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# The Elusive Basis of Legitimacy in Global Governance: Three Conceptions

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**GLOBALIZATION AND AUTONOMY  
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# Preface

The issue of legitimacy is central to the Globalization and Autonomy project volume entitled: *Autonomy, Democracy, and Legitimacy in an Era of Globalization* for which Steven Bernstein is the lead editor. Given that legitimacy in political science terms is key to the functioning of democracy at the nation-state level, it is also potentially crucial at supranational levels. What legitimacy might mean, however, in the absence of a state or in the presence of intergovernmental or private forms of supranational authority is less clear. In this heavily researched and well argued paper, Professor Bernstein provides a comprehensive overview of how legitimacy might be conceptualized in relation to such forms of supranational authority.

William D. Coleman  
Editor, Working Paper Series

## ABSTRACT

### The Elusive Basis of Legitimacy in Global Governance: Three Conceptions

How to create and maintain legitimacy is arguably the greatest contemporary challenge to global governance and international order. To address this challenge, International Relations scholars, accustomed to a clear distinction between international and domestic legitimacy, have had to borrow extensively from the fields of political philosophy, comparative politics, law, and sociology, which have long investigated the legitimate basis of political authority. These traditions inform three distinct conceptions of legitimacy in this new wave of scholarship: 1) principled legitimacy rooted in democratic politics; 2) legitimacy as law or legalization; and 3) a sociological conception of legitimacy rooted in intersubjective beliefs about appropriateness. Each conception provides only partial insight into the core puzzle animating this literature: what does political authority beyond the state require? The answer can only be found through an examination of the relationship of power, legitimacy, and community, which together constitute political authority.

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# The Elusive Basis of Legitimacy in Global Governance: Three Conceptions

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## **Introduction**

The field of International Relations (IR) is premised on a clear distinction between international legitimacy and the legitimacy of a domestic political order or government. That separation coincides with the putative boundary between governance and public policy (a domestic phenomenon bounded by the nation-state) and cooperation under anarchy (an international phenomenon in the absence of an overarching political authority).

Perceived changes in the nature and location of political authority have led many to question that division. The formal concentration of political authority previously enjoyed by national governments appears to be fracturing: up to supranational bodies such as European Union (EU) institutions and the World Trade Organization (WTO); down to sub-state jurisdictions; and laterally to transnational “private” or “hybrid” (of mixed private and governmental actors) authorities and networks.<sup>1</sup> The ensuing attention to “global governance”<sup>2</sup> stems from attempts to comprehend experienced changes in who makes collective decisions that command authority over political communities and on what basis those decisions are made.

Whereas multi-level governance within states is widely accepted, emerging sites of authority *beyond* the state more fundamentally challenge understandings of legitimate rule. The reason goes beyond the location of decision-making. Many formal international organizations have enjoyed widespread legitimacy because their functionally specific mandates make them more akin to bureaucracies than states (Steffek 2003). The bureaucratic analogy, however, strains as lines of authority and accountability blur, especially when the effects of rules, decisions and political processes delegated to specific institutions appear to spill over into policies beyond their original competencies. Moreover, institutions of global governance face increasing demands from state and non-state actors alike to make authoritative rules and decisions in areas formerly the preserve of sovereign states. Simultaneously, a growing chorus of societal groups acting across borders – and some governments – challenge their authority to do so.

The resulting strain on political authority has been referred to variously as a crisis of governance, the hollowing out of the state, or a democratic deficit. These terms all point to what in the domestic context used to be called a legitimacy crisis: the system of legitimation has not kept pace with perceived changes in the operation or location of political authority (Habermas 1973, Connolly 1984). Despite a proliferation of “globalization” studies on market and social forces that drive the fracturing of authority, legitimacy in global governance received little attention until prompted by the shock of mass protests in places such as Seattle and Genoa that targeted international economic institutions. The protests and related social movements signalled that perceived shifts in authority might not be sustainable, desirable, or peaceful.

Unsurprisingly, IR scholars’ attempts to understand legitimacy problems lag those in political philosophy, comparative politics, law, and sociology who have long investigated the legitimate basis of political authority. This paper, on one level, is a catch-up exercise. It identifies how these traditions inform three distinct conceptions of legitimacy in the new wave of scholarship on the prospects and limits of political authority beyond the state: 1) principled legitimacy rooted in democratic politics; 2) legitimacy as law or legalization; and 3) a sociological conception of legitimacy rooted in intersubjective beliefs about appropriateness.

I assess these conceptions ultimately on how well they answer the core puzzle animating this literature: what does political authority beyond the state require? That question can only be answered, I argue, through

an examination of the relationship of power, legitimacy, and community, which together constitute political authority. A useful conception of legitimacy must be sensitive to its relationship to how influence is wielded and where it resides (power) as well as to who are the authors and/or subjects of political authority (the problem of community). Current research, though rich and varied, is weakest in taking account of this relationship. A concluding section considers the implications of this argument for the sustainability and limits of global governance.

Two caveats are also in order. First, I assume legitimacy matters. Although space limitations prevent a full defence of that assumption here, I will offer a few good reasons for doing so. First, Governments routinely act in accordance with international rules and norms they accept as legitimate, and go to great pains to justify their actions when they do not, usually by appealing to some other rule or norm. Their failure to do so entails real material and diplomatic costs, as the Bush administration found post-September 11 following its inability to create legitimacy for many of its policies that contradict long-accepted international norms such as multilateralism.<sup>3</sup> Most dramatic are the rising costs of post-war stabilization and reconstruction in Iraq following its inability to gain legitimacy for the 2003 war through the Security Council. More generally, global governance institutions require legitimacy to operate effectively as their scope increases and they reach into policy areas formally considered domestic preserves. In other words, if governments require legitimacy to rule domestically, a relatively uncontroversial argument, it is reasonable to assume that the more “global” governance looks like domestic governance, the more legitimacy demands will follow it. Finally, international relations scholarship is replete with references to the importance of legitimacy for international order, institutions, and what today we refer to as governance. The classic demarcation made by Weber between the domestic – where legitimate authority resides – and the international – which lacks it – is an idealized demarcation that assumes the complete absence of governance. To the degree that governance exists – and this paper’s focus is on assessing how such governance is possible and sustainable – the problem of legitimacy arises. This paper does not, therefore, re-hash debates on the power of legitimacy or function of norms, which have been ably put forward elsewhere.<sup>4</sup>

Second, I do not cut up the discussion of legitimacy along normative versus descriptive or explanatory lines (Steffek 2003). Legitimacy always contains both injunctive and descriptive dimensions. Any argument concerning why actors *should* accept a decision or rule as authoritative (as opposed to because they are coerced) necessarily includes possible reasons why the decision is accepted, and vice-versa, even if particular conceptions of legitimacy entail trade-offs in the leverage they provide for normative or positive projects.

### **The Problem of Legitimate Governance beyond the State**

Works primarily on legitimacy have only recently re-emerged in the IR literature after a long hiatus, and most have focused on the arguably *sui generis* political phenomenon of the European Union (EU).<sup>5</sup> Prior to the recent wave of interest, the last general treatment was Inis Claude’s 1966 essay on the legitimization function of the United Nations. Other notable exceptions either focused very broadly on legitimating and stabilizing an international order of states through great power diplomacy and consensus<sup>6</sup> or specifically on rule compliance.<sup>7</sup> Despite this formal neglect, a new preoccupation with legitimacy demands characterizes the explosion of research on global governance as scholars increasingly recognize its centrality to emerging forms of organization, institutions and orders. How should the problem of legitimacy in global governance be characterized?

The basis of legitimate rule within the state is well established. It rests minimally on consent of the people governed or popular sovereignty, and, increasingly, on democratic process and participation, accountability,

and some basic political and citizenship rights. From this baseline, political philosophers may debate the proper combination and content of procedural and substantive legitimacy, deliberation, rights and duties, or accommodation of difference, that legitimate government requires.

In contrast, state sovereignty is the traditional basis of legitimacy in the modern international system. A system of sovereign states, by definition, exhibits minimal governance relative to the state, which bounds political community and authority. An international right to rule is an oxymoron in a sovereign state system. International governance in this view may be at most delegated, since there would be no legitimate basis for states to transfer authority.<sup>8</sup> What governance occurs rests on states as the units of rights and obligations and as the relevant moral and political agents. Legitimacy at most concerns collective legitimization by states of practices or particular behaviours through formal procedures, bargaining and negotiation in cooperative international institutions such as the United Nations (Claude 1966). Through this lens, any legitimacy crisis would be a function of stresses on sovereign state diplomacy, not of governance more broadly.

