutional grounding. Majority rule can be majority tyranny. The constitutional conception of democracy “demands a government that is inclusive enough so that all people (and not merely the majority) can associate themselves with the project of self-government. To qualify as democratic, a government must respond to the interests and opinions of all the people.” (Eisgruber, 2002, p. 19 and see generally p.18-19; Ely, 1980; Richardson, 2002). It makes government more rather than less democratic when we insure that minority interests are fairly attended to and the equal rights of minorities protected. Elected representatives and other public officials are not the people, and representatives should not be empowered, once elected, to do anything they please, but should rather be constrained to defend their policy choices publicly and in terms of the common good (Macedo 1990, 40-77; Gutmann and Thompson 1996; Pettit, 2000, 105-44).

Even when fairness to minorities is not at stake, we want democratic institutions to be capable of acquiring and taking account of reliable information. As Hamilton put it: “The republican principle demands that the deliberate sense of the community should govern the conduct” of government. (Hamilton 1787: *Federalist* #71) Democratic institutions should be not only fair, but also epistemically sound. Competing public institutions, and a system of checks and balances including politically independent courts, and agencies with specialized expertise, can help insure that policy choices are defended against robust criticism, and that errors are identified and

corrected. Deliberation should help insure that the public can live with political choices over the long haul.

Thus, to conceive of modern democracies as “majoritarian” in any simple sense is misleading. Majority or plurality voting is widely employed as a reasonable and fair way of deciding between alternatives that have been deliberated upon, and vetted and refined by an inclusive legislative process. But the use of majority voting at particular points does not make a *system* majoritarian. Lawmaking typically requires the concurrence of distinct legislative chambers as well as an executive, representation is based on “different divisions of the people into constituencies,” different terms of office, and internal rules, all of which increase the range of views that need to be heard and taken into account. (Riker. 1982, 250) Laws are typically interpreted and administered by agencies and courts armed with a measure of independent discretion. All this takes place through constitutional structures authorized by supermajority requirements. In sum, existing democracies employ popular majority voting only during particular phases of a complex process.

We adopt a constitutional conception of democracy because well-designed constitutional constraints enhance democracy, understood as the ability of the public, on due reflection, to govern itself over the long run.² Constitutional and statutory constraints can contribute to the improvement of democracy in three ways that are directly relevant to our democratic defense of multilateral institutions: by combating special interests, protecting rights, and fostering robust public deliberation. As we will see in Part III, multilateralism can have similar democracy-enhancing effects.

² For a valuable account—paralleling our own—of the relationship between democracy and liberal constitutionalism, see Holmes, 1995. We leave open many specific questions of constitutional design.

A. Combating Special Interests

Constitutional procedures can make democracy more inclusive by directing policy toward the public good of the community as a whole, rather than the special interests of particular factions.

James Madison defined a faction as a majority or minority of citizens, “united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” (Madison 1787: *Federalist # 10*).

Madison’s solution, embodied in the United States Constitution, was to move governance up to a higher level by establishing indirect or representative government within an “extended republic” embracing a much larger territory and encompassing a greater variety of interests. This would “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens” selected from larger constituencies, which he expected would improve the quality of decisions. Most important, according to Madison, larger scale tends to counteract special interest pressures:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary (Madison, *The Federalist #10*).

While Madison himself focused primarily on the problems of unrestrained majorities (which we discuss in more detail below), we focus here on capture by powerful minority factions.

Whereas in theory electoral institutions might be expected to impede the formation of minority factions, in practice this often fails to occur. Instead the free play of decentralized representative institutions often empowers those with short-term vision, intense particular interests, and

disproportionate political resources or organizational capacity. These special interests can therefore capture policy, by constructing relationships with administrative agencies and politicians. While many circumstances facilitate capture of policy by special interests, political scientists and policy analysts generally agree that such capture is particularly likely where benefits and costs are asymmetrically distributed such that majority interests are diffuse, uncertain, or far in the future, while special interests are concentrated, certain or current. (Olson 1965, Dahl 1956, 128-132, Lowi 1969; Schattschneider 1960).

“Direct democracy” is far from a panacea. Referenda in the American states are frequently driven by deep pocket special interests that pay signature gatherers for petition drives, fund research on how to frame ballot questions, and dominate media in the run-up to voting, making voters “dupes in a process manipulated by wealthy interests” (Broder 2000, 88). At best, voters may use rule-of-thumb heuristics to limit such manipulation (Lupia 1994). In Europe, the topics subject to referenda are often low in salience or very complex, meaning that referendum voting will reflect little real deliberation and learning about the issue at hand. Voters in Europe generally use referenda to express their views on unrelated domestic issues (Moravcsik 2006)

Under some conditions, delegation to an agent not directly answerable to the public has proven itself an effective instrument to achieve long-run interests shared by a majority. Constitutional democracies have therefore created independent central banks and have in some cases delegated substantial authority for the review not only of legislation but also of administrative decisions to courts. In situations involving a public good that no individual group has an incentive to provide on its own, the resulting policy may be more *representative* of diffuse general interests and majority preferences that pass the test of public deliberation than the policies enacted through more directly majoritarian processes (Fischer 1995; Stewart 1975)

B. Protecting Individual and Minority Rights

Some policies favored by majorities violate rights or impose unjust burdens on vulnerable individuals and minorities. Combating the capture of government by majority factions (or “tyranny of the majority” as Alexis de Tocqueville famously called it) was regarded by Madison as “the great object to which our inquiries are directed” and as essential to rescuing government by the people “from the opprobrium under which it has so long labored” (Tocqueville 1835; *Federalist* #10). The constitutional enumeration and enforcement of minority and individual rights pre-commits members of a polity to guarantee a minimum level of protection to each citizen. Across the globe, legitimate domestic democracies regularly, and increasingly, also create checks and balances, allow minority vetoes at some points, deliberately over-represent small groups, and, most importantly, delegate the enforcement of individual rights to courts. As Ian Shapiro puts it, “The countries in which there is meaningful freedom of speech, association, respect for personal and property rights, prohibitions on torture, and guarantees of equality before the law are overwhelmingly the countries that have democratic political systems” (Shapiro 2003, 217).

