2011

Matters of Preference: Tracing the Line between Citizens, Democratic States, and International Law

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In this Article, we assess the role that the aggregation of citizen preferences into the foreign policy choices of a democratic country might play in the legitimization of international law. After addressing some of the theoretical and empirical issues of such an approach, we use a variation of an anticipated reaction model to show that even in large democracies there are mechanisms through which citizen preferences can be and are reflected in the policy choices of their representatives. Incumbents and candidates for public office take policy positions in hopes of maximizing their future election chances. Although policymakers each have their own personal policy preferences, those preferences must be balanced against those of the electorate to optimize the prospects for future election. Rational, well-informed policymakers anticipate future electoral consequences of public opinion and adjust their present policy positions accordingly. We then discuss the implications of such an approach for the principle of subsidiarity and the participation of states in multilateral

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institutions, in particular the International Monetary Fund. We argue that there is reason to believe that citizen preferences remain relevant in decisions whether to centralize or decentralize and in decisions whether a state will support or undermine the mission of international institutions. Those preferences must be considered as those institutions make their own substantive and procedural choices.

I. INTRODUCTION

The current international economic crisis underscores the difficult problem of the legitimacy of international law, as decisions made on the international level impact individuals, families, and communities worldwide. There have been several responses to this challenge.[1] Among them is the claim that the legitimacy problem is ameliorated to the extent that a nation state enjoys a democratic form of government, in which citizens have some say in the adoption of laws and regulations that bind them. This Article explores one aspect in which that claim is true by modeling situations in which the preferences of citizens in a democracy are reflected in the decisions of policymakers, who then try to influence decisions on the international level. This Article acknowledges the theoretical and empirical limitations of this approach. Nonetheless, there is value in describing formally what a number of scholars have observed, that at times, foreign policy issues become sufficiently important to citizens that policymakers must consider the preferences of even diffuse citizen groups when they formulate and advance solutions to various international issues. This observation, of course, is only half of the equation since the mere fact that citizens have some impact on foreign policy decisions on the national level could mean little when decision-making moves to the international level. Nevertheless, understanding what happens within a democratic state serves as a starting point from which to assess what happens as states interact and try to influence international decisions.

This Article consists of three substantive parts. In Part II, it describes the underlying legitimacy problem and situates, within an array of possible responses, the democratic state's answer to that problem. Certain replies to the legitimacy problem rely on the state as the intermediary through which consent to be bound by international law and accountability by international bodies to citizens occur. It is appropriate then to ask whether such consent and accountability represent, in any meaningful way, actual citizen preferences about such issues. If they do, the democratic state is a relatively strong response to the legitimacy problem.

The remainder of Part II identifies and discusses theoretical and empirical challenges of such an approach. Among these challenges are the limits of an aggregative understanding of democracy, and concerns whether

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[1] *See infra* notes 4-9.

the public has any interest in foreign policy matters and whether leaders respond to the public in any case. Such limits and concerns are significant. However, with respect to aggregation, there are reasonable responses to challenges to the basic assumptions of any social-maximizing approach, including beliefs about human behavior and the formal problems raised by collective action. Furthermore, although legitimacy has several facets, one powerful claim is that legitimate governments are those that respond to the wishes of their citizens. With regard to citizen impact, our review of the literature indicates that although the public often leaves foreign policy matters to elected leaders and experts, there are times when the public does care about foreign policy. Under such circumstances, elected officials often do respond to that concern.

In Part III, this Article makes a more formal argument by adopting an anticipated reaction model, which describes policymakers' decisions in relation to the preferences of voters. The model that this Article adopts assumes that, as rational actors, policymakers make policy decisions with the expectation of maximizing future election chances. While policymakers have their own personal policy preferences, those preferences must be balanced against those of the electorate. Thus, whether out of political expediency or out of a desire to represent the interests of their constituents, rational and well-informed policymakers anticipate the future electoral consequences of public opinion and adjust their present policy positions accordingly.

In Part IV, this Article explores some of the implications of the model and directions for further research. With regard to the latter, the most important task—expressing formally how norms might be adopted at the international level after a democratic state adopts its own norms through the process described here—must be left for another time. However, at this point, this Article argues that, at a minimum, the model has implications for two areas of international law. First, a model that takes seriously the possibility for citizen impact on foreign affairs helps better assess subsidiarity, which itself has been proposed as a criterion for the legitimacy of international law. Second, such a model lends support to arguments for broad state participation in multilateral organizations and in other international governing bodies.

II. DEMOCRATIC STATES AS A "SOLUTION" TO THE DEMOCRATIC DEFICIT

A. *The Problem and Its Solutions*

Over the past two decades, it has been so widely accepted that democracy is the primary source of legitimacy of government and of law that some scholars speak of an emerging international right to democracy.[2] As this

[2] *See, e.g.*, Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Amartya Sen, *Democracy as a Universal Value*, 10 J. DEMOCRACY 3 (1999). For a

consensus was emerging, the scope of international law was already expanding both its reach and penetration into areas traditionally reserved to states. These two trends raise a troubling question: if democracy is the primary source of the legitimacy of government and law, what does this mean about the legitimacy of international law arising from institutions and methods of governance that can be far from democratic? As Kumm puts it:

> Citizens find themselves in a *double bind*: the meaning of participation in the democratic process on the domestic level is undermined as international law increasingly limits the realm in which national self-government can take place. At the same time, there are no comparable democratic institutions and practices established on the international level.[3]

In a recent paper, Keohane, Macedo, and Moravcsik reviewed three conventional responses to the legitimacy problem, two of which are significant here.[4] The first response, based on legitimacy derived from accountability, argues that policy decisions made by international multilateral institutions are "directly accountable to [their] member states, and thus indirectly accountable to publics in the democracies among them."[5] Keohane, Macedo, and Moravcsik point out that multilateral institutions have limited coercive powers compared to states, are largely controlled by national governments through appointments to such institutions, require supermajority votes, consensus or unanimity to act, and require national implementation of policies.[6] In this view, such "mechanisms add to a high level of accountability, albeit mostly indirect, and render the arbitrary exercise of power by international institutions far less likely."[7]

The second response, grounded in consent theory, argues that the power given to multilateral institutions has been "delegated democratically and

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relatively recent review of the literature, see Jan Wouters, Bart De Meester & Cedric Ryngaert, *Democracy and International Law* (Leuven Interdisciplinary Research Group on Int'l Agreements & Dev., Working Paper No. 5, 2004).

[3] Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 912–13 (2008). For general discussions of the issue, see ALFRED C. AMAN, JR., THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM (2004); Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237 (2000).

[4] Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism* 5–6 (Inst. for Int'l Law & Justice, N.Y. Univ. Sch. of Law, Working Paper No. 2007/4, 2007), *available at* http://www.jhfc.duke.edu/ducis/GlobalEquity/documents/Keohane_paper.pdf.

[5] *Id.* at 5 (emphasis removed).

[6] *Id.* at 5–7.

[7] *Id.* at 8.

could . . . be rescinded that way."[8] According to this view, ratification processes on the domestic level provide ample room for democratic deliberation and governments often retain the right to withdraw from international institutions. Thus, it is arguable that citizens indirectly give their consent to international exercises of power through their national governments.[9]

Both the accountability-based and consent-based responses to the legitimacy problem view the state as an intermediary between citizens of a democracy on the one hand and international institutions on the other, through which accountability and consent flow. But if these models are to have legitimizing force, one should be able to trace a line between the choices of citizens through the state, and then on to decisions made on the international level. As Kumm puts it, "from the perspective of citizens in a constitutional democracy, [the state] is just the institutional framework within which citizens govern themselves."[10]

To be sure, for Kumm and others, the connection is tenuous—either because of the waning influence of states on the international level[11] or because of an apparent inability of citizens to influence political decisions on the domestic level, let alone on the international level. Therefore, one must

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[8] *Id.* The third general response that the authors describe is that international law is justified out of necessity, i.e., that some issues can be addressed effectively only at the international level is its own justification. Keohane, Macedo & Moravcsik, *supra* note 4, at 6–7. *But see* J.H.H. Weiler, *The Geology of International Law—Governance Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547, 562 (2004) ("That a legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes none at all.").

[9] Keohane, Macedo & Moravcsik, *supra* note 4, at 5–6. Indeed, Guzman and Landsidle argue that the actual amount of state delegation of authority to international bodies is quite modest. Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1694 (2008).

[10] Kumm, *supra* note 3, at 910. J.L. Brierly shares this view: "[S]tates . . . are merely *institutions*, that is to say, organizations which men establish among themselves for securing certain objects . . . . They have no wills except the wills of the individual human beings who direct their affairs . . . ." J.L. BRIERLY, THE LAW OF NATIONS 126 (Humphrey Waldock ed., 6th ed. 1963). Kumm is primarily interested in the growing influence of multilateral institutions at the expense of states, because "[a]nything that imposes constraints on states also imposes constraints on citizens and how they govern themselves." Kumm, *supra* note 3, at 910.

[11] Kumm argues that changes in three dimensions of international law have led to a form of international governance that "blurs the distinction between national and international law," and implies greater constraints on states and thus their citizens. Kumm, *supra* note 3, at 915. First, the subject matter of international law has expanded from discrete, technical matters with little political salience to areas that matter a great deal to citizens, such as human rights and the environment. *Id.* at 913. Second, international law, although grounded in consent based treaties, is increasingly generated by quasi-legislative or quasi-judiciary bodies that are contemplated by those treaties, but largely beyond an individual state's control. *Id.* at 914. Third, states have less flexibility in the interpretation and enforcement of international law, in part because of the greater specificity of international obligations and the greater use of third party dispute resolution. *Id.* at 914.

look for other models of legitimacy that do not rely as much on the state's role in the process.[12] Yet, the state remains an important actor in the creation of international law. Thus, it is worth asking what it might mean for the state to be the mechanism through which citizens engage in self-governance, even with regard to international matters.[13] This involves a two-fold question: the first is the extent to which citizens can influence foreign policy decisions made at the domestic level; the second is the extent to which that influence makes its way up to the international level. The purpose of this Article is to focus on the first part of the question and leave the second for future work.