All talk of governance “without government” – in the absence of centralized political power – suggests a deeper questioning of order and authority in which the above characterization of legitimacy no longer suffices. Stripped of its dependency on centralized state power, governance consists of two elements. First, it is the purposeful steering of actors towards collective or shared goals or values. Second, it is authoritative (Rosenau 1995). Authority requires legitimacy or the acceptance of shared rule by a community. Legitimacy *authorizes* particular individuals or institutions to make or interpret rules. Perhaps owing to the conceptual break of recognizing that governance can occur in the absence of hierarchy or coercive forms of state power, the literature on global governance has emphasized the importance of legitimacy as the source of compliance in global governance. Legitimate rules exert a “pull towards compliance” not because of power or interest, but “because those addressed [normatively] believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process” (Franck 1990: 24). While this paper also places legitimacy as the central problem of global governance, it argues that the move away from the Weberian conception of political authority as domination has come at the cost of bracketing its two other essential elements, power and community.

Max Weber understood political authority to link a monopoly on *coercive power* with *legitimacy* (the right to hold that monopoly and therefore to rule) in the state (Weber 1978: 54-56). An earlier generation of scholars on international legitimacy acknowledged this connection. As Claude put it, “legitimacy... not only makes most rulers more comfortable but makes all rulers more effective – more secure in the possession of power and more successful in its exercise” (Claude 1966: 368). Westphalian norms, which rooted political authority in exclusive territorial spaces, reinforced a Weberian understanding of political authority, as did the gradual historical consolidation of the means of violence in the hands of state rulers. Although Weber primarily wished to understand obedience to state authority and its organization of domination, analyses of legitimacy frequently focus primarily on the distinction between coercive power and legitimate commands – those that compel obedience in themselves – as sources of compliance, at the expense of the broader context of Weber’s analysis of authority (Weber 1978: 212-299).

Analytically the distinction makes perfect sense. Even if legitimacy frequently reflects the interests of powerful actors, it always means that the leader, rule, or institution in question has authority recognized by the relevant audience independent of brute force. The distinction also resonates in global governance. Whereas new sites of authority may sometimes be backed by the coercive powers of leading states, the de-coupling of coercive force and legitimate rule is the most striking feature of contemporary global governance. Indeed, according to James Rosenau, “the essence of [new sites of authority] is that they derive their legitimacy from

the voluntary and conditional participation of individuals who can revoke their consent at any time” (Rosenau 2003: 308). Moreover, with little indication that coercive power is moving beyond the state in any systematic fashion, the importance of legitimacy appears elevated.

Nonetheless, new authorities resting wholly on moral legitimacy are rare and unlikely to create broader order. The problem of politics is that compliance, even when it is the “right” thing to do, is never absolute. Broader order relies minimally on the possibility of enforcement, although enforcement must be legitimated for governance to be sustainable. To take the analogy of social contract theory, contracts may be rational and entered into voluntarily, but they grant authority to enforce the contract for governance to be achieved. Thus global governance worth its name cannot simply be a realm of voluntary action. What makes current global governance talk something more than idealist musings is the increasing enforceability of rules and acceptance of their broader reach. These developments make visible possible tensions between authority and legitimacy. The question at stake is whether the apparent delegation of rule, especially when backed by resources that confer power, is legitimate.

Thus, the distinction between legitimacy and power can mask power relationships inherent in the exercise of political authority. Uncovering forms and relations of power becomes an important subject of inquiry. For example, power may be indirect in the form of institutional power and law or the empowering of particular actors such as technical experts or private authorities,<sup>9</sup> or it could be direct, but diffuse, reflecting structural power of leading states or classes but without the need for their direct intervention.<sup>10</sup>

Similarly, a more nuanced analysis is needed of how legitimacy links to the problem of community to overcome the either/or view of political community as residing in states versus its unlikely or far off appearance globally.<sup>11</sup> This characterization cannot be complete since community figures prominently in all definitions of legitimacy. Sociologists, for example, who have long struggled with the role of legitimacy in sustaining and giving credibility to organizations and institutions, view legitimacy as embedded in social systems that provide a basis of appropriateness, or that make the purposes, goals, or rationale of the organization understandable to the *relevant audience* in society (Suchman 1995). Or, as Thomas Franck, an international lawyer, puts it, “the most basic indicator of a rule’s legitimacy [is] whether it is validated by community or, to put it another way, whether the rule is systemically based” (Franck 1990: 198). Whether in reference to a corporation seeking legitimacy from consumers, competitors, and regulators, a government seeking legitimacy from its citizens, or an international organization seeking legitimacy from governments and transnational actors, legitimacy entails that those communities accept the organization as appropriately engaged in the task at hand. Two problems of community arise in this context. First, who counts as a relevant audience may be contested and the boundaries of relevant communities may be highly complex and fluid. Second, what constitutes a community; to what degree or in what way do members of a community need to be bound in order to grant authority? With these arguments in mind, I examine each of the three dominant conceptions of legitimacy.

## **Principled Legitimacy**

### ***The Case for a Principled Conception***

The first conception of legitimacy examined is rooted in democratic and critical normative political theory. Its main concern is to clarify and vindicate standards and criteria of legitimacy that are appropriate and that deserve the allegiance of members of relevant communities, although theorists differ on whether such standards can be derived from “rational” processes based on premises concerning justice or the good life, or whether

they should be historically situated, and derived from “those feelings of dissatisfaction and lack which we normally experience in actual democratic politics” (Connolly 1984:12, Young 2001: 10).

Giving serious attention to a principled or moral notion of legitimacy, no less principles usually associated with legitimate state *government*, marks a significant shift even from landmark studies such as Franck’s on the “power” of legitimacy in the international system. Franck argues that domestic models of legitimacy, which tend to conflate legitimacy and justice, do not apply internationally for two reasons. First, on operational grounds, justice applies to persons, not aggregates such as states. Second, on theoretical grounds, legitimacy and justice are related, but conceptually distinct. Rules may be legitimate, but unjust. Similarly, just rules may be deemed illegitimate (Franck 1990: 208-09). A principled conception challenges these arguments.

Franck’s operational concern contains two components: justice only applies to persons and an empirical claim that, “At its present stage of development, most systemic rules command not persons but states, allocating duties and benefits on an aggregate basis” (Franck 1990: 209). Whereas most international rules, with few exceptions in areas of human rights or war crimes, still do not *address* people, they increasingly *affect* people and public policies, not just relations among states. International environment, development, economic, health and safety, or cultural agreements, policies or programs may not create any specific rights or obligations for individuals – they usually target governments or corporate actors – but they nonetheless can affect people’s life chances, identities, and prospects of pursuing the “good” life. Thus, they fall into the operational realm of justice.

The question of whether domestic notions of legitimacy should apply to global governance therefore becomes an empirical matter conditional upon the reach of rules and whether a sufficient sense of community exists for notions of justice or democratic legitimacy to apply. If, as some have argued, “[t]here are no settled social bonds [community] in an age of globalization” and therefore “the Westphalian “givens” of justice no longer pertain,” meeting such conditions is possible (Devetak and Higgot 1999: 484).

Nearly all discussions of global democracy and legitimacy begin with the empirical claim that the world Franck described in 1990 *has* changed.<sup>12</sup> As Habermas put it that same year, “the democratic processes constituted at the level of the nation-state lag hopelessly behind the economic integration taking place at a supranational level” (Habermas 1996b [1990]: 49). Concerns over globalization are now commonly expressed in terms of justice and democracy by utilizing the rationale that institutions of global governance are usurping domestic democratic institutions. Two conclusions follow. Either international institutions must become more democratic – a view expressed in various forms by cosmopolitans<sup>13</sup> and many EU scholars – or state governments must be protected from usurpation. The latter position rests on a philosophical claim that global governance can only be of peoples, i.e., governance of a community of states whose representatives can engage in rule making, but the legitimacy of those rules ultimately must rest on domestic constitutional order (Rawls 1999).

In both cases, legitimacy requires democracy because it is the central principle in contemporary politics that legitimates authority. As put succinctly by Held, “Democracy bestows an aura of legitimacy on modern political life: laws, rules, and policies appear justified when they are democratic” (Held 1995: 1).

