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The Political Economy of Global Multilateralism

John O. McGinnis*

Many conservatives (at the least the subset who are classical liberals) approve of global multilateral trade agreements and allied agreements that keep global capital markets open. Conservatives, however, tend to be openly skeptical of other global multilateral agreements, be they environmental accords, human rights conventions, military pacts, or an agreement on an international criminal court. In this paper I offer the beginnings of a framework of sound political economy that justifies these divergent intuitions and shows that they are rooted in more than just a reflexive liking for trade combined with a disdain for the environment, human rights, criminal justice, and world peace.

I begin with an important caveat. This paper offers an account of global multilateralism at a necessarily high level of generality, given the space limitations for the essays in this collection. It does not seek to defend or critique the actual operation of particular global multilateral treaties, although it occasionally uses some treaties as examples. Specifically, it does not defend the particular structure of the World Trade Organization ("WTO") or criticize particular environmental or human rights treaties.¹ I also recognize that the guidelines it offers for global multilateralism may be too pristine for the world of practical politics where compromise is frequently necessary. But before we begin the necessary task of compromising, it is useful to get our theoretical baselines right. This paper thus presents a sketch of what a Kantian would call "a regulatory ideal"—a model by which we should inform the concrete practices of global multilateralism.

* Professor, Benjamin N. Cardozo School of Law. The direction for this collection of essays was to footnote lightly and I followed this mandate with delight. My thanks to David Bernstein and Peter Spiro for helpful comments. I am also very grateful to Mark Movsesian for his comments and his collaboration on a forthcoming paper about the WTO, which prompted many of these thoughts. Thanks to Jeremy Rabkin for his encouragement and to John Bolton for the invitation.

1. A defense of some aspects of the WTO is set out in John O. McGinnis and Mark L. Movsesian, *The World Trade Constitution*, 114 Harv L Rev (forthcoming 2000).

I. THE PROPER GOALS OF MULTILATERALISM

The first step in assessing the proper scope of global multilateralism is to define it as a set of globally-based mechanisms of governance to change in some formal way the conduct of nations and through these effects change the behavior of their citizens.² Viewed from this perspective, global multilateralism is a constitutive mechanism that can be justified, like any constitutive mechanism, only if it improves the well-being of the citizens of the participatory nations. Thus, one's view of the appropriate scope of multilateralism depends on one's general approach to constitutionalism. That approach in turn must be grounded in one's assessment of human nature.

It is beyond the scope of this short paper to offer a complete description of the appropriate goals of constitutionalism in light of the realities of human nature. But here is a beginning. Humans, like many other animals that live in groups, have two modes of gaining resources—both backed by a set of instincts.³ One is exchange by which they provide goods and services in return for other goods or services (or, in the modern economy, money). The other is hierarchy, by which they gain goods and services on the basis of their position and status in the social order.

If exchange is the prevalent mode of acquiring resources in society, wealth increases because individuals gain incentives to create what others want. If hierarchy is the prevalent mode of acquisition, wealth dissipates because individuals fear to create what others can take by virtue of their position in the social hierarchy. Hierarchy also breeds conflict, because it increases pressure to displace others in a fixed pecking order. Moreover, it is natural for each citizen in a hierarchy to regard his fellow citizens either as sources of wealth he can seize or as threats to his property.⁴ The prospect of acquisition through hierarchy thus sows suspicion and division.

Accordingly, for moral as well as economic reasons, constitutive structures of government such as multilateralism should aim at promoting exchange and constraining hierarchy.⁵ Expanding the market across national boundaries obviously

2. International multilateralism affects nations and their citizens less directly than domestic constitutive structures affect citizens. In international relations today, force is rarely used to compel nations to comply with global multilateral agreements. Nevertheless, the premise for this essay (which I actually defend only in the context of trade multilateralism and even then in a cursory way) is that multilateralism does have some effects on the participating nations and that those effects flow from the content of those multilateral agreements.