B. Aggregating Preferences in a Democracy

One way to assess the degree to which citizens do engage in self-governance in international affairs is to examine the extent to which citizens' points of view or preferences on particular issues are reflected in foreign policy decisions made at the national level. This is one manifestation of an important democratic principle: "[W]hen binding decisions are made, the claims of each citizen as to the laws, rules, policies, etc. to be adopted must be counted as valid and equally valid."[14]

At the outset, this Article acknowledges that an approach based on aggregating and mapping citizen preferences onto public policy or law has its limits, and that there is a strong argument that individual and collective human experience is too rich to be explained as simply doing what one

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[12] These commentators represent a fourth response to the legitimacy question. This response examines whether the decision-making processes and outcomes occurring on the international level would be considered legitimate had they occurred on the domestic level. Kumm, for example, proposes four constitutional principles that form a framework for assessing the legitimacy of international law: the first is a rebuttable presumption that international law is legitimate. *Id.* at 918. That presumption can be overridden if one of the remaining three principles—subsidiarity, adequate participation and accountability, and reasonable outcomes—are grossly violated. Kumm, *supra* note 3, at 920, 924, 927. A similar approach can be found in the work of Thomas Franck, for whom fairness is the ultimate legitimizing force. *See generally* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995). On a more functional level, some commentators question the extent to which international institutions perform the functions that democracies do on the domestic level: offsetting factions, protecting minority rights, and improving the quality of democratic deliberation. *See* Keohane, Macedo & Moravcsik, *supra* note 4.

[13] This approach reflects Putnam's understanding of international interaction as a two-level game, one on the domestic level and the other on the international level. *See generally* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT. ORG. 427 (1988).

[14] ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 105 (1989). Dahl doubts that international organizations can be democratic. *See* Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, *in* DEMOCRACY'S EDGES 19 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999) [hereinafter *Can International Organizations Be Democratic?*].

prefers.[15] Dryzek, in support of a deliberative approach to democracy, discusses several theoretical problems raised by an aggregative approach. He points out that the rational choice theorist's view—that individuals, whether they are citizens or their representatives, are egoists who seek to maximize their own utility—is ultimately an unverifiable assumption about human nature.[16] Another (and in Dryzek's view, the far more difficult) challenge is posed by social choice theorists who ask whether, no matter what assumptions one might make about human nature, any aggregation of individual preferences into a single social policy can ever be formally coherent, short of disproportionate influence by powerful groups or dictatorship.[17] Finally, there is the challenge from Dryzek and other deliberative theorists, who argue that it is possible for citizens to change each other's preferences through deliberation; whereas both rational choice and social choice theorists argue that an individual's preference set remains independent throughout the process of political interaction.[18]

It would take more space than available here to respond thoroughly to each of these concerns. However, it remains worthwhile to use an aggregative approach based on an individual's maximization of preferences for several reasons. As an initial matter, although much of the literature on cooperative behavior assumes an egoist seeking to maximize utility, it is equally possible to view altruistic, other-regarding behavior as a set of preferences that can be expressed by a utility function that is then maximized.[19] For example, a person's opposition to the use of land mines out of concern for others who could be harmed by such weapons can be framed in terms of preferences that one would want to see embodied in foreign policy. Therefore, a preference-maximizing approach need not be tied to particular assumptions about the selfishness or generosity of human beings.

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[15] Without further explanation, the concept can become useless. Taken too broadly, to say that people do what they prefer provides little predictive power. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1067–68 (2000).

[16] JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS 33–34 (2000).

[17] *Id.* at 34–36.

[18] *Id.* at 32, 34.

[19] As an example of the debate among evolutionary game theorists, Binmore bases a system of large-scale cooperative behavior on a self-regarding individual. *See generally* KEN BINMORE, NATURAL JUSTICE (2005). Gintis, on the other hand, argues that long-term cooperative behavior is better explained though persons who are other-regarding. *See* Herbert Gintis, *Behavioral Ethics Meets Natural Justice*, 5 POL., PHIL. & ECON. 5, 7 (2006); *see also* James Andreoni & John Miller, *Giving According to Garp: An Experimental Test of the Consistency of Preferences for Altruism*, 70 ECONOMETRICA 737, 749–50 (2002) (stating that subjects showing an interest in altruistic behavior can be shown to adhere to the axioms of revealed preference, which implies that a continuous and convex utility function could have generated such choices).

Dryzek is right that the collective action problem posed by social choice theorists is the more daunting challenge. The Impossibility Theorem, first articulated by Arrow, states that it is impossible to devise any system of mapping individual preferences onto a social welfare function, while at the same time satisfying relatively modest conditions one would assume should be part of any acceptable group decision-making process.[20] Much of the subsequent work in social choice theory has responded to the Impossibility Theorem by relaxing one or more of the conditions imposed by Arrow.[21] As Dryzek points out, one reaction to the theorem has been to reject as nonsense the concept of the will of the people; as a consequence, voting systems, at best, enable persons to get rid of tyrants who impose their own social orderings onto the polity.[22] Others do not go so far. Dryzek himself argues that deliberation has the effect of limiting the range of preference orderings,[23] either by stipulating in advance what that range will be or by eliminating, through deliberation, preference orderings that cannot be defended in public through comprehensible reasons.[24] What is important, for the purposes of this Article, is that the literature indicates there are plausible relaxations of

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[20] KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 24 (2d ed. 1963). Arrow proposes several conditions. First, every set of possible preference orderings should be admissible. *Id.* at 24. Second, there should be a positive relationship between social orderings and individual preferences; if every individual's preference for a particular state rises, one should see it rise in any corresponding social ordering. *Id.* at 25–26. Third, any social ordering should be independent of irrelevant alternatives. *Id.* at 26–27. To use Arrow's illustration, if officials in an election are to be determined by individual lists of preferred candidates, should one of the candidates die before the election, her name should be taken off the list and only the preferences with respect to the remaining candidates should be taken into account. *Id.* at 26. Fourth, there should be unanimity: the social welfare function representing citizens' preferences should not be imposed on anyone. ARROW, *supra*, at 29. Finally, there should be no dictatorship; that is, there should be no one person whose preferences are the sole basis for the choices made by a society. *Id.* at 30. Arrow goes on to show formally that no majority voting system can satisfy all these conditions. *Id.* at 46–59.

[21] For a nontechnical discussion of the major responses to Arrow's theory, see generally Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349 (1999). On the significance of Sen's contribution to the literature, see Kenneth J. Arrow, *Amartya K. Sen's Contributions to the Study of Social Welfare*, 101 SCANDINAVIA J. ECON. 163 (1999). According to Arrow, one of Sen's several contributions is his demonstration that even in situations where several of Arrow's conditions are relaxed, even modest Pareto-based decisions cannot be reconciled with a strongly held liberal belief that individuals should have freedom to choose particular outcomes. *Id.* at 165–66. The relevant work is Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970) [hereinafter *The Impossibility of a Paretian Liberal*].

[22] DRYZEK, *supra* note 16, at 35 (discussing WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982)). The absence of a dictator is one of the conditions imposed by Arrow. *See* ARROW, *supra* note 20, at 29

[23] Another condition posed by Arrow is an unlimited set of individual preferences. ARROW, *supra* note 20, at 24.

[24] DRYZEK, *supra* note 16, at 42–47. As a consequence, deliberation relaxes the condition of unlimited preference orderings, thus enabling coherent social decisions. *See id.*

one or more of the conditions posed by Arrow so that it is meaningful to speak of an aggregation of citizen preferences.

We also take seriously the possibility that citizens' preferences can change through a process of debate and persuasion by others and are therefore not fixed, even during the policy formation process. However, as Dryzek recognizes at some point political decisions are made on the basis of elections, committee votes, or through some other decision-making process,[25] at or by which time a snapshot of citizen preferences will be or have been taken and viewed as fixed, even though in reality such preferences can change almost immediately thereafter.[26] In Part III, this Article argues that rational elected officials will anticipate future public opinion about foreign policy matters and indeed might try to influence that opinion. Even so, such an approach involves guessing what that opinion will be, in effect taking a future snapshot of citizen preferences at some future election time. This means an aggregative approach does not preclude understandings of democracy, which allow preferences to change.[27]

Finally, in addition to the theoretical issues just addressed, this Article acknowledges that legitimacy involves more than government reflection of citizen preferences.[28] Bekkers and Edwards argue that democratic legitimacy can be assessed in three broad areas. First, one must assess opportunities for citizen participation in the process, the quality of representation, and the openness in setting the agenda.[29] Second, one needs to judge how collective decision-making is actually carried out in practice, the quality of participation, the amount of transparency, and the presence of checks and balances in the decision-making process.[30] For Bekkers and Edwards, it is only in the third assessment area, which they call output legitimacy, that one

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[25] *Id.* at 38–39. This is what causes Dryzek to turn his focus away from voting systems and toward collective choice through consensus-building and non-electoral means of responding to voters. *Id.* at 47–56.

[26] Hence, the reluctance to hold a runoff vote after a close election. Not only can citizen preferences change over time, but citizens can misremember what their preferences were before a political decision was made. *See* Mark R. Joslin, *The Determinants and Consequences of Recall Error About Gulf War Preferences*, 47 AM. J. POL. SCI. 440, 444 (2003).

[27] *See also* AMARTYA SEN, RATIONALITY AND FREEDOM 310 (2002) ("To ask what . . . the social choice should be (or would be) given the profile of individual preferences does not amount to taking individual preferences as 'given' in the sense of assuming them to be unchanging or unalterable."). When preferences change after a decision has been made, the question becomes whether it would be better for society to remain in repose or to reconsider that prior decision.

[28] This Article also acknowledges that democracy involves more as well. See *infra* text accompanying notes 90–91 and 111–12.

[29] This is what Bekkers and Edwards term "input legitimacy." Victor Bekkers & Arthur Edwards, *Legitimacy and Democracy: A Conceptual Framework for Assessing Governance Practices*, *in* GOVERNANCE AND THE DEMOCRATIC DEFICIT: ASSESSING THE DEMOCRATIC LEGITIMACY OF GOVERNANCE PRACTICES 35, 43–44 (Victor Bekkers et al. eds., 2008).

[30] This is termed "throughput legitimacy." *Id.* at 44–45.

expressly asks whether government policy has been responsive to the expressed wishes of the people.[31] Even in terms of outcomes, they argue, one must also assess the degree to which such outcomes contribute to remedying collective action problems and whether there is accountability to citizens for such outcomes.[32]

Legitimacy thus has many criteria. Yet, several of the criteria that Bekkers and Edwards identify are designed to increase government responsiveness to the wishes of its people. The criterion of who may vote is obvious in this respect, as is who may determine the agenda for political discussion and decision. The same is true at the output end of the process. As Keohane notes, accountability can exist in many forms of organization, democratic or otherwise, with accountability taking several forms itself.[33] To use Keohane's framework,[34] when voters in a democracy authorize and reauthorize their representatives to wield power on their behalf, one of the normative claims they make on such representatives is that they should carry out the wishes of their constituents. Citizens may make additional normative claims on their representatives (for example, by insisting that they adopt policies that work in the pragmatic sense) but responsiveness to citizen demands will always remain one of the most powerful of those claims.