Notably, this emphasis on procedural legitimacy is a departure from longstanding demands for global justice focused on substantive principles such as distributive justice, autonomy or equality. Such demands challenge the legitimacy of a global order that entrenches unequal distributional consequences and power relations (Murphy 2000). Critical scholarship thus attacks the new focus on global governance for obfuscating a history of domination by Western states and powerful economic classes, acting at times through international institutions to further legitimize their interests (Cox 1983). It thereby challenges an underlying assumption of much global governance literature that procedural and substantive legitimacy will be mutually reinforcing.<sup>14</sup>

### *Application to Global Governance: The Limits of a Principled Conception*

Principled analyses of global governance come in two basic varieties: those that accept the basic legitimacy of state sovereignty and those that do not. The question is not about the ontological status of states versus individuals, rather it is a moral argument concerning whether the purpose of just political institutions is to achieve the autonomy of political communities or “peoples,” or whether justice concerns only individual autonomy.

**International Legitimacy.** Proponents of the former position establish criteria required for a political unit to gain standing in the international system, and by extension that legitimate that system (unit and system legitimacy are co-constituted). Successive waves of democratization and the spread of human rights norms have led to arguments for a minimum set of standards required for recognition (Chopra and Weiss 1995; Franck 1995: 83-139; Buchanan 1999). Legitimate global governance, then, ought to rest on principles that would be agreeable to these legitimate members. In its most idealized formulation, Rawls extends the idea of a legitimate social contract to global society. He formulates the conditions of a contract among “peoples” as opposed to individuals, deriving a set of legitimating principles that would be agreeable given the diversity of political cultures and the presence of liberal and illiberal (but “decent”) communities (Rawls 1999). As in the domestic contract of constitutional democracies, the process can be modeled abstractly by assuming rational, free and equal individuals under a “veil of ignorance” of their circumstances, who would agree to constitutional principles they would find legitimate (Rawls 1971: 11-20, 1985: 224-225, 1996: 137). Except, in this case, those individuals are representatives of peoples. Moreover, legitimacy rests on “public reason”: basic societal principles must be explainable to reasonable people and people of different background or values in the society would agree to endorse them as consistent with their own freedom and equality (Rawls 1996: 215). Substantive and procedural legitimacy converge in such models, as do legitimacy and justice in the form of principles of fairness, at least at the level of fundamental or constitutional principles.<sup>15</sup>

The substantive principles Rawls’ derives strongly resemble norms in the United Nations Charter. He adds an emphasis on human rights and distributive justice, but these too correspond to norms in existing multilateral agreements, although actual distributional principles remain largely declaratory or non-binding “soft law”.<sup>16</sup> One may reasonably wonder whether Rawls’ theory can serve as a critical tool to increase democracy in global governance or if it at most legitimates existing norms or reproduces an international legitimacy of states, derivative of the liberal state.

Whereas Rawls’ is concerned with “ideal” theory, students of international organization have identified principled criteria of “good governance” based on actual democratic challenges to existing organizations. They recognize that, outside of the EU, most international institutions remain structured on the principle of state consent as the source of legitimacy. The United Nations and its affiliated organizations, for example, entrench state sovereignty, recognize states as the actors with rights and obligations, require positive consent by governments to be bound by agreements or decisions of the organization (the UN charter is a notable exception with universal application, although only Security Council decisions are binding), have decision-making procedures that involve votes or deliberation by state representatives, and contain provisions for withdrawal. Legitimation is a “collective” *political* process among sovereign states that confer that function on organizations they establish, even if international law is an outward expression of the results (Claude 1966: 371-372).

Good governance criteria primarily identify how collective legitimation ought to occur, such as improved accountability, participation, and procedural and substantive fairness among states (Woods 1999). For example, accountability involves ensuring transparency in decision-making and operations to governments, who



are accountable to their citizens, frequently through elections, not necessarily to NGOs, who are not (Woods 1999: 45). These demands come especially from governments that feel disenfranchised from decisions that affect their countries, although even major powers question the legitimacy of voting procedures and deliberative practices in institutions such as the UN Security Council that reflect an anachronistic global order and power configuration.

Despite its state-centric character, good governance discourse opens the door to expanding democratic values to address publics directly affected by the reach of relevant institutions, especially given “the long and opaque chains of delegation” involved (Keohane and Nye 2001: 276). Thus, even skeptics of what they view as utopian visions of global democracy, propose extending transparency and openness to include NGO access to technical material in order to translate it for more general consumption, more regularized processes through which relevant NGOs could access policy making or judicial processes of direct concern, and improved accountability to those directly affected to promote “ownership” of decisions by stakeholders.<sup>17</sup>

The ambiguity of “good governance”, however, makes it malleable to a more limited reform agenda. The International Monetary Fund (IMF), for example, which remains premised on expert knowledge in policy making and confidentiality with governments, has stubbornly resisted democratic reform despite the significant effects of its policies in many countries. In the view of many member governments and staff, legitimacy demands greater transparency among its members to avert global financial surprises or domestic improvements in accountability and the rule of law, but does not require opening up IMF processes to non-state actors (IMF 2002).

Some authors see little problem with the IMF’s emphasis on performance and effectiveness, or “output legitimacy,” as the appropriate basis for legitimate global governance, rather than “input legitimacy,” the democratic procedures or extent to which citizen demands enter the political process (Scharpf 1997). Still, legitimacy concerns a judgement of appropriateness determined by the values of the relevant audience, not because efficiency *per se* produces legitimacy. In practice in democratic societies, what might be termed “output” legitimacy for public institutions is increasingly linked to process criteria. To be legitimate, un-elected institutions (such as Supreme Courts or central banks) require transparent decision-making and reasoning, and must be linked in clear chains of delegation ultimately accountable to citizens (Keohane and Nye 2001). No democratic society accepts the legitimacy of discarding democratic processes in favour of efficiency.

The same trend can be observed internationally where civil society appears less willing to simply allow authority to move to technical experts by default.<sup>18</sup> Moreover, global governance institutions generally do not have available the traditional domestic responses of either coercion or welfare for marginalized groups, because of weak enforcement and an inability or unwillingness to redistribute significant resources owing to an insufficient sense of community. Thus, most principled arguments downplay the input/output distinction, arguing instead that institutions without legitimacy will not be effective in the long run.

**Global democracy.** For cosmopolitan proponents of global democracy, reform of intergovernmental institutions alone cannot eliminate a democratic deficit when political decisions made elsewhere (whether in global governance institutions or another state) increasingly have effects. If individual autonomy, rights and consent are the basis of legitimate rule, then governance at any level can only be legitimated based on consent of individuals, public participation in and access to transparent decision-making processes that affect them, and accountability to them, with decision-makers perhaps even being subject to removal. Mechanisms that merely increase transparency to governments will lack legitimacy if the problem is the inappropriate delegation of authority in the absence of accountability mechanisms or “public space” for deliberation, an argument also vocally expressed by the anti-neoliberal globalization movement.<sup>19</sup>

The implicit linkage of legitimacy to justice in cosmopolitan models also means that principles of justice that legitimize a constitutional order in the state should apply internationally. Beitz, for example, argues that Rawls' difference principle of distributive justice – that “social and economic inequalities are to be arranged so that they are... to the greatest benefit of the least advantaged” – applies internationally, especially under conditions of increasing institutional thickness.<sup>20</sup> In “fully interdependent systems, the world as a whole would fit the description of a scheme of social cooperation,” the moral boundaries of principles of justice in Rawls' thought (Beitz 1979: 132). Held, using similar logic, proposes a global democratic cosmopolitan system where the state is but one forum because, “the idea of a political community of fate – of a self-determining collectivity — can no longer be meaningfully located within the boundaries of a single nation-state alone.... If these processes and structures [of globalization in economic, cultural, legal, and administrative domains] are not acknowledged and brought into the political process themselves, they may bypass or circumvent the democratic state system” (Held 1997: 260-261).

While few proponents of global democracy foresee accountability occurring strictly in the form of competitive elections directly by the world's people, many envisage multiple sites of authority with an emphasis on retaining local community autonomy and self-determination under a principle of subsidiarity (i.e., that central authority ought to be subsidiary to local authority in the absence of a compelling case for the contrary). Proposed participatory mechanisms include referendums and elected representative institutions such as People's Assemblies or a Global Parliament that can hold global regulatory institutions accountable or ensure the protection of local autonomy and individual rights, especially those that enable basic well-being and associational and political activity.<sup>21</sup> Increasingly, proposals to overcome democratic deficits are rooted in deliberative models of legitimation, following Habermas, over the social contract tradition.<sup>22</sup>

Deliberative legitimacy ideally requires “discursive validation,” where decisions rest on “good arguments” made under “ideal speech” conditions in which free and equal autonomous actors, [absent coercion], can challenge validity claims, seek a reasoned communicative consensus about their understandings of the situation and justifications for norms guiding their action, and are open to being persuaded.<sup>23</sup> For example, extrapolating from Habermas's criteria, Risse identifies “argumentative” rationality as a possible logic of action, and by extension, source of legitimation in world politics. Argumentative logic applies to legitimating norms and governance through truth-seeking processes, where actors “argue” or deliberate about whether norms are appropriate or can be justified.<sup>24</sup> Whether arguments and justifications occur between state representatives, members of transnational organizations or individual citizens, legitimacy requires a situation where persuasion is possible and common understanding is the goal.