3. I offer a more complete explanation in John O. McGinnis, *The Human Constitution and Constitutive Law: A Prolegomenon*, 8 J Contemp Leg Issues 211, 222 (1997). See also Mark F. Grady and Michael T. McGuire, *A Theory of the Origin of Natural Law*, 8 J Contemp Leg Issues 87, 89 (1997) (describing similar dual modes of acquiring resources in chimpanzees, our closest animal relative).

4. See John O. McGinnis and Michael B. Rappaport, *The Case for Supermajority Rules*, 98 Pol Rev 45, 56 (1999).

5. I here speak of global multilateralism, because I want to make clear that I am not speaking of the European Union or other multilateral agreements among regional neighbors.

promotes the exchange mode of gaining resources because the market is itself an important form of exchange. Advancing democratic forms restrains hierarchy, because pluralistic democracy is more successful than despotic forms of government at impeding rulers and their supporters from using the government to secure resources for themselves at the expense of the general citizenry.⁶

Even in a democracy large and diverse enough to inhibit majority tyranny, however, minority factions in the form of special interests can use their greater leverage to gain resources through hierarchy at the expense of the public. Additional mechanisms are therefore needed to assure, in Mancur Olson's phrase, that a nation is governed by an "encompassing interest" rather than by special interests.⁷ Such an encompassing interest—the diffuse majority or supermajority of citizens—has less incentive than special interests to engage in the expropriation of resources through government—what public choice theorists term rent-seeking—because it would then be taking resources from itself.⁸ Therefore mechanisms that promote governance by the encompassing interest reduce the opportunities for expropriation through hierarchy.

Jurisdictional competition among sovereign nations is a primary mechanism for empowering the "encompassing interest" of a nation and reducing the ability of interest groups to take resources from the government. Under jurisdictional competition, sovereigns compete by providing efficient levels of public goods. Leaders are thereby restrained from rewarding themselves, their supporters, or influential special interest groups.⁹ A large, diverse democracy, where interest groups are held in check by jurisdictional competition, substantially reduces the incentives for individuals to seek rents through government action. Individuals will instead spend their time, on balance, in relatively more productive and peaceful activity.

Thus, considered most abstractly, good forms of multilateralism would help sustain one of three key forms of decentralized order that promotes governance by the encompassing interest—democracy, jurisdictional competition, and competitive economic markets. The source of competitive economic markets can be enlarged

6. This is the defense of the continental republic given in Federalist No 10. For further discussion of the importance of an extended democratic sphere in limiting the endurance of any single majority faction's control, see David A. Epstein, *The Political Theory of the Federalist* 99–107 (Chicago 1984). The size of democracy necessary to accomplish this has probably declined since Madison's time, because the complex division of labor in the modern world has created more interest groups, see McGinnis and Rappaport, 98 *Pol Rev* at 50 (cited in note 4), thus making it harder for any majority faction to maintain control.

7. See Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* 15–16 (Basic 2000) (discussing the need to restrain interest groups to assure that prosperity).

8. *Id.*

9. See John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 *Harv J L & Pub Pol* 195, 205–06 (1997) (describing manner in which jurisdictional competition in the original Constitution limited government).

either by extending markets or by correcting market failure in a manner that does not create more costs than benefits. Such a decentralized regime, which we might term “good multilateralism,” diffuses power throughout the productive citizenry. It would help ensure that the social order reflects the spontaneous decisions of the many rather than the fiat of a few politicians or bureaucrats wielding governmental power or a relatively few special interest groups holding disproportionate leverage over its exercise.

Allowed to hold global sway, spontaneous order facilitated by multilateralism can create wealth and reduce conflict in a manner perhaps unprecedented in human history.¹⁰ On the other hand, centralizing power in international bureaucracies at the expense of markets, democracy, or jurisdictional competition—what we might call “bad multilateralism”—could interfere with markets and provide power to special interests on a global scale, reducing the power of the encompassing interests of various nations to govern themselves. The beneficence of a new world order thus will depend crucially on the forms of multilateralism we create.

Having established the appropriate goals of multilateralism I offer three general axes for investigating whether a particular form of multilateralism is justified. After laying out these axes, I will then briefly address the conceptual framework behind four different kinds of multilateral agreements—those concerning trade, human rights, regulation, and an international criminal court—and the use of force. Finally, and very tentatively, I will suggest the factors that should determine the conditions under which such multilateral agreements might deserve support.