Such non-majoritarian institutions for rights protection can enhance constitutional democracy in a number of ways. First, many rights—in addition to voting rights—are essential to meaningful democratic participation and debate: without rights of free speech, assembly and privacy, as well as freedom of the press, individuals and groups would be unable to form and express their views freely and confidently on public matters, thereby rendering elections a charade. Second, the free expression of minority interests and perspectives improves democratic deliberation by insuring that minority voices are heard and minority interests respected, resulting in policy more likely to represent the interests of all and a fuller range of public concerns.

Mechanisms that facilitate the representation of “discrete and insular minorities” are often viewed as important to democracy. (Ely 1980, 76) Third and finally, rights protection removes intractable disputes from the public agenda and facilitates democratic governance with respect to genuinely common interests. The classic example is the “agreement to disagree” about religion: if citizens do not put religious disputes aside, collective governance often proves impossible. By delimiting areas of special concern to vulnerable minorities and providing equal minimum protection of minority interests against unfair encroachment, we make it possible for them to participate with confidence in the larger society and politics. In each of these ways, deliberate departures from direct majoritarian control better protect the interests of minorities who would be vulnerable to *de facto* exclusion or oppression, thereby rendering democratic politics more inclusive and reasonable.

C. Fostering Collective Deliberation

Democracy stands for governance on the basis of arguments and evidence that have been tested in public with a wide range of information. When policies are adopted deliberately—after sufficient discussion, debate, and the sifting of reasons and evidence, including from experts—they are more likely to be policies that we will be prepared to live with. Yet political institutions vary in their *epistemic quality* (Buchanan and Keohane 2006). Some are more transparent and proactive in providing information; some are superior in generating, disseminating and acting on expert knowledge; and some are better at listening seriously to critical voices.

Simple majoritarian institutions may inhibit sound collective deliberation by failing to provide for the optimal generation and distribution of information, criticism, and expertise. Individual citizens often lack the time, money, attention, interest, or expertise to obtain and consider information. Those with more resources, and an incentive to use them, may mislead the public.

Elected representatives and popular majorities may be biased by short-term or personal motives. Madison specifically argued that too frequent resort to elections can undermine both the representatives' capacity to assume responsibility for the people's long term interests, and the people's capacity to hold representatives responsible for complex measures requiring time to ripen (Madison, *The Federalist* #63).

By broadening the information, expertise and argument on which decisions are made, non-electoral, "depoliticized," specialized, and higher-level institutions may enhance democracy's deliberative capacity (Holmes 1995; Pettit 2000). For this reason, among others, all modern democracies insulate certain classes of such institutions from direct electoral contestation via constitutional mandates, statutory guidance, requirements of technical expertise, and more intermittent public oversight. Among such mechanisms are the separation of powers, bicameralism, legislative committees, long electoral mandates, technical bodies and administrative agencies, autonomous experts, central banks, independent courts, and the simple expedient of moving decision-making to a higher (less local) level of government. Often such institutional forums function with particularly robust encouragement of full and impartial debate, and with requirements for explicit reason-giving (Macedo 1990, 142-162; Dorf and Sabel 1998). The people's business is often better conducted in such forums, precisely because the "epistemic" soundness and reliability of decision-making is improved.³ Citizens appear to be satisfied with this result, as illustrated by consistent poll results across OECD democracies

³ On the "epistemic" advantages of liberal democracy, see Buchanan 2004, 106; and Holmes, 1995, 162, "Liberal constitutions... consist largely of metaconstraints: rules that compel each decision-making authority to expose its decisions to criticism and possible revision."

showing that insulated institutions such as courts, bureaucratic agencies, national executives, and the military are better liked and more trusted than legislatures and elected politicians.⁴

III. DEMOCRACY-ENHANCING MULTILATERALISM

We have seen that real-world democracy is best understood as constitutional democracy, in which much of politics is deliberately insulated from direct majoritarian control. Existing, seemingly highly legitimate, democratic systems make extensive use of such insulated institutions. We turn now to our core argument that multilateral institutions can, and often do, bolster democracy by enhancing imperfect domestic constitutional mechanisms of this kind. We provide empirical evidence to show that multilateralism can and does help combat dominant factions, protect vulnerable minorities, and enhance democracy's epistemic virtues.

A. Combating Special Interests

Of the numerous constitutional domains in which the interests of broad groups are particularly apt to be overwhelmed by pressure from more powerful, self-conscious and concentrated special interests, trade policy is among the most prominent. Trade generally creates aggregate gains, but it also always creates losers. In some situations, the losers may have just claims for compensation or other ameliorative action, and we believe that in such situations both national governments and international organizations may have obligations to respond to these claims. Governments and international organizations have sometimes sought to meet these obligations (Ruggie 1983, Scharpf 1999).

Often, however, the losers from trade liberalization, such as local import-competing firms, have no valid claims to special treatment or compensation. In general, trade restrictions create

⁴ See data cited in Moravcsik, 2006 (original source: Eurobarometer 56.2, Oct./Nov. 2001).

dead-weight losses for the society as a whole, as well as globally, so there should be a presumption against claims for protection. Yet in the competitive struggle of interest group politics, concentrated and well-organized losers from trade liberalization dominate diffuse and less organized winners from liberal trade, such as consumers and future exporters. The history of American trade policy in the first third of the 20th century illustrates this proposition (Schattschneider 1935).