Most proponents of global democracy also recognize the importance of a political community or *demos* – the “popular unit that exercises political rights... constituted by a shared identity” – in establishing democratic political authority (Cederman 2001: 144). However, their insensitivity to the institutional, communicative, and affective requirements of political community leaves them vulnerable to charges of utopianism. They have yet to develop the logical and practical links between processes that have undermined the givens of political communities bounded by nation states and processes that produce political communities beyond the state. In recognition that an expanding *polis* without a corresponding *demos* can produce legitimacy problems, even in “de-nationalized” settings such as the EU, a move is underway to recast the debate from participatory mechanisms to identity-formation (Cederman 2001; Greven 2000; Offe 2000). As one author warns, insensitivity to the identity requirements of mass-based legitimacy risks “degenerating into deliberation without democracy” by empowering specialized or highly educated elites at the expense of ordinary citizens who lack the cultural or communicative resources to participate in deliberative mechanisms (Cederman 2001: 160-161). Institutions

outside the EU are even less likely to meet requirements of democratic legitimacy since national identities and fragmentation are enduring features of global politics, despite the proliferation of sites of associational activity.

Proponents of global democracy do not necessarily disagree, but are more sanguine that participatory and other institutional reforms can be a catalyst for social cohesion. For example, Habermas believes a European constitution voted on through referendum could catalyze “the emergence of a European civil society; the construction of a European-wide public sphere; and the shaping of a political culture that can be shared by all” (Habermas 2001a: 16-17, 2001b: 89-103). More cautiously, Zürn breaks down the concept of *demos* into constitutive elements of acceptance of rights, mutual trust, public spirit, public discourse and solidarity, arguing that not all components of a *demos* are required for all democratic decision-making, so appropriate institutional arrangements across different contexts should develop democratic and deliberative features in a mixed fashion, as the social pre-requisites emerge (Zürn 2000).

Similarly, Risse acknowledges that “argumentative rationality” requires the possibility of empathy and a common “lifeworld” of collective interpretations of the world and themselves but believes many current situations exist where this logic applies, despite power differentials in world politics.<sup>25</sup> Legitimacy does not require heroic assumptions that “ideal” situations prevail, only that participants of different rank or capabilities adhere to conditions that make deliberations “argumentative” rather than strategic (i.e., they refrain from pulling rank or coercive tactics). Argumentative rationality could even prevail in the UN Security Council as long as both permanent and non-permanent members treat arguments non-hierarchically. Risse acknowledges there is no guarantee powerful actors will refrain from strategic action, but, if legitimacy increasingly depends on some approximation to those conditions, they risk undermining the Security Council’s authority when they act otherwise.

### ***The problems of community and power***

These examples reveal important disagreements over the nature and requirements of political community and its relationship to public international authority. Some continue to view international organizations as analogous to issue-specific bureaucratic agencies that service communities of states or other defined groups of actors with shared social purposes. Their legitimacy therefore depends upon officials “explaining and defending” decisions to “rule addressees”, which links the agreed upon scope, principles and procedures of the organization to specific decisions or policies (Steffek 2003). Democratic participatory or deliberative requirements are unnecessary because the “community” of a functional agency is voluntary and based on specific collective needs, not a community of fate (Hooghe and Marks 2003: 240). Functional agencies generally do not compete with general-purpose jurisdictions like states where authority on a variety of functions is granted over a political community (Hooghe and Marks 2003; Steffek 2003).

However, the problem of community in global governance cannot simply be dismissed as a misplaced “domestic analogy” when the line that divides the requirements of general-purpose jurisdictions from functional jurisdictions blurs. What conditions of community apply when previously functional organizations (say, trade bodies) spill over into the competencies of other agencies in areas such as economic development, health or the environment; move beyond delegation from legitimate state authorities; or command authority in areas publics view as inappropriate for delegation? Even when principals agree that these issues are legitimately addressed beyond the state, the old legitimacy requirements of what Keohane and Nye call the “club model” – of bargaining among tightly knit communities of officials of major states and agency staff on decomposable issues – no longer apply.<sup>26</sup> This points to the need for more research on how requirements of political community may vary dependent on conditions of global governance that prevail.

Also needed is research on how actual institutions could reconcile local community autonomy and self-

determination with regulatory regimes at higher levels of aggregation, which remains vague in cosmopolitan proposals. This omission is especially troubling when political theorists single out inattention to political difference as deliberative democracy's major weakness (Hauptmann 1999). Inclusion of marginalized groups requires not only access to participation but also openness to different modes of communication, recognition of social differences, and the possibility that the goal of deliberation may not be to reach a common understanding or common good *per se*, but might be precisely to better understand sources and terms of disagreement behind basic conflicts of values (Young 2001). Anyone who has observed trade officials from North and South debate the merits, implications or means to implement the Doha agenda of the WTO, to take one example of a well institutionalized area of global governance, will recognize this pattern of participants who use different modes of communication, have different narratives of their experiences with the international trade regime, and argue in a context of structural conflicts of interest. The authority, even survival, of the institution hangs in the balance of legitimately managing these differences and sense of marginalization.

IR scholars must also confront political theorists who ask whether even a shared fate is sufficient to produce a *demos*, being merely a descriptive category owing to living in an interconnected world (Williams 2003). While most theorists resist equating a *demos* with ethnocultural or linguistic characteristics, sharp disagreements persist on positive requirements for a sense of moral obligation that ties people's fate together. Must bonds be rational, as in a shared commitment to core political values such as equality and freedom, or based on institutionalized trust? Or, does loyalty bind members of political community to its structure of authority, rooted in affective attachments to a shared identity based in cultural cohesion, shared history and myths, or deep feelings of solidarity? (Ferguson and Mansbach 1996). Writers agree even less on the institutional or political mechanisms of shared decision-making to create and stabilize such bonds. Most accept that democratic governance presupposes "an institutional context characterized by intense communication" and publicity, but debate the role of mechanisms such as language policy or civic education in building citizen identities (Cederman 2001: 160-161; Williams 2003). IR scholars working with principled notions of legitimacy have an opportunity to explore these characteristics of burgeoning political communities in real-life quasi-experiments of new sites of authority, although the subjective and interpretive nature of such bonds raises methodological challenges.

Also glaringly absent from the global democracy literature is recognition of the importance of power in creating or maintaining effective political authority.<sup>27</sup> Driven by a normative agenda of constraining power and promoting democracy, writings are insensitive to the practical problem of how power might be transferred to enable institutions to enforce decisions, adequately regulate markets, or re-distribute wealth. Conversely, if authority is unlikely to be transferred – an undesirable outcome for many given commitments to local autonomy and problems of political community – work within a principled conception ought to consider more carefully how to reconcile needed political power which remains territorially based with the proliferation of new sites of authority demanded by civil society, states and market players (albeit for different purposes). New authorities absent power risk either ineffectiveness or obscuring power relations actually at work. The latter leaves them vulnerable to legitimacy problems because to the degree the institution is effective it will not reflect power legitimated by those processes.

### **Legitimacy as Legalization**

This second conception of legitimacy, as Claude put it uncharitably, "tend[s] simply to translate legitimacy as *legality*" (Claude 1966: 368). It assumes the "rule of law" creates its own aura of legitimacy. A special *IO* issue on "Legalization in World Politics" is the best contemporary example of this view. The editors define

legalization as “a particular form of institutionalization, [that] represents the decision in different areas to impose international legal constraints on governments” (Goldstein et al 2000: 386). Legalization is measured along three dimensions: the degree of obligation the rule(s) impose as measured by the degree the activity being governed is under the scrutiny, procedures, or discourse of international and domestic law; the precision of those rules in defining the conduct they authorize or proscribe; and the delegation to third parties of authority to implement or interpret the rules, such as dispute resolution or compliance bodies (Goldstein et al 2000: 386, Abbott et al 2000: 401-4).