C. *The Public's Impact on Foreign Policy*

In his 1992 review of the literature on public control over foreign affairs, Holsti wrote of the challenges to an earlier consensus that had emerged in the decade following World War II and had solidified by the early 1960s.[35] That consensus, represented by scholars and commentators such as Almond and Lippmann,[36] was skeptical about the public's role in foreign policy. In their view, to the extent that the public had any interest in foreign affairs issues, two flaws prevented public opinion from being of any use to policymakers. First, such opinion was too volatile.[37] Second, public opinion lacked any structure and coherence, so much so that public attitudes about

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[31] *Id.* at 45.

[32] *Id.* at 45–46.

[33] Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121, 1123–27, 1130–34 (2003).

[34] *Id.* at 1124–27.

[35] OLE R. HOLSTI, *Public Opinion and Foreign Policy: Challenges to the Almond-Lippmann Consensus, reprinted in* MAKING AMERICAN FOREIGN POLICY 55, 61 (2006) [hereinafter *Public Opinion and Foreign Policy*].

[36] *See generally* GABRIEL ALMOND, THE AMERICAN PEOPLE AND FOREIGN POLICY (1950); WALTER LIPPMANN, PUBLIC OPINION (1922); *see also* THOMAS BAILEY, THE MAN IN THE STREET: THE IMPACT OF AMERICAN PUBLIC OPINION ON FOREIGN POLICY (1948).

[37] *See* BAILEY, *supra* note 36, at 167 ("The mass mood, when it fluctuates violently, is more likely to do so regarding foreign affairs than domestic affairs.").

foreign policy "might be best described as 'non-attitudes.'"[38] In any event, the public was thought to have little, if any, impact on the conduct of foreign policy.[39]

According to Holsti, this consensus began to unravel by the end of the 1960s,[40] such that the current literature indicates a much more nuanced understanding of the public's role in foreign affairs. Some studies have placed public involvement in foreign affairs within a broader historical context, have shown that the issue has existed since the founding of the republic, and point out the times when there is in fact strong public interest in foreign affairs.[41] Such studies began to show that, far from being volatile, the public's general views on foreign policy tend to be consistent over time.[42]

Holsti's own work confirms this influence exists. In a recent study, for example, Holsti uses pre and post-9/11 survey data to show that U.S. public attitudes regarding whether the United States should be more involved in foreign affairs or more isolationist have been relatively stable even in the aftermath of that event.[43] Several other studies have questioned the claim that public opinion on foreign affairs issues lacks coherence. For example, with respect to both domestic and foreign issues, Erickson, MacKuen, and Stimson show that when the electorate is viewed as a whole, as opposed to individual voters, the public tends to exhibit highly rational forms of anticipation and evaluation of its leadership's policy decisions and

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[38] *Public Opinion and Foreign Policy*, *supra* note 35, at 60.

[39] *Id.* at 58.

[40] Holsti argues that the Vietnam War led some scholars to wonder whether experts were indeed better than the public at making foreign policy decisions. *Id.* at 62. There were also questions about the methodology of earlier studies, particularly with regard to polling methods. *Id.* at 63.

[41] ERIC ALTERMAN, WHO SPEAKS FOR AMERICA? WHY DEMOCRACY MATTERS IN FOREIGN POLICY 13 (1998); RICHARD J. BARNET, ROCKETS' RED GLARE: WHEN AMERICA GOES TO WAR: THE PRESIDENTS AND THE PEOPLE (1990) (both Alterman and Barnet trace the history of public involvement in foreign affairs). Public interest and knowledge about foreign affairs could be growing, albeit in channeled ways. Matthew Baum argues that by reducing the opportunity and transaction costs of paying attention to foreign policy issues, the rise of soft news (news from entertainment-oriented programming as opposed to strict news programs) has led to increasing, although narrow, public awareness of foreign affairs. MATTHEW A. BAUM, SOFT NEWS GOES TO WAR: PUBLIC OPINION AND AMERICAN FOREIGN POLICY IN THE NEW MEDIA AGE 5–6, 30–33 (2003). This development has led, in Baum's view, to a democratization of foreign policy. *Id.* at 282.

[42] ALTERMAN, *supra* note 41, at 13.

[43] OLE R. HOLSTI, *A Return to Isolationism and Unilateralism?: American Public Opinion, Pre- and Post-September 11*, *in* MAKING AMERICAN FOREIGN POLICY 269, 303 (2006); *see also* Alexander Todorov & Anesu N. Mandisova, *Public Opinion on Foreign Policy: The Multilateral Public that Perceives Itself as Unilateral*, 68 PUB. OPINION Q. 323 (2004). Four surveys conducted from June 1996 to February 2003 show no major changes in public attitudes towards the U.S. role in the world. *Id.* at 329.

performance.[44] Other studies show that citizens who are informed about foreign affairs tend to use the same thought processes as experts when thinking about and reaching judgments about particular issues[45] and are no more error prone than elites in that regard.[46]

The literature also indicates that public opinion does in fact shape foreign policy decisions when public opinion is viewed in very broad terms. As Hartmann and Wendzel put it, "the public *does* have general views and fundamental beliefs that policymakers will disregard at their peril."[47] Such foreign policy views can impact the results of elections both prospectively and retroactively.[48] For example, competing popular understandings of national identity[49] lead to disagreement about the appropriate level of state involvement in foreign affairs.[50]

Accordingly, Holmes argues that public moods of introversion and extroversion in foreign policy are a dominant force in American foreign policy. According to Holmes, the President—who in Holmes' view has the most impact on foreign policy affairs—is particularly sensitive to public mood in this regard.[51] Monroe, likewise, shows that for the years 1960–74 American

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[44] ROBERT S. ERIKSON, MICHAEL B. MACKUEN & JAMES A. STIMSON, THE MACRO POLITY 105–08 (2002).

[45] Paul Goren, *Political Sophistication and Policy Reasoning: A Reconsideration*, 48 AM. J. POL. SCI. 462, 471 (2004) (finding that both sophisticated and unsophisticated persons rely on beliefs about militarism and communism to establish preferences for military spending to the same degree, although sophistication did play a role in shaping preferences about aid to the Contras).

[46] BARNET, *supra* note 41, at 413; Steve Farkas & Will Friedman, *Mixed Messages: A Survey of the Foreign Policy Views of American Leaders* 10 (Public Agenda, Working Paper, 1995) (finding no major differences between the foreign policy goals of leaders who specialize in foreign affairs and those who do not).

[47] FREDERICK H. HARTMANN & ROBERT L. WENDZEL, AMERICA'S FOREIGN POLICY IN A CHANGING WORLD 189 (1994). In this regard, Druckman argues that for citizens, the search costs of selecting suitable frames for assessing and responding to foreign policy issues are prohibitively high, which leads citizens to delegate to credible elites the task of sorting through such frames. These frames serve as a rough set of controls over the elites because citizens will not allow their leaders to arbitrarily choose frames that meet only the purposes of the elite. James N. Druckman, *On the Limits of Framing Effects: Who Can Frame?*, 63 J. POL. 1041, 1045 (2001).

[48] OLE R. HOSTI, PUBLIC OPINION AND AMERICAN FOREIGN POLICY 55–56 (2004) (discussing a number of correlations, citing case studies that discuss the impact of public opinion on foreign affairs issues on elections).

[49] BARNET, *supra* note 41; Jack Citrin et al., *Is American Nationalism Changing?: Implications for Foreign Policy* (Inst. of Gov't Studies, Univ. of Cal. Berkeley, Working Paper No. 94-12, 1994).

[50] Citrin et al., *supra* note 49, at 46.

[51] JACK E. HOLMES, THE MOOD/INTEREST THEORY OF AMERICAN FOREIGN POLICY 2–3, 115 (1985); Michael B. MacKuen, *Political Drama, Economic Conditions, and the Dynamics of Presidential Popularity*, 27 AM. J. POL. SCI. 165 (1983) (noting that foreign policy events account for 20 percent of the variation in presidential approval ratings). McAvoy shows, however, that public evaluations of the President with regard to foreign policy vary as the public learns about particular foreign policy issues through the media. Gregory E. McAvoy, *Stability and Change:*

public opinion on foreign policy and foreign policy outcomes were consistent 92 percent of the time; moreover, changes in public opinion for domestic and foreign issues and subsequent policy changes were congruent 66 percent of the time.[52] In a comparative study, Brooks and Manza also show that public preferences influence policy outcomes among OECD democracies.[53]

A possible causal link between public opinion and policy outcomes is proposed by Erikson, MacKuen, and Stimson.[54] They posit that politicians rationally anticipate the general public mood as to whether the government should play a more or less active role in the political economy and reach their own policy positions accordingly.[55] Individually, "[p]oliticians . . . alter their support for liberal and conservative policies, to accommodate changes in public opinion and thus produce a clear dynamic linkage between what the public wants and what politicians provide."[56] As a result, when such policy choices by individual politicians are aggregated, adjustments in policy tend to follow public opinion.[57] Erickson, MacKuen, and Stimson then empirically examine the responsiveness of the House of Representatives, the Senate, the President, and, even the Supreme Court, to shifts in public opinion.[58] They find that each of them does respond to public opinion—with the House the most responsive and, as might be expected, the Supreme Court least responsive.[59] They also find that such governmental bodies respond relatively quickly to shifts in public opinion.[60] Such responses take the form of both

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The Time Varying Impact of Economic and Foreign Policy Evaluations on Presidential Approval, 59 POL. RES. Q. 71, 81 (2006).

[52] Alan D. Monroe, *Consistency Between Public Preferences and National Policy Decisions*, 7 AM. POL. RES. 3, 10 (1979).

[53] Clem Brooks & Jeff Manza, *Social Policy Responsiveness in Developed Democracies*, 71 AM. SOC. REV. 474, 490 (2006).

[54] ERIKSON, MACKUEN & STIMSON, *supra* note 44, at 338–39.

[55] The composition (Democratic or Republican) of a given governing body also has an impact on policy outcomes. *Id.* at 339.

[56] *Id.* at 291. According to the authors, politicians are not the only players who rationally anticipate the public mood: "Those who advance policy proposals—bureaucrats, lobbyists, judges, and citizens—are concerned with what can be done successfully, be it an administrative act, a judicial decision, or a legislative proposal." *Id.* For a general discussion of the roles of the press, think tanks, advocacy groups, and other organizations and academia in foreign affairs, see DAVID D. NEWSOM, THE PUBLIC DIMENSION OF FOREIGN POLICY (1996).

[57] ERIKSON, MACKUEN & STIMSON, *supra* note 44, at 292.

[58] *Id.*

[59] *Id.* at 305–07, 310, 313. On the Supreme Court's responsiveness to public opinion, see Kevin T. McGuire & James A. Stimsom, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004) (arguing that the Supreme Court is highly responsive to public mood).

