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Conceptions of Civil Society in International Lawmaking and Implementation: A Theoretical Framework

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CONCEPTIONS OF CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND IMPLEMENTATION: A THEORETICAL FRAMEWORK

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INTRODUCTION

The last two decades have seen an unprecedented explosion in the number of civil society organizations seeking to influence national and international policy making and implementation.[1] Global leaders, activists, scholars, and policy experts have increasingly called for the inclusion of civil society in international governance and in the national implementation of international commitments.[2] Most recently, the wave of civil uprisings that swept the Middle East and North Africa has put fostering civil

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1.   The number of nongovernmental organizations (NGOs) that sought to impact policy in issues ranging from human rights to the environment nearly doubled in the 1990s, growing from 23,600 in 1991 to 44,000 in 1999, and has continued to grow at a similar pace since then. U.N. DEV. PROGRAM, HUMAN DEVELOPMENT REPORT 8 (2000), *available at* http://hdr.undp.org/en/media/HDR_2000_EN.pdf; 5 Y.B. INT'L ORGS. 33, fig.2.9 (Union of Int'l Ass'ns ed., 2011). http://www.uia.be/yearbook-international-organizations-online

2.   These actors have emphasized the importance of civil society participation in myriad contexts, which are too many to list here. *See, e.g.,* THE WORLD BANK, ISSUES AND OPTIONS FOR IMPROVING ENGAGEMENT BETWEEN THE WORLD BANK AND CSOs ix (2005) (proposing "options for promoting more effective civic engagement in Bank-supported activities"); Sophie Thoyer & Benoît Martimort-Asso, *Introduction: Participation for Sustainability in Trade, in* PARTICIPATION FOR SUSTAINABILITY IN TRADE 1, 5 (Sophie Thoyer & Benoît Martimort-Asso eds., 2007) (describing the demands of civil society organizations for "more direct citizen participation in the international rule-making process" at the IMF, World Bank, and WTO); Hillary Clinton, U.S. Sec'y of State, Remarks to the Community of Democracies: Civil Society: Supporting Democracy in the 21st Century (June 3, 2010) (arguing that a strong civil society "undergirds both democratic governance and broad-based prosperity" and exhorting the United Nations to "do more to protect civil society").

society participation high on the agenda of national governments and international organizations. Indeed, most international organizations have devised mechanisms to engage with civil society[3] and regard civil society participation as contributing to their legitimacy, accountability, and effectiveness.[4]

The meaning of "civil society," however, is deeply ambiguous. It has been interpreted in a variety of ways reflecting conflicting underlying normative values and commitments.[5] International organizations have used the term "civil society" inconsistently, betraying this lack of consensus and clarity about its meaning. For example, in his address to the General Assembly urging international organizations to engage civil society in global governance, then U.N. Secretary-General Boutros Boutros-Ghali defined civil society as encompassing all nongovernmental entities, including business and industry.[6] In contrast, the International Monetary Fund (IMF) excludes individual profit-oriented enterprises from its definition of civil society but includes "business forums" that aggregate and lobby on behalf of private, for-profit business interests.[7] An official U.N. Report on United Nations-Civil Society relations (the *Cardoso Report*) adopts a nar-

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3.   Jan Aart Scholte, *Civil Society and Democratically Accountable Global Governance*, 39 GOV'T & OPPOSITION 211, 215 (2004) (noting that "[m]ost global governance agencies have now devised mechanisms of one kind or another to engage . . . with . . . initiatives from civil society associations" and giving examples).

4.   Reflecting a growing consensus that civil society participation contributes to the legitimacy, accountability, and effectiveness of international organizations and national governments, former U.N. Secretary General Kofi Annan has recently characterized civil society involvement as "not an option but a necessity." Kofi Annan, U.N. Secretary-General, Opening Address to Fiftieth DPI/NGO Conference (Sept. 10, 1997). Numerous other examples of international organizations endorsing civil society participation as increasing their legitimacy and accountability could be cited. *See, e.g.*, U.N. Panel of Eminent Persons on United Nations–Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance, transmitted by letter dated June 7, 2004 from the Chairman of the Panel*, ¶ 9, U.N. Doc. A/58/817 (June 11, 2004) [Hereinafter *Cardoso Report*] (arguing that civil society was one of the "emerging pillars" of a new, stronger framework of global governance with enhanced "democratic accountability to citizens everywhere"). In the global trade context, Pascal Lamy applauded civil society organizations for "joining hands to better influence the work of the WTO." Pascal Lamy, Dir. Gen., WTO, Keynote Address to WTO Public Forum (Oct. 4, 2007). In the field of development, the World Bank credited its consultations with civil society with "improv[ing] the quality of policymaking . . . and promot[ing] public sector transparency and accountability." WORLD BANK, CONSULTATIONS WITH CIVIL SOCIETY ORGANIZATIONS, GENERAL GUIDELINES FOR WORLD BANK STAFF 3 (2000).

5.   *See, e.g.*, MICHAEL EDWARDS, CIVIL SOCIETY 4 (2004) (likening civil society to "a concept that seems so unsure of itself that definitions are akin to nailing jelly to the wall"); Robert C. Post & Nancy L. Rosenblum, *Introduction, in* CIVIL SOCIETY AND GOVERNMENT 1, 1 (Nancy L. Rosenblum & Robert C. Post eds., 2002) ("Civil society is so often invoked in so many contexts that it has acquired a strikingly plastic moral and political valence."). For a comprehensive historical account of the concept of civil society, see generally JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (1999).

6.   U.N. Secretary-General, *An Agenda for Democratization*, ¶ 85, U.N. Doc. A/51/761 (Dec. 20, 1996).

7.   *Factsheet: The IMF and Civil Society Organizations*, INT'L MONETARY FUND (Sept. 2012), *available at* http://www.imf.org/external/np/exr/facts/pdf/civ.pdf.

rower definition that excludes industry lobby groups and business federa-
tions.[8] Some international organizations and supranational bodies, such as
the World Health Organization, appear to use the terms "civil society" and
"non-governmental organizations" (NGOs) interchangeably, and to favor
the participation of nationally and internationally recognized NGOs in
policy making and enforcement.[9] Yet other international bodies, such as
the World Bank, focus on the role of local civic associations in developing
the capacity of citizens to participate in public life.[10]

The wide range of definitions and uses of "civil society" and the diver-
sity of actors encompassed by each definition has prompted some to doubt
its worth as an analytical category.[11] But calls to do away with the concept
of civil society are misguided. First, the idea of civil society remains of
crucial practical importance, as it is embedded in the language of interna-
tional organizations and national governments; thus, current scholarship
must engage with the varied meanings ascribed to it. Second, although
critics of the use of the term "civil society" as an analytical category are
correct that current uses of the term provide little guidance for how the
wide variety of groups that make up civil society should interact with inter-
national bodies and national implementation mechanisms, this deficiency
stems from a thin, poorly theorized understanding of the concept of civil
society, not from its analytical futility. Third, different normative under-
standings of civil society counsel different prescriptive outcomes, including
different institutional designs.

Two strands of scholarship have studied the relationship between non-
state actors and international organizations. The first seeks to reconcile
the reality of the growing impact of nonstate actors with international law

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8.   *Cardoso Report, supra* note 4, at 7, 13. The *Cardoso Report* differentiates "civil
society" from the "private sector" and explicitly emphasizes the "public benefit" functions of
civil society, that is "a type of civil society organization that is formally constituted to provide
a benefit to the general public or the world at large through the provision of advocacy or
services." *Id.* This definition excludes both industry lobby groups and business federations.
Id.

9.   *See* Christophe Lanord, World Health Organization Civil Society Initiative [WHO-
CSI], *A Study of WHO's Official Relations System with Nongovernmental Organizations*, ¶¶
1-3, CSI/2002/WP4 (June 2002). Several other documents authored by the WHO's Civil Soci-
ety Initiative also use the terms civil society and NGO interchangeably. *See, e.g.,* Rene
Loewenson, WHO-CSI & Training & Res. Support Ctr. [TARSC], *Overview of Issues from
the Bibliography on Civil Society and Health*, 4, CSI/2003/BI1 (Apr. 2003), *available at* http://
www.tarsc.org/WHOCSI/overview.php ("In this bibliography the term non government or-
ganisation (NGO) is used to mean the same thing as CSOs.").

10.   The World Bank has designed a variety of initiatives to "empower vulnerable and
marginalized groups." World Bank, *Demand for Good Governance: Global Call for Propos-
als*, WORLD BANK, http://go.worldbank.org/T7KOXEQLI0 (last visited Mar. 2, 2013).

11.   *See, e.g.,* John Grimond, *Civil Society*, ECONOMIST, Oct. 2001, at 18 (urging that the
concept of civil society be abandoned because the concept has little foundation in established
theory). Krishan Kumar voiced similar concerns, characterizing current scholarly writing on
civil society as "an interesting exercise in intellectual history but it [nevertheless] evades the
real political challenges at the end of the twentieth century." Krishan Kumar, *Civil Society:
An Inquiry into the Usefulness of an Historical Term*, 44 BRIT. J. SOC. 375, 392 (1993).

theory, which has traditionally focused on relationships between sovereign states. This debate has centered on whether nonstate actors can be considered subjects of international law—thus possessing international legal personality with both global rights and responsibilities—and on the development of international law theories that would account for the actual influence of nonstate actors in international lawmaking and implementation.[12]

A second strand of scholarship has focused on the legitimacy and accountability of both nonstate actors and the international legal system itself. These scholars are concerned with two types of democratic deficits. The first relates to nonstate actors themselves and asks whether they are legitimate participants in the international legal system. Concerns regarding their legitimacy stem from their perceived lack of accountability to the global system on which they exert increasing political power.[13] The second type of democratic deficit relates to what Robert Keohane and Joseph Nye have termed the "club model" of international law, in which a relatively small number of cabinet ministers from a relatively small number of countries (primarily from the North) get together in international institutions to make rules of international law.[14] "Club model" institutions suffer from a democratic deficit because they lack transparency and accountability mechanisms.[15] In this context, some scholars view civil society engagement

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12.   Both adherents of the process school of international law (the "New Haven School") and transnational process scholars criticize the doctrine of international legal personality as unsuited to describe the role of nonstate actors in lawmaking and implementation. The New Haven School prefers the term "participants" to describe how multiple actors engage with international law. *See, e.g.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 49–51 (1999); W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 322 YALE J. INT'L L. 575 (2007). Transnational Process scholars employ the dynamic concept of "transnational legal personality" to describe those actors whose actions, through any number of social interactions, influence the content of international law norms. *See, e.g.*, Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 181-207 (1996). In contrast, international law "skeptics" both on the right and on the left have cautioned against the expansion of nonstate actors' participation in international law. *See, e.g.*, JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (arguing that international law emerges from and is sustained by nations acting rationally to maximize their interests); DAVID KENNEDY, THE DARK SIDES OF VIRTUE 20-21 (2008) (arguing that the human rights movement, and NGOs associated with it, have promoted an interventionist agenda based on Western models that impoverishes local political discourse in developing countries).

13.   For a discussion of the legitimacy and accountability of civil society organizations, see generally the articles in the symposia on civil society organizations organized by the Brooklyn Journal of International Law, the Chicago Journal of International Law, and Chicago-Kent Law School. Symposium, *Governing Civil Society: NGO Accountability, Legitimacy and Influence*, 36 BROOK. J. INT'L L. 813, 813-1074 (2011); Symposium, *Paradise Lost? NGOs and Global Accountability*, 3 CHI. J. INT'L L. 155, 155-206 (2002); Symposium, *Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289, 289-612 (2000).

14.   Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy, in* POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD 219, 220 (Robert O. Keohane ed., 2002).

15.   *Id.* at 212.

with international organizations as (partially) curing this democratic deficit by channeling the concerns of the relevant public(s) and increasing institutional transparency.[16] Others think civil society participation exacerbates this deficit by allowing special interest groups to bypass national democratic decision-making procedures.[17]

These two strands of scholarship, however, have failed to engage directly with the varying, and often conflicting, theories about civil society.[18] This Article seeks to fill this gap in the literature by developing a theoretical framework that provides a more fine-grained description of civil society. I propose a typology that distinguishes civil society organizations into their possible functions and purposes, ranging from apolitical and individualistic to policy-oriented and state-integrated. I argue that five groups of theories of civil society, each espousing different value systems and thus emphasizing particular functions of civil society while minimizing others, map onto this framework: (1) market liberal; (2) civic republican and social capital; (3) Habermasian critical; (4) Third World, feminist, and minority critical; and (5) new governance and state-society synergy theories. These distinctive theories provide strikingly different answers to fundamental questions, such as: Why should international organizations and national governments encourage civil society participation? Which civil society actors should participate? Which institutional designs best foster such participation and result in successful implementation? Does civil society participation contribute to or detract from the legitimacy of international organizations?

Seeing civil society through the lens of each of these theories leads to distinct consequences for the design of international institutions and national implementation mechanisms that seek to interface with civil society. Adoption of this theoretical framework would sharpen the debate about

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16.   *See, e.g.*, Steve Charnovitz, *The Illegitimacy of Preventing Civil Society Participation*, 36 BROOK. J. INT'L L. 891, 894 (2011) ("In my view, the value-added from NGOs on the international plane is that they correct for the pathologies of governments and IOs [International Organizations]."); Anne Peters, *Dual Democracy, in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 263, 318 (Klabbers et al. eds., 2009) ("The legitimacy gains of NGO involvement are apt to outweigh the legitimacy problems. Overall, a further democratization of the international legal order requires that the participation of NGOs in law-making and law-enforcement be strengthened.").

17.   *See, e.g.*, John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 221 (2000) (describing globalism as "a kind of worldwide cartelization of governments and interest groups").

18.   Although a few scholars have examined political science theories of civil society in discussions about global governance and national implementation, none have reorganized and synthesized the set of political science and sociological theories examined here. More importantly, none have advanced the theoretical framework and typology of civil society I describe, which identifies and illuminates conflicting, unstated conceptions of civil society as a special problem for international governance and national implementation, allows for their systematic analysis, and reveals divergent possible institutional designs. *See, e.g.*, MARY KALDOR, GLOBAL CIVIL SOCIETY (2003); Francesca E. Bignami, Civil Society and International Organizations: A Liberal Framework for Global Governance (2007) (unpublished manuscript), *available at* http://scholarship.law.duke.edu/faculty_scholarship/1126.

how civil society should interact with the state and with international organizations and what type of civil society organizations should participate in these interactions; pinpoint shortcomings of existing institutional designs; and expand the range of possible design options. It would do so by providing conceptual clarity and a shared language to guide policy debates, by illuminating different understandings of civil society already implicit in some international organizations' policies vis-à-vis civil society, and by showing other perspectives not considered in existing institutional designs.

The theoretical framework I propose also contributes normatively to debates regarding the legitimacy of international organizations. Whether international organizations can legitimately constrain state action is a question of pressing importance, as international organizations have acquired increasing independence from the nation states that created them.[19] The legitimacy of international organizations is important for both pragmatic and normative reasons. As a practical matter, belief in the legitimacy of international organizations is a critical element in motivating state compliance with international law. The legitimacy of international organizations is also important normatively to justify their increasing autonomy and authority.[20] Yet, traditional conceptions of what it means for a state to be legitimate—that is, having a democratically elected government with direct delegation and accountability relationships—do not easily translate to international organizations.[21] In the absence of a global parliament and global elections, a conception of what the legitimacy of international organizations requires must be broader than democratic electoral legitimacy.[22]

Several scholars have postulated that civil society can play a crucial role in the development of a theory of legitimacy for international organizations.[23] But procedures for civil society participation that are inattentive to power disparities within civil society itself and inattentive to the need for fostering the expression of all relevant interests, may paradoxically increase the democratic deficit of international organizations and hinder implementation. In other words, an undertheorized mechanism for civil society participation may undermine the very legitimacy it is designed to provide. In Part III, I rely on the theoretical framework outlined in this Article to develop a theory of civil society—which I label *inclusive-contestatory*—that best explains and justifies a role for civil society participation in international lawmaking and implementation.

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19.   *See, e.g.,* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW MAKERS (2005) (examining the role international organizations play in international law, multilateral treaties, and the institutionalized dispute settlements).

20.   *See infra* Part III.A.4.

21.   *See infra* Part III.B.

22.   *See infra* Part III.B.

23.   *See, e.g.,* Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions,* 20 ETHICS & INT'L AFF. 405, 406 (2006); Charnovitz, *supra* note 16, at 894-95; Peters, *supra* note 16, at 313-18; *see also infra* Part III.B.

My argument proceeds in three parts: Part I is diagnostic. It develops a framework to analyze the relationships among civil society, the state, and international organizations that classifies the functions and purposes of civil society as inward–looking, outward-looking, or boundary-crossing. It analyzes and maps five groups of theories of civil society onto this framework—(1) market liberal; (2) civic republican and social capital; (3) Habermasian critical; (4) Third World, feminist, and minority critical; and (5) new governance and state-society synergy—exposing fundamentally different normative understandings of civil society.[24]

Part II works out in more detail how choosing one theoretical interpretation of civil society over another will lead to different prescriptive outcomes. It relies on a case study of the international regime that seeks to implement the U.N. General Assembly Declaration of Commitment on HIV/AIDS (UNGASS). It first provides a brief overview of the global efforts to address the HIV/AIDS epidemic, focusing on the role of the UNGASS monitoring process. It then illustrates how UNGASS provides inconsistent definitions of civil society that reveal the lack of an underlying analytical framework to guide policy prescriptions. It concludes by showing how the five groups of theories generate distinct monitoring-regime designs, applicable not only to UNGASS but also more broadly to many international monitoring regimes: (1) *delegation* to market-ordered, apolitical, private associations; (2) *deference* to the state; (3) *participation* of minority voices; (4) *criticism* of state action; and (5) *collaboration* among all stakeholders.[25] This Part pays particular attention to civil society participation in the national implementation of international commitments. This emphasis on implementation is driven by documented implementation gaps in a variety of fields, including human rights law.[26]

Part III relies on the theoretical framework developed in Part I to engage normatively with the scholarly debate surrounding the legitimacy of international organizations. I show how debates about civil society's contribution to the legitimacy of international organizations are confounded by different underlying conceptions of civil society, which are seldom explicitly articulated or explored. I then show how my framework can contribute to the debate by suggesting that an outward-looking theory of civil society, based on a capacious reading of Habermasian critical theory, can best justify a legitimizing role for civil society participation in international lawmaking and national implementation. This understanding of civil

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24.   *See infra* figs.1 & 2.

25.   *See infra* tbl.1.

26.   *See, e.g.,* TODD LANDMAN, STUDYING HUMAN RIGHTS (2006); TODD LANDMAN, PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY (2005); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002); Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 487-88 (2001). *But see* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L 171, 171-72 (2003) (arguing that the empirical effect of human rights treaties show minimal, and sometimes no reduction in human rights violations).

society is particularly important in areas likely to engender normative dis-
agreement about the proper role of international institutions, where legiti-
macy questions are most salient.

I. CIVIL SOCIETY AND THE STATE: A THEORETICAL FRAMEWORK FOR ANALYSIS

What is civil society? The term often evokes the emancipatory move-
ments in Latin America of the 1980s and Eastern Europe of the 1990s.[27]
More recently, it has been used to describe the wave of popular protests
that sparked the "Arab Spring."[28] This understanding of civil society
equates civil society to social movements engaged in political opposition.
But civil society is also used to describe groups with shared interests or
identities, which effectively create cohesive ties among individuals without
any explicit political agenda.[29] Civil society may include lobbying groups
that represent powerful business interests, NGOs with international reach,
and local community associations. Political scientists and sociologists have
long grappled with this slippery concept and proposed multiple ways of
characterizing the diverse assortment of groups and interests that can be
said to make up civil society. I draw from these two fields to create a typol-
ogy of civil society that, I argue, is particularly well suited to describe and
understand the multiple ways in which international organizations have
(often implicitly) conceived of civil society. Each category in my proposed
typology corresponds to a particular theory or groups of theories of civil
society described in detail in Section E. Thus, theories of civil society can
be understood as emphasizing the different functions of civil society de-
picted in this typology. Specifically, I propose that different types of civil
society organizations range from inward-looking to outward-looking in
their purposes and effects. At one end of the spectrum, civil society is
apolitical and serves only individualistic aims. At the other, it is explicitly
political, interacting with the state to shape public policy.

A. Inward-Looking Functions of Civil Society

Inward-looking functions are directed toward the individual. They in-
clude personal psychological advantages derived from being a member of
a community; the development of an individual's identity through interac-

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27.   *See, e.g.*, Michael Ignatieff, *On Civil Society: Why Eastern Europe's Revolutions Could Succeed*, 74 FOREIGN AFF. 128, 128 (1995); Michael Foley & Bob Edwards, *The Paradox of Civil Society*, J. DEMOCRACY, July 1996, at 38, 38.

28.   *Arab Spring: Challenges during Political Transitions and Comparative Lessons for Civil Societies in the Middle East and North Africa*, THE GRADUATE INSTITUTE, http://graduateinstitute.ch/ccdp/ccdp-research/projects/current-projects/arabspring.html(last updated Jan. 7, 2013) (arguing that "civil society" has been in the "driving seat" of the Arab Spring).