Since protectionism can prevail even when gains from trade liberalization outweigh losses for the society as a whole and the winners are more numerous than the losers, control of minority factions is the central issue of trade policy. Across the globe, democratic societies have responded by placing greater control over the trade agenda into the hands of more insulated leaders with a broader and longer-term mandate—who are generally likely to support the interests of diffuse majorities on trade issues. Where this is the case, multilateral institutions may further improve the ability of national democracies to represent legitimate domestic majorities.⁵

Consider first the case of the United States. From the start, the American Constitution sought to promote an open commercial republic, free of protectionist policies among states. It did so by giving the power to regulate commerce among the states to Congress, and by requiring states to extend to citizens of other states whatever “privileges and immunities” they extend to their own citizens (*Federalist* #22 and Article IV of the Constitution). Still, after the Civil War, United States trade policy was, with brief exceptions, protectionist, since the dominant coalition put together by the Republican Party had protectionism as a core policy. Congressional log-rolling

⁵ We treat liberal trade as contingently desirable, as we believe it has generally been for most of the past half century. We assume that the political community has decided on good grounds that liberal trade is in the common interest, and focus on the institutional mechanisms required to realize it. Selective protectionist measures might be defended as in the public interest, especially at early stages of economic development (See Rodrik 1997) but protectionism cannot be justified as a general practice. We readily acknowledge, however, that tradeoffs between trade liberalization and other values (such as environmental protection or labor rights) may exist, and that trade liberalization has no claim to absolute priority.

increased levels of tariff protection, in a process that reached its apogee with the record-high Smoot-Hawley tariff of 1930 (Schattschneider 1935).

Since the enactment of the epochal Reciprocal Trade Agreements Act of 1934, United States trade policy has been based on the principles of liberalization and reciprocity. The primary institutional response has been to structure the process of negotiation and adjudication so as to empower diffuse coalitions of liberalizing interests. Among the decisive domestic mechanisms have been enhanced presidential power, recognition of international adjudication, and negotiation through international institutions with norms of reciprocity and non-discrimination. This was possible in large part due to multilateral trade norms and institutions that altered domestic practices—generally enhancing executive and judicial power, reshaping the incentives of legislators, and shifting the salience of issues—so as to empower a previously powerless majority.

International organizations reinforce this system, and their effects are in some respects similar to those for which the founders of the American republic hoped when they moved important aspects of governance up from the state level to a higher national level. Multilateral institutions such as the GATT, WTO, and NAFTA provide mechanisms by which democratic publics can limit the influence of minority factions by committing in advance to a set of multilateral rules and practices that require trade policies to be defended on the basis of public reasons. Three international elements have been particularly important.

First the establishment of a hallmark *principle of reciprocity* in trade negotiations underscores that in the modern world, the way to get other nations to reduce their trade barriers is to reduce your own trade barriers for their goods. This gives domestic producer groups a greater incentive to mobilize to counteract domestic protectionist groups, thereby encouraging liberal trade

through tacit international coalitions (Gilligan 1997; McGinnis and Movsesian 2000, 539-540).

A parallel norm of anti-discrimination has further limited the ability of domestic special interests to construct bilateral protectionist coalitions of their own (Finlayson and Zacher 1983). These principles were made explicit in 1947 under the General Agreement on Tariffs and Trade (GATT) and then again more recently under the World Trade Organization (WTO) and the North American Free Trade Agreement.

A second crucial mechanism is that the use of bilateral and multilateral forums to negotiate trade liberalization *shifts control over the domestic trade agenda into the hands of the executive branch*, which represents a broader national constituency than individual members of Congress and the Senate. By bringing back a finished trade deal, the president sets the domestic agenda—a power the executive has tended to use to empower diffuse free-trade interests. This logic underlay the aforementioned 1934 Trade Act, which delegated to the President wide authority to cut tariffs on a reciprocal basis, with immediate and long-term liberalizing effects. (Bailey, Goldstein, and Weingast 1997) It similarly underlay the formation of the Special Trade Representative’s Office in the 1970s—an institutional innovation Gilbert Winham has linked with Madison’s core constitutional concern to control factions.⁶ It has subsequently become customary for Congress to delegate “fast track” negotiating authority to the president, which subjects the resulting agreement only to streamlined Congressional ratification without amendment.

⁶ Winham says of insulated US procedures originally implemented to negotiate the GATT Tokyo Round: “The task of negotiating ... was delegated to a small number of government officers who were responsible for protecting the interests of groups in a community, and the process of consulting with constituents was extended widely through [committees] in order to receive a fair representation of all interests [which also] helped the government to control the groups. The [negotiation] was a modern example of the Madisonian principle of republican government...the government controls the people, but the people control the government.” Winham 1980, 392-393.

A third and final element is that *impartial international adjudication*, centered on the WTO dispute-settlement procedures with an Appellate Body as the final authority, creates a salient and legitimate standard around which domestic free trade interests can organize. The WTO Appellate Body, a quasi-judicial body whose members are chosen by member governments, is authorized to rule that national measures are GATT-illegal. During the decade since the formation of the WTO, it has notably extended its authority, promoting further liberalization of the trade regime as well as helping to enforce the rules agreed upon by states in the 1986-1994 Uruguay Round of trade negotiations. Furthermore, under the WTO the dispute settlement procedure has been heavily used: during the 46 years of the GATT system, 535 complaints were filed (an average of less than twelve per year), whereas during the first eight years of the WTO system, 269 complaints were filed (over 33 per year). Many of its rulings have been on important issues, requiring powerful trading blocs such as the EU and the United States to rescind or revise measures judged by the Appellate Body to be illegal under GATT rules (Steinberg 2004; Goldstein and Steinberg 2007).