[60] ERIKSON, MACKUEN & STIMSON, *supra* note 44, at 319.

greater political activity[61] and the actual laws promulgated.[62] In turn, according to these authors, public mood responds to the changes in policy, thereby restarting the reiterative cycle.[63]

The literature thus indicates that the public does in fact take foreign policy positions, which in turn influence decision-makers. However, as discussed, such opinions tend to concern broad attitudes regarding government intervention, internationalism, or isolationism. Even if, from time to time, the public becomes interested in and then influences specific foreign policy issues,[64] those instances could be rare.[65] Therefore, it is a fair question whether public influence, in the form of broad attitudes about the

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[61] *Id.*

[62] *Id.* at 339.

[63] *Id.* at 350–51. Such a system of course must be qualified. For example, politicians can misperceive public opinion. Todorov and Mandisova show that "[w]hereas Americans have a strong preference for multilateral policies, they underestimate public support for such policies and overestimate public support for unilateral policies." Todorov & Mandisova, *supra* note 43, at 343. In this regard, Entman argues that the interplay between public opinion (actual or perceived), the media, and foreign policy elites is so intertwined that it is difficult, if not impossible, to determine the extent to which actual public opinion independently influences foreign policy decisions. ROBERT M. ENTMAN, PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY 137–38 (2004). He writes:

> [I]t appears the media played a role in shaping outcomes, along with leaders' talk, actions, and perceptions of public opinion, and the public's actual sentiments. In this jumbled spiral, this double helix, of reciprocal influences, movements, and resistances among elites and the public, evidence for the independent influence of public opinion on policy, or for genuinely democratic control of government by the public, is likely to remain incomplete.

Id. at 137. Finally, there is always the possibility that decision-makers will deliberately select positions that go against the public grain. ERIKSON, MACKUEN & STIMSON, *supra* note 44, at 316. Foyle argues that the influence of public opinion on foreign policy outcomes depends on what decision-makers believe the role of the public should be and on the context in which the decision needs to be made. DOUGLAS C. FOYLE, COUNTING THE PUBLIC IN: PRESIDENTS, PUBLIC OPINION, AND FOREIGN POLICY 2–5 (1999).

[64] Some scholars have argued that public opinion has influenced specific U.S. foreign policy issues. For example, anticipated public opposition to an extended occupation influenced the Truman Administration's occupation policy. HARTMANN & WENDZEL, *supra* note 47, at 189–90. Vietnam has also been identified as an issue in which public opinion was an important influence. *Id.* at 189. *But see* ERIKSON, MACKUEN & STIMSON, *supra* note 44, at 306, 316 (showing data that U.S. political leadership was actually unresponsive to public opinion during the Vietnam War). *See also* Sara McLaughlin Mitchell & Will H. Moore, *Presidential Uses of Force During the Cold War: Aggregation, Truncation, and Temporal Dynamics*, 46 AM. J. POL. SCI. 438, 446 (2002) (arguing that international factors might be more important than domestic factors when the President decides to use force).

[65] *Can International Organizations Be Democratic?*, *supra* note 14, at 30. As Moravcsik puts it, "In the real world, individual citizens suffer from a limited and unequal ability to devote time and energy to learning about and engaging in politics. In the real world, citizens remain 'rationally ignorant' or non-participatory with regard to most issues, most of the time." Andrew Moravcsik, *Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 GOV'T & OPPOSITION 336, 344 (2004).

role of government in the political economy or world affairs, with occasional influence over more specific foreign policy issues, is "enough democracy" to legitimate more specific policies or laws that eventually percolate up to the international level.

For Dahl, the answer to that question is probably no—it is not enough that the public either does not care in the first place or has delegated these issues to elected leaders. This is because delegated decisions made under those tepid circumstances might not reflect what would be the majority view, had there been more information and deeper public engagement. Dahl argues that all decisions by a democratic government lead to winners and losers among citizens.[66] Modern democracies try to resolve this dilemma by positing some idea of the public good, either substantive or procedural.[67] However, Dahl believes the public good is as "rationally contestable" on international issues as on domestic questions, and there is "no reason to believe that the views of elites are in some demonstrable sense objectively correct."[68] This raises the problem that an elite consensus and a lack of public interest could lead to foreign policy decisions being made without adequate debate or consideration. As Dahl explains, "if citizens had gained a better understanding of their interests and if their views had then been more fully developed, expressed, and mobilized, the decisions might have gone another way."[69]

Moravcsik takes the opposite tack. For him, delegation to elites is a realistic, albeit second best, solution that melds democratic ideals with political reality.[70] Such delegation is needed precisely because, like Dahl, Moravcsik worries that diffuse public interest could lead to either ill-considered decisions or decisions unduly influenced by powerful groups.[71] He notes that to counter this danger, citizens often insulate and delegate authority to decision-makers for at least three reasons: to provide expertise in complex areas; to protect minority rights by establishing those rights and shielding from public influence certain decision-makers charged with protecting those rights, such as courts; and finally to help redress imbalances in power.[72] Moravcsik points out that while each of these situations creates

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[66] *Can International Organizations Be Democratic?*, *supra* note 14, at 25.

[67] *Id.* at 26–27. For a discussion of the difficulty, if not impossibility, of determining and achieving the public good in large democracies, see JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 250–56 (2nd ed. 1950). For Dahl's defense of the public good, see DAHL, *supra* note 14, at 299–308.

[68] *Can International Organizations Be Democratic?*, *supra* note 14, at 27.

[69] *Id.*

[70] Moravcsik, *supra* note 65, at 344.

[71] *Id.* at 346.

[72] Moravcsik, *supra* note 65, at 344–46.

exceptions to direct democratic decision-making, "[i]n each of these cases, under many circumstances more insulated and delegated authority of . . . governance structures might be thought of as more 'representative' of citizen concerns precisely because they are less directly 'democratic.'"[73]

Therefore, whether one can characterize as democratic what the literature observes—the general character of public interest in foreign affairs, its diffuse nature, and the degree of influence such interest exerts over foreign policymaking—is ultimately a question of the glass being half empty or half full. This is the case even when we understand democracy in terms of consent and accountability. However, as long as policymakers select specific policies that fall within those broad policy terms that the public has contemplated, and as long as citizens do not subsequently object once they become aware of these specific policy choices, then an argument can be made that there has been public consent, even if, at a minimum, citizens have only acquiesced to the policy decisions in question.[74] Put another way, the nature of public opinion might be general, but the laws and other public policy outcomes to which citizens react and for which the citizens hold their leaders accountable are nevertheless quite specific. Thus, the connections between the broad and the specific create a dynamic of consent and accountability. It is concerning from a democratic perspective when the public takes a strong position on a particular foreign policy matter and elected officials act inconsistently with that position. Of course, this sometimes does happen, but at least in theory, democratic systems are designed to correct such situations.

III. A MODEL OF CITIZEN PREFERENCES IN FOREIGN AFFAIRS DECISIONS

The impact of public opinion on foreign policy decisions discussed in the preceding Part can be viewed with greater precision through more formal modeling. In this Part, this Article adopts an anticipated reaction model, developed by Bailey, which describes policy decisions in relation to the preferences of voters, in either discrete or diffuse groups.[75] The model

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[73] *Id.* at 346–47 (emphasis removed). Indeed, Moravcsik goes on to argue: "[T]here is no reason to believe that a marginal increase in direct participation by the average citizen in majoritarian or consensus decision-making, as opposed to delegation and insulation of policymakers, promotes outcomes that can be more easily justified in terms of normative and positive democratic theory." *Id.* at 347. Thus, Moravcsik believes modern democracies enjoy a basic legitimacy from a democratic standpoint and thus can serve as a baseline for assessing the legitimacy of international organizations. If, for example, a modern democracy delegates decision-making authority to a central bank because expertise is required, a similar grant to an international financial institution should be viewed as legitimate. *Id.*

[74] This justification assumes that the policymaking process is transparent enough that concerned citizens can adequately inform themselves about policy decisions.

[75] *See* Michael Bailey, *Quiet Influence: The Representation of Diffuse Interests on Trade Policy, 1983–94*, 26 LEG. STUD. Q. 45 (2001). Although Bailey focuses on congressional decision-making, there is no reason why the model would not also apply to any elected office. In his work, he shows

assumes that as rational actors, incumbents and candidates for office take policy positions in hopes of maximizing their future election chances.[76] The model recognizes that while policymakers each have their own personal policy preferences,[77] those preferences must be balanced against the electorate's policy preferences to optimize the prospects for future election.[78] Thus whether it is for political expediency or with a sincere desire to represent the interests of citizens, rational and well-informed policymakers anticipate future electoral consequences of public opinion and adjust their present policy positions accordingly.[79]

Bailey's model incorporates a number of important concepts for the purposes of this Article: voter utility, divergence between the preferences of various actors, multiple issues, weighting, and uncertainty. First, voter utility is used to measure a voter's satisfaction with particular policy outcomes. Second, this Article assumes that a voter will have a personal preference regarding a particular foreign or domestic policy issue, as will policymakers, and those preferences might diverge. As a result, voter utility decreases with increasing divergence between the voter's and the policymaker's respective positions on specific issues. Third, since voters and policymakers each have preferences with respect to a number of foreign and domestic policy issues, total utility for an individual voter is negatively related to the aggregate differences between a voter's preferred positions on various issues and the corresponding positions expressed by policymakers.[80] Fourth, Bailey's model recognizes that a voter might care more about some issues than others and weigh them accordingly.[81] Finally, a voter might not know for certain what her preferred position is with respect to particular issues and thus, a voter's utility function[82] is subject to random shocks, which

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that diffuse voter groups had an impact on votes on trade within the House of Representatives. *Id.* at 64–71.

[76] This is also the approach taken by Ericson, MacKuen, and Stimson. ERIKSON, MACKUEN & STIMSON, *supra* note 44, at 284, 287. While Erikson, MacKuen, and Stimson's work focuses on national mood, Bailey's work focuses on "how individual representatives respond to their constituents." Bailey, *supra* note 75, at 50.

[77] For example, a given policymaker's range of acceptable policy options is, to some extent, determined and constrained by party affiliation. Thus, the distribution of acceptable positions of one party will likely be arrayed to the left or right of the distributions for another party. *See* ERIKSON, MACKUEN & STIMSON, *supra* note 44, at 288.

[78] *Id.* at 287.

[79] *Id.* at 284.

[80] Bailey, *supra* note 75, at 47.