A. *Mutuality of Gains.* Multilateralism is appropriate only when the agreement provides gains to all parties to the agreement and when the gains could not be realized by the nations acting individually. The requirement of mutual gains is important because an agreement that exploits one nation for another’s advantage will be unstable and internationally divisive. The requirement that nations cannot otherwise achieve the gains individually flows from a basic principle of subsidiarity. So long as they are of a sufficient size, localized institutions are easier to control by an encompassing interest than distant ones. Therefore, multilateralism should be used only when the gains for one nation are contingent on the actions of another.¹¹

B. *Facilitation of the Encompassing Interest.* Second, global multilateralism should facilitate the governance of participating nations by an encompassing interest. For instance, if a multilateral agreement increases jurisdictional competition among nations in areas where there are no substantial externalities, this development will be a substantial benefit. Indeed, in my view, the *defining* virtue of sovereignty is its maintenance of jurisdictional competition. Jurisdictional competition creates another

10. For further discussion of the virtues of spontaneous order, see F. A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* 35–52 (Chicago 1973).

11. On this point, see Stephen D. Krasner, *Power and Constraint*, 1 Chi J Intl L 239 (2000).

market—a market for governance in which governments must compete to provide a high ratio of public goods to taxes and other exactions. Without that high ratio, capital and businesses will exit.¹² Given this benefit, I believe that the right multilateral agreements can strengthen sovereignty by intensifying jurisdictional competition while the wrong ones can weaken it by extinguishing the competition.

C. Light Elaboration Mechanisms. The final criterion concerns the substantiality of the elaboration mechanism needed to make global multilateralism work. In a sense, this third criterion is a corollary of the second. If complex international mechanisms with plenary authority are needed to sustain the agreement, such agreements would run a high risk of capture by special interest groups because such institutions are distant from the politics affected by them.¹³ They would narrow the encompassing interest by which nations should be governed. They also may create an unaccountable international bureaucracy which would have incentives to seize international authority to the detriment of jurisdictional competition.

For this reason, it is always important to assess whether other structures more conducive to rule by an encompassing interest will accomplish the desired result of a particular form of multilateralism. I suggest, for instance, that trade multilateralism, with its decentralizing virtues, may accomplish some of the goals of human rights multilateralism without its risks of centralization.

Thus, opposing multilateral structures for specific categories of regulation, such as criminal law, human rights, or military intervention, does not mean that the goals of such multilateralism are themselves undesirable, only that their international structures have more costs than benefits. For instance, in some cases the greater centralization required to impose these goals through international ordering will lead to substantial losses in human welfare. I now turn to a more specific but necessarily brief discussion of each kind of multilateralism to assess how each fares in light of these criteria.

II. TRADE AGREEMENTS

A. Mutual Gains. Trade agreements, including agreements to permit free trade in goods and services and to preserve open capital markets, are the multilateral agreements easiest to defend. First, they create wealth among all nations that are a party to them. According to the well-established theory of comparative advantage, nations prosper when they specialize in the goods and services they can produce most

12. The advantages of jurisdictional competition over centralized regulation are discussed at much greater length in McGinnis and Movsesian, 114 Harv L Rev (cited in note 1).

13. See Paul B. Stephan, *Symposium: Institutions for International Economic Integration: Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 J Intl L Bus 681, 699–701 (1996) (citizens face higher costs in monitoring international rules than domestic rules).

efficiently.¹⁴ Thus, the mutuality of wealth creation gives all nations a stake in sustaining these agreements.¹⁵

It is true that unilateral free trade is beneficial, but multilateral free trade creates even greater benefits by encouraging more efficient use of factors of production. That is one reason to create multilateral institutions: to encourage trade. The other reason lies in domestic political economy. Protectionist interest groups have a tendency to resist free trade. By reducing tariff barriers in other countries, exporter interest groups are mobilized to fight for free trade.¹⁶ Thus, not only are there mutual gains to be realized from free trade, there is reason to believe that the mutual gains are contingent on the political action of other states. The political contingency of tariff reductions in one country on tariff reductions in other countries provides the best rationale for trade policies to be pursued through global multilateralism.