The democracy-enhancing effects of reciprocity, enhanced executive power, and international adjudication under GATT are exemplified by the fate of the so-called “Manufacturing Clause,” an 1891 clause of the United States Copyright Act requiring that many printed materials be printed in the United States to enjoy copyright protection—a clause originally designed to protect “infant” industry but perpetuated by printing industry unions. In the 1980s, the European Community (EC) pressed for the elimination of the clause, sparking a domestic struggle between President and Congress. President Reagan vetoed a Congressional measure to renew the Manufacturing Clause, but ultimately acquiesced in a four-year extension. When the EC filed suit before GATT, the Reagan Administration, without consulting Congress, declined to invoke

its right to veto the process and eventually accepted a panel report ruling against the United States. Accordingly, when renewal of the Clause came before Congress again in 1986, the EC could credibly threaten to retaliate against \$300-\$500 million worth of US goods. Special Trade Representative Clayton Yeutter declared that extending the manufacturing clause “is going to cost us a lot more jobs [than it saves in printing] ... because we have assured retaliation.”⁷ The Manufacturing Clause disappeared from American law.

Critics protest that WTO prevents democratic publics from acting on their preferences – for example, the European preference not to eat genetically modified foods. While our criteria acknowledge that we should be attentive to the potential danger that legitimate public purposes would be quashed, an empirical analysis based on our criteria for democracy-enhancing democracy suggests that current concern is exaggerated. A WTO ruling against restrictions on genetically modified food does not automatically impose free trade. Instead, the Appellate Body’s decision means that the European Union may refuse imports of genetically modified foods, but since there is no sound scientific evidence to indicate that such foods are unhealthy, the EU must compensate producers of such foods whose products are excluded from European markets. The system imposes a penalty for regulations that lack a solid scientific justification, which is surely necessary to defend the global trading system, while affording member states considerable flexibility in choosing how to respond. Europeans retain the option of paying a price for maintaining public health regulations unsupported by sound evidence. Moreover, those who continue to doubt the healthfulness of genetically modified food are encouraged to renew their search for sounder evidence; should it emerge, European restrictions would become WTO-legal. This seems a reasonable balance, and thus we conclude that modern international trade

⁷ United States Congress 1986: 10; Hudec 1993 Clayton Yeutter testimony, Subcommittee on Trade, Committee on Ways and Means, 99-2, June 26, 1986, 10.

adjudication is “broadly consistent with a democracy-reinforcing jurisprudence” (McGinnis and Movsesian, 2000, 601).

The EU is an even more ambitious multilateral institution. Such an expansive pooling of sovereignty in the world’s most ambitious and successful international organization deserves close scrutiny—which the EU has received from critics and defenders of multilateralism, and those who criticize the EU’s supposed “democratic deficit.” Three salient characteristics of EU trade policy underscore our thesis about the utility of international organizations in combating domestic factions.

First, the EU has functioned for decades, much in the same way as the WTO, to “strengthen the executive” in European member states in the negotiation of reciprocal policy trade liberalization and its implementation. Strengthening the executive has facilitated the representation of diffuse public interest in economic liberalization as against domestic factions.⁸ Adjudication by national courts and the European Court of Justice has similarly undermined the power of domestic firms to exploit consumers and competitive producers—as, for example, in the landmark *Cassis de Dijon* case, striking down spurious health-based restrictions on the importation of foreign liquor.

Second, the evolution of the EU since the single market initiative of the 1980s demonstrates that the logic of empowering diffuse general interests against special interests is not limited to trade policy alone. EU regulation has expanded to other areas with a similar structure of interests, including environmental policy, central banking, and the management of foreign aid. There is scant evidence to support the widespread belief that the EU as a whole is undermining

⁸ Moravcsik 2002. A notable exception, namely the Common Agricultural Policy, proves the proverbial rule—for farming is a case in which a special interest successfully dominates national electoral politics in every OECD country, and even the EU has proven too weak to combat it.

national social welfare provision. (Scharpf 1999, 156-186) Rather, EU policies promoting economic liberalization only partially offset a pervasive tendency among European national polities to offer levels of social protection and labor market rigidity in favor of “insiders” (pensioners and older high-wage workers)—policies that are, largely for demographic and fiscal reasons, unsustainable. In this way, too, the EU can be seen as balancing (though not directly combating) short-sighted special interests.

Third, it is striking that the areas in which the EU can act with the greatest autonomy from national executives—such as central banking, constitutional adjudication, human rights protection, civil prosecution, trade liberalization, and technical regulation—are precisely those areas in which delegation of the same variety is widely practiced in (presumptively) legitimate national polities. This supports our thesis that the terms of delegation to multilateral institutions are consistent with the principles governing constitutional delegation in general, rather than being a characteristic fault or ideological predisposition specific to multilateral governance in Europe or elsewhere.

Consider one final policy arena. Various scholars have argued that multilateral organizations may have advantages over particular governments when it comes to fulfilling the public’s wishes with respect to foreign aid. Dani Rodrik has pointed out that multilateral agencies such as the World Bank not only constitute what amounts to an aid-giving cartel, increasing donor influence, but may be better than national governments at providing information, which helps governments and publics monitor aid recipients (Rodrik 1996). Helen Milner goes further to argue that multilateral aid agencies help to solve a domestic principal-agent problem. Donor governments may be tempted to use foreign aid to advance their political interests, whereas domestic publics are more interested in addressing the needs of the people of recipient countries, as indicated by

their inclination toward humanitarian assistance. Publics find it difficult to monitor their governments, but place greater trust in multilateral aid organizations that are accountable to their member states collectively rather than to particular governments. Milner's analysis suggests that when publics are less favorable toward foreign aid, governments allocate a greater proportion of their aid multilaterally. "When publics are more skeptical about aid," Milner concludes, channeling aid through multilateral institutions may mean "all sides end up better off: the government can distribute a larger amount of aid than otherwise, and the public gets higher quality aid through multilateral allocation" (Milner 2005: 110).