[81] *Id.*

[82] A utility function expresses the relationship between voter satisfaction (utility) and the explanatory variables.

are reflected mathematically in an error term, here designated as ε_i.[83] Thus, the utility of voter i can be represented as:

$$u_i(x^k) = -\sum_{m=1}^{M} \gamma_{im}\left(X_{im} - X_m^k\right)^2 + \varepsilon_i^k$$

Equation 1

where x^k is an M-dimensional vector of policy positions[84] for policymaker k, γ_{im} is voter i's intensity of preferences on issue m,[85] X_{im} is the personal preference of voter i on dimension (or policy issue) m, X_m^k is the policy position taken by policymaker k on issue m, and ε_i is the random error term with mean 0 and variance σ^2. Because the variance of the error term increases with voter uncertainty about a particular issue m, to the extent that greater levels of information reduce voter uncertainty, the variance decreases with greater information.[86]

A policymaker's optimal position will then take into account the mean preferences of the various voting groups, weighted by the size, intensity, and information levels of each group.[87] Thus, the politically expedient policy position on issue m (represented by θ_m)[88] given N groups comprised of η_i voters with identical preferences is:

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[83] Bailey, *supra* note 75, at 48. An error term is used to capture variations in dependent variables (in this case, voter utility) that are not explained by the independent variables in the model. The variable ε_i is randomly drawn from a known distribution with mean 0 and variance σ^2. In this model, variance increases with voter uncertainty about a particular issue. *See id.*

[84] Representing policy positions in an M-dimensional vector, where each dimension represents a particular policy issue, provides an analytical framework for identifying the multiple issues for which policymakers are held accountable and for analyzing how those policy issues are weighed against each other.

[85] That is, how much the voter cares about issue m.

[86] Bailey, *supra* note 75, at 48.

[87] *Id.*

[88] The set of θ_m that maximizes the total utility, as defined by Equation 1, minimizes the sum of squares of distances between vector θ and vector X_i. Thus, the set of positions θ is the closest to all groups given their assigned weighting. While the Hotelling Location Theory predicts that a candidate maximizes the chance of electoral success by moving to the ideological center, there is general agreement that, in a probabilistic voting environment, the candidate's optimal position is the weighted mean of voter preferences as represented in Equation 1. *See* Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929); Robert A. Bernstein, *Directing Electoral Appeals Away from the Center: Issue Position and Issue Salience*, 48 POL. RES. Q. 479 (1995). For an overview of the current debate concerning directional and proximity-based voting models, see Jeffrey B. Lewis & Gary King, *No Evidence on Directional vs. Proximity Voting*, 8 POL. ANALYSIS 21 (2000).

$$\theta_m = \frac{\sum_{i=1}^{N} \frac{\gamma_{im}\eta_i X_{im}}{\sigma_i}}{\sum_{i=1}^{N} \frac{\gamma_{im}\eta_i}{\sigma_i}}$$

Equation 2

where, γ_{im} is voter i's intensity of preferences on issue m; X_{im} is the personal ideal position of voter i on dimension m; and σ_i is the standard deviation of the random shock variable ε_i.

To simplify, the relationships represented in Equation 2 can be represented graphically as shown in Figure 1 below.[89] Each of the two axes represents positions available on issues 1 and 2, respectively. For the sake of discussion, the scale on each axis can represent an increasing level of conservatism. Each of the circles represents groups of voters that share the same preference set on issues 1 and 2, which means that each of the voter groups represented by each circle prefers the same policy positions and have assigned the same relative weight to each of the two issues. Because we are limited by what can be represented in a two-dimensional drawing, the size of the circles represents the size of that group weighted by the intensity of the group's preference for a particular pair of issues. Given that X_i is the optimal set of policy positions that maximizes the utility function for a given individual voter i, the metric distance between θ (the politician's optimal position) and X_i as represented by the line depicted in the figure, can be understood as the democratic deficit from the perspective of the individual voter.

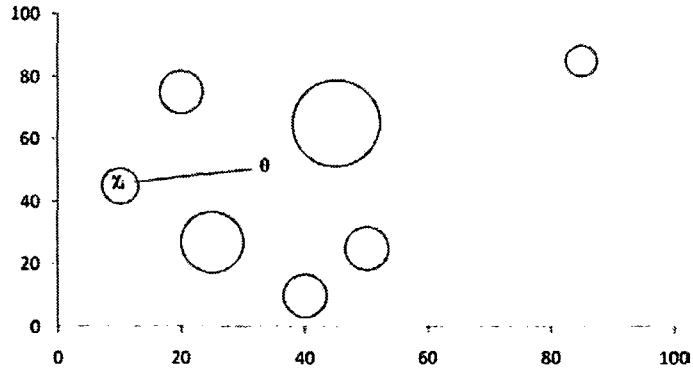

Figure 1

[89] While M issues are included in the voter utility function, for illustration purposes, here Equation 1 is limited to only two issues. Imposing this restriction allows us to graphically illustrate voter preferences along those two policy dimensions.

This result can be analyzed to reflect changes in the number, size, preferences, and information levels of the groups. For example, as a group's size increases, the politically expedient policy position will move closer to that group's preferred policy positions, as depicted in Figure 2 below. Here, the original inner circle of group A has expanded (with intensity remaining constant) and the expedient position for the politician has moved accordingly. It so happened that, in this example, the democratic deficit from the perspective of voter ***i*** has decreased, because the expanded group's preferred positions are closer to voter ***i*** than the original position taken by politician ***k***.

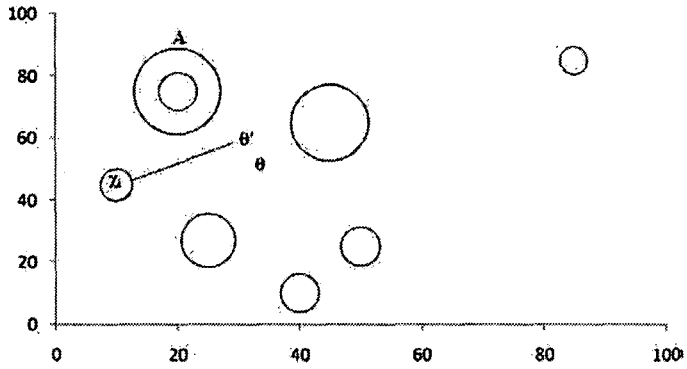

Figure 2

In addition to group size, preferences are weighted by voter intensity and information levels. As a result, a well-informed small group with intense preferences for a specific policy position can also pull the politically expedient position toward that group's preferred position, even with the size of the voter group remaining constant.[90] Thus, if that group's preferences are relatively more conservative than the politically expedient position taken previously, then an increase in the magnitude of preference intensity and the resulting increase in advocacy would have the effect of increasing the size of circle ***B***, and accordingly, $\boldsymbol{\theta}'$ will be pulled toward a more conservative position, increasing the democratic deficit for more liberal voters. Thus, the result is that $|\boldsymbol{\theta}' - \boldsymbol{X_i}| > |\boldsymbol{\theta} - \boldsymbol{X_i}|$, meaning that the democratic deficit for voter ***i*** has increased, as illustrated in Figure 3:

[90] Bailey, *supra* note 75, at 48–49.

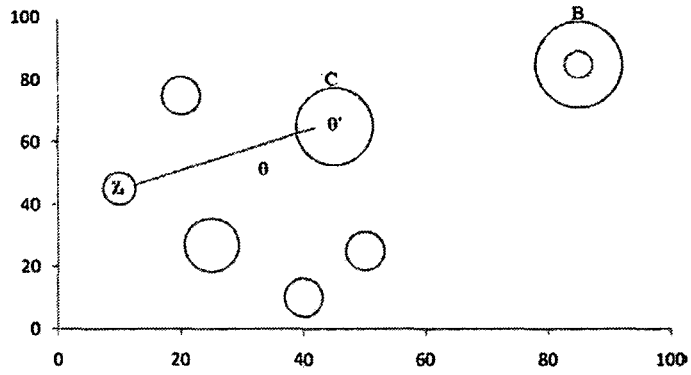

Figure 3

As this Article alluded to above, movement from $\boldsymbol{\theta}$ to $\boldsymbol{\theta}'$ will not occur merely because voters feel more strongly about a particular set of issues. Such an increase in the intensity of preferences must either increase the likelihood of voting or motivate the voter to actually expend resources—in particular, time, money, or both—to influence either other voters' preferences or policymakers directly.

Both the model and the associated figures illustrate how voters and policymakers attempt to influence preferences and to anticipate what preferences will be in the future. As discussed in Part II.B, an anticipated reaction model allows for the possibility of a change in preferences. Here, this shift can happen through voter activity, which seeks to either increase the size of the group that shares those preferences or to increase the intensity of the group's activity, which has the same gravitational effect. Alternatively, the policymaker herself can try to shape voter preferences through any number of methods such as giving speeches, advertizing, or holding townhall meetings. All of this activity occurs with a view toward influencing what the contours of the preference map will, at some future point, look like when the voters have the opportunity to hold the policymaker accountable for the foreign policy positions she takes.

There are a number of broader implications of this model. First, the model shows how citizens' preferences are aggregated and considered in the decision-making process. But it also shows the democratic deficit. Although in this model, policymakers do take citizens' preferences into account, it is only by coincidence that the policymakers' ultimate position will match exactly the preferences of any particular individual or group of voters (as illustrated in Figure 3 above). Statistically, a perfect match between personal preferences on a myriad of issues, as opposed to only the two issues as illustrated above, would be the equivalent of winning the lottery. This is another way of saying that in a representative democracy no one necessarily gets his or her way.

It follows, therefore, that although the model demonstrates an aggregate conception of democracy in which citizens' preferences are taken into account in a meaningful way, it also shows the limitations, not of the model, but of

the representative form of democracy. As Sen and others have pointed out, liberal values require that there are times when a citizen has a right to get her way.[91] Here we return to the problem of weighing the benefits gained from participating in society against the loss of individual freedom.[92]

IV. IMPLICATIONS OF A PREFERENCE-BASED MODEL OF FOREIGN AFFAIRS FOR INTERNATIONAL LAW

A description of how public opinion influences national-level foreign policy decisions is only the first step in understanding the extent to which consent-based and accountability-based arguments legitimize law made on the international level. As noted in the Introduction, the fact that foreign policy decisions reflect public opinion might mean little, as states interact with other states, non-state actors, and multilateral institutions. The next step would be to express formally how norms might be adopted at the international level once a democratic state adopts its own norms through the process described above. Unfortunately, it is beyond the scope of this Article to engage in that discussion. However, this Article will, at this point, explore in a preliminary way the implications of the anticipated reaction model for two areas of international law. First, a model that allows for citizen impact on foreign affairs helps better assess the concept of subsidiarity as a criterion for the legitimacy of international law. Second, such a model also strengthens arguments for broadening, as much as possible, the participation of democratic states in multilateral organizations and other international governing bodies.

A. Subsidiarity

Subsidiarity is the principle of social organization that decisions should be made at the lowest appropriate level of organization. The principle has deep roots, having sprung into more recent form in Catholic social thought[93]

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[91] *The Impossibility of a Paretian Liberal*, *supra* note 21, at 152.

[92] This Article discusses a related problem in the choice between centralization and decentralization. *See infra* text accompanying notes 106–10.