29.   The clearest articulation of this apolitical view of civil society comes from Robert Putnam and Francis Fukuyama, who emphasize the role of civil society in building social capital by fostering ties among individuals. Francis Fukuyama, *Social Capital, Civil Society and Development*, 22 THIRD WORLD Q. 7, 11 (2001); Robert Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65, 67.

tions and debates about group goals and policies; the development and adoption of a set of moral values; and the development of self-respect and self-sufficiency. Additionally, civil society associations may foster specific inward-looking individual qualities that tend to prepare citizens for participation in public life, such as trust toward and cooperation with fellow citizens. Associations that foster these qualities may lead indirectly to higher levels of citizen engagement in public life, by "broaden[ing] participants' sense of self [and] developing the 'I' into the 'we.'"[30] Examples of this associational type include voluntary civic associations such as church-related groups, parent-teacher associations, sports groups, and fraternal groups. What all of these inward-looking groups have in common is the lack of an explicit political agenda that seeks to influence governmental decisions.[31]

B.   *Inward-Outward Boundary Functions*

At the inward-outward boundary are those instances in which civil society has a dual role as a space for fostering both inward-looking characteristics and outward-looking public discourse. For example, civil society as a "subaltern counterpublic[ ]" (a term coined by feminist critical scholar Nancy Fraser) functions as a space where groups with minority views not (yet) accepted by the wider public can come together to (1) develop and formulate their "identities, interests, and needs" (an inward-looking goal) and (2) deliberate about and develop alternative and often contestatory interpretations of accepted norms (an outward-looking goal).[32]

C.   *Outward-Looking Functions*

Outward-looking functions are directed toward others (be it society-at-large or a section of society). Outward-looking aspects of civil society seek to impact opinion-formation in the realm of civil society (for example, through public debate and media campaigns) and decision making in the realm of the state (for example, through monitoring, criticism, and lobbying). In addition, they include "service" aspects of associational life. The monitoring or watchdog role of civil society seeks to hold the state accountable to its national and international commitments and to point out those instances in which it has fallen short. Criticism entails an analysis of

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30.   Putnam, *supra* note 29, at 67; *accord* Fukuyama, *supra* note 29, at 11 (arguing that voluntary associations of civil society that promote generalized social trust are able to instill in individuals "the habits of cooperation that would eventually carry over into public life").

31.   The groups listed *typically* carry out inward-looking functions. But this does not rule out that some of these groups may be engaged in outward-looking activities at specific time points. The functional approach described here requires an analysis of the *type* of activity a particular association is engaged in. *See infra* Part I.E.1.

32.   *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, Soc. Text, no. 25/26, 1990, at 56, 67-68 ("[S]ubaltern counterpublics have a dual character. On the one hand, they function as spaces of withdrawal and regroupment; on the other hand, they also function as bases and training grounds for agitational activities directed towards wider publics."); *infra* Part I.E.3.

the state's actions either through the lens of currently applicable law and norms, or under an alternative paradigm (for example, formulated in counterpublics). Through criticism and mobilization of public opinion and resources, civil society can challenge existing norms or interpretative frameworks and eventually replace them with alternative ones.[33]

D. *Boundary-Crossing Functions*

Finally, civil society could participate in decision and policy making in collaboration with the state. In contrast, all other functions described *above* situate civil society outside political life (by focusing on inward-looking functions) or in opposition to the state (by providing alternative interpretations of dominant norms or by serving as a check on government power through its role as watchdog and critic). Most liberal theories of civil society, in fact, consider that a sharp separation between the state and civil society is necessary for the latter to maintain its independence and its ability to represent a legitimate check on state power.[34] Nevertheless, as I explain in detail below, a boundary-crossing function is increasingly being ascribed to civil society in critical theory and new governance scholarship.[35] This typology is depicted below in Figure 1:
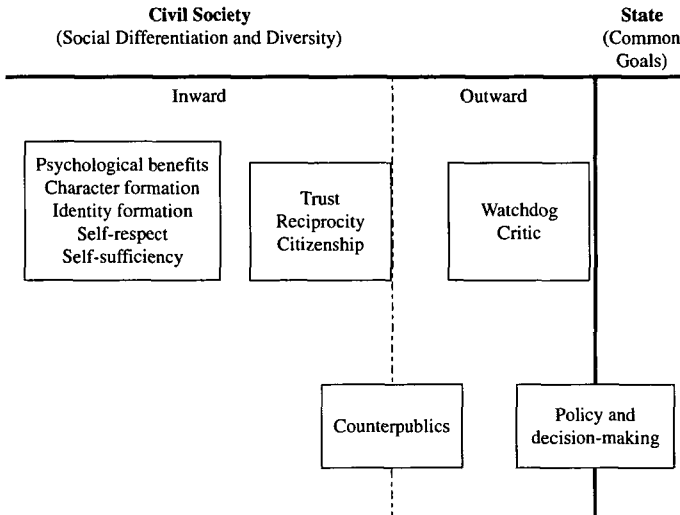
FIGURE 1

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33.   *See infra* Part I.E.2.

34.   *See generally* Post & Rosenblum, *supra* note 5, at 90 (explaining that a separation between state and civil society exists); *see infra* Part I.E.4.

35.   *See, e.g.,* Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance,* 20 POL. & SOC'Y 393, 443 (1992) (positing that the "fuller and more explicit incorporation of groups into governance might actually enhance the exercise of popular sovereignty through the traditional institutions and practices of territorial representation"); Gráinne de Búrca, *EU Race Discrimination Law: A Hybrid Model?, in* NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE U.S. (Gráinne de Búrca & Joanne Scott eds., 2006).

The typology of civil society functions described *above* can begin to provide a "thicker" understanding of civil society organizations by distinguishing among key functions performed by different associational types. Emphasis on particular inward- or outward-looking functions of civil society will have consequences for institutional design. For example, international organizations that monitor compliance with international agreements may choose different reporting guidelines depending on whether they are interested in (1) fostering cooperation among members of local communities (an inward-looking function); (2) eliciting independent, critical information to evaluate state performance (a watchdog, outward-looking function); or (3) fostering close civil society-state collaboration at the national level (a boundary-crossing, outward-looking function).[36] The creation of thicker community ties to encourage cooperation among local communities may best be fostered by encouraging individual associations of civil society to develop their own monitoring reports and by providing flexible reporting guidelines, in which a plurality of means of communication is considered valid. In contrast, if the international organization is seeking an independent and credible critique of state reports, standardized reporting guidelines may be preferable, as they would allow comparisons between state and civil society reports to be made efficiently. Additionally, in this situation, reports by national NGOs with both technical expertise and a solid reputation may provide the most reliable information to evaluate state performance. Finally, fostering close collaboration between civil society and the state may require the preparation of a single report to be presented internationally and the development of mechanisms to ensure a broad national consultation process.[37] I explore in more detail the consequences of emphasizing particular functions of civil society for the design of monitoring and implementation regimes with the aid of a case study in Part II.

While this analytical framework provides a useful tool to classify different civil society organizations, it cannot answer *which* types of civil society organizations should engage with international organizations and national governments in international lawmaking and implementation, or *how* they should do so. The following Section engages with normative theories of civil society that map onto this framework and provide support for emphasizing specific functions of civil society over others.

E. *Theories of Civil Society*

All democratic perspectives of civil society share some fundamental assumptions. They all agree that civil society and the state represent two realms that are in opposition but also interdependent.[38] They are in oppo-

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36. *See infra* Part II.C.2.

37. *See infra* Part II.C.2.

38. *See, e.g.,* Post & Rosenblum, *supra* note 5, at 11 (arguing that civil society and government are in productive tension, because while there must always exist a boundary between them, "civil society requires government to survive, and government, at least democratic government, draws deeply from the strengths of civil society").

sition because civil society fosters the development of different individual and group identities, based on a variety of moral conceptions of the good life, while the state is the realm of shared norms and identities that reflect society's common purposes or compromises. Because of this oppositional relationship, civil society and the state can also pose a threat to each other. Civil society can undermine public discourse about the common good and efforts to reach compromises when particularist groups impose their own conceptions of the good life by capturing state mechanisms of norm creation and enforcement.[39] This can happen, for example, if groups representing dominant economic, religious, or ethnic interests come to dominate governmental policy making, conflating the "common good" with the interests of that particular group. Conversely, the government threatens the plurality of civil society if it seeks to impose a uniform conception of the good life on all civil society associations. Imposed convergence on a single common purpose flowing from this conception can pave the way to totalitarianism by eroding the realm of civil society as a space where alternative or novel ways of life can be developed and tested.[40] But civil society and the democratic state also depend on each other, as both a plurality of identities and shared purposes (or compromises) are essential to the creation of a legitimate democratic government.[41] Beyond these areas of agreement, however, theories of civil society differ sharply in their conceptualization of the proper role of civil society, including how it should interact with state institutions.

The following sections engage with five theories of civil society. For each theory I analyze how it maps onto a distinct portion of the function-based typology introduced *above* thus providing support for emphasizing particular functions of civil society over others. I begin to explore how each theory provides different answers to *which* types of civil society organizations should engage in international lawmaking and implementation, and *how* they should do so. I also engage with key criticisms.

1.   Inward-Looking Theories: Market Liberal and Social Capital/Civic Republican Theories

a.   Market Liberal Theory

Loren Lomasky provides the flagship definition of civil society adopted by market liberals; he defines civil society as "the realm of voluntary association that stands between the individuals . . . and the state."[42]

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39.   *See, e.g., id.* ("Government's claim that it is not simply the mirror and agent of the most powerful forces in society must be credible.").

40.   *See* Post & Rosenblum, *supra* note 5, at 16 (discussing Hannah Arendt's characterization of totalitarianism "as the end point of unremitting congruence"). Thus, to remain legitimate, democratic governments cannot simply be "the mirror and agent of the most powerful forces in society." *Id.* at 11. A pluralist civil society is a precondition for democratic decision making. *Id.*

41.   *See, e.g.,* Post & Rosenblum, *supra* note 5, at 11.

42.   Loren Lomasky, *Classical Liberalism and Civil Society, in* ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY 50, 50 (Simone Chambers & Will Kymlicka eds., 2002).

Market liberals construct a dualistic model of civil society that places all voluntary associations in opposition to the state.[43] Market liberals emphasize the values of choice, liberty and efficiency. In this context, competitive markets are a crucial component of civil society because they function as a mechanism that coordinates social interests based on individual choice.[44] The market functions as the main engine of human flourishing, enabling individuals to pursue their self-interest, become self-sufficient, and "take responsibility for their lives and to develop meaningful social roles."[45] Because they prioritize economic aspects of social life, market liberal theories emphasize associations that promote the inward-looking goals of self-reliance and responsibility. Thus, market liberals consider associations of civil society *outside the political realm*, where individuals come together for personal reasons, as vital places where individuals have a chance to be free and flourish.[46]

In contrast to a civil society organized around market competition, which is imagined as the realm where human flourishing can and does take place, the state, according to market liberals, is best kept in the background.[47] Because the government holds the power of coercion, limiting governmental expansion is crucial to securing individual liberties. Thus, the role of the state is limited to enforcing the coercive mechanisms necessary to "secure a framework that encourages productive competition within the private sector."[48] There is a strong presumption against affirmative state action, rebuttable only if "the regulatory means are minimally restrictive of choice, and if they can reasonably be expected to work a substantial improvement in the general welfare."[49]

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43.   Steven Scalet & David Schmidtz, *State, Civil Society, and Classical Liberalism, in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 26.

44.   *See, e.g.,* Cohen & Rogers, *supra* note 35, at 398 (describing choice and liberty as the core values in U.S. neoliberal constitutionalism).

45.   Scalet & Schmidtz, *supra* note 43, at 34.

46.   *Id.* at 30.

47.   *See id.* (characterizing civil society as constituting the forefront, and the state the background, of classical liberal theory).

48.   Richard B. Miller, *Overview: The Virtues and Vices of Civil Society, in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 370, 383 (internal quotation marks omitted).

49.   Cohen & Rogers, *supra* note 35, at 399. Market liberals support governmental provision of services (or governmental regulation of services provided by private firms) in some situations of market failure, understood as the failure of a system of price-market institutions to lead to Paretian efficiency, that is a situation in which it is impossible to make anyone better off without making someone else worse off. Classical examples are governmental provision of public goods (or governmental intervention to foster the private creation of public goods), for example through intellectual property rights, and governmental intervention when imperfect information prevents the public as customers from making informed choices, for example through overseeing and regulating testing of pharmaceutical products. *See generally*, Francis Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351 (1958) (discussing market failures within different types of regulatory models); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422 (2003) (discussing motivational benefits that private firms have over public sector counterparts, resulting in increased efficiency in some sectors). Nevertheless, market failure alone is insufficient to

Market liberals justify governmental restraints on individual choice and liberty only when necessary to protect the very existence of these values. In this context, market liberals decry the affirmative state as corrupting voluntary associations by encouraging rent-seeking behavior by organized interests. That is, when particular civil society organizations are able to use the affirmative power of the state to secure special advantages (which are subsidized by the public purse), state policies come to be defined by the agendas of special interest groups.[50] In turn, special interest politics lead to decreased efficiency. Efficiency losses take place because political activity "divert[s] the energy of citizens away from economically productive contributions,"[51] and because governments are not as sensitive as private actors to poor performance.[52] For this reason, market liberals are "inclined to define civil society in terms of private associations, and to ignore or be skeptical about associations involved in political advocacy."[53] Market liberals are generally skeptical of organizations involved in political advocacy (or "special interest groups") because the process of political organization and advocacy is thought to produce inefficiencies both by diverting energies from economically productive activities and by using the public purse to subsidize a group's private aims.[54] Partly because of this

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justify government intervention, because market liberals argue that political action is often likely to lead to greater inefficiencies. *See, e.g.*, Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417, 417 (1981).

50.   FRIEDRICH A. HAYEK, 3 LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 13–15 (1979).("[The] domination of government by coalitions of organized interests [is] . . . . the inescapable result of a system in which government has unlimited powers to take whatever measures are required to satisfy the wishes of those on whose support it relies."); *see also* Cohen & Rogers, *supra* note 35, at 404.

51.   Cohen & Rogers, *supra* note 32, at 401–02.

52.   *See* Trebilcock & Iacobucci, *supra* note 49, at 1436–39. Trebilock and Iacobucci argue that governments are likely inefficient providers of goods and services even when the goal of these services is not profit-maximization but rather other, public purposes (such as educating students on the virtues of citizenship). This is because governments are "insulat[ed] from the risk of failure," *id.* at 1439, while other private actors (be it for-profit or nonprofit entities) have "incentives to perform well to ensure their organization's survival and retain their employment." *Id.* at 1436. As a consequence, the competitive provision of services by nonstate actors is generally preferred. If the desired goal is not profit-maximization, it is more efficient for the state to set performance standards and allow competition among different providers than to provide the service itself. *Id.* at 1437.

53.   Will Kymlicka, *Civil Society and Government: A Liberal-Egalitarian Perspective, in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 83. Market liberals also view positively those apolitical, voluntary, nonprofit associations that focus on service provision, because these organizations are likely to curtail the expansion of the welfare state. *See* FRIEDRICK A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 150-52 (1976).

54.   *See, e.g.*, Loren Lomasky, *Classical Liberalism and Civil Society, in* ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY (Simone Chambers & Will Kymlicka eds., 2002). Market liberals object particularly to civil society associations that seek to use the public purse to subsidize their own economic activities and to interfere with the operation of the free market, such as business associations that engage in restrictive market practices. They do not object to those civil society organizations with educative or coordinating functions that do not attempt to use public funds to subsidize their own activities and that act "in ways consistent with a commitment to a minimal state." *See* Cohen & Rogers, *supra* note 35, at 400.

focus on securing individualistic aims, a market liberal theory is unable to imagine a role for civil society groups engaged in political advocacy that will not devolve into factional politics.

Market liberals' distrust of most affirmative state policies stems largely from the primacy they bestow on the values of choice and individual liberty. Other theories of civil society, however, dispute the superiority of these two values and support state intervention, even at the price of inefficiency, when it furthers a different set of values such as political equality or distributive justice.[55] Market liberals' conceptualization of individuals as producers and consumers also risks the erosion of their identity as members of political or cultural communities.[56] By contrast, social capital and civic republican theories, which I turn to in the next section, seek to foster individuals' shared identities as community members, which they view as crucial to developing and sustaining a democratic government.

b.   Social Capital Theory[57]

The development of the theory of social capital owes much to Alexis de Tocqueville's insight that Americans combatted the excessive individualism generated by modern democracy by forming and engaging in voluntary associations.[58] Tocqueville credited civic associations in America with serving as the "schools of democracy" that sustained a vibrant democratic government.[59] To Tocqueville, associational life that fostered public virtues such as trust and reciprocity served as a check on the atomistic tendencies of modern society.[60]

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55.   *See* Kymlicka, *supra* note 53, at 80.

56.   Michael Walzer made a similar argument in his lecture at the University of Stockholm. Michael Walzer, Gunnar Myrdal Lecture at University of Stockholm: The Civil Society Argument 4 (Oct. 1990), *available at http://cts.lub.lu.se/ojs/index.php/st/article/viewFile/2863/2427* (arguing that "autonomy in the marketplace provides no support for social solidarity").

57.   I focus on the theory of social capital as developed and popularized by political scientists Robert Putnam and Francis Fukuyama. *See generally* ROBERT D. PUTNAM, ROBERT LEONARDI & RAFFAELLA Y. NANETTI, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1994); Fukuyama, *supra* note 29.

58.   ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 119 (Henry Reeve trans., 3d ed. 1863) (explaining how democracy engenders individualism: "thus not only does democracy make every man forget his ancestors, but it . . . throws him back forever upon himself alone, and threatens in the end to confine him entirely within the solitude of his own heart."); *Id.* at 129 (explaining the crucial role of associations in combatting individualism: "feelings and opinions are recruited, the heart is enlarged, and the human mind is developed, only by the reciprocal influence of men upon one another. I have shown that these influences are almost null in democratic countries; they must therefore be artificially created, and this can only be accomplished by associations." *Cf.* Putnam, *supra* note 29, at 65 (discussing Tocqueville's impressions of American civic associations).

59.   *See* Wayne Norman & Will Kymlicka, *Citizenship, in* A COMPANION TO APPLIED ETHICS 210, 215-16 (R.G. Frey & Christopher Heath Wellman eds., 2003) (explaining how Tocqueville saw "the associations in civil society as 'schools of democracy,' teaching the virtues of public-spiritedness, cooperation, and civility").

60.   *Id.*

Modern social capital theorists echo Tocqueville's central thesis that "democracy itself depends on active engagement by citizens in community affairs."[61] Social capital theory is an empirical effort, within a civic republican framework, to understand the mechanisms through which civic engagement and social connectedness strengthen democratic norms and institutions.[62] One of the leading proponents of the importance of social capital for long-lasting and effective democratic governance, Robert Putnam, defines social capital as "features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit."[63] Importantly, because the norms that constitute social capital are norms of trust and reciprocity that lead to cooperation in groups, they are "related to traditional virtues like honesty, the keeping of commitments, reliable performance of duties, [and] reciprocity."[64]

Putnam, Leonardi, and Nanetti argue that civic associations contribute to the effectiveness and stability of democratic government "both because of their 'internal' effects on individual members and because of their 'external' effects on the wider polity."[65] In other words, those associations that inculcate in their members "skills of cooperation as well as a sense of shared responsibility for collective endeavors,"[66] will produce spill-over effects in society at large, giving rise to a citizenry that has both the tools and the motivation necessary to engage in public life.[67]

Because relationships of trust, reciprocity and responsibility require repeated, face-to-face interactions among group members engaged in a common goal, social capital theorists emphasize *local community* organi-

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61.   *See* Robert D. Putnam & Kristin A. Goss, *Introduction, in* DEMOCRACIES IN FLUX 1, 6 (Robert D. Putnam ed., 2003); *accord* PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 11 (acknowledging that Tocqueville's emphasis on civic associations as key depositories of civic virtue "play a central role in our analysis").

62.   Social capital theorist Robert Putnam explicitly places his experimental research program within a civic republican framework. PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 87 ("[Civic republicanism] contains the seeds for a theory of effective democratic governance. . . . We want to explore empirically whether the success of a democratic government depends on the degree to which its surroundings approximate the ideal of a 'civic community'.").

63.   Putnam, *supra* note 29, at 67.

64.   Fukuyama, *supra* note 29, at 7–8.

65.   PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 89.

66.   *Id.*; *accord* Putnam, *supra* note 29, at 73 ("Members of associations are much more likely than nonmembers to participate in politics, to spend time with neighbors, to express social trust . . . .").

67.   Nancy Rosenblum has labeled this understanding of civil society the "mediating association" approach. Rosemblum uses the term "mediating" to convey the idea that the "moral dispositions" and "social capital" generated in social networks are transferred to and benefit political society as a whole *unintentionally and without government action.* NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 41 (1998).

zations as the preeminent locus of social capital.[68] The common goal that brings participants together need not be political. In fact, Putnam's research showed that the best predictor of good government in Italy was choral societies, soccer clubs, and co-operatives—all inward-looking, apolitical associations.[69] Further, some types of explicitly political groups contribute only negligibly to social capital because they do not foster the type of social connectedness that is crucial to the development of civic virtues among its members.[70] Thus, politically oriented membership organizations—whose roster may count thousands of dues-paying members linked only by their shared concerns (for the environment, for women's rights, etc.) but unaware of each other's existence—do not produce the type of connections that generate social capital. The same is true of large apolitical NGOs such as Oxfam, whose numerous donors are connected only by their belief in the NGO's mission.

Social capital theorists' emphasis on local community networks relies on "small moral worlds" to create, sustain, and improve the nation.[71] Social capital theory is inward-looking precisely because it considers self-regulation and small-scale interpersonal relations as a prerequisite for effective democratic governance.[72]

Community associations that foster qualities of trust and cooperation among their members need not necessarily benefit the wider community, however, and may in fact be detrimental to it. For example, close-knit groups may be hostile to those they view as outsiders.[73] To account and correct for this criticism, social capital theorists postulate that two types of social capital are required for effective democratic governance: bonding social capital (creating in-group bonds) and bridging social capital (creat-

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68. *See* Robert D. Putnam, *What Makes Democracy Work?*, IPA REV., no. 1, 1994, at 31, 34 (arguing that "[i]nvestments in the portfolio of social capital must occur at the local level").

69. *Id.* ("[W]hat best predicted good government in the Italian regions was choral societies, soccer clubs and co-operatives. . . . Communities don't have choral societies because they are wealthy; they are wealthy because they have choral societies—or more precisely, the traditions of engagement, trust and reciprocity that choral societies symbolize."); *see also* PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 90 (emphasizing that promoting social capital does not "require that the manifest purpose of the association be political. Taking part in a choral society or a bird watching club can teach self-discipline and an appreciation for the joys of successful collaboration").