In all of these situations multilateral organizations assist domestic publics to achieve goals that they would otherwise have difficulty achieving. Both GATT/WTO and the EU typically empower diffuse general interests against special interests, and multilateral aid agencies such as the World Bank enable publics to authorize policies that implement their values when they do not fully trust their own governments to do so. However, it is important to note that the empowerment of general interests is not an *automatic* result of the involvement of multilateral institutions. Collusion between special interests and multilateral institutions is also possible. Once again, the standards we propose – including promotion of the public interest – can be used both to point out when multilateralism enhances democracy and when it fails on account of collusion.

Our claim here is limited to the proposition that such institutions enhance democratic processes with respect to trade policy in powerful states such as the United States and the members of the European Union. By their very nature they impose some constraints on majorities within countries, but these constraints often have benign effects: they serve as pre-commitments that make cooperation for mutual benefit possible. It is quite possible that

particular rules may be badly designed, or may themselves be biased in favor of special interests; but the proper remedy would be to change the rules rather than to remove the constraints, since the latter measure would enable special interests in each country to enact protective measures at the expense of exporters elsewhere and of their own publics.

B. Protecting Individual and Minority Rights

In constitutional democracies, institutions exist to protect the interests of vulnerable minorities and individuals against infringement by the state or by factious majorities. This function is increasingly, though not exclusively, carried out by courts.⁹ Yet domestic protections in sovereign democracies are invariably imperfect and uneven—particularly in newer or quasi-democracies (Issacharoff 2007). Where this is the case, multilateral institutions may improve such protections.

Nearly all advanced industrial democracies have signed multilateral treaties that enumerate human rights and establish international adjudication—thereby helping to protect human rights and fundamental minority interests. The recent spread of *ex post* constitutional review for human rights across Western nations—in nearly all of which there is no such indigenous tradition—has been largely a function of such multilateral commitments.

The most developed system has evolved under the European Convention on Human Rights (ECHR), which now governs 46 countries from Russia to Iceland. Since 1960, its Court of Human Rights has issued over 8000 judgments, and continues to do so at an accelerating rate. 80% of such judgments find for the plaintiff, and compliance is widely viewed as effective. Judgments have been enforced against torture in Northern Ireland, discrimination against

⁹ The history of civil rights in the United States demonstrates that during times of war and national emergency, these judicial protections have not always been effective, but over time, the rights of many minorities in the United States have become more secure. Stone 2004.

homosexuals in the British military, violation of privacy rights in Switzerland, arbitrary detention in Russia and several other former Soviet states, restriction of religious rights in Moldova, incarceration of journalists in Turkey, and many other violations (Blackburn and Polakiewicz 2001).

The power of multilateral institutions to improve the human rights performance of established democracies is not limited to Europe. Weaker systems exist in the Americas and Africa, and under UN auspices. Even the far weaker UN system has had an impact. Up to the mid 1990's, for example, Tasmania refused to follow the rest of Australia in removing certain forms of discrimination against homosexuals—a position with strong popular support (Willett, 2000, 231-237). In 1991 a member of the Tasmanian Gay and Lesbian Rights Group, having exhausted domestic remedies, challenged the restrictions on homosexuals before the United Nations Human Rights Committee (UNHRC). The federal government of Australia agreed with the basis of the appeal, referring to “a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation” (Pritchard, 1994). The UNHRC found in 1994 that the Tasmanian restrictions violated the International Covenant on Civil and Political Rights (ICCPR), opening the way for the Australian federal government to invoke its treaty-making power to override the restrictions. In 1997, legal pressure and public anti-government campaigns led the Tasmanian parliament to reverse course.¹⁰

Such examples can be multiplied, and are not limited to judicial intervention in defense of individual rights. Multilateral organizations have played a significant role against gender violence, in part by strengthening national governments. (Merry 2006). The International Labor Organization and the World Bank have developed standards and practices that have helped to

¹⁰ For the timeline of the Tasmania controversy, see the website of the Tasmanian Gay & Lesbian Rights Group, http://tgllrg.org/more/76_0_1_0_M4/

protect the rights and interests of indigenous peoples (Kingsbury 1999). The effects of such institutions, empirical studies suggest, is more than anecdotal. These dynamics appear to be particularly strong in newer democracies (or democracies with reformist left-wing governments), where much needs to be done and elements of the new political leadership may have an incentive to encourage enforcement against entrenched national practices (Moravcsik, 2000b).

The sources of compliance with human rights regimes are contested, in view of the fact that, unlike trade pacts, they do not generate reciprocal policy concessions. One view is that governments seek to improve their reputations (Chayes and Chayes 1995, 27). However, reputational arguments are hard to substantiate and the costs of a bad reputation may be avoidable (Downs and Jones 2002). Alternatively, governments may comply with human rights standards because they are linked to material benefits such as preferential trade agreements (Hafner-Burton 2005). Sometimes domestic and international institutions work in tandem, as when commitments under international human rights treaties are incorporated by parliaments into domestic law and enforcement powers are transferred from national political authorities to more impartial domestic courts (Moravcsik 2000b, Alter 2001). Legal judgments may also spark social mobilization by creating a focal point around which domestic pressure groups can organize (Keck and Sikkink, 1998).

In this context, it is ironic that the United States, the first country to promulgate a written Bill of Rights and to regularize *ex post* judicial review domestically, has remained skeptical toward adherence to international human rights norms—whether in the form of bilateral or multilateral treaties or citation of foreign and international jurisprudence by domestic courts. Michael Ignatieff terms this tendency “American exemptionalism” (Ignatieff, 2005).