Legalization qualifies as a candidate for legitimacy because once legalized, “discussion of issues purely in terms of interests or power is no longer legitimate” (Abbott et al 2000: 409). Instead, “Legalization of rules implies a discourse primarily in terms of the text, purpose, and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations, and particular facts” (Abbott et al 2000: 409). Yet, the latter observation is strikingly incongruous with the treatment of legalization as a dependent variable that can be explained, according to most contributors to the *Legalization* volume, by the play of power and interest. Though IR scholars may welcome attention to the influence of power on the substance and institutionalization of rules, the resulting incongruity between legitimacy and legalization, its proxy, is troubling.

Whereas the volume delivers an empirical research program into the causes and consequences of legalization – the outward sign of a legal order – it addresses only tangentially the legitimacy of positive law, which, “is sometimes the precise issue at stake in political controversy” (Claude 1966: 369). Gains in empirical tractability, and amenability to neo-utilitarian explanations, come at the cost of obscuring *why* international law creates a pull toward compliance. Answering why legalization matters and whose power it legitimates are surely as important as why legalization varies across issues and contexts, especially under prevailing conditions of global governance where coercive power and legitimacy are largely de-coupled. There is no basis for simply assuming that the degree of obligation, precision and delegation indicate the normative force of a rule.

Only Lutz and Sikkink’s contribution considers normative effects of international legalization, on democracy in Latin America. They find that legalization was insufficient to produce legitimacy, being only one element in a broader normative shift that de-legitimated particular violations of human rights and legitimated democracy. They conclude that the response of governments to international and domestic human rights norms cannot be understood “without confronting the issue of legitimacy and esteem,” especially for governments who “aspire to belong to a normative community of nations” (Lutz and Sikkink 2000: 658-9, Keck and Sikkink 1989: 29). Their emphasis on the motivation of reputation and socializing effects of international norms moves them toward a more sociological understanding of legitimacy as stemming from a social structure or normative community, whether or not formalized in law.

### ***Constitutionalization***

What makes legalization legitimate, then, rests on notions such as appropriateness, procedures, institutionalization or justice. When legalization becomes analogous to constitutionalization, such notions are invoked. As its nominal meaning suggests, constitutionalism implies a constitutive relationship of rules and practices by enabling certain kinds of action, or deeming them appropriate and acceptable. Constitutionalized rules become a basis on which to make judgements of acceptability or appropriateness. They may even generate a basis on which to create more rules or provide a foundation on which less fundamental rules rest. In this latter sense, constitutionalization overlaps with a constructivist understanding of legitimacy, as resting on legitimating norms.

Legalization blends into constitutionalism when rules define obligation “as an attribute that incorporates general rules, procedures, and discourse of international law,” which invokes what H.L.A Hart identified as

secondary rules of a legal system (Abbott et al 2000: 403). Whereas primary rules are regulative, obligating to do or refrain from certain actions, secondary rules are “about rules;” they “confer powers” to create or change primary rules (Hart 1961: 79). As constitutionalization progresses, those rules appear further removed from their original source of legitimacy in state consent and more deeply institutionalized.

Constitutionalization produces two possible scenarios. In one, legitimacy continues to rest on state consent, which is explicitly recognized in the constitutionalized system. For example, the U.N. charter, which comes closest to a universal constitution of the international system, in Article 2 (1, 4 and 7) entrenches fundamental rules of international law including sovereignty as recognition, sovereign equality, territorial integrity and political independence (which assigns sovereignty to the state), and non-intervention. These norms reinforce the legitimacy of state consent as the legitimate basis of obligation. Similarly, the system of international law itself contains a variety of well-institutionalized norms and procedures, including *pacta sunt servanda* (that international law is recognized and creates obligations) (Franck 1990: 187-8). Ultimately, those rules rest on the acceptability of that system by the recognized members empowered by it. This standard account of international legitimacy views international law as a hierarchy of rules that legitimates the power of the state (Brunnée and Toope 2000: 22 fn 8).

A second possibility, however, is that interpretation of rules can proceed independently or some steps removed from state consent, perhaps even empowering new actors. Here, rules not only independently bind states’ hands, but become a basis to interpret related rules: they become their own source of legitimacy. The legalization criterion of delegation to third party authorities, and resultant *judicialization*, is a direct manifestation of the movement of global governance in this direction (Abbott et al 2000: 403). Delegation, or the degree to which tribunals are insulated from the will of state governments, increases the more tribunals allow access by non-state parties, the higher their independence in rendering decisions, and the greater their ability to implement decisions through institutional mechanisms (such as domestic courts) without state vetoes and that operate independently of legislative or administrative acts of government (Keohane et al 2000: 458). Delegation, especially along the last criterion, signals movement toward the internationalization of authority since some functions of that branch of government would transfer to a previously external governing order.

From a legalization perspective, delegation *increases* legitimacy because it de-politicizes decisions, creates legal certainty, and protects rights. The European Court of Justice (ECJ), although not without critics, is a “best” case for this linkage. In contrast, the WTO dispute resolution mechanism, which performs similar functions in the protection of economic rights, faces a legitimacy crisis. One reason is that the ECJ makes decisions in a thick institutional environment where states have delegated a wide range of functions to regional decision-making and implementing bodies, in a complex system of evolving overlapping authority. In contrast, decisions of WTO panel and appellate body rulings occur within an otherwise thin institutional setting, which fits the first scenario of constitutionalization noted above. Thus, increased delegation undermines its own basis of authority, because it erodes the authority of states to interpret rules, and more significantly, to bring them into being or change them through their consent or state practice. (The WTO binding dispute settlement process can only be overturned by consensus of members, replacing a system of non-binding arbitration where panel decisions had to be affirmed by consensus, although institutionalized bargaining is a feature of both systems). The willingness of panels to rule in cases where WTO agreements are vague or extend rules into policy domains that lack consensual rules exacerbates this problem. Critics thus see a “supranational Behemoth, not democratically accountable to anyone” and worry that constitutionalizing the multilateral trading system “will only exacerbate the legitimacy crisis” without greater democratic contestability, access, and accountability (Howse and Nicolaïdis 2001: 228).

Here, the “rule of law” easily blends into the “rule of lawyers” (Weiler 2001: 339). In contrast to domestic bureaucracies, WTO panels of trade lawyers lack institutionalized mechanisms of accountability that bind experts to private actors or their legitimate political representatives. It is perfectly understandable in these circumstances that popular mobilization and protest target especially institutions that appear to operate under delegated legal authority. Although other targets of protest such as the IMF and World Bank have no formal delegated authority to adjudicate or make rules, they develop detailed policies that can become legally binding when part of loan conditions (Abbott et al 2000: 417).

The pressure to allow non-state actors affected by the consequences of decisions to have access to these bodies, even when they are not objects of rulings, suggests that citizens have not delegated to governments’ the authority to internationalize the state. One should therefore also expect increased attention to lesser-known standard setting bodies such as the Codex Alimentarius Commission in the case of food safety or the International Organization for Standardization that make decisions with potentially legally binding consequences, since their standards may be recognized by other adjudication bodies such as WTO panels (Skogstad 2001).

Constitutionalization and legitimacy are also in tension when bodies with delegated authority institutionalize unequal access to decision-making by some segments of society over others. Whereas the legitimacy of governments rest, at least formally, on guaranteed access of all citizens to their political representatives and the courts, delegated international authorities frequently limit access to states or, more problematically, to corporate actors. Unequal access occurs because even in the case of the ECJ, the bulk of law “has been directed toward creating the rights of economic citizenship, not building precedents in social or civil rights” (Kahler 2000: 667-8). The impetus for such legalization comes from corporations and investors who want a stable, transparent and rule-governed policy environment to protect them from perceived arbitrary political or regulatory interference. The effect, however, is to institutionalize rules and processes in international economic organizations that entrench rights for investors and corporations.

The problem is not simply that unequal distributional consequences may result – the focus of rational institutional analysis – but that differential access and lack of societal accountability appear especially illegitimate when decisions on trade or investment rules designed to provide rights for corporate actors pass judgement on public policies with implications for individual citizens or communities, such as in environment or health. Whether motivated by genuine health or environmental reasons, or by thinly disguised protectionism, legalization that institutionalizes unequal access to those with the authority to make that determination will understandably lead to demands for access by affected third parties.

Such demands follow similar trends in domestic judicial systems where, to maintain their own legitimacy, *amicus curiae* briefs are increasingly accepted in cases of constitutional or broad public policy significance (Epstein & Knight 1999, Roach 1993, Morton & Knopff 2000: 25-6, 54-6, Epp 1998). Greater pressure on international tribunals to delve into areas of ambiguity or silence strengthens the case for the legitimacy requirement of *amici* briefs internationally. The WTO finally responded to these pressures in two cases with environmental and health implications, *Turtle-Shrimp* and *Asbestos*. Ultimately, one must ask what limits legitimacy imposes on states to delegate away authority to third parties outside of state constitutional jurisdiction.