70. Putnam, *supra* note 29, at 70 (arguing that new mass-membership organizations such as the Sierra Club, while of great political importance, are not as important in generating social capital as local organizations where members interact face-to-face with each other because the ties among members in mass-membership organizations "are to common symbols, common leaders, and perhaps common ideals, but not to one another").

71. ROSENBLUM, *supra* note 67, at 41 (citing Alan Silver, *The Curious Importance of Small Groups in American Sociology, in* SOCIOLOGY IN AMERICA 70 (Herbert J. Gans ed., 1990)).

72. *Id.* at 41–42.

73. *See, e.g.*, Fukuyama, *supra* note 29, at 8 ("Many groups achieve internal cohesion at the expense of outsiders, who can be treated with suspicion, hostility or outright hatred.").

ing bonds across groups).[74] Bridging social capital is strengthened by individual membership in a plurality of associations, which bridges potentially divisive differences.[75] Membership in multiple groups with different goals and aspirations is predicted to moderate extreme views as a result of cross-pressure from groups with different views.[76]

Social capital theorists share with market liberals their emphasis on inward-looking functions of civil society but focus on different sets of inward-looking qualities. To market liberals, the focus is on the individualistic values of self-reliance, liberty and choice. To social capital theorists, the focus is on the virtues of sociability, responsibility, and cooperation that provide individuals with both the tools to engage successfully in public life (for example, by teaching members how to participate in reasoned deliberation and how to reach consensus) and the willingness to do so. In contrast to market liberals, who view the market as a place where individuals can flourish, social capital theories tend to regard market interactions as eroding individuals' ability to develop their identities as citizens and participants in collective projects.[77] Citizens as consumers will lack the ability to understand citizenship as social solidarity and thus the willingness to cooperate toward shared goals. This difference in focus can also be framed as a difference in unit of analysis: while market liberals prioritize the individual consumer or producer and his or her ambitions, social capital theorists prioritize the ties among members of a community or social network.

Both market liberal and social capital theories de-emphasize politically motivated associations that seek to directly influence state policy. Market liberals do so explicitly, motivated by their fear that groups organized for political motives will either capture state mechanisms of coercion and impose their vision of the good life on society at large, or use public dollars to fund the interests of their group members. Social capital theorists minimize the importance of politically-inspired associations indirectly. They do so by celebrating dense interpersonal relations, and emphasizing the importance of local social networks that instill the virtues of civility, reciprocity, and cooperation.

Social capital theory seeks to address empirically one aspect of civic republican theory—the importance of "civic virtue" for democratic governance. But it does not have a developed theory of the state that can guide decisions on how the state should interact with civil society. Civic

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74.   *See id.*

75.   *See* Putnam & Goss, *supra* note 61, at 11.

76.   *See, e.g.,* PUTNAM, LEONARDI & NANETTI, *supra* note 57, at 90; Fukuyama, *supra* note 29, at 9–10.

77.   *See, e.g.,* Putnam, *supra* note 68, at 106 ("Compared with earlier generations, we are less engaged with one another outside the marketplace and thus less prepared to cooperate for shared goals. This decline in social capital helps explain the economic and political troubles of our own democracy.").

republican theory, however, analyzed in the next section, can fill this gap.[78]

c. Civic Republican Theory

Civic republicans see the state as a force for advancing the common good. In contrast to market liberals, who seek compromise rather than consensus over social goals and values,[79] civic republicans are committed to agreement on precisely what the common good requires. While acknowledging that agreement may not be possible on all political issues, they maintain "the possibility of settling at least some normative disputes with substantively right answers."[80]

According to civic republican theory, consensus on what constitutes the common good requires public-regarding deliberation in political institutions.[81] Deliberation is public-regarding when political actors justify their choices by appealing to a broader public good, not to their own private interests.[82] Additionally, the process of rational deliberation can only take place if political equality eliminates "sharp disparities in political participation or influence among individuals or social groups,"[83] and if groups and individuals share a commitment to consensus as a regulative ideal.[84] Thus, although private interests inform the deliberative process, decision making is not merely a compromise among warring factions. Rather, it is an exercise in rational decision making *about* the common good. When deliberation is inclusive of all views, articulated as rational arguments about public needs and wants, affirmative state action is legitimized as resulting from social consensus about what the common good requires in a particular situation.

Public-regarding deliberation requires individuals to come together as citizens. Citizens, as opposed to subjects of an authoritarian regime, participate in government with "independence of mind and judgment," and possess "civic virtue," or a general concern for the public good.[85] As discussed above, to social capital theorists, civic virtue is generated and sus-

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78.   I address prescriptions derived from social capital and civic republican theory, as well as criticisms to these approaches, in the next section.

79.   Market liberals are profoundly skeptical of "people's capacities to communicate *persuasively* to one another their diverse normative experiences: of needs and rights, values and interests, and, more broadly, interpretations of the world. . . . in ways that move each other's views on disputed normative issues toward felt (not merely strategic) agreement without deception, coercion, or other manipulation." Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507 (1988) (describing modern pluralist political science understanding of the political process as "insuperably private-regarding or strategic") (emphasis in original).

80.   Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988).

81.   *See id.*

82.   *See id.* at 1550.

83.   *See id.* at 1541.

84.   *See id.* at 1550.

85.   *Id.* at 1551; *see also* WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 221–24 (1991).

tained in dense, local networks within civil society where individuals can learn the virtues of sociability, responsibility, respect for others, and cooperation. Similarly, contemporary civic republican theorists recognize the importance of private associations as "seedbeds of virtue" that prepare citizens for engagement in politics.[86] For example, Michael Sandel has emphasized the importance of institutions such as townships, schools, religions, and "virtue-sustaining occupations" in "form[ing] the 'character of mind' and 'habits of the heart' a democratic republic requires."[87] Frank Michelman's version of civic republicanism considers that citizenship is exercised both in the realm of politics and through civic associations that are not directly involved in party politics or in efforts to lobby the state, which can create community and provide citizens with the "direct experience of self-revisionary, dialogic engagement."[88]

Civic republican theory prescribes affirmative state action in the realm of civil society. Specifically, civic republicans tend to endorse measures that foster the creation, proliferation, and survival of those civil society organizations that foster in their members the qualities of character that civic republican theories deem necessary for the common good of self-government.[89] Thus, much like social capital theorists, civic republicans prize those inward-looking institutions of civil society that can serve as "private boot camps for citizenship"[90] by inculcating in their members the

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86. *See generally* SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995).

87. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 320–21 (1996).

88. Michelman's version of civic republicanism appears to view civil society similarly to critical feminist and Third World theorists. That is, civil society is prized as a realm where contestatory versions of what constitutes the common good are dialogically developed. For example, Michelman emphasizes that "[u]nderstandings of the social world that are contested and shaped in the daily encounters and transactions of civil society at large . . . are . . . to be counted among the sources and channels of republican self-government and jurisgenerative politics." Michelman, *supra* note 79, at 1531; *cf.* Sunstein, *supra* note 80, at 1542 (arguing that although "[c]itizenship often occurs in nominally private spheres . . . its primary importance is in governmental processes"). *But see* Kathleen Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1721 (1987) (questioning whether Michelman's view of civil society associations as speakers in a non state-centered republican dialogue is consonant with civic republican theory). Michelman, however, differs from critical feminist and Third World theorists, first, in that he places deliberation among members of the judiciary as the key means by which those marginal voices of civil society interact with the state to shape its policies. Second, Michelman's depiction of voluntary associations as participants in a common public life is somewhat at odds with feminist and critical scholars' understanding of civil society as spaces of regroupment, introspection, and opposition to dominant norms. *See infra* Part I.E.3. (discussing critical feminist and Third World theories of civil society).

89. *See* SANDEL, *supra* note 87, at 25; *see also,* Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 17 (1990) (noting that associations of civil society are unlikely to be self-sustaining in modern society, and emphasizing a role for the state in nurturing the formation and maintenance of community organizations).

90. Sullivan, *supra* note 88, at 1721 (noting that civic republicans tend to value private, voluntary associations insofar as they function as "private boot camps for citizenship" where "greater participation, feelings of attachment, and common commitment" are taught).

importance of participation, attachment, and commitment to the common good over self-serving interests.

Although public deliberation and participation in government by civic-minded citizens are central tenets of civic republican theory, civic republicans remain skeptical of civil society associations organized for lobbying and political advocacy for the same reasons as market liberals.[91] Because groups can have hierarchical and unequal internal structures, lack transparency regarding decision-making procedures, and impose conditions on policy makers that benefit that particular group at the expense of society at large, civic republicans seek to save public deliberation from the influence of special interest groups.[92] Thus, civic republican theories generally propose institutional reforms that attempt to shield arenas of public deliberation from direct group influence.[93] For example, some civic republican proposals have focused on sharply delineating, in order to strengthen, particular areas of state power to enhance the ability of political institutions to promote rational deliberation. Cass Sunstein maintains deliberative politics should take place in legislatures;[94] Frank Michelman, on the other hand, places the locus of deliberative politics in the judicial branch.[95]

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91.   *See* SANDEL, *supra* note 87, at 131 (observing that classical republicans such as James Madison sought to disempower special interest groups "so that disinterested statesmen might govern unhindered by them"); Michael Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1653 (1988) (remarking that "[i]n general, the most important structural goal [of civic republicans] appears to be political insulation"); Sunstein, *supra* note 80, at 1549-50 (noting that intermediate organizations can themselves be a source of oppression in the private realm and emphasizing that "the antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups," and to prevent the influence of interest groups in law-making, republicans "may well attempt to insulate political actors from private pressure and they may also favor judicial review designed to promote political deliberation and perhaps to invalidate laws when deliberation has not occurred.").

92.   Fitts, *supra* note 91, at 1652.

93.   *See id.*; *see also* Cohen & Rogers, *supra* note 35, at 406 (describing the civic republican strategy of "insulation" as aiming to "strengthen institutions, alternative to secondary association, that have the capacity to consider and act on the common good and to encourage those holding power within such institutions to engage in just such consideration and action").

94.   Sunstein, *supra* note 80, at 1539; *cf.* Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (arguing that deliberative politics should take place in the regulatory process and attributing regulatory failures to the lack thereof).

95.   According to Michelman, a civic republican understanding of citizens as self-rulers and law-abiders requires citizens to be able to challenge and re-shape the conception of the common good that underlies dominant understandings of law. Michelman, *supra* note 79, at 1503, 1526-27. Michelman considers that alternative interpretations of what the common good requires often originate in minority voices, which come together as "emergently self-conscious social groups" in the realm of civil society. *Id.* at 1529. It is in civil society where marginalized groups engage in dialogue that can potentially transform mainstream understandings of law. A pluralist civic-republican tradition thus requires the "constant reach for inclusion of the other, of the hitherto excluded." *Id.* Michelman grants a preeminent role to judges as interpreters and evaluators of whether these "voices from the margin" make valid re-interpretative claims of what the common good requires. *Id.* at 1537.

Civic republicans and market liberals differ markedly in the processes and institutions considered crucial for human flourishing. Market liberals defend the primacy of a minimally-regulated marketplace where individuals can pursue their self-interested aims. Civic republicans emphasize public deliberation isolated from group influence, and the preeminence of those civil society associations that foster republican dialogue and civic virtue.

A powerful criticism of civic republicanism is that consensus on what the common good requires presupposes and depends upon a sufficiently undifferentiated civil society in which such consensus is indeed possible. In other words, pluralism may preclude the pursuit of consensus.[96] In a pluralist society, public deliberation about the common good may lead either to the exclusion of minority voices from public debate and the imposition of majority conceptions of the common good, or to compromise rather than consensus among a plurality of participants with largely irreconcilable views. Contemporary civic republican theorists have proposed interpretations of the republican tradition that defend plurality as an important feature of civic republicanism. Proposals range from focusing on republican deliberation at the local level—where consensus is likely more easily achieved than at the national level[97]—to ensuring group representation at the national level[98] and opening avenues for citizen contestation of legislative, administrative, and judicial decisions.[99]

Additionally, neither social capital theory nor civic republican theory sufficiently explains how civic virtue generated in the realm of civil society transfers to the realm of the state. Social capital itself is often empirically measured by assessing the level of trustfulness in a society, using survey

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96. This critique has been wielded both by market liberals, who envision the political process as a series of compromises among a plurality of self-regarding interests, and by feminist, Third World and minority critical theorists, who see consensus decision-making as concealing the informal oppression of marginalized groups. For a description of the market liberal position, see generally James M. Buchanan & Gordon Tullock, The Calculus of Consent 171-188 (1962). For a description of the critical perspective, see generally, Chantal Mouffe, *Democracy, Power and the "Political", in* Democracy and Difference: Contesting the Boundaries of the Political 245, 250-52 (Seyla Benhabib ed., 1996); *see also* John S. Dryzek & Simon Niemeyer, *Reconciling Pluralism and Consensus as Political Ideals*, 50 Am. J. Pol. Sci. 634 (2006) (describing the tension between the political values of consensus and pluralism); *infra* Part I.E.3.

97. *See* Walzer, *supra* note 89, at 20 (characterizing republicanism as "an integrated and unitary doctrine in which energy and commitment are focused primarily on the political realm," but postulating that the civic republican doctrine "can be extended to account for a 'republic of republics,' a decentralized and participatory revision of liberal democracy").

98. *See* Sunstein, *supra* note 80, at 1542.

99. *See, e.g.*, Philip Pettit, A Theory of Freedom 167-172 (2001) (emphasizing that the perils of elite manipulation, faction or corruption can be remedied by "editorial" control through contestatory democracy: establishing minorities' powers of challenge to force public review of contestable decisions in impartial settings, setting up advisory community bodies, carrying out participatory hearings and inquiries prior to passing legislation, and publishing proposed legislation prior to approval).

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data from the World Values Studies and association membership.[100] Theories that seek to attribute high levels of citizen participation in government to the high levels of trust arising from face-to-face interactions in civil society organizations can thus be circular and incapable of establishing a chain of causation. In other words, "a group's success is attributed to its social capital, but social capital is measured by group success."[101] Without understanding this process, it is unclear that a program designed to increase associational density in civil society will lead to greater cooperation with and participation in government.[102]

A third important critique of civic republican theory is that it conceives of civil society in merely instrumental terms. In other words, because civic republicans prioritize deliberation in the public, universal sphere of government, they tend to view private associations as valuable only insofar as they can aid deliberation in government. Social capital theorists hold a similarly instrumental view of private associations: their worth derives from their ability to generate social capital. Social capital, in turn, is valuable because it ultimately ensures the ability of citizens to work cooperatively in the public sphere of government. Neither approach emphasizes a role for civil society in developing individual identities, or acting as a watchdog or critic. It is precisely on this oppositional role of civil society that outward-looking theories, examined in the next section, focus.

2. Outward-Looking Theories: Habermasian Critical Theory

Unlike market liberals and many civic republicans, who tend to focus exclusively on the relationship between civil society and the state, Habermasian critical theory focuses more explicitly on the relationship between civil society and both the state and the market economy.[103] This distinction is tightly linked to Jürgen Habermas' division between

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100. *See* Peter Knorringa & Irene van Staveren, *Beyond Social Capital: A Critical Approach*, 65 REV. SOC. ECON. 1 (2007).

101. *Id.* at 5 (citing Steven N. Durlauf, *On the Empirics of Social Capital*, ECON. J., Nov. 2002, at F459, F459-79); *see also* Alejandro Portes, *Social Capital: Its Origins and Applications in Modern Sociology*, 24 ANN. REV. SOC. 1, 19 (1998) ("As a property of communities and nations rather than individuals, social capital is simultaneously a cause and an effect. It leads to positive outcomes, . . . and its existence is inferred from the same outcomes. Cities that are well governed and moving ahead economically do so because they have high social capital; poorer cities lack in this civic virtue.").

102. *See, e.g.*, ROSENBLUM, *supra* note 67, at 43. Rosenblum argues that "[T]here is the tendency to adopt a simplistic 'transmission belt' model of civil society, which says that the beneficial formative effects of association spill over from one sphere to another." *Id.* at 48. Therefore, "[w]ithout a plausible dynamic, the idea of mediating institutions rests on little more than an optimistic 'liberal expectancy.'" *Id.* at 43.

103. *See* Jürgen Habermas, *Three Normative Models of Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 21, 28 (Seyla Benhabib ed., 1996) ("[C]ivil society provides the social basis of autonomous public spheres that remain as distinct from the economic system as from the administration."); *see also* Simone Chambers, *A Critical Theory of Civil Society*, *in* ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY 90, 92-96 (Simone Chambers & Will Kymlicka eds., 2002).

"lifeworld" and "system."[104] To Habermas, the lifeworld is the informal realm of society containing all those activities and institutions that are organized around communicative acts.[105] In the realm of the lifeworld, individuals interact with each other to create moral and practical knowledge, that is, to create, interpret, criticize, and transmit meaning.[106] Civil society is located in the lifeworld: it is composed of all associations and institutions in which individuals interact with each other through communicative acts designed to create such moral and practical knowledge.[107]

Moral and practical knowledge, instantiated in the lifeworld, stands in opposition to instrumental and strategic knowledge, instantiated in the realm of "system."[108] The latter constrains individual action based on instrumental and strategic imperatives and does not engage in communicative action to develop and clarify valid norms.[109] Both the state and the market are systemic insofar as they coordinate individual activity through the medium of authorized power or by the imperative of profit-making.[110] State power is hierarchical and coercive, while communication in civil society is egalitarian and persuasive. The rationality of the market emphasizes profit-making and efficiency, while the rationality of civil society emphasizes the production and transmission of meaning.[111]

Thus, differentiating civil society from both the state *and* the market helps to clarify different modes of organization characteristic of each realm: civil society is organized around communicative interactions, the state around bureaucratic routine and authorized power, and the market around profit imperatives. Most importantly, however, by placing civil society in opposition to the market economy, Habermasian critical theory emphasizes that it is not only the state that can pose a threat to the autonomy of civil society. Rather, the ability of civil society to critique dominant norms is eroded when institutions of civil society cease to be organized around communication and debate and begin to be organized around profit making. To Habermasian critical scholars, autonomous deliberation

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104.   *See* JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 153-97 (Thomas McCarthy trans., 1987).

105.   *See, e.g.,* Chambers, *supra* note 103, at 92 ("The lifeworld is made up of meanings. We are connected to it via our interpretations and understandings. It is transmitted, altered, and reproduced via communication.").

106.   *Id.*

107.   JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY 429 (1992) ("It is . . . on the institutional level of the lifeworld, that one can root a . . . concept of civil society.").

108.   Chambers, *supra* note 103, at 90.

109.   HABERMAS, *supra* note 104, at 154.

110.   *Id.* ("[I]n modern societies, economic and bureaucratic spheres emerge in which social relations are regulated only via money and power.").

111.   These definitions of civil society, state, and market are highly stylized, and critical theorists recognize that all three coordinating logics (communication, power, and profit-making) co-exist in the realms of the state, market, and civil society. Nevertheless, they serve to identify dominant modes of coordination in each one of the three realms.

is at the heart of civil society: both the market and the state can undermine civil society by threatening "the ways in which we interact" in civil society.[112]

Although Habermasian critical theorists include in their definition of civil society the type of apolitical private associations prized by market liberal, social capital, and civic republican theorists, they prioritize those associations that can criticize state political institutions, offer alternative interpretations of dominant norms, and generally "perceive, interpret, and present society-wide problems."[113] In practice, this means that critical theorists are largely interested in outward-looking associations of civil society that are expressly political, that is, that seek to take active part in deliberations about the common good and to both criticize and influence lawmaking and enforcement by state entities.[114] Deliberation about common affairs takes place in the "public sphere"—a space within civil society accessible to anyone. The public sphere is both a broad normative ideal for all societies and an empirical reality in democratic states—that tends to fall short of the normative ideal. It requires that: (1) it be open to all who wish to participate; (2) it be autonomous from both the state and the market; (3) participants bracket their inequalities and deliberate as equals relying on the public use of reason; and (4) participants debate the common good, leaving aside their private interests and issues.[115]

This emphasis on outward-looking associations of civil society stems from the essential role ascribed by critical theorists to institutions of civil society in maintaining a legitimate democratic state. An autonomous civil society that is open to all, and in which rational deliberation among equals about the common good takes place, can critically evaluate and analyze state policy to expose arbitrary state action, unjustified or insufficiently justified policies, or underlying assumptions or ideologies behind dominant norms. Thus, a politically-oriented civil society preserves democracy by ensuring that the state gives reasons for its policies that can survive critical scrutiny in the public sphere.

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112.   Chambers, *supra* note 103, at 94.

113.   JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 358 (Willam Rehg trans., 1996).

114.   Habermas considers the "network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres," to be at the "core of civil society." *Id.* at 367. Thus, it is those politically-oriented associations that organize to debate issues of common concern that take center stage in Habermasian critical theory.

115.   *See* JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 27, 30, 36-37 (Thomas Burger trans., 1989) [hereinafter HABERMAS, THE PUBLIC SPHERE] (explaining the development of the public sphere in the political realm); *see also* Jürgen Habermas, *"Reasonable" versus "True" or the Morality of World-views, in* THE IN-CLUSION OF THE OTHER 75, 86 (Ciaran Cronin & Pablo de Greiff eds., 1998) [hereinafter Habermas, *Morality of World-Views*] ("Anything valid should also be capable of a public justification. Valid statements deserve the acceptance of everyone *for the same reasons.*") (emphasis added).