B. Relatively Simple Elaboration. The second advantage of trade agreements is that they need relatively simple elaboration mechanisms. This follows from the simple fact that they reduce tariffs and other constraints on markets rather than increase them. For instance, reducing tariffs takes no positive regulation at all. Eliminating non-tariff barriers does not require a substantial administrative apparatus either, because an arbitral system can enforce relatively determinate non-discrimination rules.¹⁷ The relatively streamlined enforcement structure of the trade regime enhances the desirability of trade multilateralism because public choice has suggested that a substantial administrative apparatus is subject to capture by interest groups.¹⁸

14. See Todd G. Buchholz, *New Ideas from Dead Economists: An Introduction to Modern Economic Thought* 67–73 (New American Library 1990).

15. Citizens in the nations party to these agreements become better off as well, and this growing prosperity makes the nations more stable and more likely to keep their agreements. I realize that some may claim that trade increases inequality and thereby instability, but I disagree. It is a corollary of comparative advantage that trade increases the average income of citizens in a nation. Judge Richard Posner has shown, in turn, that increasing average incomes in a society increases political stability. See Richard A. Posner, *Equality, Wealth and Political Stability*, 13 J L Econ & Org 344, 344 (1997).

16. In *The World Trade Constitution*, Professor Movsesian and I argue that this mobilization of producer interest groups also has benefits to the domestic political structure of democracies. McGinnis and Movsesian, 114 Harv L Rev (cited in note 1).

17. Professor Movsesian and I demonstrate this in *The World Constitution*. We also address NGOs at length in that article—a subject which I do not discuss because of space limitations here. McGinnis and Movsesian, 114 Harv L Rev (cited in note 1).

18. While I do not fully address here the very important issue of how multilateral agreements are ultimately enforced (see note 4), I will briefly discuss some of the factors that help sustain trade multilateralism. Unlike domestic legal obligations, trade multilateral obligations are not enforced by coercive sovereign power because they are pacts among sovereign powers. Trade multilateralism thus must create its own dynamic of enforcement by changing interests within nations so their governments will respect the agreements. First, multilateral trade agreements provide more wealth to export groups, giving these groups an interest in their enforcement. Second, they provide more wealth or status to rulers. In despotisms the form of wealth provided is the higher taxes or other

C. *Facilitating the Encompassing Interest.* Other elements of global economic integration empower the encompassing interest within nations by facilitating jurisdictional competition—what I have called the defining virtue of sovereignty. As the century ends, capital has become more mobile both because of technological factors, like electronic transfers, and legal trends, like the relaxation in exchange controls.¹⁹ The latter development has been encouraged by multilateral agreements, like the International Monetary Fund.²⁰ Mobile capital, in turn, increases the pressures of regulatory competition and helps it provide benefits even when individuals cannot move from nation to nation.²¹ Thus, open capital markets and investment agreements help make sovereignty work on behalf of the encompassing interest of society.²²

For all these reasons, multilateral trade agreements can, in concept, provide useful mechanisms for sustaining markets and governing societies by a broad encompassing interest. Multilateral trade agreements might ultimately create a world constitutive mechanism that resembles the original Constitution of the United States.²³ The Constitution promoted decentralized order by creating a market for governance where open capital markets and free trade forced state governments to deliver public goods in an efficient manner. This system sustained very substantial growth and limited governmental expenditures.²⁴

exactions rulers can enjoy from faster growing economies sustained by trade. In democracies rulers benefit from the greater likelihood of retaining political power because of higher economic growth. As trade agreements reinforce markets, so is their enforcement facilitated by growth in markets. They are, in this sense, a self-sustaining system.