[93] LEO XIII, RERUM NOVARUM: ENCYCLICAL LETTER ON THE CONDITION OF LABOR (1891), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 14, 35 (David J. O'Brien & Thomas A. Shannon eds., 1992). The concept finds expression in the papal encyclical *Rerum Novarum*. Writing in 1891, Leo XIII contemplates a society comprised of various groups and associations, each seeking some end. He writes,

> Let the State watch over these societies of citizens united together in the exercise of their right; but let it not thrust itself into their peculiar concerns and their organization, for things move and live by the soul within them, and they may be killed by the grasp of a hand from without.

Id. Forty years later, Pius XI develops the concept in a retrospective on *Rerum Novarum*. PIUS XI, QUADRAGESIMO ANO (1931), *in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 42, 60. He writes, "[I]t is an injustice and . . . a grave evil and a disturbance of right order to

and even more recently by its grafting into the constitutional framework of the European Union.[94] The concept has been justified on a number of bases. The theological account of subsidiarity is grounded in the dignity of the human person, who has capacities for inner growth and social living that should be allowed to flourish without undue constraint from "higher" levels of organization.[95] As an organizing principle for politics, subsidiarity is similarly promoted as protecting political liberty, flexibility in response to local conditions, identity, diversity, and a respect for the internal divisions within members of a particular association.[96] Although the principle can be understood as a preference for lower or smaller organizations,[97] in reality, subsidiarity is neutral as to the level of organization; if a lower level of government cannot better achieve particular desired ends, then it is appropriate for a higher level to do so.[98]

Subsidiarity has been proposed as an important principle in regulating[99] the relationship between the state and international law. Kumm argues that, as applied to international law, the principle would recognize that modern democratic states have well-established mechanisms for consent and accountability.[100] These mechanisms for consent and accountability, in turn, then weigh in favor of keeping a particular governmental function at the state level.[101] At the same time, because the subsidiarity principle also moves in the opposite direction, it legitimates international law when there are good

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transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies." *Id.*; *see also* PAUL VI, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (1965), *in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 166, 217 ("Authorities must beware of hindering family, social, or cultural groups, as well as intermediate bodies and institutions.").

[94] Treaty on European Union and Final Act, art. G, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 247, 257–58; Treaty of Amsterdam Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 5, Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56, 80–81.

[95] Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 42–43 (2003).

[96] George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 340–42 (1996).

[97] *See, e.g.*, the subsidiarity principle as stated by Popes Leo XIII, Pius XI, and Paul VI, *supra* note 93.

[98] Sjef Ederveen, George Gelauff & Jacques Pelkmans, *Assessing Subsidiarity*, *in* SUBSIDIARITY & ECONOMIC REFORM IN EUROPE 19, 20 (George Gelauff, Isabel Grilo & Arjan Lejour eds., 2008) ("The subsidiarity principle involves a careful assessment of the optimal level at which decisions should be taken, which can result in centralization but also in decentralization.").

[99] As Bermann notes, subsidiarity can function in four ways: as a procedural guide to forming legislation; as an interpretive guide such that courts would construe legislation to support the principle; as a ground for invalidating legislation; and to build the confidence of the constituent members of a particular group. Bermann, *supra* note 96, at 366–67.

[100] Kumm, *supra* note 3, at 922.

[101] *Id.*

reasons for delegating issues to the international level.[102] For Kumm, the principle becomes important at the moment of delegation precisely because, in his view, consent is lost on the international plane. He writes that "if international law as governance is no longer grounded in the specific consent of states, jurisdictional concerns addressed by the framework of analysis provided by the principle of subsidiarity have a central role to assess, guide and constrain transnational legal practice."[103]

If, as argued here, citizens in modern democracies do indeed influence foreign policy decision-making, two important issues arise: when is such delegation appropriate at the international level and what good reasons exist for such delegation? Several authors who address the issue in the European Union context have framed the issue in economic efficiency terms. According to the standard theory, the choice is between decentralization and centralization. The argument for decentralization is to better accommodate citizens' preferences.[104] Centralization, on the other hand, is warranted when externalities are present or when sufficient economies of scale and scope can be gained at a higher level of organization.[105] Thus, the citizens of a country might prefer to delegate a particular governmental function to the international level when the benefits gained from internalizing externalities, or from obtaining greater economies of scope and scale, outweigh the loss of influence over a particular issue on the domestic level.[106]

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[102] *Id.*

[103] *Id.*

[104] Ederveen, Gelauff & Pelkmans, *supra* note 98, at 22; Joachim Ahrens, Martin Meurers & Carsten Renner, *Who Shall Decide What? Citizens' Attitudes Towards Political Decision Making in the EU, in* SUBSIDIARITY & ECONOMIC REFORM IN EUROPE 41 (George Gelauff, Isabel Grilo & Arjan Lejour eds., 2008) ("Public goods[,] the demand for which is based on heterogeneous preferences across countries[,] should rather be provided at national or even local levels of policymaking.").

[105] Emanuela Carbonara, Barbara Luppi & Francesco Parisi, *The Optimal Territorial Scope of Laws, in* THE ECONOMICS OF LAWMAKING 51, 57–62 (Francesco Parisi & Vincy Fon eds., 2009); Ederveen, Gelauff & Pelkmans, *supra* note 98, at 22; Ahrens, Meurers & Renner, *supra* note 104, at 41. Ederveen et al. assert, however, that even if externalities and economies of scale are present, centralization is not required if there is a credible prospect that states will cooperate with one another on the issue at hand. Ederveen, Gelauff & Pelkmans, *supra* note 98, at 25. Some literature accounts for what is viewed as a mismatch between the predictions of the standard theory and the actual allocations of governmental functions between the European Union and the Member States. *See* Ahrens, Meurers & Renner, *supra* note 104; Carbonara, Luppi & Parisi, *supra*; Ederveen, Gelauff & Pelkmans, *supra* note 98.

[106] A similar calculation is made when citizens weigh the loss of direct control over policy matters against the benefits to be gained from delegating them to representatives or to experts, or the benefits to be gained from adopting pre-commitment strategies. For further discussion of delegation and its benefits and costs, see Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1 (2008). The European Parliament presents an interesting wrinkle in this discussion. Members of the European Parliament are elected by direct universal suffrage on the national level. Consolidated Version of the Treaty Establishing the European Community, art. 190, Dec. 29, 2006, 2006 O.J. (C 321) [hereinafter EC Treaty].

The decision whether to delegate government functions to higher levels of organization can be represented in the model developed in Part III by modifying the figures used there. In Figure 4 below, the analysis moves from the domestic to the international level. To simplify, assume that there are only two countries, Country A, whose preference map is illustrated above in Figure 1, and a new Country Z. Assume that the preferences of the citizens of Country Z are homogeneous and therefore can be represented by a single circle, Z. Centralization essentially has the effect of adding group Z's preferences to what now can be understood as an international map of citizen preferences. Suppose for illustration, θ_D represents the optimal point that Country A reached at the domestic level. If Country Z has preferences that are more conservative on a particular issue than θ_D, then the optimal point from an international perspective will move away from more liberal individuals' preferred policy positions to θ_I. Thus, $|\theta_I - X_i| > |\theta_D - X_i|$].

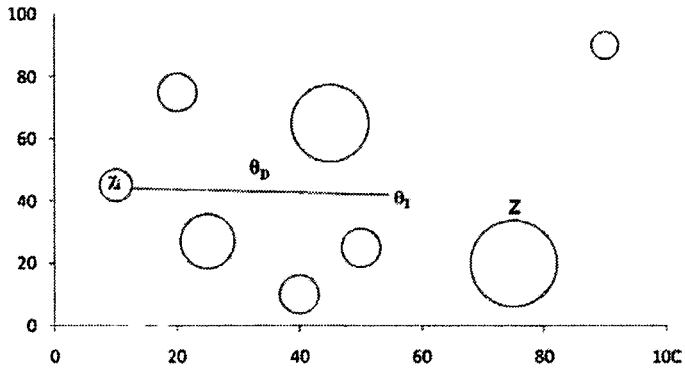

Figure 4

Note here that the introduction of Country Z results in the move to θ_I because its preferences are being weighted in the same way that the citizens of Country A's preferences are being weighted, that is, according to group size and intensity. Although this is not the way that decisions are weighted at the international level,[107] for purposes of this discussion, this Article illustrates

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However, they may form themselves into political groups on the transnational level. *Id.* at art. 191; Decision of the European Parliament of 28 September 2005 Adopting the Statute for Members of the European Parliament 2005/684, art. 8(1), 2005 O.J. (L 262) 1, 3 (EC). The Parliament thus provides a means by which policy preferences can in theory be expressed directly on the international level, as opposed to the system that we focus on in this paper, in which policy positions that were developed on the domestic level are then intermediated by the state to the international level. For a discussion of the impact of party organization on the voting patterns of representatives in the European Parliament, see Simon Hix, Abdul Noury & Gérard Roland, *Dimensions of Politics in the European Parliament*, 50 AM. J. POL. SCI. 494 (2006). These authors conclude that the voting behavior of Parliament members falls mostly along traditional left-right lines and not along positions taken by the national governments. *Id.* at 599.

[107] Voting systems weighted by population have been considered but rejected as politically unacceptable. WERNER J. FELD, ROBERT S. JORDAN & LEON HURWITZ, INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH 135 (3d ed. 1994). A number of procedures are

the decision-making method which best accommodates the preferences of citizens as individuals.

As discussed above, the argument for decentralization is to better accommodate group preferences. One would expect that the heterogeneity of preferences increases as the scope of representation increases with centralization.[108] The reduction in total utility that results from the increase in heterogeneity of preferences is captured in Equation 3, where G is the governing authority.[109]

$$u_i(\theta^G) = -\sum_{m=1}^{M} \gamma_{im}(X_{im} - \theta_m^G)^2 + \varepsilon_i^G$$

Equation 3

The optimal degree of centralization weighs the utility reductions from increasing heterogeneity of preferences against the cost efficiencies gained from economies of scale and scope.[110] In its simplest form, the subsidiarity cost test can be expressed as:

$$C^C \leq C_1^R + C_2^R$$

Equation 4

Where C^C is equal to total costs at the central level and C^R equals the costs at each regional level, respectively.[111] Therefore,

$$C^C - (C_1^R + C_2^R) \leq 0$$

Equation 5

The cost savings from centralization can be expressed simply as ΔC. As discussed above, these cost savings must be balanced against the loss of aggregate utility that results from the increase in heterogeneity of preferences, as decision-making is centralized away from the local level.

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followed at the international level, including unanimity, majority vote with equality of voting power, various forms of qualified majorities, weighted voting, veto rights, and consensus. *See generally id.* at 133–37; ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 151–62 (2007); PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 263–67 (5th ed. 2001).