Critical theory's emphasis on a discursive model of civil society, where individuals come together to debate common affairs, has much in common with civic republican theories of public-regarding deliberation in political institutions. In particular, both theories emphasize the importance of rational deliberation about the common good and the need for all individuals to participate as equals.[116] Critical theorists differ from civic republicans, however, in that they consider deliberative politics to extend beyond the formally-organized political system to the public sphere of civil society.[117] Indeed, Habermasian critical scholars propose a "two-track" version of deliberative politics that accords a prominent role to informally organized associations of civil society. Because the key role of civil society is to identify and interpret social problems and bring them to the forefront, "a good part of the normative expectations connected with deliberative politics" falls onto civil society associations.[118] In fact, Habermas emphasizes that the task of shaping public opinion must not be left to the political system.[119]

Nevertheless, much like civic republicans, critical scholars recognize that civil society associations can be "anarchic" and self-interested.[120] Hence, to Habermas, political decision making falls to the state and the established party system, which "filter" reasons for preferring one normative interpretation over another through institutionalized deliberation processes (such as parliamentary deliberation). Deliberative politics thus depends on "the interplay of institutionalized deliberative processes with informally developed public opinions."[121]

Because Habermasian critical theory ties the flourishing of civil society to a liberal rights framework,[122] Third World scholars have criticized it as excluding those Third World voices that do not fit neatly within such a framework, thus omitting a wide swath of actors (for example, Islamic or Native American social movements) from critical deliberation about the

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116.   *See* Habermas, *supra* note 103, at 27.

117.   Kenneth Baynes, *A Critical Theory Perspective on Civil Society and the State, in* CIVIL SOCIETY AND GOVERNMENT, *supra* note 5, at 123, 128 (discussing Habermas' theories of civil society and emphasizing that public associations of civil society have the unique ability to "interpret[ ] social needs and problems, and shap[e] public opinion in response to them"); *see also* HABERMAS, *supra* note 113, at 275 ("A deliberative practice of self-legislation can develop only in the interplay between, on the one hand, the parliamentary will-formation institutionalized in legal procedures and programmed to reach decisions and, on the other, political opinion-formation along informal channels of political communication.").

118.   HABERMAS, *supra* note 113, at 358.

119.   *Id.*   ,

120.   *See id.* at 307–08 ("On account of its anarchic structure, the general public sphere is, on the one hand, more vulnerable to the repressive and exclusionary effects of unequally distributed social power, structural violence, and systematically distorted communication than are the institutionalized public spheres of parliamentary bodies.").

121.   *Id.* at 298.

122.   *Id.* at 366–67, 371 ("[A] robust civil society can develop only in the context of a liberal political culture . . . it can blossom only in an already rationalized lifeworld.").

common good.[123] Third World scholars have also criticized this emphasis on a liberal rights framework as privileging established NGOs by requiring that advocacy groups acquire legal identity—and consequently legal recognition as legitimate nonstate actors by the state—before they can be considered part of civil society.[124] This conflation significantly narrows the type of associations that are allowed to participate in international lawmaking and implementation.

Feminist, Third World, and minority scholars have also criticized the Habermasian ideal of the public sphere as leading to the *de facto* exclusion of marginal or minority views. In Habermasian critical theory, the ideal version of the public sphere imagines a single realm where individuals from all walks of life put aside their differences in status to deliberate as equals on issues of general interest.[125] Scholars such as Nancy Fraser, Iris Marion Young, and Jane Mansbridge have pointed out, however, that social inequalities continue to distort deliberation, even when all participants are formally equal.[126] Power and economic inequalities reproduce themselves in deliberative interactions irrespective of the formal equality of all participants.[127] This is because inequalities informally affect deliberation so that those privileged economic or social groups tend to dominate the discussion, which is often conducted using language and terms with which dominant groups are more comfortable, and which often focuses on topics of greater interest to those dominant groups.[128]

Feminist and Third World critical approaches to civil society seek to "render visible the ways in which societal inequality infects formally inclusive existing public spheres and taints discursive interaction within them."[129] The next Section explores these approaches.

3. Inward-Outward Theories: Feminist, Minority, and Third World Critical Theories

Like Habermasian critical scholars, feminist, Third World, and minority critical theorists emphasize the importance of deliberation in the public sphere for democratic government. In particular, they agree with the Habermasian and civic republican criticism of interest-based politics (as

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123.   *See, e.g.,* Balakrishnan Rajagopal, International Law from Below 259–61 (2003).

124.   *Id.* at 261.

125.   *Cf.* Fraser, *supra* note 32, at 62 (criticizing the Habermasian assumption that "a single, comprehensive public sphere is always preferable to a nexus of multiple publics").

126.   *See, e.g.,* Fraser, *supra* note 32, at 62; Jane Mansbridge, *Democracy, Deliberation, and the Experience of Women, in* Higher Education and the Practice of Democratic Politics 122, 123 (Bernard Murchland ed., 1991); Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy, in* Democracy and Difference: Contesting the Boundaries of the Political 120, 122-23 (Seyla Benhabib ed., 1996); *see infra* Part I.E.3.

127.   *See, e.g.,* Fraser, *supra* note 32, at 63-64.

128.   *Id.* at 64.

129.   *Id.* at 65.

exemplified by market liberal theories), which conceive of democratic decisions as compromises among self-interested actors.[130] They also endorse the tripartite model of civil society that distinguishes civil society from both the state and the economy for the reasons described above: namely, that the tripartite model makes clear that the ability of civil society to act as a watchdog and critic depends upon its independence from both state coercion and market imperatives.[131]

These theorists, however, have three major points of disagreement with Habermasian critical theory: (1) the ideal of a single public sphere, (2) the prioritization of legally constituted and formally recognized organizations, and (3) the focus on debates about the common good. First, feminist, minority, and Third World theorists criticize the Habermasian ideal of a single public sphere where all participants bracket their inequalities and debate as if equals relying only on reasoned arguments.[132] To these theorists, this required bracketing of differences is neither practically achievable, nor normatively desirable. It is not practically achievable because "informal impediments to participatory parity . . . can persist even after everyone is formally and legally licensed to participate."[133] Minority groups may have internalized barriers to participation—for example, a diminished sense of one's right to speak, to interrupt, or to assert one's opinion.[134] Additionally, these groups may lack the necessary training to express their points of view through the speech style that is most valued in arenas of public debate, that is, through formal and general arguments, rather than through personal narratives; and through assertive and confrontational statements rather than tentative or conciliatory ones.[135]

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130.   *See, e.g., Introduction, in* DEMOCRACY AND DIFFERENCE (Seyla Benhabib ed., 1996) (summarizing the contributions of feminist critical theorists Jane Mansfield, Seyla Benhabib, Iris Marion Young, Amy Gutman, and Chantal Mouffe, as "defending a version of 'deliberative democracy' [espoused by Habermas] as providing the most adequate conceptual and institutional model for theorizing the democratic experience of complex societies"); Mansbridge, *supra* note 126, at 122–23.

131.   *See* Fraser, *supra* note 32, at 57.

132.   *See, e.g.,* Young, *supra* note 126, at 123 ("Despite the claim of deliberative forms of orderly meetings to express pure universal reason, the norms of deliberation are culturally specific and often operate as forms of power that silence or devalue the speech of some people."); Iris Marion Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory, in* FEMINISM AS CRITIQUE 57, 59 (Seyla Benhabib & Drucilla Cornell eds., 1987) ("Habermas remains too committed to the ideals of impartiality and universality.").

133.   Fraser, *supra* note 32, at 63.

134.   Young, *supra* note 126, at 124 (noting that "[i]n many formal situations the better-educated white middle-class people . . . often act as though they have a right to speak and that their words carry authority, whereas those of other groups often feel intimidated by the argument requirements and the formality and rules of parliamentary procedures, so they do not speak, or speak only a way [sic] that those in charge find 'disruptive.'").

135.   Feminist scholars such as Nancy Fraser, Iris Marion Young and Jane Mansbridge remark that the deliberative style predominant in public spheres tends to view deliberation as a contest. Deliberation-as-contest privileges assertive and confrontational styles, which are often male-centric, over exploratory or conciliatory ones, which are often female-centric. *See, e.g.,* Young, *supra* note 126, at 122–24.

Bracketing participants' differences is not normatively desirable: it can mask subtle forms of domination of minority groups by majority elites by treating as neutral a type of deliberative style that is, in fact, culturally contingent.[136] Feminist and minority scholars emphasize the historical domination of public spaces of deliberation by white, upper-middle class men. This domination, they argue, has given rise to a type of rhetorical style that privileges dispassionate over passionate speech, that views deliberation as competition rather than collaboration, and that presents these forms of speaking as the application of "pure universal reason."[137] A key insight of these theorists is that the norms of deliberation of a single deliberative public sphere are likely to reflect the cultural preferences of dominant groups and thus can "operate as forms of power that silence or devalue the speech of [minorities]."[138]

Rather than espouse Habermas' ideal single public sphere, feminist, minority, and Third World theorists conceive of civil society as constituted by multiple publics. These multiple publics are thought to enhance, rather than diminish, the democratic potential of civil society. To Habermas, the emergence of multiple arenas of debate is a sign of fragmentation, which he postulates undermines deliberative democracy.[139] In contrast, feminist critical theories tend to view the coexistence of multiple publics as a resource that ultimately enhances deliberation in the broader public sphere.[140] Multiple publics enhance deliberation by allowing for the development of perspectives irreducible to the common good, which can ultimately transform the opinions of the dominant public.[141] Because a single public sphere is likely to drown minority critiques, smaller arenas of deliberation where minority groups can come together can help these groups "find the right voice or words to express their thoughts" and "articulate and defend their interests in the comprehensive public sphere."[142] Feminist critical scholar Nancy Fraser has termed these smaller arenas of deliberation "subaltern counterpublics" to capture their dual function as both *inward-looking* spaces where subordinated social groups develop their "identities, interests, and needs" and *outward-looking* arenas where minorities deliberate about and develop alternative and often contestatory interpretations of accepted norms.[143]

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136.   *See, e.g.*, Mansbridge, *supra* note 126, at 130-31, 134.

137.   Young, *supra* note 126, at 123.

138.   *Id.*

139.   HABERMAS, *supra* note 104, at 307–08.

140.   *See* Fraser, *supra* note 32, at 62.

141.   Young, *supra* note 126, at 127.

142.   Fraser, *supra* note 32, at 64, 66.

143.   *Id.* at 67-68 ("[S]ubaltern counterpublics have a dual character. On the one hand, they function as spaces of withdrawal and regroupment; on the other hand, they also function as bases and training grounds for agitational activities directed toward wider publics."). For example, Fraser credits feminist subaltern counterpublics with developing new language to re-conceptualize social practices that were either previously accepted by society at large, or that remained a hidden social problem. *Id.* at 68. Thus, terms such as "marital rape" ques-

Because they recognize that dominant rhetorical styles are historically and culturally-contingent, feminist, minority, and Third World critical theories stress the importance of integrating different modes of communication into public deliberation. These theories emphasize, first, that some minority groups may be unable to express their points of view through formal and general arguments.[144] Second, they highlight the importance of different forms of communication, in particular informal, first person narrative styles, to "supplement argument by providing ways of speaking across difference in the absence of significant shared understandings."[145]

A second critique of Habermasian critical theory focuses on how an understanding of civil society that privileges formally recognized and formally constituted NGOs (a process often called "NGOization") undermines Third World social movements and de-politicizes civil society.[146] For example, scholarship on law and development has criticized the "NGOization of civil society [as] severely limit[ing] its radical democratic potential" by excluding social movements that do not have a recognized legal identity.[147] But it is precisely these social movements—and not NGOs constituted by Anglophone cosmopolitan actors—that command grassroot support in developing states and are thus seen as legitimate representatives of their interests.[148] These scholars have also condemned international development institutions for viewing NGOs merely as providers of efficient technical solutions to development problems. To these critics, such an instrumental view of NGOs "largely ignores, down-

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tioned the state's reluctance to interfere. *Id.* at 67. The term "double shift" emphasized society's unspoken expectations that women who hold full-time jobs take care of the majority of household duties. *Id.*

144.   *See, e.g.*, Young, *supra* note 126, at 124 (arguing that norms of deliberation that privilege formal and general speech "must be learned," because they are "culturally specific" and often a "sign of social privilege").

145.   *Id.* at 129, 131; *accord* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413, 2439 (1989) (emphasizing the key role of narrative—or counterstories—in challenging dominant mindsets, those "bundle[s] of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place").

146.   Sonia E. Alvarez, *Beyond NGO-ization, Reflections from Latin America*, 52 DEV. 175, 176 (2009) (defining "NGOization" as "national and global neo-liberalism's active promotion and official sanctioning of particular organizational forms and practices among feminist organizations and other sectors of civil society"). In particular, Alvarez criticizes the promotion and endorsement by national states, Intergovernmental Organizations and International Financial Institutions of "more rhetorically restrained, politically collaborative and technically proficient feminist practices." *Id.*

147.   RAJAGOPAL, *supra* note 123, at 261; *accord* Alvarez, *supra* note 146, at 175. For example, the U.N. Economic and Social Counsel (ECOSOC) requires applicants for consultative status with the U.N. to "provide a copy of the registration paper or, if your country does not require registration, please provide other proof of existence." Department of Economic and Social Affairs, NGO Branch, *How to Apply for Consultative Status*, UNITED NATIONS, http://csonet.org/?menu=83 (last visited Mar. 3, 2013).

148.   RAJAGOPAL, *supra* note 123, at 261–62.

plays, or attempts to coopt the political role of NGOs."[149] According to this thinking, the proper role of civil society (and of NGOs) is to criticize the development project as it is currently imagined by international organizations, thus creating "alternative development discourses and practices."[150]

Finally, feminist, minority, and Third World critical scholars also criticize the requirement that all participants deliberate about the common good. Feminist scholars point out that what precisely constitutes the "common good" is debatable. The indefiniteness and malleability of the concept has the potential to privilege the perspectives of dominant groups and thus be oppressive to minorities.[151] Rather than focus on defining the common good, or finding areas of agreement, the key functions of deliberation should be to expose participants to multiple perspectives, often not reducible to a single common good. This exposure helps participants expand their points of view: by illuminating the partiality of each participant's vantage point while simultaneously exposing all involved to multiple perspectives, participants "can come to understand something about the ways proposals and claims affect others differently situated."[152] Furthermore, deliberation can aid participants to pinpoint precisely where their differences lie, for example by forcing the articulation of unspoken assumptions.[153]

The emphasis on multiple, smaller publics, however, runs the risk of creating isolated enclaves. In other words, unless sufficient emphasis is placed on the mechanisms whereby the contestatory ideas developed in these smaller publics can impact wider publics, and unless wider publics are receptive to these ideas, fostering minority spaces may result in either isolation or tokenism.[154] Additionally, there is in principle no guarantee that the contestatory ideas developed in these smaller publics will be democracy-enhancing. In fact, these smaller publics could be deeply illiberal groups, or develop into radical groups that seek to destabilize or foreclose,

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149.   William F. Fisher, *Doing Good? The Politics and Antipolitics of NGO Practices*, 26 ANN. REV. ANTHROPOLOGY 439, 445-46 (1997).

150.   *Id.* at 443. Third World critical scholars have endorsed Fraser's re-conceptualization of the public sphere as both accommodating social movements and recognizing their contestatory function. For example, Balakrishnan Rajagopal emphasizes that Nancy Fraser's notion of subaltern counterpublics, "which stresses the need to recognize a plurality of civil societies that may exist in these counterpublics, is much more capable of representing the actually existing practices of social movements." RAJAGOPAL, *supra* note 123, at 262.

151.   Fraser, *supra* note 32, at 72; Young, *supra* note 126, at 126.

152.   Young, *supra* note 126, at 128.

153.   In particular, allowing deliberation to take into account claims of self- or group-interest may help minority groups "find ways to discover that the prevailing sense of 'we' does not adequately include them." Jane Mansbridge, *Feminism and Democracy*, AM. PROS-PECT, Spring 1990, at 126, 131.

154.   For example, dominant groups may "pretend" to listen to minority concerns, and provide token concessions to minority demands, while not allowing minority views to have a substantial impact on policy outcomes.

rather than enrich, the conversation in wider publics.[155] Two mechanisms may mitigate this isolation: first, these smaller publics have a *dual* orientation, one of which is outward-looking; that is, they seek to interact with the wider public. Second, in multicultural societies, overlapping group memberships are likely to at least partially counter isolation by diffusing ideas among overlapping publics.[156]

4. Boundary-Crossing Theories: New Governance, State-Society Synergy Theories

All theories explored in the preceding sections view civil society as a separate sphere, independent from the state. In fact, most democratic political theories of civil society consider that a sharp separation between the state and civil society is necessary for the latter to maintain its independence and thus its ability to represent a legitimate check on state power.[157] Nevertheless, a diverse group of scholars increasingly pays attention to mechanisms of coordination between civil society and the state that accord civil society a more direct role in policy formation.[158] I focus here on these initiatives, as well as on recent proposals by both legal and political science scholars that tend to blur the boundaries between civil society and the state.

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155.   While acknowledging their potential for engendering illiberal tendencies, some feminist scholars have emphasized that illiberal groups may, paradoxically, serve to contain these tendencies. For example, Nancy Rosenblum argues that a function of associational life may be as much to contain vice as to promote civic virtue. ROSENBLUM, *supra* note 67, at 349-51. This is because some associations which foster such un-civic values as snobbery and separatism may provide "safety valves" that contain these illiberal tendencies. *Id.* at 349. These outlets can provide psychological benefits to members and contribute to the maintenance of the social order by instilling individuals with a measure of self-respect, by providing them with the opportunity "not only to belong but also to exclude others, [with] some place where their contributions are affirmed and where the likelihood of failure is reduced." *Id.*

156.   The idea that overlapping memberships can moderate extreme views and thus preserve democratic stability has a long history in pluralist theories of democracy. *See* SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 88-89 (1960) (arguing that "chances for stable democracy are enhanced to the extent that groups and individuals have a number of crosscutting, politically relevant affiliations").

157.   *See generally* Post & Rosenblum, *supra* note 5, at 90.

158.   *See* Cohen & Rogers, *supra* note 35, at 397 (proposing a set of institutional reforms that accord "secondary groups an extensive and explicitly public role"); Fraser, *supra* note 32, at 76 (arguing for a "conception [of civil society] that can permit us to envision a greater role for (at least some) public spheres than mere autonomous opinion formation removed from authoritative decision-making"); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 310–11 (2004) (arguing for a new horizontal conception of self-government "resting on the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities in domestic and transnational society generate the rules, norms, and principles they are prepared to live by"); Lucio Baccaro, *Civil Society Meets the State: A Model of Associational Democracy* 1 (Int'l Inst. for Labour Studies, Discussion Paper Series No. 138, 2002) (proposing a new model of associational democracy in which "state and civil society organizations are both part of a single new regulatory framework that transforms both").

Rather than dealing with a discrete theory of civil society, this final Section combines three approaches that advocate a more direct role for civil society associations in lawmaking and implementation in collaboration with the state: some critical theory approaches, new governance theory, and state-society synergy theory. I briefly analyze each below.

Some critical scholars emphasize the need to move beyond the state-civil society dichotomy and allow civil society associations to participate in the political process as decision and policy makers.[159] For example, Joshua Cohen and Joel Rogers propose a more direct and formal governance role for groups in areas where the objects of regulation are either too dispersed, too numerous, or too mutable for the government to set compliance standards and monitor performance.[160] This effort to incorporate civil society into decision-making processes traditionally reserved to parliamentary bodies mirrors "new governance" initiatives that seek to promote experimentation at multiple levels of government, and to foster deliberation and participation in government by recognizing a key role for civil society actors as policy makers.[161] Blurring the boundaries between state, market, and civil society, new governance scholars argue, fosters cooperation, experimentalism, and innovation.[162] New governance scholars believe that allowing civil society (and also the market) to participate in lawmaking and implementation imbues all sectors of society with a problem-solving spirit whereby common problems can be tackled creatively.[163]

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159.   Nancy Fraser criticizes the Habermasian conception of civil society for promoting a sharp separation between associational civil society, whose deliberation results only in opinionformation (which she terms "weak publics"), and parliamentary bodies, whose deliberation encompasses binding decisionmaking (which she terms "strong publics"). Fraser, *supra* note 32, at 75. Fraser argues that some particular contexts may call for the direct participation of civil society in lawmaking. *Id.* Fraser does not, however, specify which types of situation may call for this direct participation. *Id.* Cohen and Rogers provide a more detailed elaboration of particular contexts that call for a more direct role for civil society in policymaking. Cohen & Rogers, *supra* note 35, at 447–454.

160.   Cohen and Rogers emphasize three key attributes of civil society organizations that allow them to positively contribute to democratic governance in these areas: their ability to provide on-the-ground information to policy-makers; their potential to equalize representation of dispersed interests by pooling them, thus making representation more fine-grained; and their ability to act as innovative problem solvers. Cohen & Rogers, *supra* note 35, at 424-26. These attributes may be particularly important when policymaking and implementation requires coordination among various actors, or when it requires that policies be tailored to specific local conditions.

161.   *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 442 (2004) ("[T]he obsessive maintenance of traditional boundaries—including those of public and private, profit and non-profit, formal and informal, theory and practice, secular and religious, left and right—is no longer a major concern with the shift to the Renew Deal [that is the New Governance] paradigm."); *see also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) (arguing for the "reorient[ation] of administrative law toward facilitating the effectiveness of public/private regulatory regimes and away from the traditional project of constraining agency discretion").

162.   *See* Lobel, *supra* note 161, at 375-376.

163.   *See id.* at 442.

Importantly, in this framework, the role of the government shifts from reg-
ulator and controller to facilitator in the shared problem-solving enter-
prise.[164] Finally, state-civil society synergy theorists point to empirical
research that provides additional reasons for fostering "ties that connect
citizens and public officials across the public-private divide."[165] Social sci-
ence field work has found that when state officials are embedded in the
communities in which they work, they create synergies that lead to the
more efficient implementation of state policies. "State-society synergy" re-
quires both complementary efforts by state and civil society, that is, efforts
that rely on a more traditional division of labor between the two realms,
and embeddedness, that is, the development of ties that cross the public-
private divide.[166]

   A direct policy-making and implementation role for civil society orga-
nizations, however, may perpetuate existing social inequalities by allowing
groups that already possess a large amount of political power to direct
decision making and implementation to their own benefit (and likely to
the detriment of society at large). This concern is exacerbated in situations
where groups with unequal power and clashing priorities compete to influ-
ence regulation in areas with scarce resources.[167] Thus, any regime that
seeks to institutionalize a role for civil society in policy making should
include mechanisms to safeguard representativeness and to foster a collab-
orative environment among participating stakeholders. These mechanisms
can include rotation schedules for civil society organizations, so that single
groups do not dominate the discussion, and multiple perspectives can con-
tribute to the debate without sacrificing efficiency. Additionally, as men-
tioned *above*, for those civil society theorists (such as feminist, Third
World, and minority scholars) who prize civil society's ability to develop
alternative and often transgressive critiques of the state, a direct role of

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   164.   *Id.* at 348, 377 (identifying the following features as key elements of a new govern-
ance regime: "increased participation of nonstate actors, stakeholder collaboration, diversity
and competition, decentralization and subsidiarity, integration of policy domains, flexibility
and non-coerciveness, adaptability and dynamic learning, and legal orchestration among pro-
liferated norm-generating entities.").