### ***Re-connecting with power and principles***

The above discussion points to the need for IR scholars working with a legal conception to pay closer attention to the internal structure of law that gives it an aura of legitimacy, but to do so in a way that does not give up the insights into political authority that come along with more explicit attention to power and interests.

One possibility is to look more closely at the role and expression of power in processes of constitutionalization and judicialization, as have some critical legal scholars (Howse 2001). This is especially needed if constitutionalization no longer rests on “a power-legitimizing ‘rule of recognition,’” which explicitly acknowledges the legitimization of state power (Brunnée and Toope 2000: 22 fn 8). Alternatively, if international law is truly a horizontal, non-hierarchical system, then more careful work needs to be done on how law internally generates legitimacy. One such effort comes from transaction theorists. Drawing on the legal theory of Lon Fuller, they emphasize law’s “internal morality” based on criteria such as avoidance of contradiction, generality, and congruence with underlying rules, although legitimacy also depends on “cooperation between the governing and the governed” rooted in social practices and conventions among actors (Brunnée and Toope 2000: 49-53, 66). Such cooperation makes rules understandable, creates stable expectations, and “thick” acceptance of norms. Sociological conceptions similarly root legitimacy in shared understandings and goals of a community. Still, critics may argue that this characterization obscures structural power in the creation and effectiveness of international legal rules. A sociological conception allows more explicit attention to this possibility, although it is open to the opposite criticism, that its lack of a link to “internal morality” or “truth” may limit its utility in explaining legitimacy.

### **A Sociological Conception**

Sociological conceptions of legitimacy share an attention to the society in which the rule or institution operates. Legitimacy is rooted in a collective audience’s shared belief, independent of particular observers, that “the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”(Suchman 1995: 574). This view corrects the common mistake of confusing internalization of a rule or norm by individuals as synonymous with its legitimacy (Hurd 1999: 388). Even when norms possess a “taken-for-granted quality”, sociologists identify legitimacy with cognitive “exteriority and objectivity” (Zucker 1983: 25). Legitimation involves institutionalization in the form of formal and informal rules, laws, declarations, and/or practices that become authoritative or understood to obligate by members addressed, whether or not they choose to comply.

This move turns attention to the substance of rules, or the values and goals promoted. To be legitimate, rules and institutions must be compatible or institutionally adaptable to existing institutionalized rules and norms already accepted by a society. All rules need not be consistent – institutions can embody rules that uneasily coexist – but those uneasy combinations then become the basis of legitimacy for new or related rules. A “contagion of legitimacy” links new elements in an institution with networks of related functions already institutionalized (Zucker 1991: 105).

Extrapolating this perspective to the problem of governance, rules that make up a social structure of governance define authority relationships and empower actors and institutions that participate in those relationships and construct governing institutions through their interactions. These practices in turn become institutionalized – or accepted – as “appropriate” by the community in an ongoing process of legitimization and delegitimation. Thus, there is a constant interaction of rules with the social purposes and goals of relevant audiences. But unlike in a principled conception, the question of legitimacy in many sociological accounts, following Weber, bears no particular relationship to truth or right (Connolly 1984: 18). Rather, the question is interpretive: what basis of legitimacy holds sway in a particular society or how does a prevailing political order generate an intersubjective *belief* in its legitimacy? Thus, a “traditional” mode of legitimation such as medieval religious authority (divine right of kings or sacral legitimacy of the Church) is potentially as valid as contempo-



rary political legitimacy derived through deliberative processes, accountability, and rule of law. It depends only on the historically contingent values, goals, and practices of the relevant society. In terms of global governance, different audiences of states, global civil society, or marketplace actors may share different criteria or weightings of “input” versus “output” legitimacy.

### ***Identifying Continuity and Change in Global Authority***

IR scholars influenced by this perspective have primarily sought to identify legitimate criteria for membership in international society, the legitimate bases of international systems, and by extension, to identify systemic change. This work owes an intellectual debt to the English School, especially Hedley Bull’s view of international society. Bull identified the legitimate basis of modern international society to be sovereignty of states and rules that spell out reciprocal requirements for sovereign states to coexist, including those that restrict the use and purposes of violence, rules of diplomacy and treaties. These institutions are justified by the fundamental goal of minimal security against violence (Bull 1977: 58, 69). Sovereignty is constitutive of contemporary world politics “as opposed to such alternative ideas as a universal empire, a cosmopolitan community of individual human beings, or a Hobbesian state of nature or state of war” (Bull 1977: 67-8).

Constructivists similarly view norms that define “who counts as a constitutive unit of the international system” as the deepest<sup>28</sup> within a hierarchical international social structure composed of “levels” of norms.<sup>29</sup> More foundational levels are not limited to rules about rules, as in Hart’s formulation, but include rules that constitute the actors who make rules and can define their substantive rights and obligations, in effect defining which political institutions and practices are viewed as appropriate. Characterizing norms as arranged in a hierarchy usefully depicts social structure as an authority relationship or structure of governance, in which norms at more fundamental levels enable and constrain less fundamental institutions (Wendt and Duvall 1989: 64). For example, norms that govern cooperation must be consistent with deeper norms that empower states with status as sovereign actors. Empirical work influenced by sociological institutionalism also stresses the causal and constitutive significance of existing institutional arrangements in providing legitimate foundations for new rules and practices, including new institutions such as the European Bank for Reconstruction and Development, specific norms such as transparency, or complexes of norms that define appropriate behaviours and set the boundaries for action in areas such as environmental governance (Weber 1994, Florini 1996, Bernstein 2001).

This conception of social structure possibly explains the difficulty non-state actors face when making legitimacy claims in international institutions rooted in Westphalian norms. Similarly, it explains why states resist when fundamental norms of authority are threatened by governing institutions beyond the state, since they traditionally depend on such institutions to *reinforce* sovereignty. Willingness to *accept* changes (i.e., without coercion) in those norms may only be an option for the most secure states or where historical circumstances have made such shifts possible or desirable – and Europe may be alone in this regard. Change is always possible through processes of delegitimation, but social structure can be a conservative force, providing rules and resources that legitimate some avenues for change but not others.

These insights have been applied to advance understanding of systemic change by drawing attention to how legitimating norms enabled new actors and defined the distribution of authority in different historical systems (Ruggie 1986, Hall 1997, Reus-Smit 1999). Whereas many non-constructivists also identify shifts in actor identity as an indicator of systemic transformation,<sup>30</sup> constructivists emphasize that change depends on whether norms legitimate such shifts and empower those new centres with authority, thus changing the basis on which world politics and governance is conducted. Whether shifting identities lead to changes in warfare, diplomacy, interactions, or distribution of resources is an empirical question. Nonetheless, whereas realists

may be correct that such changes will not lead to an end to violence, historical evidence suggests that such changes can influence what people fight about.

Systemic change can occur either by disaggregating the link between sovereignty, territoriality and the state, or by an alternative norm to sovereignty that enables multiple and overlapping authority claims. The empirical question is whether apparent shifts in authority challenge fundamental sovereignty norms, and, more profoundly, whether alternative norms become their own source of legitimacy, providing a new institutional basis on which authority can be claimed.

This view highlights the burden on cosmopolitans to defend their position that globalization has undermined the “givens” of sovereign authority and democracy, rather than merely affected state autonomy, which is compromised any time a state enters an agreement or allows transactions across borders. Only threats to authority – the right to rule – reflect a possible shift in the basis of international legitimacy. Determining such a shift can be tricky.

One concrete proposal is to distinguish delegations from transfers of authority (Kahler and Lake 2000: 11). Significant delegation of power to third parties can arguably occur without giving up “residual rights” that define areas of decision-making reserved to the actor, “up to and including the right to determine the terms of the delegation itself.” However, practical difficulties arise in determining whether residual rights of actors have actually been reduced or transferred simply by observing behaviour, since failures to act do not necessarily indicate the loss of a right to do so (Kahler and Lake 2000: 11-2). For example, Pauly, commenting on the global financial system, observes that the behaviour of states in times of financial stability indicates the apparent relinquishing of authority to the private sector or self-regulating organizations. But, the test is hard times, when “the overarching issue of social justice returns to counterbalance ideological demands for ruthless efficiency” (Pauly 2002: 87). If residual rights of control continue to reside in states as agents of legitimate public authority, we should expect them to reassert their regulatory power. However, if authority has truly been transferred, or worse, relinquished without the establishment of a new legitimate basis of authority upon which the global financial system rests, markets collapse (Pauly 2002: 87).