The result has often been to undermine the rights of vulnerable minorities in the United States. From the Chinese exclusion cases of the late 1880s to disputes over the treatment of prisoners held in Guantánamo today, the US has permitted federal statutes to trump treaty commitments, even at the cost of the internationally recognized human rights of foreign nationals. The Senate has, moreover, consistently resisted the ratification of any multilateral human rights treaties with domestic application to US citizens. This staunch opposition to domestic application, particularly in the 1950s and 1960s, was initially led by Southerners who feared that the federal and state courts might use adherence to such treaties as a basis to rule racial segregation or massive discrimination illegal. Even after the end of segregation, resistance linked to conservative opposition to rights enforcement continues to be strong—precisely because such intervention can effectively defend individual rights against prevailing democratic majorities (Moravcsik 2005 176-186; Kaufman 1990, 52-59). The rejection of such mechanisms by groups seeking to repress minorities suggests that with regard to the protection of vulnerable individuals and minorities, multilateral institutions can enhance constitutional democracy.

We do not argue, however, that multilateral institutions invariably enhance human rights protections or democracy. In the wake of the attack on the World Trade Center in September 2001, for example, the UN Security Council enacted anti-terrorist resolutions requested by the US, requiring states to freeze the assets of named individuals or institutions believed to be associated with terrorism. Placement on the list results from closed proceedings of the Sanctions Committee, and many states around the world give automatic effect to these decisions. Individuals who are thus deprived of their property and means of livelihood are afforded none of the prior administrative or legal safeguards normally afforded to accused persons. (Schepple 2006, 360). In Europe, about 450 individuals and institutions have had their assets frozen, and so

far the European Court of First Instance has not insisted that individuals have rights to due process: it has deferred to the Security Council—leaving only diplomatic recourse (Kumm 2006, 289). While it is common and sometimes legitimate to suspend (or amend) due process guarantees when national security is threatened, multilateral institutions here seem to be facilitating the migration of anti-democratic norms. Punishing individuals without fundamental due process protections, including the right to confront charges and evidence in an impartial forum, subjects individuals to arbitrary treatment, and deprives the entire society—or in this case, the whole world—of the opportunity to learn about the decisions being made in its name, including whether those being punished are actually guilty.¹¹ Here again, the democracy-enhancing case for multilateralism also furnishes critical standards for assessing the performance of multilateral institutions.

C. Fostering Collective Deliberation

With competitive political systems, guaranteed freedoms of press, speech and assembly, and a wide array of rules and institutional structures empowering critics and requiring public justifications, liberal constitutional democracies are designed expressly to generate and disseminate information, correct errors, and improve policies and practices. For all their intrinsic epistemic advantages, however, individual democracies can utilize information, expertise, and debate even more effectively when they participate in multilateral institutions and networks. To be sure, some dismiss the possibility that critical insights from abroad can improve the truth-seeking potential of our domestic political institutions, and even portray openness to overseas experience and insight as a betrayal of the American constitutional tradition (Rubinfeld 2004;

¹¹ The right to an individualized hearing—requiring the government to respond in an impartial forum to individuals' grievances when applying the law to them—can be understood as a right to democratic participation, see Eylon, Yuval and Alon Harel, 2006.

Rabkin 2005). We regard such criticisms as both misguided and misinformed. The wider scope, greater diversity, expert staffs, and political insulation of multilateral forums can enhance the epistemic basis of political decision-making by expanding the range of information available to national politicians and publics. When information and critical insights are generated and utilized more effectively, democracy is improved.

Multilateral institutions' capacity to improve the quality of domestic democratic deliberation is particularly well-documented with respect to global environmental assessments. The scientific process by which the impact of ozone-depleting chemicals was assessed played a major role in creating widespread consensus on the need to phase out such chemicals. As Edward Parson writes, "scientific assessments can exercise important influence on policy... by authoritatively resolving scientific questions that have come to be accepted as crucial determinants of the seriousness of the issue" (Parson 2003, 266). A recent review of global environmental assessments concludes that the influence of such assessments "flows from the process by which it creates knowledge rather than from the reports it may produce... The effectiveness of assessment processes depends on a process of co-production of knowledge between assessment producers and potential assessment user groups" (Mitchell et al. 2006, 324).

The Intergovernmental Panel on Climate Change (IPCC), formed under UN auspices in 1988, is the most highly publicized global environmental assessment project. The IPCC involves governments, who approve the summary reports for policy-makers and provide legitimacy for its work; but its core activities are run by networks of scientists. The IPCC has issued four assessment reports, each drawing on a comprehensive survey of contemporary research, and each heavily peer-reviewed. Over the last 20 years, the IPCC has provided the most authoritative information on climate change available to policy-makers, and has done so in a way that is

highly salient – as demonstrated by the extensive media coverage of its Fourth Assessment Report in 2007 (Intergovernmental Panel on Climate Change 2007).

Most international organizations work less as vertical systems (in which international officials or judges render decisions) than as transgovernmental networks linking national officials and quasi-public bodies with their foreign counterparts for the purpose of joint decision-making, coordination, or information sharing (Keohane and Nye 1974; Slaughter 2004; Slaughter and Zaring 2006, 220). Whereas critics often emphasize the extent of diversity and disagreement on the global stage, political communities with similar political systems and levels of economic development typically face many similar (and rapidly changing) problems. Multilateral institutions and networks offer forums in which information on preferred solutions and “best practices” can be exchanged and debated. The decentralized and divided structure of international organizations means, contrary to critics, that they generally meet *higher* standard of transparency and justification by reason-giving than most national systems.