   165.   *See* Peter Evans, *State-Society Synergy: Government and Social Capital in Develop-
ment, in* GOVERNMENT ACTION, SOCIAL CAPITAL AND DEVELOPMENT: REVIEWING THE EVI-
DENCE ON SYNERGY 178, 180 (Peter Evans ed., 1996).

   166.   *Id.* at 179-80. Relying on experimental data from different instances of state-civil
society collaborations, Evans identifies two key features of successful synergy: complemen-
tarity and embeddedness. Complementarity requires that the state ensure rule-governed en-
vironments that enable diverse civil society organizations to flourish. Embeddedness
facilitates implementation by creating dense networks of ties that bind local state and civil
society actors. *Id.*; *see also* Danielle M. Varda, *A Network Perspective on State-Society Syn-
ergy to Increase Community-Level Social Capital,* 40 NONPROFIT & VOLUNTARY SECTOR Q.
896, 896 (2011) (arguing that synergistic interactions between the state and civil society in-
crease the levels of bridging social capital, thus improving implementation outcomes).

   167.   *See, e.g.,* Lobel, *supra* note 161, at 458 (recognizing that new governance ap-
proaches may produce "a vicious cycle under certain circumstances—tilting more and more
entitlements in favor of those already in power").

civil society in policy making and implementation risks the moderation of critique and the further NGOization of civil society.[168]

This Part developed a framework that allows for a more fine-grained analysis of the diverse purposes and functions that can be performed by different civil society associations. I argued that the purposes and functions of civil society organizations range from inward to outward-looking. I then posited that five theoretical approaches to civil society map onto this framework and justify emphasizing particular purposes and functions of civil society while minimizing others. This theoretical framework is depicted below in Figure 2:
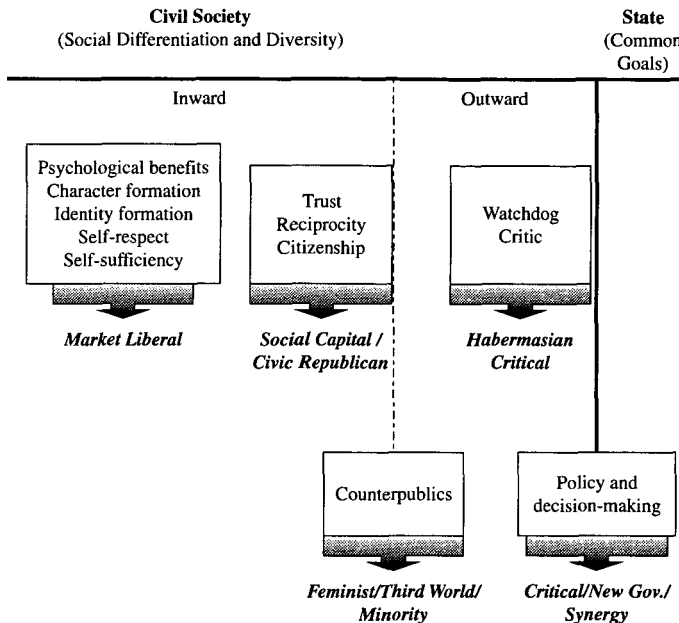
FIGURE 2

Although not all of the functions of civil society depicted in Figures 1 and 2 are mutually exclusive, and it is certainly possible for a single civil society organization to seek to achieve both inward-looking and outward-looking goals, there are often trade-offs. For example, groups that seek to focus on the personal discovery and growth of their members may have to put aside discussions about shared values and the common good.[169] Conversely, groups organized for efficient political representation may fail to serve as sources of individual identity.[170] More importantly for the pur-

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168.   *See supra* Part I.E.3.

169.   *See, e.g.,* ROSENBLUM, *supra* note 67, at 37.

170.   *Id.* (noting that while organized political interest groups may "serve the classic function of political representation," they "may fail to serve as important reference points for the moral dispositions of members or to foster deep commitment to democratic values or to the political community as a whole").

pose of this work, international organizations seeking civil society partici-
pation should recognize the variety of functions performed by different
kinds of civil society organizations, and the normative theories that ex-
plain and justify a focus on certain attributes at the expense of others. As I
began to explore in this Part, understanding civil society through the lens
of each of the five families of theories described above (which in turn em-
phasize particular functions of civil society) has consequences for the de-
sign of international institutions. In Part II, I apply the theoretical
framework developed in this Part to a concrete example, the UNAIDS
monitoring process to the HIV/AIDS Declaration of Commitment, to
work out in more detail how choosing one theoretical interpretation over
another will lead to different institutional designs.

II. Applying the Theoretical Framework: The HIV/AIDS Declaration of Commitment and UNAIDS Monitoring Process

This Part provides a brief overview of the global efforts to address the
HIV/AIDS epidemic, with an emphasis on the HIV/AIDS Declaration of
Commitment and the UNAIDS monitoring process. It then gives exam-
ples of how UNAIDS initiatives to increase civil society engagement pro-
vide inconsistent definitions of civil society that reveal the absence of an
analytical framework to guide policy prescriptions. Finally, it demonstrates
the importance of developing such a framework by analyzing how the the-
oretical framework described in Part I would counsel different institu-
tional designs for civil society participation.

A. *History and Content of UNGASS Commitments*

In the year 2000, the Security Council, for the first time in its history,
debated a global health issue.[171] The Council considered that the acceler-
ating spread of the HIV/AIDS epidemic "may pose a risk to stability and
security," and urged states to redouble their efforts to mount a coordi-
nated campaign against the epidemic.[172] The Security Council also en-
couraged "additional discussion among relevant United Nation bodies,
Member States, industry and other relevant organizations to make pro-
gress, *inter alia*, on the question of access to treatment and care, and on
prevention."[173] In 2001, the U.N. General Assembly convened a Special
Session (UNGASS) dedicated to HIV/AIDS.[174] At the close of the meet-
ing, representatives of 189 nations unanimously adopted the Declaration

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171. *See* Press Release, Security Council, Security Council Holds Debate on Impact of
AIDS on Peace and Security in Africa, U.N. Press Release SC/6781 (Jan. 10, 2000); *Rx for
Survival; Politics and Global Health*, Public Broadcasting Service, http://www.pbs.org/
wgbh/rxforsurvival/series/politics/who_united.html (last visited Mar. 1, 2013) ("In 2000 . . .
health moved for the first time onto the agenda of the UN Security Council . . . ."); S.C. Res.
1308, U.N. Doc. S/RES/1308 (July 17, 2000).

172.   S.C. Res. 1308, pmbl., U.N. Doc. S/RES/1308 (July 17, 2000).

173.   *Id.* ¶ 6.

174.   *See* G.A. Res. S-26/2, U.N. Doc A/RES/S-26/2 (Aug. 2, 2001).

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of Commitment on HIV/AIDS: "Global Crisis—Global Action" (Declaration).[175]

The Declaration calls for the development of national strategies that involve "civil society and . . . business" as one of the pillars of a national response.[176] It also commits states to submit country progress reports to UNAIDS, the Joint United Nations Program on HIV/AIDS, once every two years.[177] Currently, in a single monitoring process, UNAIDS reporting guidelines combine UNGASS targets with commitments set forth in three other U.N. Resolutions on HIV/AIDS: the Millennium Development Goals[178] and two Political Declarations of Commitment.[179] These three resolutions along with the Declaration represent the core international commitments in the global fight against AIDS.

UNAIDS has designed a series of core indicators to monitor countries' progress.[180] Indicators include epidemiological data related to the spread of the disease and population behavioral patterns, as well as data that reflect the countries' HIV/AIDS policy environment. The latter data is used to derive the National Composite Policy Index (NCPI), designed to "assess progress in the development and implementation of national level

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175.   *Id.*; Joint United Nations Programme on HIV/AIDS [UNAIDS], Monitoring the Declaration of Commitment on HIV/AIDS, Guidelines on Construction of Core Indicators, UNAIDS/07.12E /JC1318E, 9 (April 2007) [hereinafter UNAIDS, 2007 Core Indicator Guidelines] ("At the close of the groundbreaking UNGASS on HIV/AIDS in June 2001, 189 Member States adopted the Declaration of Commitment on HIV/AIDS.").

176.   G.A. Res. S-26/2, *supra* note 174 ¶ 37.

177.   UNAIDS, the World Health Organization (WHO) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) are the key players in the international response to HIV/AIDS.

178.   "To have, by then, halted, and begun to reverse, the spread of HIV/AIDS, the scourge of malaria and other major diseases that afflict humanity" and "[t]o provide special assistance to children orphaned by HIV/AIDS" are two of the eight Millennium Development Goals adopted by the General Assembly in the year 2000. G.A. Res. 55/2, ¶ 19, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

179.   *See generally* G.A. Res. 65/277, ¶¶ 50, 51, U.N. Doc. A/RES/65/277 (July 8, 2011) (reaffirming the 2006 Declaration of Commitment and setting new targets, which include, by 2015, to reduce sexual transmission of HIV and HIV infection among people who inject drugs by half, to increase the number of people on treatment to 15 million, to halve TB-related deaths in people living with HIV, and to eliminate new HIV infections among children); G.A. Res. 60/262, ¶ 20, U.N. Doc. A/RES/60/262 (June 15, 2006).

180.   UNAIDS, *Global AIDS Response Progress Reporting 2012: Guidelines*, at 8, UNAIDS/JC2215E (Oct. 2011) [hereinafter UNAIDS, *2011 Core Indicator Guidelines*]; UNAIDS, *Monitoring the Declaration of Commitment on HIV/AIDS: Guidelines on Construction of Core Indicators*, at 9, UNAIDS/09.10E/JC1676E (Mar. 2009) [hereinafter UNAIDS, *2009 Core Indicator Guidelines*]; *see also* UNAIDS, SCALING UP ACCESS TO HIV PREVENTION, TREATMENT, CARE AND SUPPORT: THE NEXT STEPS (2006) *available at* http://data.unaids.org/Publications/IRC-pub07/jc1267-univaccess-thenextsteps_en.pdf; UNAIDS, *Setting Targets for Moving Towards Universal Access* (UNAIDS Working Doc., Oct. 2006), *available at* http://data.unaids.org/pub/guidelines/2006/20061006_report_universal_access_tar gets_guidelines_en.pdf.

HIV and AIDS policies, strategies and laws."[181] The NCPI is based on interviews with two groups: (1) government officials, and (2) bilateral agencies, U.N. organizations, and civil society organizations.

The NCPI queries whether countries have "ensured the full involvement and participation of civil society in the development of a multisectoral strategy."[182] In addition, UNAIDS encourages governments to involve civil society in the monitoring and evaluation process itself, by convening workshops before the drafting of the report and by reviewing progress reports. Reporting guidelines emphasize that the preparation of national reports should include input from civil society as "partners" that can "provide quantitative and qualitative information to augment the data collected by governments[,] . . . provide a valuable perspective on the issues included in the National Composite Policy Index, and . . . participate in the review and vetting process for progress reports."[183] UNAIDS emphasizes the importance of *process* in the elaboration of the UNGASS reports as an opportunity to develop civil society/government partnerships, noting that "the importance of the Index lies in the process of data collection and data reconciliation between different stakeholders, detailed analysis of the responses, and its use in strengthening the national HIV response."[184] UNAIDS discourages, however, the preparation of independent shadow reports—limiting them to cases in which civil society *strongly* feels it was not adequately included in the national reporting process or the state is unable to provide an official report.[185]

Once every two years, UNAIDS compiles country progress reports, which are reviewed at a special UN General Assembly meeting ("High

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181.   UNAIDS, *2009 Core Indicator Guidelines, supra* note 180, at 27; *see also* UNAIDS, *2011 Core Indicator Guidelines, supra* note 180, at 139–42 (NCPI questionnaire for civil society organizations and others).

182.   UNAIDS, *2009 Core Indicator Guidelines, supra* note 180, at 27, 94 (footnote and internal quotation marks omitted). The 2011 Guidelines similarly ask whether the government has included civil society in planning, budgeting, monitoring and evaluation of the national response to HIV. UNAIDS, *2011 Core Indicator Guidelines, supra* note 180, at 139–40.

183.   UNAIDS, *2009 Core Indicator Guidelines, supra* note 180, at 16. The 2011 Guidelines characterize civil society's contribution to the national response in similar terms, emphasizing that "civil society organizations are well positioned to provide quantitative and qualitative information to augment the data collected by governments." UNAIDS, *2011 Core Indicator Guidelines, supra* note 180, at 15.

184.   UNAIDS, *2009 Core Indicator Guidelines, supra* note 180, at 28.

185.   UNAIDS, *2011 Core Indicator Guidelines, supra* note 180, at 15 ("Shadow reports by civil society will be accepted . . . [but] are not intended as a parallel reporting process for civil society. Wherever possible UNAIDS encourages civil society integration into national reporting processes. . . . Shadow reports are intended to provide an alternative perspective where it is strongly felt that civil society was not adequately included in the national reporting process, where governments do not submit a Country Progress Report, or where data provided by government differs considerably from data collected by civil society monitoring government progress in service delivery."); UNAIDS, *2009 Core Indicator Guidelines, supra* note 180, at 16.

Level Meeting").[186] Civil society can participate in the review process by attending civil society hearings and round-tables.[187] Civil society participation at the international level is channeled through a "Civil Society Task Force," which aims to coordinate communication among civil society participants, provide input on the themes for the round tables, and advise on civil society accreditation to attend.[188]

B. *Inconsistent Definitions of Civil Society: Lack of an Analytical Framework*

Despite numerous references to civil society involvement, UNGASS documents do not provide a clear definition of what groups constitute civil society. Neither do they undertake an analysis of the strengths and weaknesses that different civil society constituents may bring to the response nor an assessment of whether the inclusion of certain types of groups should be favored. In short, the UNGASS process lacks an analytical framework that addresses why civil society should be involved in the response, which kinds of associations should participate, what kind of relationship the state should have with civil society, and how the international community should interact with both civil society and individual states.

For example, some passages in UNGASS preparatory documents include the business sector in its definition of civil society.[189] In contrast,

186.   UNAIDS, Know Your Response, http://www.unaids.org/en/dataanalysis/knowyourresponse/ (last visited Mar. 1, 2013) (listing available country progress reports); UNAIDS, 2007 Core Indicator Guidelines, supra note 175, at 7 ("Reports received by UNAIDS, on behalf of the Secretary-General, are used to prepare the *Report on the Global AIDS Epidemic*"); G.A. Res. S-26/2, supra note 174, ¶ 100 (calling on the General Assembly to "[d]evote sufficient time and at least one full day of the annual session of the General Assembly to review and debate a report of the Secretary-General on progress achieved in realizing the commitments set out in the present Declaration"); G.A. Res. 65/180, ¶ 1, U.N. Doc. A/RES/65/180 (Dec. 20, 2010) (calling for a High Level Meeting to "undertake a comprehensive review of the progress achieved in realizing the [2001] Declaration of Commitment on HIV/AIDS and the [2006] Political Declaration on HIV/AIDS").

187.   *See, e.g., Informal Interactive Hearing with Civil Society for the High Level Meeting on AIDS*, UNAIDS. Apr. 8, 2011, http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2011highlevelmeetingonaids/csh/ (describing the informal civil society hearing at the 2011 High Level Meeting on AIDS); U.N. President of the Gen. Assembly, Letter dated Mar. 4, 2011, from the President of the 65th Session of the General Assembly to the Member States (Mar. 4, 2011), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/20110304_HLM_PGAs_letter.pdf (announcing the establishment of a civil society task force to assist in "organising the civil society hearing and with maximising civil society input at the [High Level Meeting]").

188.   *See Civil Society Application Process to Participate in the 2011 United Nations General Assembly High Level Meeting on AIDS and Civil Society Hearing*, UNAIDS, http://www.unaids.org/en/aboutunaids/unitednationsdeclarationsandgoals/2011highlevelmeetingonaids/civilsocietyand2011highlevelmeetingonaids/ (last visited Mar. 1, 2013).

189.   *See, e.g.*, G.A. Res. 55/13, ¶ 14, U.N. Doc. A/RES/55/13 (Nov. 16, 2000) ("[The General Assembly] [i]nvites, in this context, the President of the General Assembly to make recommendations, for consideration by Member States during the preparatory process . . . as to the form of the involvement of such *civil society actors, in particular associations of people living with HIV/AIDS, non-governmental organizations and the business sector, including*

some passages of the Declaration differentiate civil society from both the business and the "private" sectors,[190] while other passages draw a distinction only between civil society and the "private sector,"[191] or between civil society and business.[192] Again, other segments of the Declaration appear to distinguish civil society from local communities, people living with HIV/ AIDS and vulnerable groups, suggesting that the term civil society is perhaps meant to encompass NGOs with a developed advocacy agenda.[193] Yet, other passages indicate civil society includes people living with HIV/ AIDS, vulnerable groups, and caregivers.[194]

The Civil Society Task Force described above includes representatives from the business sector,[195] once again suggesting a broad view of civil society. The list of civil society organizations approved for participation in the high-level meeting includes several large pharmaceutical companies such as Merck, Pfizer, GlaxoSmithKline, and Bristol-Myers Squibb, as well as other international corporations such as Exxon Mobil.[196] Importantly, neither UNGASS preparatory documents nor the Declaration address whether nonprofit organizations that represent private, for-profit interests (such as business associations or lobbying groups) should be con-

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pharmaceutical companies, in the special session and, to the extent possible, in the preparatory process.") (emphasis added).

190.   G.A. Res. S-26/2, *supra* note 174, ¶ 103 ("We look forward to strong leadership by Governments and concerted efforts with the full and active participation of the United Nations, the entire multilateral system, civil society, the business community and private sector . . . .") (removed emphasis).

191.   *Id.* ¶ 46 (stating that one action must be to "establish and strengthen mechanisms that involve *the private sector and civil society partners* and people living with HIV/AIDS and vulnerable groups in the fight against HIV/AIDS") (emphasis added).

192.   *Id.* ¶ 55 ("By 2003, ensure that national strategies, supported by regional and international strategies, are developed in close collaboration with the international community, including Governments and relevant intergovernmental organizations as well as with *civil society and the business sector* . . . .") (emphasis added).

193.   *Id.* ¶ 27 ("Welcoming the progress made in some countries to contain the epidemic, particularly through . . . working in partnership with *communities, civil society, people living with HIV/AIDS and vulnerable groups* . . . .") (emphasis added).

194.   *Id.* ¶ 94 ("Conduct national periodic reviews with the participation of civil society, particularly people living with HIV/AIDS, vulnerable groups and caregivers, of progress achieved in realizing these commitments . . . .").

195.   Amy Coulterman, *Civil Society Task Force Chosen for the Comprehensive AIDS Review*, NGO DELEGATION TO THE UNAIDS PROGRAMME COORDINATING BOARD (Feb. 4, 2011), http://unaidspcbngo.org/?p=10780.

196.   The full list of international companies approved to participate as civil society in the 2008 High Level meetings is: Becton Dickinson & Co., Bristol-Myers Squibb, Exxon Mobile, GlaxoSmithKline, Merck, Mylan and Pfizer. President of the General Assembly, *List of Civil Society Representatives to be Invited to Participate in the High-Level Meeting on a Comprehensive Review of the Progress Achieved in Realizing the Declaration Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS*, Annex, U.N. Doc. A/62/CRP.1, (Apr. 23, 2008) [hereinafter 2008 List of Civil Society Representatives]. The full list for 2011 is available at http://unaidspcbngo.org/wp-content/uploads/2011/04/Organizations-for-HLM .pdf.

sidered part of civil society and, if so, how they should participate in the response.

In addition, several HIV/AIDS documents contain a long list of attributes of civil society but do not engage in an analysis of the relative importance of these attributes for a coordinated response, or study the extent to which the UNGASS process should seek to enhance certain capacities of civil society (and if so, how).[197] The Guidelines and other UNGASS documents leave unexamined whether the state or the international community should delegate monitoring and implementation to a market-ordered civil society while providing minimal oversight (for example, as advocated by market liberals); act as a coordinator of the national response by fostering local experimentation by civil society while facilitating the scaling up of successful initiatives and preventing duplicative efforts (for example, as advocated by new governance scholars); or engage civil society only indirectly by considering its opinions but delegating ultimate responsibility for drafting a monitoring and implementation plan to the legislature or other governmental body (for example, as advocated by civic republicans).

Analyzing the consequences of tight state control versus loose organizational oversight would bring to light the consequences of two modes of operation that may already be functioning in an *ad hoc* fashion in different countries. Although the more outward-looking partnership and policy making and the more inward-looking "individual empowerment" roles of civil society could coexist, particular institutional designs and modes of participation may require trade-offs. For example, a monitoring system like the one currently in place for UNGASS that discourages the preparation of shadow reports and that requires a relatively high level of technical sophistication may discourage local national constituencies from engaging directly with the reporting process and from bringing their concerns to the attention of the international community, thus indirectly disempowering more local and less organized civil society organizations. A discussion about the proper role of civil society in the response should include a deeper analysis of the impact of particular institutional designs and modes of participation on these features of civil society organizations.