Pauly’s assertion that legitimacy ultimately requires social justice points to an important limitation of a sociological approach, its neglect of legitimacy’s “immanent relation to truth” (Habermas 1973: 97). If Habermas is right that, to avert future crises, legitimacy cannot be grounded in mystification, ideology or outright manipulation,<sup>31</sup> links between principled and sociological conceptions require further exploration. It may be that democratic legitimacy rooted in justice or fairness is the unavoidable substantive basis of legitimate governance, whatever the level. The relevant question becomes whether the expansion and reach of mechanisms of global governance, driven by integrating financial markets and hyper-trade liberalization, will extend questions of legitimacy to areas formerly left to international bureaucracies on the fringes of consciousness, just as Habermas argued occurred when the post-war welfare state expanded into more areas of economic and social life in order to maintain economic performance. That expansion “enhance[d] the visibility of the conventional and political dimension of social life and encourage[d] citizens to ask the state to legitimize the particular conventions supported by its action” (Connelly 1984: 13). Not coincidentally, mechanisms of global governance are becoming more visible at the same time as governments increasingly absolve themselves of responsibility for managing the economy. Under such circumstances, legitimacy demands on the institutions themselves increase as they appear authoritative to ordinary citizens who view them as the institutional embodiment of globalization. Hence, civil society looks to these institutions to provide social justice and equity, not just financial stability (Devetak and Higgott 1999).

***The power of legitimacy or legitimation of power?***

One advantage of a sociological understanding of legitimacy is its ability to explain the power of legitimacy to affect behaviours and social practices. In the boldest assertion of this argument, sociologists John Meyer and his colleagues argue that the rules of “world society” not only co-constitute state sovereign identity, reinforcing state authority, but also “define and legitimate agendas for local action... in virtually all of the domains of rationalized social life – business, politics [i.e., citizenship], education, medicine, science, even the family and religion” (Meyer et al 1997: 145). Similarly, constructivist IR scholars have argued that international organizations and transnational movements can “teach” legitimate purposes to states (Finnemore 1996, Keck and Sikkink 1998). These explanations for widespread isomorphisms in domestic practices and state identities rest on a view of world society as at least semi-autonomous, and causally important. If the rise in extra-territoriality associated with globalization accelerates the scope and reach of institutions and associational life beyond the state, we should expect world society’s share of the explanation for legitimate roles and functions of states and governments to increase.

Yet, this argument is oddly devoid of power. It assumes legitimacy independently produces authority. A sympathetic realist reader might simply respond that norms of international society recognize the authority of states, where material power remains largely concentrated. Thus, authoritative norms reflect the social purposes and bargains of dominant states (Ruggie 1982). But if international or “world” society is indeed an autonomous realm of authority, an alternative understanding of power is needed.

One possibility is that the co-constitution of the rules of world society and state institutions mask domination or disciplining of identities and action. Michel Foucault’s concept of “governmentalization” – emergent or self-organizing networks of governance, productive of individuals’ identities and practices – captures such a process (Foucault 1991, Douglas 1999). Global governance or “governmentality” can be seen as the extension of the reach of disciplines or epistemes – the background knowledge that passes “the command structure into the very constitution of the individual” – into other sites of authority, thereby empowering and legitimating them (Douglas 1999: 138). New sites of authority simply extend beyond the state a process of diffusion and internalization of epistemes such as “globalism, competitiveness, self-motivation, rapidity, agility... etc” (Douglas 1999: 152). Here legitimacy is explicitly linked to power in terms of how background normative, ideological, technical and scientific understandings are productive of modes of behaviour and interaction.

This linkage to productive power highlights that not all value change legitimated internationally is “progressive” or empowering of individuals or global civil society. Power, not only culture and associational life, may determine the form and content of social purposes, whether of states, firms, or individuals. This perspective points to the need for a critical research program focused on revealing productive power at work, through mechanisms such as surveillance, statistical analysis of populations, and rationalized discourses.<sup>32</sup> Critical scholars have already pointed to the disciplining effects of neoliberalism, where political and legal processes “lock in” neo-liberal reforms that protect property rights, macroeconomic stability and capital mobility, and divorces them from political interference (Gill 2000, Upham 2002). As noted in the earlier discussion of constitutionalization, the empowerment and legitimation of corporate actor rights is already underway through bodies of international trade and investment law, and institutions such as the WTO or ECJ. The spread of the rule of law itself might also be examined as disciplining – masking power dynamics, empowering actors with technical and legal expertise, and legitimating particular modes of governance. Such a research program, however, risks degenerating into the extreme position that all legitimation must be resisted, because authority in all its guises is always a “mode of normalization” (Beiner 1997). It is incumbent on critical researchers to state their normative commitments rather than hide behind a naïve utopian vision that believes an absence of norms

would somehow make the world a more habitable place.

Indeed, the absence of explicit attention to justice is the primary weakness of a sociological approach, perhaps to the surprise of critics of constructivism who see it in an old-style idealism. Legitimizing norms can become institutionalized that entrench unequal power relations, empower illiberal actors, provide unequal access to decision-making, and establish institutions that, by design or effect, produce unequal distributional consequences.<sup>33</sup> The sociological view is only that such institutions rest on norms accepted by the members empowered to act in the governing system.

In practice, however, legitimacy may be undermined if members of the community notice a disjuncture between the justice claims a legitimate order makes and consequences that belie such claims. This has led some constructivist scholars to focus on the force of principled arguments in the emergence of new bases of legitimacy. But determining the relative causal importance of justice concerns and material and social causes in societal change is extremely difficult, as the debate over what caused the transition in domestic governing legitimation towards democracy at the end of the Cold War attests. The initial attention by constructivists to actors such as norm entrepreneurs and transnational social movements as agents of change sits uneasily with a conception of legitimacy rooted in a logic of appropriateness and institutional legacies (Finnemore 1996, Keck and Skikink 1998, Finnemore and Skikink 1998). This may account for the recent turn to deliberative democratic theory and an emphasis on the importance of argumentation and justification to create or sustain legitimate authority.<sup>34</sup> Emphasizing process has the potential to bring the various traditions of thinking about legitimacy in global governance together, but still lacks a causal theory of when norm change is likely to occur. That may still depend on rules and resources enabled by existing social structures and by what social purposes and power dynamics dominate in given communities.

## **Conclusions**

The three traditions of legitimacy explored are not conceptually exclusive. My division of the literature was simply pragmatic: to pull out the assumptions and reasoning behind particular strands of research actually undertaken by IR scholars, to draw out their logic and utility. No conception completely captures the relationship between power, legitimacy and community, the pillars upon which political authority rests. Below are some general conclusions that stem from the above analysis.

First, legitimacy in global governance is not conducive to formulaic lists of requirements. It is highly contextual, based on historical understandings of legitimacy and the shared norms of the particular community granting authority. Institutional mechanisms designed to respond to legitimacy demands must be appropriate to social and community context. All three conceptions of legitimacy overlap on this point in an emerging emphasis on the importance of communication and developing shared understandings of what is legitimate. Legitimacy is unlikely to develop when communities affected do not share enough of a common “lifeworld” to make such communication possible. Given different experiences and narratives of important actors in world politics, accommodation of difference will increasingly add to that challenge.

The reflectivist insight follows that our arguments and theories about legitimacy in global governance affect the nature and content of legitimacy demands put forward. New demands for accountability and deliberation partially result from changing understandings and arguments about how world politics ought to be conducted, who deserves a voice, and who counts as a member of relevant communities.

In addition, four hypotheses worth further investigation emerge specifically from attention to how legitimacy links to political community and power. First, the relative legitimacy enjoyed by proliferating private and

hybrid market authorities can be explained, in part, by a common lifeworld, enhanced technologies and modalities of communication, and some degree of shared knowledge and normative frameworks within relevant communities of transnational market actors and government officials. In other words, those communities meet minimal conditions enabling of political community. For example, private market authorities and networks tend to share a focus on pragmatic and performance oriented criteria of legitimacy according to standards developed by network members (Porter 2003). Legitimacy is also enhanced when such networks are open to new participants and link to other networks as well as generalized norms in international law and politics (Porter 2003). Challenges to their legitimacy frequently arise owing to their spillover effects, which broadens the relevant community basis of authority. The power dynamics behind such networks are also in need of investigation. Markets are one obvious source of resources, but a combination of overt political power and disciplinary power may also be at work in the form of the implicit or explicit influence of the domestic rules or standards of major states where markets or corporate headquarters reside.