[108] However, there might be instances when the position taken at the international or centralized level more closely approximates the preferences of at least some groups at the domestic level.

[109] G may take on the value of C at the central level, R at the regional level, and N at the national level.

[110] Carbonara, Luppi & Parisi, *supra* note 105, at 52.

[111] For a discussion of cost reductions from the economies of scale and scope derived from centralization, see *id.* at 57–59. This Article assumes that the cost advantage of internalizing externalities is captured by these cost variables.

While this decrease in utility can be expressed simply as ΔU, it becomes necessary to assign a monetary value to weigh the loss of utility that represents the gap between citizen preferences and government policy positions, against the cost savings gained through centralization. Otherwise, standing alone the two variables are incommensurate. The subsidiarity test[112] thus becomes $\Delta C \leq \rho \Delta U$,[113] where ρ represents the valuation parameter.

The mathematical simplicity of this subsidiarity test conceals the complex issues involved in assigning a monetary value to ρ. In essence, ρ represents society's willingness to trade individual freedom (as represented by a person's ability to have her preferences reflected in government policy that will have coercive effect) for the cost efficiencies gained through centralization. There is of course a strong argument that society has already implicitly assigned a value to ρ in the real world because decisions are made routinely to centralize or decentralize.[114] Through this process of rational decision-making, ρ is revealed. At the same time, there is also an argument that ρ is meaningless because it purports to represent the value of human freedom when the value of such freedom might be infinite; thus, even if it is possible to monetize the value of the loss of freedom, the issue is whether a democratic society is ever justified in assigning such a value to individuals' rights to choose.[115]

B. State Participation in International Decision-Making

In a way, the prospect that citizens of democracies do in fact impact foreign policy at the national level serves only to underline the legitimacy problem that this Article described in Part II. As democratization increases within nations, it becomes increasingly difficult to legitimately ignore the preferences of those states as they interact with other international actors. This is not just because of the independence of nation states in the classical sense, but also because those states do in fact reflect the choices of their

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[112] In addition to the economic cost savings expressed by Carbonara, Luppi, and Parisi, the subsidiarity test adopted here also takes into account the loss of utility discussed above.

[113] It might appear counterintuitive that ΔC be less than or equal to $\rho \Delta U$, but this is because cost and utility reductions result in negative values for ΔC and ΔU. Thus, higher values (less negative) for ΔU indicate less utility loss; lower values (greater negative) for ΔC indicate greater cost savings.

[114] For a discussion of Revealed Preference Theory, see Paul Samuelson, *A Note on the Pure Theory of Consumers' Behaviour*, 5 ECONOMICA 61 (1938).

[115] *See* Carbonara, Luppi & Parisi, *supra* note 105. Carbonara, Luppi and Parisi argue that other dynamics can influence greater centralization. *Id.* They show that due to the path-driven nature of centralization, a norm that requires centralization in some instances and not in others could create a dynamic in favor of centralization even though the standard theory would not call for it. *Id.* For a full discussion of the relationship between rational decision-making and substantive freedom, see AMARTYA SEN, DEVELOPMENT AS FREEDOM 76–81 (2001).

citizens. To ignore a particular state on the international plane may well mean dismissing the wishes of millions of people. Yet the problem is complex if what Weiler observes is true.[116]

Weiler argues that the forms of governance emerging from international law have changed over time.[117] International governance first arose out of bilateral transactions between states, mainly in the form of treaties where state consent is at the fore.[118] Then constitutional and legislative forms emerged, such as the United Nations and the European Union,[119] which introduced the possibility of creating and pursuing policies contrary to the aims of Member States. Finally, international governance has more recently taken the form of regulation, where there is neither government nor governed.[120] As Weiler puts it, none of these "strata" of law and governance has disappeared through the evolution: all three forms combined constitute the "geology" of international law.[121]

Such complexity is on full display in the efforts to respond to the global economic crisis. A few preliminary remarks are in order. It is of course impossible to make definitive statements here because events are still unfolding. Further, this Article does not speak to the substantive merits of the various proposals for fiscal, monetary, and regulatory coordination. However, given this Article's findings that citizens influence foreign policy, it is worth using the lens of citizen influence, even if in a tentative way, to examine the processes by which highly contested solutions will be reached. It is also appropriate to address the present crisis because such an examination shows how difficult decision-making is within a particular substantive area.

On the one hand, citizen preferences may be irrelevant to the realm of finance and economics as a descriptive matter and should be as a normative matter. These areas are technical and thus are prime candidates for delegation to experts. Further, because of the technical nature of financial and economic policy and because their impacts are so diffuse and far-reaching, decisions about such policies arguably should be insulated from outside pressure from either particular interest groups or citizens as a whole. Finally, financial and economic governance seems to warrant greater coordination or centralization because of the intertwined world economy, the presence of externalities, and the potential for economies of scale and scope.

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[116] *See* Weiler, *supra* note 8.

[117] *Id.* at 552.

[118] *Id.* at 553.

[119] *Id.* at 556.

[120] *Id.* at 559–61.

[121] Weiler, *supra* note 8, at 551–53.

On the other hand, the state of the economy is often the determinative factor in the outcome of an election, and the current crisis has grown to such a scale and scope that it cannot be ignored. The public is now at least minimally aware of credit default obligations (which experts themselves have difficulty understanding), credit rating agencies, and structured finance. Furthermore, notwithstanding attempts to insulate economic policymaking from outside influence, there are critics who argue that such influence is present,[122] the very thing about which Dahl and Moravcsik are concerned.[123] These considerations mean that the public is engaged in these issues and may well become more concerned about them. Thus, the global financial crisis shows how different strands of decision-making, popular consent, representation, delegation to experts, and insulation become entangled. It also reminds us that we must place the aggregation of citizen preferences in context with the other tools for making decisions at any level, but with a greater appreciation for its power.

As of this writing, most of the policies at issue are being formulated (to expand Weiler's lexicon) at the substratum of international law, i.e., the state level.[124] Substantive fiscal, monetary, and regulatory policy is implemented primarily within countries.[125] Locating this activity on the domestic level is not surprising given what has been discussed in this Article. In democracies, leaders who are addressing these issues will eventually answer to their constituencies for the actions they take now, even though this is somewhat qualified because important aspects of financial policy have been delegated to independent entities such as the Federal Reserve Board.[126] At the same time, international coordination seems warranted to internalize externalities, to prevent free riding, and to take advantage of economies of scope and scale, which gives rise to various forms of international governance.[127] The international financial system and proposed reforms are too complex to discuss here in this Article. Instead, the Article focuses on the G20's decision to use the International Monetary Fund ("IMF") as the primary financial

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[122] Simon Johnson, *The Quiet Coup*, THE ATLANTIC, May 2009, *available at* http://www.theatlantic.com/doc/200905/imf-advice (arguing that the financial services industry is hindering the necessary response to the financial crisis).

[123] *See supra* notes 66–73.

[124] Stephen Grenville, *Does the Global Financial Crisis Need a Domestic or International Response?* E. ASIA F., Feb. 10, 2009, *available at* http://www.eastasiaforum.org/2009/02/ 10/does-the-global-financial-crisis-need-a-domestic-or-international-response/#more-1774.

[125] *Id.*

[126] Yet, even in this context, the recent controversy over the reappointment of the chair of the Board indicates that such delegation cannot be fully insulated from the political process. Sewell Chan, *Fed Chief Wins a Second Term Despite Critics*, N.Y. TIMES, Jan. 29, 2010, at A1.

[127] Recall, however, that coordination among states concerning a particular governmental function is not the same thing as centralizing that function. *See* Ederveen, Gelauff & Pelkmans, *supra* note 98, at 25.

intermediary for international assistance to small and medium-sized economies during the crisis.[128]

This renewed attention to the IMF is being paid just as the institution has been responding to criticism from a number of sources. In the past, critics have questioned its policies when acting as a lender of last resort to condition assistance on the borrower's acceptance of what are often viewed as onerous and intrusive internal structural adjustment commitments. This criticism became particularly sharp during the Asian Debt Crisis of the late 1990s.[129] Such criticism of the IMF's substantive policy has been accompanied by questions about IMF governance.[130] Dijkstra identifies two areas of concern in this regard. First, he and others have argued that the current voting system, which ties voting power to a member state's quota of special drawing rights,[131] does not accurately reflect the relative economic strength of its members, particularly that of emerging economies, and leads to the disproportionate dominance of richer countries over poorer ones.[132] Dijkstra

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[128] Group of Twenty Finance Ministers and Central Bank Governors [G20], *The Global Plan for Recovery and Reform*, paras. 17–21, Apr. 2, 2009, *available at* http://www.londonsummit.gov.uk/resources/en/PDF/final-communique [hereinafter Global Plan for Recovery and Reform].

[129] The literature on the Asian Debt Crisis and the IMF response is extensive. A general overview can be found in Roman Terrill, *The Promises & Perils of Globalization*, *in* THE E-BOOK ON INTERNATIONAL FINANCE AND DEVELOPMENT (2007), *available at* http://www.uiowa.edu/ifdebook/ebook2/PDF_Files/Part_3_4.pdf; *see also* Roman Terrill, *1998/1999 Update: The Asian Crisis Goes Global*, *in* THE E-BOOK ON INTERNATIONAL FINANCE AND DEVELOPMENT (2007).

[130] There is extensive literature on the governance of the IMF and the controversies raised by its lending activities. *See, e.g.*, Int'l Monetary Fund [IMF], Comm. on IMF Governance Reform, *Final Report*, Mar. 24, 2009, *available at* http://www.imf.org/external/np/omd/2009/govref/032409.pdf; Geske Dijkstra, *Supranational Governance and the Challenge of Democracy: The IMF and the World Bank*, *in* GOVERNANCE AND THE DEMOCRATIC DEFICIT: ASSESSING THE DEMOCRATIC LEGITIMACY OF GOVERNANCE PRACTICES 269 (Victor Bekkers et al. eds., 2007); IMF, Indep. Evaluation Office, *Governance of the IMF: An Evaluation*, May 21, 2008, *available at* http://www.ieo-imf.org/eval/complete/pdf/05212008/CG_main.pdf; Devesh Kapor & Moises Naim, *The IMF and Democratic Governance*, 16 J. DEM. 89 (2005); REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK (Ariel Buria & J.A. Ocampo eds., 2005); PETERSON INST. FOR INT'L ECON., REFORMING THE IMF FOR THE 21ST CENTURY, SPECIAL REPORT 19 (Edwin M. Truman ed., 2005); Hector R. Torres, *Reforming the International Monetary Fund—Why Its Legitimacy Is at Stake*, 10 J. INT'L ECON. L. 443 (2007).