As civil society scholar Michael Edwards has pointed out, "[a]n idea that means everything probably means nothing . . . . At the very least, clarity about the different understandings [of civil society] in play is necessary if we are to have a sensible conversation . . . ."[198] Clarification of these shifting and internally inconsistent concepts of "civil society" and the further disaggregation of the different civil society players according to

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197.   For example, the Guidelines for the Construction of Core Indicators published by UNAIDS stress the importance of including a broad range of stakeholders in the national response. Inclusion refers "not only to implementation and innovation, but also to issues of public policy, advocacy and oversight functions, monitoring and evaluation." UNAIDS, *Clearing the Common Ground for the "Three Ones"* (Conference Paper for Washington Consultation Apr. 25, 2004), *available at* http://data.unaids.org/UNA-docs/Three-Ones_Consultation Report_en.pdf.

198.   EDWARDS, *supra* note 5, at 3.

their attributes (as shown in Figures 1 and 2) would help sharpen the debate regarding the precise role of different actors in the global response against HIV/AIDS.

C. Applying the Theoretical Framework: Consequences for Institutional Design

This Section applies the elements disaggregated in Figures 1 and 2 to the UNGASS process, shows how emphasis on different aspects of civil society will lead to divergent institutional designs, and demonstrates how current institutional arrangements will impact the relationship among civil society, the state, and the international order.[199] It focuses on two key areas of disagreement among the theories of civil society described above: (1) whether the market, and thus business organizations, should be considered part of civil society; and (2) whether the national and international response should prioritize inward-looking, apolitical organizations or outward-looking, politically oriented organizations. This Section illustrates only some of the consequences of incorporating the disaggregated framework illustrated in Figures 1 and 2 to an analysis of civil society. It is not intended to describe all possible consequences for institutional design but rather to illustrate some of the divergent institutional designs dictated by emphases on different functions of civil society.

1. Inclusion of the Market in the Concept of Civil Society

As explored above, UNGASS documents are unclear regarding whether the market should be included in the concept of civil society. In practice, business representatives are part of the Civil Society Task Force and pharmaceutical companies (as well as other corporations) are invited to High-Level Meetings under the rubric of civil society.[200] This means that corporations can be active participants in the same round-table discussions and can address member states and observers at the day-long civil society interactive hearings.[201] At the national level, the UNAIDS monitoring guidelines emphasize the importance of creating a single multisectoral AIDS-coordinating institution, but they appear agnostic as to whether for-profit companies should be included as active members with a certain amount of decision-making power.[202] Member countries have

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199.   *See infra* Parts II.C.1, II.C.2. & Table 1.

200.   *See, e.g.*, 2008 List of Civil Society Representatives, *supra* note 196 (listing Bristol-Myers Squibb, Becton Dickinson and Company, among other private corporations invited to the High Level Meetings as members of civil society).

201.   For a description of the hearing, as well as a webcast and transcript of the 2008 and 2011 review sessions' selected civil society speakers, see *2008 High-Level Meeting on AIDS*, UNITED NATIONS (June 10–11, 2008), https://www.un.org/ga/aidsmeeting2008/ (follow "Statements and Webcasts" hyperlink) and *2011 High-Level Meeting on AIDS*, UNITED NATIONS (June 8–10, 2011), http://www.un.org/webcast/aidsmeeting2008/index.asp (follow "Statements and Webcast" hyperlink).

202.   UNAIDS, GLOBAL TASK TEAM ON IMPROVING AIDS COORDINATION AMONG MULTILATERAL INSTITUTIONS AND INTERNATIONAL DONORS, FINAL REPORT (2005), *available at* http://data.unaids.org/Publications/IRC-pub06/JC1125-GlobalTaskTeamReport_en.pdf;

taken different approaches to constructing such a coordinating body. For example, Nicaragua's National AIDS Council does not include private, for-profit entities, while Brazil's does.[203]

In the context of the global fight against HIV/AIDS, it is undisputed that international corporations, and in particular pharmaceutical companies, are key stakeholders that play a role in the response. As researchers and manufacturers of HIV/AIDS cocktail drugs, pharmaceutical price-setting practices have a large impact on access to medicines in the developing world, as do their decisions to enforce international patents against foreign governments.[204] Thus, including pharmaceutical companies in international and national debates about the global HIV/AIDS epidemic is generally considered essential.[205] It may thus appear that concerns as to whether the concept of civil society is broad enough to include pharmaceutical companies reflect purely theoretical debates with little practical relevance.

Indeed, neoliberal, social capital, and civic republican theories of civil society tend to emphasize the oppositional relationship of civil society and the state, but leave unexplored and unproblematized the relationship between civil society and the market.[206] Similarly, new governance theory, while distinguishing between civil society and the market, tends to presuppose a positive and complementary relationship between the two, whereby market and civil society actors are "partners" in implementation and mon-

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UNAIDS, *National AIDS Programmes: A Guide to Monitoring and Evaluation*, at 20, UNAIDS/00.17.E (June 2000), *available at* http://www.who.int/hiv/pub/epidemiology/en/ JC427-Mon_Ev-Full_en.pdf ("The more diffuse the response, the more important it becomes to have a strong centrally coordinated M&E system to which each sector can contribute information."); UNAIDS, *"Three Ones" Key Principles* 1 (Conference Paper for Washington Consultation Apr. 25, 2004), [hereinafter UNAIDS, *Three Ones Key Principles*], *available at* http://data.unaids.org/una-docs/three-ones_keyprinciples_en.pdf (advocating for the creation of "One National AIDS Coordinating Authority, with a broad based multi-sector mandate").

203. *2008 National Composite Policy Index (NCPI) Reports*, UNAIDS, http://www.un aids.org/en/KnowledgeCentre/HIVData/CountryProgress/2008_NCPI_reports.asp (last visited Mar. 1, 2013) (listing specific information on national multisector AIDS programs for participating countries); *see also*, MIGUEL OROZCO & LAURA G. PEDRAZA FARIÑA, HIV/ AIDS POLICY IN NICARAGUA: A CIVIL SOCIETY PERSPECTIVE (2007), *available at* http:// www.opensocietyfoundations.org/sites/default/files/nicaragua_20080115.pdf.

204. For a discussion on the role of pharmaceutical companies in access to essential medicines in the developing world, see generally OBIJIOFOR AGINAM, GLOBAL HEALTH GOVERNANCE: INTERNATIONAL LAW AND PUBLIC HEALTH IN A DIVIDED WORLD (2005) and HOLGER HESTERMEYER, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (2007).

205. *See, e.g.*, Peter Piot & Awa Marie Coll Seck, *International Response to the HIV/ AIDS Epidemic: Planning for Success*, 79 BULL. WORLD HEALTH ORG. 1106, 1109 (2001) (documenting how dialogue between countries and the pharmaceutical industry "led to widespread support for preferential drug pricing for developing countries, pricing transparency, [and] price competition").

206. *See* JUDE HOWELL & JENNY PEARCE, CIVIL SOCIETY AND DEVELOPMENT 63 (2001) (noting that "[t]he anti-state model of civil society . . . leads to a tendency among donors to assume rather than query the relationship between civil society and the market, so failing to explore critically the tensions and contradictions implicit in this relationship").

itoring efforts.[207] It is precisely this latter theoretical understanding of civil society that appears to implicitly undergird the UNGASS Civil Society Task Force and other UNGASS civil society initiatives, which tend to emphasize partnerships and mutual cooperation among nonstate and state actors.

Nevertheless, much like differentiating the realm of the state (with its monopoly on the use of legal force) from that of civil society (as the realm of voluntary interactions) creates a useful conceptual distinction that allows us to think of civil society as a "watchdog" of governmental activities,[208] differentiating the market from civil society could reveal oppositional relationships between civil society and business entities or nonprofit organizations that advocate on their behalf; bring to the surface conflicts of interest; and allow civil society to play a critical watchdog role vis-à-vis the market. Moreover, if, like Habermasian critical scholars, we understand civil society organizations to be focused on the production and transmission of meaning through communication and debate, rather than profit-making, it is important to differentiate those associations organized around communication and debate from those whose ultimate goal is to secure profits.[209]

A critical and oppositional role of civil society vis-à-vis the market is particularly relevant in the area of HIV/AIDS, where pharmaceutical companies have engaged in aggressive patenting tactics, for example, by suing developing countries that issued compulsory licenses to several essential medicines.[210] Thus, conceptualizing businesses, nonprofit organizations that represent business interests (such as the International Federation of Pharmaceutical Manufacturers Associations),[211] and other

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207.   *See* Lobel, *supra* note 161, at 377 ("In a cooperative regime, the role of government changes from regulator and controller to facilitator, and law becomes a shared problem-solving process rather than an ordering activity. Government, industry, and civil society groups all share responsibility for achieving policy goals. Industry is expected to participate as part of a search for common goals, not just rigidly asserting its narrow economic or political interests.") (internal citation omitted).

208.   *See, e.g.,* HOWELL & PEARCE, *supra* note206, at 81 ("[T]he conceptual separation of civil society from the state was important, not only because it more accurately reflected empirical reality but also because it made possible the protection of this space to challenge state despotism.").

209.   As emphasized by Nancy Fraser, conceptualizing civil society as a "theater for . . . deliberating rather than for buying and selling, . . . permits us to keep in view the distinctions between state apparatuses, economic markets, and democratic associations, distinctions that are essential to democratic theory." Fraser, *supra* note 32, at 57. This understanding of civil society emphasizes those organizations involved in outward-looking deliberation intended to impact policy outcomes. The critical position tends to deemphasize inward-looking civil society organizations, such as choral societies, as less central to democratic theory.

210.   *See, e.g.,* Andrew Clark & Julian Borger, *Cheaper Drugs for Africa*, THE GUARDIAN, Mar. 14, 2001, http://www.guardian.co.uk/world/2001/mar/15/aids.andrewclark; Press Release, Médecins Sans Frontières, Indian Court Ruling in Novartis Case Protects India as the 'Pharmacy of the Developing World' (Aug. 6, 2007), *available at* http://www.doctorswithout borders.org/press/release.cfm?id=2096.

211.   The International Federation of Pharmaceutical Manufacturers Associations has NGO consultative status before the U.N. Economic and Social Council (ECOSOC). *NGOs*

civil society organizations (such as groups of people living with HIV/ AIDS) as "partners" in a shared implementation enterprise risks de- politicizing civil society and obscuring its potential role as critic and watchdog.

2. Monitoring Process Design

Emphasis on particular inward- or outward-looking functions of civil society will have consequences for the design of monitoring regimes. Mar- ket liberal theorists favor *strategies of delegation*.[212] In this model, interna- tional organizations and national governments would delegate the collection of data and the preparation of a single monitoring report to apolitical, independent civil society actors. Because market-style competi- tion is thought to increase efficiency and decrease rent-seeking, a delega- tion model should ensure that selection of monitoring providers takes place through a competitive process. For example, the state and/or UNAIDS could call for monitoring proposals and choose to fund the "best" proposals, evaluated using a set of predefined criteria. The UN- GASS monitoring process as currently designed requires states to submit official monitoring reports to UNAIDS and encourages the creation of a "National HIV/AIDS Coordinating Authority" (NACA) to develop a na- tional monitoring and implementation system but is silent as to how NA- CAs implement their monitoring duties.[213]

If the organization or organizations that are chosen to carry out the monitoring report are perceived as legitimate and independent, this model may mitigate claims that the state, in drafting the monitoring report, has favored some groups while failing to include the views of others. It may also justify discouraging the submission of shadow reports to the interna- tional monitoring body—the current UNAIDS approach—as third-party monitoring reports would have built-in independence. A market liberal approach to monitoring design, however, also has several drawbacks. First, it threatens to depoliticize civil society by turning the monitoring process into a technocratic exercise, rather than an opportunity for civil society organizations to critique state and market action and formulate alternative proposals. Second, a market liberal theory does not provide a space for politically motivated social movements, NGOs, or other advocacy organi- zations to act as critics and watchdogs. But arguably social movements or advocacy NGOs may be better able (and better motivated) to call atten-

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in Consultative States with ECOSOC, INFORMATION HABITAT, http://habitat.igc.org/ngo-rev/ status.html (last visited Mar. 1, 2013). It represents "the research-based pharmaceutical in- dustry, including the biotechnology and vaccine sectors." *About IFPMA,* INTERNATIONAL FEDERATION OF PHARMACEUTICAL MANUFACTURERS & ASSOCIATIONS, http://www.ifpma. org/about-ifpma/welcome.html (last visited Mar. 1, 2013).

212.   *See supra* Part I.E.1.a.

213.   *See, e.g.,* UNAIDS, *Three Ones Key Principles, supra* note 202, at 1 (advocating for the creation of "One National AIDS Coordinating Authority, with a broad based multi-sec- tor mandate").

tion to the government's shortcomings than a monitoring system adminis-
tered by an apolitical body.[214]

Civic republican and social capital theories similarly tend to favor
strategies that discourage the direct participation of politically motivated
actors. But rather than delegate monitoring to private actors, these theo-
rists favor strategies that foster deliberation *in* government while isolating
these deliberative spaces from the direct influence of advocacy groups. In
the context of monitoring design, these theories counsel *deference to the
state*. An institutional design that emphasizes deference would place the
state as the leader of the response. Monitoring the degree and effective-
ness of the national response, including the degree of civil society partici-
pation, would take place largely through state self-reporting. In practice,
self-reporting could be carried out by a specialized body within govern-
ment, for example by a group of experts in the Ministry of Health. Civil
society would participate in the response through established channels of
communication with the governmental body in charge of monitoring. For
example, the monitoring body could hold consultation meetings with civil
society representatives prior to drafting the report, or set up an advice and
comment period whereby civil society could evaluate the proposed moni-
toring report, or establish contestatory mechanisms through which the
public could challenge the government's draft monitoring report. In the
context of UNGASS monitoring, a civic republican or social capital ap-
proach would place NACAs within a government agency, rather than as a
stand-alone body open to the participation of multiple stakeholders.
UNAIDS would encourage the submission of a single report drafted by
the NACA.

Channeling civil society participation through the national state, with
effective mechanisms for contestation and consultation, has the advantage
of pressing national governments to assume political leadership in the re-
sponse against HIV/AIDS. In practice, however, state mechanisms for
contestation and consultation are likely to be easily abused in weaker de-
mocracies or authoritarian regimes, and thus a monitoring system based
on deference by the state may provide too few outlets for advocacy organi-
zations to bring their grievances to light.[215]

Additionally, a civil society theory in which inner-looking goals and
the creation of social capital take center stage may depoliticize civil society
by relegating political advocacy organizations to the background and by

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214.   *See, e.g.*, Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight
Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–66 (1984)
(describing the "fire alarm" model of oversight as relying on citizens and organized interest
groups to "sound the alarm" when a particular policy is harming their interests, and explain-
ing how it can be a more efficient way to police compliance than direct governmental
oversight).

215.   A modified deference structure that allows civil society organizations to submit
shadow monitoring reports when they feel strongly that their views were not taken into ac-
count in the national consultation process may be one way to address this shortcoming. This,
in fact, is the structure that the UNGASS monitoring system currently favors.

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conceptualizing civil society solely in instrumentalist terms, that is, as a means to increase social capital and civic virtue.[216]

In contrast, a focus on civil society functions at the inward-outward boundary—as emphasized by feminist, Third World, and minority theories—would seek the creation of multiple deliberative spaces and enact procedures that incorporate the use of alternative modes of deliberation, thus favoring *strategies of inclusion*. As described above, these spaces can serve a dual purpose where social groups (and in particular subordinated or minority groups) both develop their "identities, interests, and needs" and deliberate about and formulate alternative and often contestatory interpretations of accepted norms.[217] A UNAIDS monitoring regime that encourages the drafting of shadow reports, lowers the technical expertise necessary to fill out the report questionnaire, allows narrative styles of reporting, and changes reporting guidelines to give civil society organizations ample opportunity to make comments about specific instances of government failure or abuse would not only encourage the contestatory function of civil society, but may also encourage the formation of civil society associations that represent minority interests.[218] An inward-outward focus may also counsel the creation of new national or international institutions to coordinate broader access to the international monitoring process by, for example, conducting outreach activities and encouraging participation by underrepresented publics.

A reporting process open to different modes of participation, however, raises efficiency and coordination concerns. Standardized reporting guidelines are streamlined to facilitate comparison among countries. Multiple forms of reporting, and in particular narrative reporting, would require an investment on the part of UNAIDS to synthesize multiple independent reports into a single global report. Additionally, without a mechanism to evaluate the validity of each civil society organization's claims, it will be hard to determine which reports contain credible critiques of state conduct. Nevertheless, because it would encourage a broad group of individuals and associations to voice their independent complaints, a model that allows multiple shadow reports would at the very least fulfill an expressive function, empowering individual group members in a manner similar to having one's day in court. Additionally, the ability to directly participate in the creation of a civil society report would also serve an educative function, raising civil society awareness of the UNGASS commitments themselves.

A focus on the outward-looking functions of civil society as watchdog and critic—as emphasized by Habermasian critical scholars—would coun-

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216.   For a criticism of the use of the concept of social capital in development, see generally JOHN HARRISS, DEPOLITICIZING DEVELOPMENT: THE WORLD BANK AND SOCIAL CAPITAL (2002).

217.   *See supra* note 32 and accompanying text.

218.   UNGASS monitoring templates currently do not leave much space for comments, and are designed largely as a questionnaire with a limited set of possible answer choices. *See* UNAIDS, *2009 Core Indicator Guidelines, supra* note 180, apps.

sel a monitoring regime that seeks to obtain up-to-date, on-the-ground information from civil society organizations to critique state performance. The monitoring process would thus be organized around *strategies of contestation*. In this context, interactions between monitoring bodies and local civil society organizations may be mediated by larger, more established umbrella or key intermediary organizations with the capacity to carry out field research and produce a technical shadow report that critically evaluates the governments' progress. For example, a civil society coordinating forum outside the state where civil society organizations come together and debate public policy, acting in a manner similar to the National HIV/ AIDS Coordinating Authority, could coordinate the drafting of civil society's shadow report. This type of interaction is likely to favor associations organized for civic or political goals, in particular national NGOs, which are likely to have the capacity to engage in systematic analyses of the governmental response.

A monitoring regime that favors the submission of critical shadow reports would facilitate what has been termed the "boomerang pattern" of state influence.[219] In this model, civil society organizations that do not have access to state channels at home would air their grievances against their state before international institutions, other member states, and transnational or foreign civil society organizations. International organizations would then put direct pressure on the noncompliant state, aided by transnational civil society networks. Nevertheless, because this approach is likely to privilege established NGOs over social movements, or other grassroots local associations, it is particularly vulnerable to the critiques of NGOization discussed above.

Finally, a focus on the boundary-crossing function of civil society that emphasizes mechanisms of coordination between civil society and the state would counsel a monitoring mechanism that relies on *strategies of collaboration*. New governance scholars in particular have employed a variety of institutional arrangements that allow civil society to participate directly in policy monitoring and implementation. Direct civil society participation could be accomplished by the creation of an independent regulatory organ composed of a mixture of civil society, business, and government representatives tasked with authoring the monitoring report. Ad hoc or institutionalized consultation processes could also involve civil society in decision making.[220]

This approach is vulnerable to the critique that powerful interest groups may unduly influence the monitoring process, and that the close cooperation between government and civil society associations may coopt the political role of civil society thereby threatening its ability to remain a

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219.   MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 12–13 (1998).

220.   For a discussion and analysis of the different types of new governance initiatives that have been employed in the European Union, see Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

critic of government action. Thus, participatory civil society-government
institutions also require safeguards against clientelism, for example, by in-
stitutionalizing strong deliberation processes, or the rotation of civil soci-
ety groups that participate in the debate.[221] These safeguards, and in
particular rotation protocols for civil society, may also mitigate the risk of
cooptation.

These five approaches to monitoring design—*delegation, deference, in-
clusion, contestation,* and *collaboration*—as well as the corresponding the-
oretical justifications and critiques, are diagrammed below in Table 1.

D. *UNGASS's Implicit Theoretical Underpinnings*

Implicit in UNGASS's current institutional design is a new govern-
ance conception of civil society that underscores strategies of collabora-
tion and views civil society actors principally as "partners" of both
government and business entities. To foster coordination at the national
level, UNGASS advocates a tripartite coordination framework.[222] This
framework conceives of civil society participation as serving mainly an in-
strumental role: to optimize the use of resources and improve the national
response to AIDS.[223] Civil society (and other relevant stakeholder) input
is incorporated into a single collaboratively written monitoring report.[224]
Shadow reports are discouraged.[225] A decrease in the number of civil soci-
ety organizations seeking to file independent shadow reports is regarded
as an indication of high levels of national collaboration.[226]

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221.   *See* Paul Magnette, *European Governance and Civic Participation: Can the Euro-
pean Union be Politicised?* (Jean Monnet Program Working Paper No. 6/01, 2001), *available
at* http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/010901.html.

222.   In April 2004, the Consultation on Harmonization of International AIDS Fund-
ing—bringing together representatives from governments, donors, international organiza-
tions, and civil society—endorsed the "Three Ones" principles: "[o]ne agreed AIDS action
framework that provides the basis for coordinating the work of all partners," "[o]ne national
AIDS coordinating authority," and "[o]ne agreed country-level monitoring and evaluation
system." UNAIDS was called to act as facilitator and mediator in efforts to realize these
principles. UNAIDS, *The "Three Ones" in Action: Where We Are and Where We Go from
Here,* UNAIDS/05.08E (May 2005), *available at* http://data.unaids.org/publications/irc-pub06/
jc935-3onesinaction_en.pdf.

223.   *Id.*

224.   UNAIDS, *2011 Core Indicator Guidelines, supra* note 180, at 15 ("Wherever possi-
ble UNAIDS encourages civil society integration into national reporting processes. . . .
Shadow reports are intended to provide an alternative perspective where it is strongly felt
that civil society was not adequately included in the national reporting process, where gov-
ernments do not submit a Country Progress Report, or where data provided by government
differs considerably from data collected by civil society monitoring government progress in
service delivery.").