Studies of the EU’s *comitology* and Council decision-making structures, for example, where national officials prepare legislation and oversee rule-making, reveal an extremely high level of information, expertise and reason-giving—in large part precisely because discussions take place among competent experts in insulated forums (Joerges and Vos 1999). Even where formal decisions are not taken, multilateral institutions and networks can help spread “best practices” in regulatory governance. Decentralized governance means that innovations are likely to appear in one or a few countries that turn out to be helpful in solving similar problems elsewhere; multilateral organizations provide a routine way to share these innovations. Analyses of “best practices” show that countries adopt pragmatic suggestions (often “second best” rather than “best”) but nonetheless that the process of harmonization can upgrade the practices of laggards

and promote a higher average level of governance (Zaring 2006). Charles Sabel and Jonathan Zeitlin (2006) describe an array such complex and multi-level arrangements for decentralized but coordinated rule-making in the European Union. The best known may be the EU's "Open Method of Coordination." This process does not require policy harmonization, but rather seeks to promote learning by establishing common objectives, developing comparable metrics for assessing progress, and setting benchmarks for good performance. According to Sabel and Zeitlin, the resulting networks take advantage of local and national knowledge about specific institutions and preferences, are more flexible and adaptive than centralized hierarchies, and are transparent and accountable enough to be as democratic in actual operation as more traditional regulatory hierarchies.

Several other international organizations generate information and specify standards or best practices in policy areas central to the world economy. The Basel Committee on Banking Supervision, meeting under the auspices of the Bank for International Settlements, is a transgovernmental regulatory network, which, in partnership with the Bank for International Settlements, "generates global public goods of information and expertise," not otherwise available (Barr and Miller 2006, 22). The International Organization of Securities Commissioners (IOSCO) coordinates research by its members on securities regulation (Slaughter 2004, 54). The Organization for Economic Cooperation and Development (OECD) is home-base for a vast network of working groups, expert groups and conferences, which involve approximately 40,000 individuals each year (Salzman 2005, 218). Its high-profile reports on economic and policy trends across a wide array of countries help inform policymakers and publics worldwide. The Financial Action Task Force (FATF), based in the OECD, has developed effective assessments to assist countries in combating criminal and terrorist money laundering.

The value of multilateral cooperation to generate information, assess arguments, and to subject national viewpoints to external criticism, may be greatest when threats to national security quell critical voices at home. At just these times, however, it may be most tempting to discount dissenting voices from abroad. Consider the role played by the United Nations Security Council in authorizing recent military interventions. The Security Council can perform a screening function, alerting politicians and publics at home and abroad whether an international consensus exists in favor of a particular military intervention. Governments that work through the Security Council and abide by its decisions thus demonstrate “restraint and a willingness to cede some control, something a more threatening ‘type’ would not be willing to do. This reassures third-party states, which are in turn less likely to retaliate politically and to oppose intervention” (Thompson 2006, 236). States that refuse to abide by Security Council decisions send potentially threatening signals, suggesting questionable motives or faulty justifications. Such signals can be useful to publics at home and abroad.

Consider the two Presidents Bush, father and son. President George H. W. Bush deliberately sought Security Council approval for US action in the first Gulf War of 1990-91—a tactic explicitly, and successfully, designed to bolster public support both at home and abroad. In part as a result, the war’s economic cost was met by contributions from a broad coalition, many of whom contributed troops as well. A decade and a half later, President George W. Bush did not secure Security Council approval for the invasion of Iraq in 2003, which cost him a decisive margin of public support in many countries, including Turkey, whose lack of cooperation meant that US war plans had to be rewritten. Some of America’s closest allies based their opposition primarily on considerations that arose in the context of UN deliberations, such the lack of

credible evidence of weapons of mass destruction and doubts about the aftermath in an occupied Iraq.

The UN debate illustrates the potential value of multilateral institutions as forums for airing diverse views and testing controversial claims. But it also illustrates the difficulty of making good use of such a forum when it has been the object of sustained distrust. In retrospect, it appears that UN inspectors provided more accurate assessments than US intelligence agencies. Those governments that took advantage of multilateral deliberation to extend and check domestic political debate were enabled to make sounder decisions based on more accurate information. The United States Government, however, rejected the reports from UN inspectors, and no one involved in writing Secretary of State Colin Powell's speech at the United Nations in February 2003 appears to have challenged the basic assumption that Saddam Hussein possessed weapons of mass destruction (DeYoung 2006, 421-452). Nor did the American public or press sufficiently heed criticisms voiced at the UN to question the claims of the Bush Administration. Although multilateral institutions provided some essential tools for enhancing the epistemic foundations of US democracy, they were not seized by those who could have used them domestically.¹²

Finally, judiciaries around the world also increasingly seek to learn from each others' experience (Slaughter 2004: chapter 2). From the time of Chief Justices John Jay and John Marshall to the present, U.S. Supreme Court Justices—from across the political spectrum—have cited foreign cases and materials, including works of legal commentary, philosophy, history, and

¹² Failure to take advantage of the UN debate may have been of a piece with a more general lack of contestation within the Bush White House. The style of decision making that Colin Powell reportedly experienced is summarized by presidential scholar Fred I. Greenstein as, “a near antithesis of a multiple-advocacy decision-making process in which a wide range of clearly posed options are subjected to rigorous debate in the presence of the chief executive. The Bush presidency, in contrast, was a bureaucratic battlefield in which back-channeling and end runs were the norm, and policy outcomes were a function of bureaucratic politics and ideological affinity rather than the merits of the policies under consideration.” There was more critical consideration of multiple options and views in Powell's experience in the Reagan and first Bush administrations. Greenstein, 2007.

literature (Calabresi and Zimdahl 2005; Parrish 2007; Koh 2004). In recent years, however, vitriolic criticisms have been leveled at those US Supreme Court justices who consult the decisions of foreign and international courts in interpreting the US Constitution. Justices Antonin Scalia and Clarence Thomas describe “[t]he Court’s discussion of these foreign views” as “meaningless” but also “[d]angerous dicta”; “this Court... should not impose foreign moods, fads, or fashions on Americans.”¹³ A chorus of prominent legislators, public officials, and commentators have agreed (Parrish 2007; Kersch 2005).