[131] Articles of Agreement of the International Monetary Fund, art. XII, sec. 5, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39 [hereinafter IMF Articles of Agreement]. Currently, each member is given a set number of basic votes plus votes based on the member's quota, which are assigned based on each members' economic size and other economic characteristics. *Id.*; IMF, IMF Quotas, Factsheet, http://www.imf.org/external/np/exr/facts/quotas.htm (last visited Feb. 3, 2010). A member's quota is represented in the form of special drawing rights ("SDRs"). IMF Articles of Agreement, art. III, sec. 1. The SDR is an "artificial" unit of exchange, based on a basket of currencies, which represents a member's claim to real foreign currency. *Id.* art. XV; IMF, Special Drawing Rights, Feb. 2009, *available at* http://www.imf.org/external/np/exr/facts/sdr.htm. The IMF member states may, subject to certain conditions, use SDRs to purchase currency to address balance of payment or reserve needs. IMF Articles of Agreement, art. XIX.

[132] Dijkstra, *supra* note 130, at 279–80; Vijay L. Kelkar et al., *Reforming the International Monetary Fund: Towards Enhanced Accountability and Legitimacy*, *in* REFORMING GOVERNANCE

also argues that the organizational structure of the IMF and the changes in its mission—from regulating foreign exchange rates to monitoring its member states' economic policies and providing crisis management—has led to a strong bureaucratic culture unaccountable to its member states.[133] Such criticisms have led to reforms aimed at greater transparency and more meaningful exchanges between the IMF and nongovernmental organizations.[134] Furthermore, in 2008, as part of the process of "quota and voice reforms" that began in 2006, the IMF proposed amendments to the Articles of Agreement to adjust member voting power.[135] The G20 nations have committed to implementing these reforms and have called on the IMF to complete the next review of quotas by January 2011.[136] These proposed changes in governance accompanied the announcement that adjustments will

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OF THE IMF AND THE WORLD BANK 45 (Ariel Buira & J.A. Ocampo eds., 2005); Torres, *supra* note 130, at 445.

[133] Dijkstra, *supra* note 130, at 279–80.

[134] *Id.* at 284.

[135] Press Release, IMF, IMF Board of Governors Adopts Quota and Voice Reforms by Large Margin (Apr. 29, 2008), *available at* http://www.imf.org/external/np/sec/pr/2008/pr0893.htm; IMF, *Acceptances of the Proposed Amendments of the Articles of Agreement*, Feb. 25, 2010, *available at* http://www.imf.org/external/np/sec/misc/consents.htm. The proposed amendments would triple the number of basic votes, ensure that the ratio between basic votes and votes based on a member's quota would remain constant, and enable each of the two Executive Directors who represent African countries to appoint an additional Alternate Director. IMF, Executive Bd. to the Bd. of Governors, *Reform of Quota and Voice in the International Monetary Fund*, at 5–6, Mar. 28, 2008, *available at* http://www.imf.org/external/np/pp/eng/2008/032108.pdf. In addition, the method for calculating quotas would be changed to allow for greater transparency and to better reflect the economic strength of emerging economies. *Id.* at 2; IMF, List of IMF Quota and Voice Publications: June 2006–Apr. 2008, http://www.imf.org/external/np/fin/quotas/pubs/ (last visited Feb. 3, 2010). For a more recent discussion of some of the proposed reforms, see IMF, Strategy, Policy, & Review Dep't & Legal Dep't, *IMF Governance—Summary of Issues and Reform Options*, July 1, 2009, *available at* http://www.imf.org/external/np/pp/eng/2009/070109.pdf.

[136] Global Plan for Recovery and Reform, *supra* note 128, para. 20. More recently, the G20 has recommended that at least 5 percent of quotas be shifted from overrepresented countries to underrepresented emerging markets and developing countries. G20, *Leaders' Statement: The Pittsburg Summit*, para. 21, Sept. 24–25, 2009, *available at* http://www.pittsburghsummit.gov/mediacenter/129639.htm [hereinafter G20 Pittsburgh Statement]. In October 2009, the advisory group to the IMF Board of Governors endorsed the G20's recommendation. IMF, *Communiqué of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund*, para. 4, Oct. 4, 2009, *available at* http://www.imf.org/external/np/cm/2009/100409.htm. The G20 also agrees that "the heads and senior leadership of the international financial institutions should be appointed through an open, transparent, and merit-based selection process." Global Plan for Recovery and Reform, *supra* note 128; G20 Pittsburgh Statement, para. 21. According to Johnson, this means that the managing directorship of the IMF, an influential position that has traditionally been appointed by European countries, will now be open to persons from emerging economies. Simon Johnson, *The Last European: Why the G-20 Was a Success*, N.Y. TIMES, Apr. 3, 2009, *available at* http://economix.blogs.nytimes.com/2009/04/03/why-the-g-20-was-a-success-obamas-initiative/.

be made in the conditions placed on IMF loans, including the removal of structural performance criteria.[137]

If the G20's call for additional funding to the IMF is realized, the IMF will effectively have a trillion dollars on hand to assist embattled countries,[138] which would bolster the IMF's importance internationally, at the same time highlighting the legitimacy issues discussed in Part II. In this respect, Weiler's treatment of the legitimacy problems associated with international governance is interesting because he anticipates the findings of this Article. Weiler argues that where international governance takes its institutional or regulatory forms, the "usual fall back position that . . . legitimacy may . . . be acquired through democratic control of foreign policy at the nation state level—loses its persuasive power."[139] According to Weiler, at the institutional level, this loss in power is due to the loss of meaningful state consent.[140] In his view, in large international institutions, state consent must be fictionalized to accommodate all members, and membership in some institutions, such as the World Trade Organization ("WTO"), is not really optional.[141] At the level of regulation, Weiler argues that democratic justifications for policy lose their persuasive power because all accounts of democracy presuppose a *demos* and an identifiable government, neither of which is present at the international regulatory level.[142]

While there are some international institutional and regulatory regimes, like the WTO, in which states are arguably highly constrained, that is not necessarily the case with the IMF, at least in some respects. Some evidence supports the argument that state consent remains relevant.[143] The recently implemented or proposed reforms discussed above indicate that international institutions, like the IMF, recognize that states, to the extent that they are

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[137] Press Release, IMF, IMF Overhauls Nonconcessional Lending Facilities and Conditionality (Apr. 3, 2009), *available at* http://www.imf.org/external/np/sec/pn/2009/pn0940.htm.

[138] Global Plan for Recovery and Reform, *supra* note 128, para. 5.

[139] Weiler, *supra* note 8, at 560; *see also* Kumm, *supra* note 3.

[140] Weiler, *supra* note 8, at 557.

[141] *Id.* at 557–58. Helfer explains that there is a strong incentive to enter into and continue free trade agreements such as the WTO, because membership is required to enjoy the "club goods" provided by such arrangements. Laurence L. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1636–37 (2005).

[142] Weiler, *supra* note 8, at 560. With regard to international financial regulation, Jan Kregel argues that poorer countries are not represented at various international rulemaking bodies that have quasi-legal status and whose members are not elected. In Kregel's view, such bodies, like the Financial Stability Forum (now the Financial Stability Board), form a *de facto* regulatory power that impacts developing countries. Jan Kregel, *From Monterrey to Basel: Who Rules the Banks?*, *in* SOC. WATCH, REPORT 2006, IMPOSSIBLE ARCHITECTURE: WHY THE FINANCIAL STRUCTURE IS NOT WORKING FOR THE POOR AND HOW TO REDESIGN IT FOR EQUITY AND DEVELOPMENT 26 (2006).

[143] *See supra* notes 8–9.

able, will balk at acceding to policies over which they have little or no control. Likewise, international institutions must respond to this resistance or risk being sidelined. In this regard, Torres argues that the effectiveness of IMF policies and the legitimacy of its governance are closely linked. Writing in 2007, Torres observed that the IMF was increasingly beset by its inability to "persuad[e] large members to follow its policy advice," and by the fact that potential borrowers were engaging in self help—accumulating their own foreign exchange reserves and pooling these reserves within regional institutions.[144] For Torres, what he terms the "two deficits" in effectiveness and legitimacy "are interlinked in a vicious circle as ultimately '[t]he Fund's credibility depends on its perceived legitimacy as an international organization representative of its members and [its] effectiveness suffers if countries of growing economic importance are not adequately represented.'"[145]

This Article does not assess whether the IMF reforms as implemented or proposed will allay the concerns of observers. However, two things are of note. First, although it can be argued that state consent has been besieged of late, such consent remains important, as Torres observes.[146] As the IMF example illustrates, state consent can become the basis upon which states either support or undermine international institutions and the norms and policies that emerge from them. To be sure, such state behavior can be construed in realist terms. However, state behavior might also be explained by the fact that, at least for democracies, citizen preferences about foreign policy matters on the domestic level cannot be ignored as a source of legitimization, even on the international level.

Second, the example of the IMF might present one way in which the work done in this Article might be further applied to the international level. Even though institutions like the IMF are far removed from the ordinary citizen, and even though their leadership is not subject to direct elections, if an institution wishes to perform its mission effectively, it must anticipate the preferences of its constituents with regard to both substance and process. Otherwise, states will try to either depart from or undermine the very purposes of that institution. This lends further support to the claims that accountability exists even when international institutions are involved,[147] and therefore, the preferences of citizens, as articulated by their governments, indirectly have some influence on the international plane.

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[144] Torres, *supra* note 130, at 444.

[145] *Id.* at 445 (quoting Rodrigo de Rato y Figaredo, The IMF's Medium-Term Strategy: Meeting the Needs of Emerging Market Members, Remarks at the Banco de Mexico, Mexico City (Mar. 23, 2006)).

[146] *See id.*

[147] *See supra* notes 5–7.

V. CONCLUSION

This Article has attempted to assess what role the aggregation of citizen preferences into the foreign policy choices of a democratic country might play in the legitimization of international law. Although such aggregation cannot be an exclusive source of legitimization, and is not the sole characteristic of a democracy, it also cannot be ignored. This Article has reviewed the literature and applied an anticipated reaction model to show that even in large democracies there are mechanisms through which citizen preferences can be, and are, reflected in the policy choices of their representatives. Policymakers therefore must anticipate what those preferences will be when it comes time to be held accountable.

As proposed in Part II, there is a sense in which one can draw a line between the preferences of an individual citizen to the choices made on the state level, although as demonstrated in Part III, such a line is far from direct. In Part IV, this Article has shown, in a preliminary way, that there is some reason to believe that line continues from the state to the international level, in the sense that citizen preferences remain relevant to state decisions regarding whether to centralize or decentralize, and whether a state will support or undermine the mission of international institutions. Thus, citizens' influence must be taken into account as those institutions make their own substantive and procedural choices. Determining how bright or faint that line is must await further research, but hopefully the findings here indicate it is a line worth tracing.