225.   *Id.*

226.   Much Progress to Report: UNGASS 2008, UNAIDS (Mar. 12, 2008), http://www.
unaids.org/en/resources/presscentre/featurestories/2008/march/20080312countryprogress/
("There has been a significant drop in number of shadow reports submitted to UNAIDS,
reflecting the substantial efforts in many countries to increase the engagement of civil society
in national reporting processes.").

TABLE 1

Typology	Theory	Priorities	Justification	Monitoring Design	Critique
Inward-looking	Market liberal	Apolitical, market-ordered associations.	Limited state. Increase efficiency. Decrease rent-seeking. Foster self-respect and self-sufficiency, freedom and choice.	*Delegation*: Delegate monitoring to independent market-ordered, private associations.	Citizen as consumer: loss of identity as member of a community with shared goals, or as a participant in public life. Resulting atomism: no foundation for social solidarity may increase tension and distrust.
	Civic Republican *and* Social Capital	Local community associations with no explicit political purpose that foster trust, reciprocity, and civic virtue.	State as prime locus of deliberation and decision-making. Decrease rent-seeking. Foster civic virtue through thick local civil society organizations. Foster bridging social capital to minimize emergence of illiberal groups.	*Deference:* Single state-authored monitoring report with built-in consultative and contestatory mechanisms at national level. Promote citizen engagement with government by: (1) encouraging government grants to local community organizations; (2) fostering cross-community work to increase bridging social capital.	May lead to exclusion of disadvantaged groups from deliberation in government. Instrumental view of civil society as valuable only to aid deliberation in government or generate social capital.
Inward/ Outward Border	Feminist; Third World; *and* Minority	Multiple small publics that nurture individual and community identities and engage in political advocacy.	Dual purpose of civil society: (1) to foster and develop individual identity; and (2) to debate and challenge existing accepted norms.	*Inclusion:* Multiple "shadow" reports by a variety of actors, in particular vulnerable groups, using different expressive means.	Multiple publics can give rise to isolated enclaves, disengaged from public-at-large. No guarantee that small publics will be democracy-enhancing. Tokenism: real minority influence may be minimal. Ossification of individual identity.

Typology	Theory	Priorities	Justification	Monitoring Design	Critique
Outward-looking	Habermasian Critical	Associations formally organized for political advocacy.	Key purpose of civil society is to preserve democracy by acting as watchdog and critic vis-à-vis the state and the market.	*Contestation:* Single "shadow" monitoring report by civil society. Create space outside parliamentary and judicial bodies where civil society associations engage in autonomous, rational deliberation about the common good.	NGOization: privileges established NGOs. Excessive focus on single deliberative space may exclude disadvantaged, minority voices.
Civil Society/ State Boundary-crossing	New Governance *and* State-society synergy	Associations organized for political advocacy and with requisite technical expertise	Civil society actors as partners in lawmaking and implementation.	*Collaboration:* Single monitoring report authored by consortium of all stakeholders.	Clientelism. Moderation of critique; cooptation.

A drop in shadow report submissions has, however, several other possible interpretations. It may merely reflect the fact that minority voices lack the capacity and opportunity to develop alternative and contestatory views of the national HIV/AIDS response; that organized civil society groups that disagree with the content of the official state report have opted-out of a monitoring process they no longer view as legitimate; or even that the government has abdicated its responsibilities under UN-GASS so that certain civil society groups run the show. Focusing on civil society's role as an innovator and a partner with stakeholders as varied as for-profit entities and state administrative agencies can obscure oppositional relationships between civil society and market actors; between civil society and the state; between civil society and international organizations (such as UNAIDS or WHO); and even between different organizations within civil society. Further, a discourse of cooperation and shared goals is likely to lead to the muting of critique both by a self-selection process (whereby those civil society actors who most agree with governmental or UNGASS policies are more likely to join the collaborative project) and by the progressive marginalization of dissenting (and often disrupting) voices from the "collaboration" table.

In other words, the current UNGASS institutional design is likely to dampen the contestatory function of civil society. But, as I argue in more detail in the next Part of this Article, it is precisely this function of civil society—together with its role as a space to nurture the emergence of alternative, minority views—that can ultimately lend legitimacy to the UN-GASS project by allowing potential disagreements about its proper purposes and goals to be both aired and potentially resolved. Its legitimacy is important not only because, as a general matter, legitimacy is a critical

element in motivating compliance, but also because in the particular case of HIV/AIDS regulation what constitutes normative legitimacy is likely to be highly contested, at least in some areas. For example, pharmaceutical companies are likely to have different views from those of people living with HIV/AIDS on whether UNGASS should advocate the issuance of compulsory licenses for HIV/AIDS drugs or promote other measures to lower their price to consumers; and religious organizations are likely to differ from reproductive-rights NGOs on the content of sex-education campaigns, including whether a focus on condom use should be the linch-pin of efforts to curb the spread of HIV/AIDS.

The next Section explores this argument in depth and develops several normative implications of the analytical framework. In particular, it proposes that a capacious interpretation of a Habermasian theory of civil society is best suited to explain and justify a role for civil society in lawmaking and implementation as increasing the legitimacy and accountability of international organizations.

III. Toward a Model of Civil Society in International Lawmaking and National Implementation

Inclusion of civil society in international lawmaking and national implementation is often justified on the grounds that civil society participation lends legitimacy to international organizations.[227] This view of civil society as increasing the legitimacy of both international organizations and implementing states is by no means uncontested. To the contrary, one of the most divisive arguments in the legal literature on international organizations concerns whether civil society participation is legitimacy enhancing or a self-serving exercise in rent-seeking.[228]

My own view is that debates on civil society's contribution to the legitimacy of international organizations are confounded by different underlying conceptions of civil society that are never explicitly articulated or explored. The civil society framework I developed in Part I can illuminate these different understandings. It can also contribute to the debate by suggesting that an outward-looking theory of civil society, based on a capacious reading of Habermasian critical theory, can best explain and justify a legitimizing role for civil society participation.

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227. *See supra* note 4 and accompanying text.

228. *Compare* Charnovitz, *supra* note 16, at 894 ("In my view, the value-added from NGOs on the international plane is that they correct for the pathologies of governments and IOs [International Organizations]."), *with* Bolton, *supra* note 17, at 221 (describing globalism as "a kind of worldwide cartelization of governments and interest groups").

A. *The Legitimacy Problem of International Organizations*

1. State Delegation and the Democratic Deficit of
International Organizations

State delegation of decision making and enforcement capabilities to international institutions has conferred upon them public powers[229] that both constrain state sovereignty and affect the well-being and opportunities of citizens everywhere.[230] International organizations, however, are not subject to the same mechanisms of democratic accountability as are territorially-bound nation-states. That is, international organizations do not possess the institutions of modern representative democratic systems, including a constitutional structure and electoral processes, which are widely held to legitimate the exercise of public power by sovereign states. In short, international organizations suffer from what is often referred to as a "democratic deficit": no global elections, no global parliament, and no global constitution constrain their public power.[231]

Delegation provides a measure of legitimacy to the actions of international organizations by formally holding them accountable to the delegating states. Nevertheless, the long chains of delegation—the great distance between national publics and supranational bodies—together with the absence of a robust international system of checks and balances significantly weakens claims to legitimacy through delegation.[232] Most importantly,

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229.   Public power refers to "those forms of power that are the legitimate subject of democratic control." Kate Macdonald & Terry Macdonald, *Democracy in a Pluralist Global Order: Corporate Power and Stakeholder Representation*, 24 ETHICS & INT'L AFF. 19, 21 (2010).

230.   A number of articles have harnessed empirical evidence to make a convincing case that international organizations are increasingly exercising authority as autonomous decision-makers. *See, e.g.*, ALVAREZ, *supra* note 19, at 586 ("Most of the states of the world cannot, on their own or even with the aid of their closest allies, expect to control the standard-setting practices of . . . [International Organizations such as] the Security Council . . . [and] the IMF."); Buchanan & Keohane, *supra* note 23, at 406-07 (arguing that international institutions are "like governments in that they issue rules and publicly attach significant consequences to compliance or failure to comply with them—and claim the authority to do so" and noting that several global institutions affect domestic policy and "limit the exercise of sovereignty by democratic states"); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. Summer/Autumn 2005, at 15, 18. *But cf.* Andrew Guzman & Jennifer Landslide, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1696 (2008) (arguing that "international delegation is not something we need worry too much about" because it "tends to be highly constrained and/or involve highly technical matters").

231.   *See* CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT? (Jens Steffek, Claudia Kissling & Patrizia Nanz eds., 2008); Robert A. Dahl, *Can International Organizations be democratic? A Skeptic's View*, *in* DEMOCRACY'S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999); Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFF. July/Aug. 2001, at 2, 2.

232.   *See, e.g.*, Curtis Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1558 (2003) ("By transferring legal authority from US actors to international actors—actors that are physically and culturally more distant from, and not directly responsible to, the US electorate—these delegations may entail a dilu-

delegation within a nation-state involves both elected and unelected offi-
cials who share the same public constituency. This allows accountability
relationships to flow directly from the public through elected officials to
their agents, thus minimizing—although not eliminating—potential princi-
pal-agent problems.[233] But this relationship does not hold for interna-
tional organizations, whose decisions impact a range of individuals
belonging to multiple political jurisdictions. Multiple accountability rela-
tionships are likely to generate conflicting demands on international orga-
nizations, thus ultimately diminishing the ability of democratic nation-
states to self-govern, because citizens within nation-states will likely be
bound by some rules over which they had no say. For these reasons, state
delegation provides only a very thin basis on which to defend the norma-
tive democratic legitimacy of international organizations.[234]

2. The Legitimacy Debate: Celebratory vs. Skeptical
Views of Civil Society

A large part of the debate surrounding the legitimacy of international
organizations has been framed around this democratic deficit.[235] The

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tion of domestic political accountability."); Buchanan & Keohane, *supra* note 23, at 414–15
(arguing that state consent sufficient for legitimacy cannot be provided through the long
chains of delegation that separate most global governance institutions from democratic pub-
lics); Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative
Law*, 115 YALE L.J. 1490, 1502–05 (2006) ("As a general matter, the legitimacy of decision-
making becomes more strained as the sense of community thins and the distance between
those exercising authority and the public grows. This problem is especially acute in the inter-
national setting, as the distance is not just physical but may also reflect deep differences in
perspectives, assumptions, and values.").

    233.   *See, e.g.*, Roland Vaubel, *Principal-Agent Problems in International Organizations*,
1 REV. INT'L ORG. 125, 126–27 (2006) (explaining that global governance institutions exacer-
bate principal-agent problems because international organizations often have vested interests
that differ from those of voters in national states, and because these voters are either "ration-
ally ignorant of most of the activities of international organizations and/or lack the power to
impose their will").

    234.   *See, e.g.*, Esty, *supra* note 232, at 1504–05 (remaking that delegations of authority
within a nation state are legitimate in part because a nation state can be understood as com-
posed of a single political community with "[a] shared sense of common destiny"); Jed
Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2020 (2004) ("The
whole point of international law, in its present form, is to supersede the outcomes of political
processes, including democratic processes. If, therefore, Americans remain committed to
self-government, they do in fact have reason to resist international governance today.");
Kingsbury, Krisch & Stewart, *supra* note 230, at 26 ("The rise of regulatory programs at the
global level . . . enjoy too much de facto independence and discretion to be regarded as mere
agents of states.").

    235.   *Compare* Kenneth Anderson, *"Accountability" as "Legitimacy": Global Govern-
ance, Global Civil Society and the United Nations*, 36 BROOK. J. INT'L L. 841, 868 (2011)
("Legitimacy in a democracy is given by people raising their hands and voting—not by the
presence of citizens or activist groups as civil society, however important they may be to
articulating versions of a society's politics."), *with* Peters, *supra* note 16, at 318 ("The legiti-
macy gains of NGO involvement are apt to outweigh the legitimacy problems. Overall, a
further democratization of the international legal order requires that the participation of
NGOs in law-making and law-enforcement be strengthened.").

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question thus has been whether global institutions can approximate the ideal of democracy as it has evolved to constrain sovereign states. In this interpretation, legitimacy—understood in its normative sense as having the *right to rule*—is synonymous with democracy, and most often with electoral democracy.[236] Scholars who have adopted this view, either implicitly or explicitly, tend to analyze civil society in terms of whether it can serve to "cure" the democratic deficit of international organizations.[237] A celebratory view of civil society calls into question the continuing primacy of states in international lawmaking, and advocates for a more prominent role for "global civil society."[238] In this context, the participation of global civil society in international decision making and enforcement is thought to play a legitimizing function by channeling the concerns of those communities likely to be affected by the decisions of international organizations.[239] In contrast, under an opposing, skeptical view, civil society organizations exacerbate, rather than cure, the democratic deficit. In this view, civil society participation is not a cure for the democratic deficit, because civil society cannot be properly construed as representing a global public to which international organizations should be held accountable.[240] This position tends to conceptualize civil society organizations as self-interested groups whose interactions with international organizations serve to extract rents to promote their self-interests.[241] From this view tend to

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236.   *Compare* Anderson, *supra* note 235, *with* Peters, *supra* note ????.

237.   *See, e.g.,* CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE, *supra* note 231 (detailing several instances in which deficiencies in democratic values are recognized in an attempt to understand and remedy those faults); Magdalena Bexell, Jonas Tallberg & Anders Uhlin, *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors,* 16 GLOBAL GOVERNANCE, 81, 81 (2010); Jan Aart Scholte, *Civil Society and Democracy in Global Governance,* 8 GLOBAL GOVERNANCE 281, 281 (2002).

238.   *See, e.g.,* Richard Falk, *Reforming the United Nations: Global Civil Society Perspectives and Initiatives, in* GLOBAL CIVIL SOCIETY 2005–2006, 150 (Marlies Glasius, Mary Kaldor & Helmut Anheier, eds., 2006); James Rosenau, *Governance and Democracy in a Globalizing World, in* REIMAGINING POLITICAL COMMUNITY 28 (Daniele Archibugi, David Held & Martin Köhler eds., 1998); Karin Bäckstrand, *Democratizing Global Environmental Governance? Stakeholder Democracy After the World Summit on Sustainable Development,* 12 EUR. J. INT'L REL. 467, 493-94 (2006) (arguing that "stakeholder democracy" that moves beyond mere participation to collaboration and truer deliberation among states, business, and civil society can partially cure the democratic deficit of international organizations).

239.   *See, e.g.,* Falk, *supra* note 238; Rosenau, *supra* note 238; Bäckstrand, *supra* note 238.

240.   *See, e.g.,* Kenneth Anderson & David Rieff, *"Global Civil Society": A Sceptical View, in* GLOBAL CIVIL SOCIETY 2004–2005 26, 37 (Mary Kaldor, Helmut Anheier & Marlies Glasius eds., 2004) (arguing that "the 'democracy deficit' of the international system is buttressed rather than challenged by the global civil society movement"); Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law,* 49 HARV. INT'L L.J. 323, 364 (2008) ("Private and nongovernmental actors involved in international treaty-making belong to a very specific subset of the international community. Men influence it more than women; the rich have a much more vocal presence than the poor; and some cultural tenets dominate it at the expense of others.") (internal citations omitted).

241.   *See, e.g.,* Anderson, *supra* note 235, at 859 ("As a theoretical matter, however, NGOs, merely as such, are what they are—simply organizations consisting of interested indi-

flow policy prescriptions that seek to narrow the reach of international law, in particular by eschewing any robust international law[242] claims of authority to regulate matters within states.[243]

3. Implicit Conceptions of Civil Society in Celebratory and Skeptical Views

Implicit in both the celebratory and skeptical positions are different conceptions of civil society, which the framework developed in Part I can help illuminate. Celebratory approaches to civil society, although diverse, have tended to converge on postulating a role for civil society organizations as "partners" with international organizations and other stakeholders (notably, businesses). This approach is most salient in some of the efforts to involve civil society in EU governance.[244] This conceptualization of civil society as "partners" in a horizontal relationship with business and international organizations corresponds roughly to a boundary-crossing function of civil society. In particular, under a new governance approach, civil society is thought to contribute to democratic legitimacy by participating in a joint "democratic experimentalism" project. New governance scholars argue that democratic experimentalism will lead to better policies by fitting local solutions to local problems, and to more efficient implementation by relying on private actors.[245]

The problem with new governance approaches to civil society is that in practice they tend to sideline deliberation about underlying disagreements on fundamental norms. Rather, new governance scholars generally assume agreement regarding the proper scope and content of implementation measures and focus on decentralization and local public-private part-

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viduals ... that attempt to persuade international organizations, states, or others in authority, to act . . . ."); Bolton, *supra* note 17, at 221.

242.   By robust international law, I mean those areas of international law, such as human rights law and parts of environmental and trade law, that purport to regulate state conduct previously thought to be the exclusive province of sovereign states.

243.   *See, e.g.*, GOLDSMITH & POSNER, *supra* note 12 (arguing that democratic states have an obligation to place their sovereign interests before any rules of international law that threaten states' right to govern themselves free from foreign interference); Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 103 (2000); Dahl, *supra* note 231, at 33–34 (conceptualizing International Organizations as nondemocratic "bureaucratic bargaining systems" and arguing that "[w]e should be wary of ceding the legitimacy of democracy to non-democratic systems" whose "'democratic deficit'" is "a likely cost of all international governments."); John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1741 (2009) (arguing against a robust version of international law because "the institutions interpreting [human rights] norms are not democratic, but bureaucratic and oligarchic and, thus, often hostile to basic economic and personal liberties").

244.   *See, e.g.*, Gráinne de Búrca, *The Constitutional Challenge of New Governance in the European Union*, 56 CURRENT LEGAL PROBS. 403, 412-23, 422 (2003).

245.   *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 338–39 (1998).

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nerships in finding innovative ways to effectuate them.[246] New governance approaches often do not differentiate business from civil society, conceptualizing both groups as "stakeholders" that participate in the joint governance project.[247] Relatedly, conceptualizing civil society as a partner with government and business threatens to dilute or coopt civil society's political role and, as a consequence, its ability to contest dominant norms and develop alternatives. But articulating, defending, and ultimately (at least in some cases) reaching consensus on substantive views about what the goals of a particular institution *should be* are, in my view, key aspects of a theory of civil society that can envision civil society as contributing to the legitimacy of international organizations. Finally, the most salient problem of new governance approaches is that they risk magnifying the preferences of small groups that can exert great political power, thus de facto institutionalizing rent-seeking behavior.[248] This latter critique is reflected in writings by civil society critics who comment on the fact that civil society as conceived by international organizations often consists of "global elites, including those in international NGOs."[249]

In contrast, skeptics, among them civic republicans and market liberals, view civil society with an inward-looking perspective that is suspicious of associations organized for explicitly political purposes. Civic Republicans believe that democratic legitimacy depends on deliberation *in* government, free from the direct influence of civil society. More specifically, at the national level (for example, in the national implementation of international norms) this implies relying on parliamentary or judiciary processes to filter society's preferences, rather than allowing direct government lobbying by civil society organizations. At the international level, this means either attempting to replicate structures of civic republican government at an international scale (for example through the creation of a global parliament) or recognizing that civil society participation must be channeled through sovereign state structures. The latter is indeed the position taken by many civil society skeptics.[250] Market liberals deal with the perceived threat of special interest groups by limiting the reach of bureaucratic power of both national and supranational government institutions. Such an approach counsels strategies of delegation (both at the national

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246.   *See* David A. Super, *Laboratories Of Destitution: Democratic Experimentalism And The Failure Of Antipoverty Law*, 157 U. PA. L. REV. 541, 553–60 (2008).

247.   *See, e.g.*, Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227, 235–37 (2010).

248.   *See, e.g.*, Super, *supra* note 246, at 550 n.26, 564–65. (criticizing new governance approaches as leading to "dialogue among representatives (albeit unelected ones) of various interest groups rather than among the citizenry itself").

249.   *See* Anderson, *supra* note 235, at 845.

250.   *See, e.g.*, Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT'L AFF. 1, 29 (2001) ("To give NGOs a second shot independent of the governments which they have elected has no rationale."); Bolton, *supra* note 17, at 217 ("Civil society's 'second bite at the apple' [i.e. its purported ability to lobby both national governments and international organizations] raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided.").

and international levels) to apolitical civil society organizations coordinated through market competition, unless market failure requires governmental intervention.[251] Competitive markets are thought to legitimate the authority of both nonstate actors and governments by holding them accountable to efficient outcomes.[252]

Civic republican and market liberal approaches, as different as they are in their conception of what constitutes a legitimate government, agree that civil society associations organized for political purposes cannot contribute, and furthermore are bound to imperil, normative legitimacy. Both theories suppose that direct involvement of civil society in politics increases factional politics driven by self-interest. But, as illustrated in Part I, an inward-looking conception of civil society, with its concomitant skepticism of politically motivated groups, is only one lens through which to analyze civil society. As I argue in the next Section, an outward-looking conception of civil society may indeed open avenues to imagine how civil society could be a legitimate participant in international lawmaking and implementation.

4. The Importance of Normative Legitimacy for International Organizations

Civil society skeptics tend to equate legitimacy with democratic legitimacy effectuated through electoral processes. If legitimacy requires global elections, then global institutions in their present form are not legitimate. But unless we are willing to give up on global governance institutions ever achieving normative legitimacy—and I argue we should not—this conception of legitimacy is too narrow for global institutions. Legitimacy is important for pragmatic reasons: if we wish to reap the benefits of coordination that international institutions promise, international institutions must enjoy ongoing public support in implementing countries.[253] Legitimacy is also important for normative reasons: as international organizations exert increasing authority that constrains state and individual action, a conception of what the legitimacy of global institutions requires is needed to justify this burgeoning authority. It is important to recognize that legitimacy is not an all-or-nothing proposition: the lack of

251.   *See, e.g.*, Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 155–157 (1977–78) (describing a "market failure" account of government).

252.   *See, e.g., id.* at 152. Markets, however, are not a democratic form of legitimacy since unequally distributed capital counts as "votes."