There is a sensible discussion to be had about which sorts of borrowing are most useful, and also about the weight to be accorded to foreign sources.¹⁴ Even those who criticize such practices in the context of constitutional interpretation defend them with respect to statutory interpretation and in other specific circumstances (Alford 2006). Defenders of the practice allow that differences between the American context and conditions abroad are often relevant. No one claims that foreign rulings are legally binding in the United States.¹⁵

We can see no good reason for a blanket prohibition on judges citing foreign legal materials when interpreting the Constitution. Supporters point to a variety of salutary uses of foreign decisions and experiences: for empirical evidence about how proposed rules might function in practice, for a valuable perspective on the reasonableness of American practices (such as applying the death penalty to juveniles or the mentally retarded¹⁶), in order to correct

¹³ Lawrence, 123 S. Ct. 2472 (2003), at 2595, Scalia dissenting.

¹⁴ See the measured support given to the practice in Parrish 2007 and the generally measured criticisms of the practice in Calabresi and Zimdahl 2005

¹⁵ Scalia is right to point out, for example, that it makes little sense to cite the fact that other countries have adopted Miranda-style rules requiring police to warn suspects of their rights, unless we also know whether they have adopted some version of the “exclusionary rule” that excludes evidence obtained by the police without a warning; see Dorsen 2005, 519-541.

¹⁶ The juvenile death penalty case is *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988), in which Justice John Paul Stevens’s plurality opinion looked to the prohibitions on the execution of minors by Western European nations and even the Soviet Union to characterize “civilized standards of decency”; for an invocation of overwhelming

misimpressions about the uniformity of moral opinion (as in the Texas sodomy case¹⁷), or simply to see how similar legal systems have dealt with similar problems. More broadly, an external viewpoint can help to identify unexamined assumptions, or to cast our own convictions in a critical light (Jackson 2005).

Long before the development of today's transgovernmental networks, the American Declaration of Independence sought to display "a decent respect to the opinions of mankind," and Madison testified to the wisdom of attending to informed opinion abroad:

An attention to the judgment of other nations is important to every government... [I]n doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed. What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind? (*Federalist* #63).

These sentiments perfectly cohere with constitutional democracy's commitment to governance based on inclusive interests, sound evidence, and due deliberation.

Societies should not automatically or uncritically adopt what other societies view as "best practices"; what is appropriate for one society may not be so for another. Public deliberation cannot be fully informed, however—including respecting our similarities and our purported "uniqueness"—until we have learned all we can from others.

disapproval abroad with regard to the execution of the mentally retarded see *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

¹⁷ In *Lawrence*, Justice William Kennedy cited various judicial decisions, including by the European Court of Human Rights, and legal reforms, in order to correct false claims of uniform disapproval of homosexual conduct, in the lower courts and in the reigning Supreme Court precedent, *Bowers v. Hardwick*, 478 U.S. 186 (1986). Also cited was a brief filed by Mary Robinson describing the Australian Parliament's actions in 1994 to implement the United Nations Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights to override the Tasmanian law described above, see Koh 2004, 50.

Conclusion

Our discussion has shown that multilateral institutions can empower diffuse minorities against special-interest factions, protect vulnerable individuals and minorities, and enhance the epistemic quality of democratic decision-making—even in well-established democratic states. In a way, this is unsurprising: the logic of domestic constitutional design suggests that moving some forms of governance up to a higher level, insisting on elaborate mechanisms for public debate and criticism, and making use of impartial and expert decision making bodies can be strategies for improving democracy.

Our argument about democracy and global governance is consistent with contemporary patterns in domestic constitutionalism. The most ambitious and autonomous multilateral institutions—especially those associated with the European Union--tend to be in precisely those areas where a measure of autonomy and insulation is also deemed advantageous in domestic politics: constitutional adjudication, technical regulation, civil prosecution, trade policy and central banking. In western democracies, such institutions, though widely criticized as being counter-majoritarian, in fact enjoy high levels of popular support. Most Europeans trust the EU more than their own national government. Polls consistently reveal strong support among Americans for multilateral institutions. If these institutions were widely rejected as reducing the quality of democratic governance, it seems unlikely that the public would support them.

Yet we are not apologists. We emphatically do *not* claim that multilateralism *always* enhances domestic democracy. To the contrary, the standards we have articulated for defending multilateral institutions on democratic grounds *equally* enable criticism of *democracy-inhibiting* multilateralism, namely, international institutions that promote special interests, violate rights of minorities, or diminish the quality of collective deliberation. There are good reasons to be

concerned that multilateralism can sometimes empower unaccountable elites – a tendency against which it is necessary to guard. Economic openness, fostered by multilateralism, is likely to be more beneficial to capital than labor in wealthy countries, exacerbating some forms of inequality (Rodrik 1997). The proliferation of governmental networks raises issues of accountability to those outside those networks, as Anne-Marie Slaughter (2004) recognizes while praising the efficiency and effectiveness of network governance. Multilateralism has advantages for democracy, which we have emphasized here, but to optimize its contributions to democracy, we must also correct or compensate for its costs.

A comprehensive analysis of the effects of multilateralism on democracy is beyond the scope of this paper, but it is an essential objective for future scholarship. Any such analysis should break the idea of democracy into more specific normative principles, as we have done, and it must assess the capacity of multilateral institutions to promote these principles in a deeply *empirical* manner: informed by the best available policy analysis and political science. Those who believe both in democracy and international cooperation should seek to understand the conditions under which multilateralism does and does not promote democracy. Instead of expending their energy on attacking multilateralism as undemocratic, democratic internationalists should contribute to a new political science that explores how multilateral organizations can allow us to achieve important goals, while enhancing rather than undermining democracy at home.

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