Second, the corollary hypothesis is that the relative paucity of civil society-led authorities stems from their difficulty meeting conditions of political community owing to the diversity of social purposes and understandings of the world among civil society organizations. However, the degree to which such authorities link to accepted global norms increases their legitimacy. It follows that community building is as important as criteria such as accountability, in attempts to increase the authority of governing schemes that link civil society and market actors in governing networks. Examples include the UN Global Compact, established to promote transnational corporate responsibility, and civil society-led certification schemes (Ruggie 2001). Such a strategy, however, risks a conformist agenda that may sit uncomfortably with some members of global civil society.

Third, supranational authorities, most notably the EU, enjoy legitimacy to the degree their political aims and public policies reinforce the social purposes of members and build on institutional legacies. In the case of the EU, legitimacy is rooted in the acceptance of its market functions, since its legitimate purpose has been primarily to lower market barriers (Greven 2000). However, legitimacy problems arise when agreed upon collective social purposes spill over into areas less easily dis-embedded from particular communities' conception of appropriateness. For example, supranational institutions will inevitably have difficulty governing the contradictions between the neoliberal goal of open markets and social goals that may be inconsistent. Criteria identified under a principled conception of legitimacy inevitably re-emerge in such circumstances. This argument suggests that new collective purposes – not simply the broadening of competencies – is the primary challenge to the EU because it can undermine its institutional legitimacy unless such changes are linked more directly to affected communities.

Fourth, legitimate authority in global governance is likely to continue to reflect centers of political power, especially major states, owing to their material and epistemic resources, at least as long as their policies reflect the will of domestic political communities. However, the sociological insight that international legitimacy is mutually constituted suggests that even powerful states can become bound by legitimating norms and the expectations they generate. The corollary is that powerful states' failure to overturn or re-define accepted rules and norms in the breach could equally undermine legitimacy of international institutions. Power and legitimacy are closely bound up in political authority. This argument reinforces what many foreign policy commentators have already noted, that contradictory normative tendencies in American and European (especially French and German) foreign policy pose perhaps the most serious current challenge to legitimacy in global governance.

## NOTES

1 Private and hybrid authorities usually consist of transnational market players in self-governance arrangements (Cutler et al. 1999; Clapp 1998; Hall and Biersteker 2002). However nongovernmental organization (NGO)—led authorities are also emerging that create rules, norms and implementing mechanisms in areas such as sustainable forestry, fisheries, tourism, and food production (Cashore 2002).

2 I use this generic term although specific instances of governance more frequently apply to subsets of actors. General treatments include Rosenau and Czempiel 1992; Rosenau 1995; Murphy 2000.

3 Ikenberry 2002 makes a similar argument.

4 Franck 1990; Hurd 1999. Even Kissinger (1964) recognized that a legitimate order could limit the scope of conflict by setting the bounds of diplomacy and legitimate foreign policy.

5 Franck 1990; Hurd 1999; Steffek 2003; Coicaud and Heiskanen 2001 are notable exceptions.

6 Kissinger 1964.

7 Franck 1990; Hurd 1999.

8 Unlike social contract theory as it developed to legitimize government authority in the state, no political philosophy recognizes the legitimacy of a process where states give over their authority comparable to individuals entering a contract to give up (authorize) sovereignty to a ruler (Hobbes 1968 [1651], 187), or to self-legislation, following Rousseau and Kant.

9 Coleman and Porter 2000, 380-382.

10 On forms of power in global governance, see Barnett and Duvall forthcoming.

11 For example, Keohane and Nye 2001.

12 Franck later (1995) acknowledged that an emerging global community means the value of fairness, which comprises distributive justice and legitimacy, applies in international law and institutions. Still, his conception of international legitimacy remains rooted in right process among states while democratic legitimacy is nationally bound. Participation by other actors is limited to help ensure compliance, domestic democracy, or proper representation of state populations (Marks 2001, 60-66).

13 Notably Held 1995, 1997.

14 The recent shift in language from substantive to “output” legitimacy is unfortunate in this regard. The former implies judgements concerning legitimate outcomes, especially regarding values such as autonomy, fairness and equality. The latter attaches value to performance criteria, primarily economic efficiency, although sometimes it includes effective social service delivery.

15 Rawls (1996, 427-429) claims to have a procedural notion of legitimacy, which is related institutionally, but not identical to justice. However, he also argues that assurances of procedural legitimacy would weaken over time in a society that deviates significantly from principles of justice: “laws cannot be too unjust if they are to be legitimate.”

16 Examples include the .7 per cent GDP target for foreign aid, the norm of “common but differentiated responsibility” for global environmental protection, and “special and differential treatment” provisions in various Uruguay round trade agreements. No current mechanism requires distribution of resources from rich to poor countries.

17 Coleman and Porter 2000, 388-390; Keohane and Nye 2001; Bohman 1999; Woods 1999.

18 Experts frequently gain authority owing to the technical demands of global governance, such as to interpret trade rules or develop technical standards (Coleman and Porter 2000, 380-382).

19 Wallach 2000, 34. The “anti-globalization” label masks a diverse movement. Many activists contest neoliberal policies more than globalization.

20 Beitz 1979; Rawls 1971, 83, 302. Notably, Rawls explicitly rejects its international application in both Theory and Law of Peoples, instead arguing only for “a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime” (1999, 37).

21 Held 1995, ch.12; Young 2000, 265-275.

22 On deliberative democracy, including formulations critical of Habermas’s idealized version, see Hauptmann 1999; Benhabib 1996.

23 Habermas 1979, 178-179. Rawls (1996, 372-434) claims his concept of public reason responds to the requirement of argumentation and justification, although it is hard to escape the view that the consensus that Rawls’ reasonable and autonomous individuals would reach is pre-ordained. Given the conditions of Habermas’s ideal speech situation, however, including “an ideally expanded audience...without limits in social space and historical time,” one might expect similar

- outcomes to what would occur by public reason (Habermas 1996a, 322).
- 24 Risse 2000. See also Zürn 2000.
- 25 Risse 2000, 10-19. On Habermas's concept of lifeworld, see Chambers 1996, 126-130.
- 26 Keohane and Nye 2001. Franck 1990, 38 also uses the analogy of "club" rules, but to argue that horizontal rules of international law obligate because "club" membership (i.e., of states) confers a desirable status. If correct, the erosion of the club model poses a greater threat to legitimacy than Keohane and Nye suggest since a middle ground between global democracy and the "club model" lacks an alternative basis of desirable status that will motivate rule addressees to comply.
- 27 Bohman 1999 is an exception.
- 28 Ruggie 1998, 20; Kowert and Legro 1996, 467-468.
- 29 For example, Frost 1996; Kocs 1994; Ruggie 1998; Reus-Smit 1997; Wendt and Duvall 1989; and Kowert and Legro 1996.
- 30 For example, Gilpin 1981; Spruyt 1994.
- 31 See Connolly 1984, 12-13. Habermas (1973) makes this argument to critique the Weberian conception.
- 32 The same processes, ironically, that Meyer et al. (1997, 164-166) identify as instrumental for diffusion of norms of world society.
- 33 See Bull 1977, 93-98.
- 34 Risse 2000; Brunnée and Toope 2000; Sending 2003; Meyer et al. 1997, 145-146; Steffek 2003.

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## Institute on Globalization and the HUMAN CONDITION

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*The Institute on Globalization and the Human Condition was created in January 1998 following the designation of globalization and the human condition as a strategic area of research by the Senate of McMaster University. Subsequently, it was approved as an official research center by the University Planning Committee. The Institute brings together a group of approximately 30 scholars from both the social sciences and humanities. Its mandate includes the following responsibilities:*

- a facilitator of research and interdisciplinary discussion with the view to building an intellectual community focused on globalization issues.
- a centre for dialogue between the university and the community on globalization issues
- a promoter and administrator of new graduate programming

*In January 2002, the Institute also became the host for a Major Collaborative Research Initiatives Project funded by the Social Sciences and Humanities Research Council of Canada where a group of over 40 researchers from across Canada and abroad are examining the relationships between globalization and autonomy.*

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*To foster dialogue and awareness of research among scholars at McMaster and elsewhere whose work focuses upon globalization, its impact on economic, social, political and cultural relations, and the response of individuals, groups and societies to these impacts. Given the complexity of the globalization phenomenon and the diverse reactions to it, it is helpful to focus upon these issues from a variety of disciplinary perspectives.*

*To assist scholars at McMaster and elsewhere to clarify and refine their research on globalization in preparation for eventual publication.*

### **“The Elusive Basis of Legitimacy in Global Governance: Three Conceptions”**

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