253.   Public support for international organizations need not be grounded on normative legitimacy; rather, the belief that a particular organization is legitimate may be sufficient to induce compliance. Sociological legitimacy, however, is bound to be strongest and more stable when it overlaps with normative legitimacy because people are more likely to consistently follow rules that emanate from institutions whose basic normative underpinnings they agree with. *See* Buchanan & Keohane, *supra* note 23, at 410 (arguing that moral reasons for supporting international institutions are preferable to those based purely on self-interest because "as a matter of psychological fact, moral reasons matter when we try to determine what practical attitudes should be taken toward particular institutional arrangements").

an elected global parliament does not mean that international organizations cannot be rendered more responsive to the concerns of those who are affected by their policies, or that civil society cannot perform a valuable contestatory function.[254]

Moreover, international law scholars are increasingly arguing against equating the legitimacy of global institutions to democratic electoral legitimacy. Those involved in the global administrative law project, such as Benedict Kingsbury, Nico Krisch, Richard Stewart, and Daniel Esty, view global institutions through an administrative law lens, arguing that "much of global governance can be understood and analyzed as administrative action."[255] These scholars aim to reduce "legitimacy deficits" of international institutions by incorporating domestic administrative law principles into international organizations and by developing new mechanisms of administrative law at the global level.[256] Global administrative law approaches to legitimacy emphasize the importance of procedural, often technocratic legitimacy, leaving aside debates regarding the democratic legitimacy of global institutions. A second group of scholars, such as Allan Buchanan, Robert Keohane, Joshua Cohen, and Charles Sabel, while recognizing that electoral democracy is not the only means whereby international organizations can gain legitimacy, underscore the importance of addressing concerns about the democratic deficit of international organizations. I situate myself within this latter group.[257] My analysis in the next Section builds upon conceptions of legitimacy advanced by this group but provides a novel perspective through which to examine legitimacy questions: that of an outward-looking theory of civil society attuned to a multiplicity of actors and interests.

B. *The Relational, Contested, and Dynamic Legitimacy of International Organizations*

Normative legitimacy, as distinct from pragmatic or sociological legitimacy, can be conceptualized as the acceptance of an organization, based

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254.   *See, e.g.*, Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT'L L.J. 61, 92 (2005) ("The fact that the global public realm is uninstitutionalised and 'weak' should not be seen as overly problematic. The absence of a single legislature does not mean that there can be no rule of law nor a live sphere of political contestation."); *see also* Esty, *supra* note 232, at 1514 (arguing that mechanisms that require supranational authorities to be responsive to the concerns and needs of the publics they serve can lend "a degree of quasi-democratic legitimacy" to international organizations).

255.   Kingsbury, Krisch & Stewart, *supra* note 230, at 17.

256.   *See, e.g.*, Esty, *supra* note 232, at 1490; Kingsbury, Krisch & Stewart, *supra* note 230, at 26 ("In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts.").

257.   *See, e.g.*, Buchanan & Keohane, *supra* note 23, at 403, 433–37; Joshua Cohen & Charles Sabel, *Global Democracy*, 37 N.Y.U. J. INT'L. L. & POL. 763, 765-66 (2006).

on an assessment that it employs the *right* goals and procedures.[258] In the case of supranational institutions, actors external to them form "legitimacy communities" that articulate particular understandings of what these right goals and procedures entail (legitimacy claims).[259] These claims can be based on whether an organization is congruent with particular modes of democratic governance (representative, participatory, or deliberative democracy claims), but legitimacy claims are not limited to democratic legitimacy. Rather, they may concern procedural legitimacy (conformance to norms and procedures); functional or performance-based legitimacy (delivery of promised outcomes); or justice-based legitimacy (conformance to particular substantive justice standards).[260] Unlike in the domestic sphere, where there is a set of generally accepted legitimacy criteria—most fundamentally democratic and constitutional legitimacy—in the international sphere, where these criteria are not directly applicable, there is considerable normative disagreement regarding how to evaluate the legitimacy of international organizations.

International organizations are subject to often opposing expectations from external actors (states, businesses, or organizations of civil society) regarding their proper roles and substantive commitments. These legitimacy communities will seek to establish accountability relationships with international organizations to both validate their claims and compel them to meet them.[261] Thus, legitimacy in the international context can be conceptualized as both relational (because it is built by dialectical relationships between international organizations and external actors) and contested (because different external actors will disagree on what the legitimacy of international organizations requires). Additionally, because international organizations adjust their purposes and functions in response to demands by these external actors, their legitimacy is dynamic.[262] Thus, the challenge in developing a standard of legitimacy for international organizations is to provide a reasonable basis to achieve coordinated support in the face of serious and persistent normative disagreements about their proper institutional roles and accountability relationships, especially when such disagreements cannot be addressed directly through democratic and constitutional legitimacy mechanisms available at the national level.[263]

Upon which reasonable bases might consensus regarding the right to rule of international organizations be built? Buchanan and Keohane propose three minimal substantive justice requirements (minimal moral ac-

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258. *See, e.g.*, Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 145 (2008) (similarly defining "legitimacy" as acceptance of an organization's procedures and ultimate goals).

259. *See, e.g.*, Julia Black, *Legitimacy, Accountability and Polycentric Regulation: Dilemmas, Trilemmas and Organisational Response*, *in* NON-STATE ACTORS AS STANDARD SETTERS 215, 243, 252–53 (Anne Peters et al. eds., 2009).

260. *See, e.g., id.*

261. *Id.* at 254.

262. Buchanan & Keohane, *supra* note 23, at 433.

263. *See id.* at 418.

ceptability, comparative benefit, and institutional integrity)[264] and two additional procedural requirements (the development of "epistemic-deliberative relationships" between international organizations and both democratic states and transnational civil society).[265] According to Buchanan and Keohane, a key procedural feature of a standard of legitimacy for international organizations is the existence of channels whereby transnational civil society can contest and debate existing accountability relationships, including both the terms of accountability (*i.e.* the particular legitimacy claims that particular accountability relationships seek to validate) and the identity of the proper accountability holders.[266] In sum, competing claims about what the legitimacy of international organizations requires must be subject to ongoing scrutiny and be open to revision. In the absence of a global democracy, the "requirement of a functioning transnational civil society channel of accountability . . . helps to compensate for the limitations of accountability through democratic state consent."[267]

But what does the "transnational civil society channel" look like? How does it incorporate the different types of actors that make up civil society? I take these questions as the starting point for developing a theory of civil society in the next Section that can contribute to the legitimacy of international organizations.

Legitimacy concerns are less salient when international organizations serve a purely coordinating function that can be discharged by relying on technical expertise. They are more prominent, however, when international organizations address politically or normatively charged issues and when these organizations enjoy significant power and autonomy to make decisions. The theory of civil society I develop in the next Section is particularly valuable in this latter scenario, where there is likely to be considerable disagreement regarding the proper normative role of international organizations.[268]

C. *Toward a Legitimacy-Enhancing Theory of Civil Society: A Proposal*

A theory of civil society that aims to contribute to the legitimacy of international organizations cannot regard civil society as either exclusively inward-looking or as a partner of state and business actors. Inward-looking theories conceive of civil society organizations as entirely private-regarding or strategic. Thus, at best, they can lend pragmatic legitimacy—that is, legitimacy grounded simply on self-interest—to international orga-

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264. *Id.* at 419–24.

265. *Id.* at 432–33.

266. *Id.*

267. *Id.*

268. *See, e.g.,* Esty, *supra* note 232, at 1511–12.

nizations.[269] On the other hand, boundary-crossing theories threaten to dilute the political role of civil society as a watchdog and critic of both government and market activity. My claim is that only an outward-looking conceptualization can justify a legitimacy-enhancing role for civil society. Thus, a Habermasian critical theory is the best candidate. Nevertheless, Habermasian critical scholars remain insufficiently attentive to the mechanisms whereby divergent normative opinions emerge. Feminist, minority, and Third World perspectives provide a corrective by pointing out how spaces of rational deliberation can paradoxically serve to silence minority dissent, and by emphasizing that the emergence of alternative viewpoints will often require allowing for different forms of communication and the creation of smaller communities of interest where particular alternative identities can take shape. Therefore, I propose a capacious understanding of Habermasian critical theory that imagines civil society as constituting an autonomous space where different normative legitimacy claims are constructed and debated (and where consensus is sought) but that also recognizes that fostering inward-looking qualities is often a prerequisite for the emergence of divergent minority voices and for their crucial contribution to debates in society at large.

1. Habermasian Foundation

My starting point are two fundamental premises of outward-looking Habermasian critical theory: (1) the concept of civil society as distinct from both the market and the state—where individuals interact with each other to create, interpret, criticize, and transmit meaning, and where different normative conceptions of what global justice requires (and how international organizations should contribute to it) can be developed; and (2) the concept of an overarching public sphere that enables the effective expression of criticism and dissent.[270] It then incorporates critiques and insights from feminist/Third World and from civic republican/social capital theories, namely: (1) the importance of not valuing ostensibly dispassionate, logical discussion over personal narratives for the articulation of minority perspectives; and (2) the importance of consensus-seeking deliberation and local face-to-face interactions.

Why are these two premises from Habermasian critical theory crucial for a theory of civil society that will lend legitimacy to international organizations? First, international organizations are subject to two types of legitimacy claims from external actors: normative and pragmatic. Normative legitimacy grounds the acceptance of an institution's right to rule on an assessment of whether it follows the *right* goals and procedures. Pragmatic legitimacy, on the other hand, is grounded simply on self-interest. That is, external actors may deem an organization legitimate simply because of its

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269.   *See, e.g.*, Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 578 (1995) (defining pragmatic legitimacy as relying on the "self-interested calculations of an organization's most immediate audiences").

270.   *See supra* Part I.E.2.

instrumental value in fulfilling their own interests either directly or indi-
rectly. Plainly, pragmatic legitimacy claims are attempts at rent-seeking
that do not contribute to the debate regarding the proper role of interna-
tional organizations.[271] But although civil society organizations can simply
act to assert their self-interests against others, they often also make claims
about justice, the rightness of a particular position, or what the public
good requires. A civil society that is autonomous from both profit motives
and institutionalized decision making has the capacity to articulate a vari-
ety of normative perspectives that allows us to avoid having policies driven
solely by market or bureaucratic rationality. These perspectives are partic-
ularly important in the case of international organizations, where there
exists significant disagreement regarding their right roles and purposes.
Thus, allowing and preserving the capacity of civil society to analyze and
challenge fundamental assumptions about the *right* goals and competen-
cies of international organizations is crucial for a legitimizing theory of
civil society.

Second, Habermasian critical scholars rightly emphasize the impor-
tance of a single public sphere autonomous from both profit motives and
state control where all those who wish to participate bracket their inequal-
ities and debate public policy (rather than only advance their self-interest)
by appealing to "public reason," that is by translating particular concerns
into expressions of general interest. The key insight here is that politically-
oriented, outward-looking, autonomous communities can create new ways
of imagining the world that challenge unjustified or insufficiently justified
policies, as well as underlying assumptions or ideologies behind dominant
norms. An overarching public sphere serves as an interface between civil
society critique and bureaucratic structures (such as, for example, states
and international organizations). This contestatory role of civil society
takes seriously claims of democratic deficit, but understands democracy to
be "as much about opposition to arbitrary exercise of power as it is about
collective self-government."[272]

2. Feminist/Third World and Social Capital Expansions

While crucial for my proposed theory of civil society, these two prem-
ises are insufficient. As Third World, feminist, and minority critiques have
emphasized, the norms of deliberation of a single public sphere are likely
to reflect the cultural preferences of dominant groups, and thus exclude or
devalue the speech of minorities.[273] The dominance of public spaces of
deliberation by only a small portion of the international community is a
significant problem for a theory of civil society that seeks to legitimize

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271.   For example, powerful pharmaceutical companies may seek accountability rela-
tionships with the World Trade Organization to ensure it acts in their interest, such as by
globalizing U.S. patent laws that are generally favorable to their interests. Normative legiti-
macy claims may pursue the same end goal, for example the harmonization of substantive
patent law, but their reasons are based on moral claims rather than pragmatic interests.

272.   Ian Shapiro, *Elements of Democratic Justice*, 24 POL. THEORY 579, 582 (1996).

273.   *See supra* Part I.E.3.

international organizations by reference to civil society's contestatory function. This is because within civil society, well-funded and better-organized groups—whose interest may already be in line with those in a position of power in international organizations—may pose a threat to the emergence of alternative, minority views. If the ideal Habermasian public sphere is in fact dominated by the same types of voices that run both the state and international organizations, civil society may paradoxically lose its ability to criticize these actors.

But a critical framework based on both the concept of civil society as a space where meaning is created, interpreted, criticized, and transmitted, and on the idea of a single public sphere, is capacious enough to incorporate this critique. Multiple publics can coexist with a more encompassing, broader public sphere and, I argue, both are necessary. Smaller publics are important: they allow the emergence of minority views and critiques by providing "spaces of withdrawal and regroupment" in relative independence from dominant views, and by relying on multiple modes of deliberation to elicit these minority views and critiques.[274] But minority communities can devolve into isolated enclaves.[275] A broad public sphere that translates concerns articulated in smaller publics into generalizable arguments is thus an important bridge between "counterpublics" and relevant institutional actors.

A broad public sphere serves another important role: it can help identify areas of substantive agreement about the proper role of international organizations. Indeed, in my view, although minority and feminist critiques are correct that oftentimes multiple perspectives will not be reducible to a single "common good," they tend to be overly skeptical of any efforts to reach consensus. Their insistence on the existence of distinct "feminine" or "minority" perspectives endowed with a type of immutable quality runs the risk of ossifying empirical realities that are often paradoxically the result of majority hegemony. For example, the perception that women are less able to engage in abstract, rational debate than men, arguably does not represent an essential attribute of females but one that is historically contingent.[276] Here, Habermasian critical theory and republican theory overlap by acknowledging "the possibility of settling at least some normative disputes with substantively right answers."[277] In contrast to civic republican theory, however, I argue that civil society organizations can catalyze discussions based on principles regarding how international organizations should contribute to global justice claims, in addition to discussions driven by self-interest.

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274.   Fraser, *supra* note 32, at 68.

275.   *Id.* at 67.

276.   *See, e.g.,* Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory, in* FEMINISM AND PHILOSOPHY: ESSENTIAL READINGS IN THEORY, REINTERPRETATION, AND APPLICATION 434, 435 (Nancy Tuana & Rosemarie Tong eds., 1995) (criticizing gender essentialism, and reviewing the debate between cultural and radical feminists on whether being "female" entails possessing particular essential attributes).

277.   Sunstein, *supra* note 80, at 1541.

A second insight, this time from social capital theory, serves to further refine my proposal. If we agree that small counterpublics are necessary to develop minority identities and views, and that these groups run the risk of turning into isolated enclaves lest they engage with society at large, then empirical data regarding how groups can promote individual engagement with broader societal debates is crucial. Specifically, social capital theory emphasizes the importance of involvement in local community, of engaging in frequent face-to-face interaction with others, and of fostering multiple, overlapping (or bridging) memberships for developing a sense of shared responsibility in participating in public life. In practice, this insight can be translated to promoting the formation of local groups that can foster the direct participation of those whose interests, while affected by the policies of international organizations, are not represented in the overarching public sphere. This can take place, for example, through community organizing campaigns.

3. Implementation

In practice, this proposal may be implemented through a three-phase process that fosters: (1) the creation of local spaces to facilitate the emergence of different normative perspectives, (2) the creation of bridging spaces to promote conversations among different communities, and (3) the creation of broader spaces that are able to translate these concerns into generalizable arguments. For example, to encourage the emergence of minority perspectives, existing civil society organizations and national governments would first identify those populations, groups, or individuals that are likely to be affected by the particular international policy at issue, or that are the explicit targets of international regulation (in the case of UNGASS, these groups would include, among others, sex workers, injectable drug users, and people living with HIV/AIDS). To foster their direct input, funds could be earmarked to subsidize grassroots organizing campaigns that bring together similarly situated individuals. To encourage participation, local meetings would focus on sharing experiences and on reconstructing identities and novel narratives from these experiences. The crucial aspect of phase one is to recognize that affected individuals need spaces to develop their own perspectives. Multiple local meeting spaces would foster face-to-face interactions that social capital theories have found crucial for promoting the type of social cohesiveness that is likely to lead to sustained engagement in political life.

In phase two, "cross-community" programs could be implemented to encourage "different groups . . . to engage constructively with each other through communication and dialogue."[278] Through cross-community programs, groups can discover common interests or concerns, and can be exposed to, and often persuaded by, different normative perspectives. These programs would foster bridging social capital, thereby discouraging the

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278.   *Strategy #4: Change Through Cross Community Work*, Civic Voices, http://www.civicvoicesforpeace.org/cross-community-work.html (last visited Mar. 1, 2013).

creation of isolated and potentially illiberal enclaves, which constitute a potential risk of the emergence of multiple publics.[279]

The third phase could take place through regional and national civil society task forces, composed of civil society organizations with sufficient capacity and experience, charged with translating concerns and experiences emerging from local community groups into broader priorities and generalizable arguments. To avoid the distortion of views, this phase should include mechanisms to ensure the participation of representatives from diverse multiple publics.

In all three phases, the key is the creation of formal fora independent both from the administrative structure of international organizations and sovereign states, and from business interests, where civil society actors can develop an analysis and critique not only of particular implementation measures, but also of underlying assumptions regarding the proper role and scope of authority of particular international organizations.

International organizations are subject to a variety of legitimacy demands from diverse nonstate actors, including business interests, and often will respond to these legitimacy claims by adjusting their purposes and functions. The proposal advanced here does not ensure, however, that international organizations will take into account norms developed within civil society, or that debates within civil society will reach substantive consensus regarding how international organizations should contribute to global justice. Indeed, the civil society participation structure that I have proposed here may be criticized for constituting a form of procedural justice that does nothing to ensure substantive justice.[280]

But this objection underappreciates the capacity of my proposal to criticize the normative goals of international organizations, and thus to better secure substantive justice. First, because it seeks to actively foster the emergence of views from all those likely to be affected by particular policies, it is poised to generate a more complete set of relevant information and, thus, to lead to more "accurate" policies.[281] Second, because it affords all those affected the opportunity to "tell their story in a meaningful way," it will give participants the satisfaction of having been heard.[282]

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279.   BARBARA J. NELSON, LINDA KABOOLIAN & KATHRYN A. CARVER, THE CONCORD HANDBOOK: HOW TO BUILD SOCIAL CAPITAL ACROSS COMMUNITIES (2003), *available at* http://concord.sppsr.ucla.edu/concord.pdf.

280.   *See, e.g.,* Alice Kaswan, *Distributive Justice and the Environment,* 81 N.C. L. REV. 1031, 1046–47 (2003) ("It is not clear, however, that procedural requirements enhancing public participation will necessarily lead to substantive decisions that are more responsive to public opinion. While enhancing participation procedures to equalize opportunities is an important step in creating the preconditions for political justice, it provides no guarantee that the substantive decision will embody political justice.") (internal citations omitted).

281.   *See, e.g.,* Lawrence B. Solum, *Procedural Justice,* 78 S. CAL. L. REV. 181, 272, 289 (2004) (noting that an important feature of procedural justice is to strive for "accurate outcomes," which require that all crucial information be both available and taken into account).

282.   *Id.* at 273. These two advantages of my proposal correspond to what Lawrence Solum has termed the "accuracy" and "satisfaction" models of procedural justice. *Id.* at 242–267.

Finally, and most importantly, because the theory of civil society I advocate pays particular attention to allowing for the powerful emergence of critique that examines *underlying normative premises*, it will also lead to better *substantive outcomes*, both in the short and long term. Better short-term outcomes will result from displacing existing civil society participation regimes that tend either to depoliticize civil society by over relying on collaborative models of implementation or to pay insufficient attention to the actual dominance of certain cultural norms and perspectives in the international scene. Additionally, this conceptualization of civil society will have long-term, systemic gains as it has the potential to serve as a springboard for the emergence of other forces (such as new epistemic communities and social movements) that can contribute to the ongoing scrutiny and debate regarding the proper role of international organizations.

CONCLUSION

In the past two decades, as the reach of international organizations has expanded, so has the number of civil society organizations that seek to influence international policy making and national implementation efforts. Diverse types of international organizations have enacted consultative mechanisms to incorporate civil society input into decision-making and implementation processes. Nevertheless, and despite its widespread use, the concept of civil society remains undertheorized in the legal literature. In this Article, I first unpacked different theoretical conceptions of civil society that underlie divergent uses of the term. I proposed that civil society can be understood as disaggregated into a series of functions that range from inward- to outward-looking. I then argued that five groups of theories from the fields of political science and sociology map onto this disaggregated framework, can justify and critique existing designs of civil society engagement in monitoring and implementation, and suggest novel institutional designs. Using UNGASS as a case study, I illustrated how these five groups of theories suggest five different monitoring regime designs based on: (1) *delegation* to market-ordered, apolitical private associations, (2) *deference* to the state, (3) *inclusion* of minority voices, (4) *contestation* of state action, and (5) *collaboration* among all stakeholders. These five types of regime design are relevant not only to UNGASS monitoring, but also to a wide range of monitoring regimes that engage civil society, such as those for the implementation of human rights and environmental commitments. More broadly, unpacking different conceptions of civil society can both illuminate theories that underlie existing practice and expand the range of possible institutional design options not only for monitoring regimes but also for other structures of civil society participation in policy making and implementation.

In the last portion of this Article I engaged normatively with debates regarding whether civil society can contribute to the legitimacy of the international legal system. I argued that implicit in the positions adopted by both critics and proponents of civil society participation as a legitimating factor are divergent underlying theoretical understandings of civil society.

I then showed how the framework developed in this Article can both illuminate these divergent understandings and help guide the development of a theory of civil society that can best justify a legitimacy-enhancing function of civil society. Specifically, I developed a theory of civil society based on a capacious interpretation of Habermasian critical theory. I argued that civil society can contribute to the legitimacy of international organizations by constituting a space where different normative legitimacy claims are constructed and debated, and where consensus (even if limited) on what the legitimacy of international organizations requires can be reached. This understanding of civil society is particularly important in issue areas likely to engender normative disagreement about the proper role of international institutions, where legitimacy questions are of particular importance.

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