19. See Reuven S. Avi-Yonah, *Globalization, Tax Competition and the Fiscal Crisis of the Welfare State*, 113 Harv L Rev 1573, 1575 (2000).
20. See, for example, Articles of the International Monetary Fund, TIAS no 1501, 2 UNTS 39, Art VIII, § 2(a) (July 22, 1944), as amended, 20 UST 2775, 29 UST 2203, TIAS no 11898 (prohibiting the imposition of "restrictions on the making of payments and transfers for current international transactions").
21. For full discussion of this argument, see Walter Oates and Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing*, 35 J Pub Econ 330 (1988). Oates and Schwab assume individuals cannot move among jurisdictions. Id at 336.
22. Sebastian Mallaby suggested that some might argue that beneficial jurisdictional competition are actually detrimental races to the bottom. See transcript of comments of Sebastian Mallaby, AEI Conference (on file with CJIL). Professor Movsesian and I discuss this argument at some length in the *World Trade Constitution*, 114 Harv L Rev (cited in note 1).
23. See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 Cardozo L Rev 903, 916 (1996) (offering an extended comparison between international trade regime and the original Constitution).
24. See Barry Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development*, 11 J L Econ & Org 1, 24–28 (1995).

III. HUMAN RIGHTS

Multilateralism under the rubric of human rights comes in at least three categories—property rights, welfare rights, and civil rights.²⁵ I will analyze the advisability of multilateral agreements in each category, but given the fact that these categories seem to be difficult to keep separate in the world of politics, it may well be a mistake to undertake global multilateralism in any of the categories unless on balance we believe the results of internationalization for all categories are good.

A. *Multilateral Property Rights.* Under the criteria we have discussed, the most appropriate area for human rights multilateralism would be basic property rights—rights to keep one's property, including property in one's person, free from government expropriation and retrospective interference.²⁶ The Takings Clause and the Contracts Clause of the US Constitution are examples of such basic property rights that should be protected. Agreement on such rudimentary property rights would increase all nations' wealth as each nation would gain advantages from trade through the increased entrepreneurship that stems from protecting and stimulating exchange.

Nevertheless, basic property rights do not appear to be contingent on multilateralism in the strong sense that reduction in tariffs may be. As discussed above, a multilateral agreement to reduce mutual tariffs may help reduce tariffs at home, because the prospect of lower tariffs abroad mobilizes exporter interest groups to counterbalance protectionist groups. In contrast, it is difficult to see how a multilateral agreement on property rights mobilizes any groups to support property rights who would not otherwise do so. In other words, the prospect that Indians will enjoy more property rights if China provides more property rights for its citizens will not prompt, at least directly, any group in China to push harder for property rights.²⁷

Under the criteria for multilateralism advanced above, property rights do have other advantages. By limiting government exactions, they extend markets and restrain

25. Once again I wish to make clear that I am only talking about multilateral enforcement of human rights—that is requiring countries to comply with certain human rights standards through an international mechanism of governance. I regard agitation for human rights through private boycotts and criticism of countries' human rights standards as a beneficial mechanism for encouraging human rights—a mechanism that has almost no downside.

26. I say rights of property broadly construed, because, like James Madison, I construe many rights that are now termed civil liberties as property rights against the government. For instance, like Madison, I think the First Amendment protects a property right in our opinions and the free communication of them. See John O. McGinnis, *The Once and Future Property Vision of the First Amendment*, 63 U Chi L Rev 49 (1996).

27. To be sure, jurisdictional competition may pressure China to grant such rights because capital is likely to move to countries with strong property rights. But this kind of jurisdictional competition can flourish so long as the world enjoys free trade and open capital markets. No specific agreements on the content of property rights within a nation, like the right to contract, are necessary to sustain such competition.

hierarchy. Moreover, being entirely negative in character, they do not require the elaborate administrative enforcement mechanisms necessary to formulate positive regulations. (The Contracts Clause and the Takings Clause, for instance, were enforced by courts.) Nevertheless, property rights cannot be enforced as easily as anti-discrimination rules of trade agreements. With Professor Mark L. Movsesian I have argued elsewhere that trade discrimination can be policed by a procedurally oriented regime that does not encroach on substantive decision-making.²⁸ In contrast, decisions to invalidate regulations on the basis of property rights would require balancing substantive justifications for regulation against the strength of the property right at issue. It would thus generate greater pressure on the legitimacy of international institutions because they would intrude more on perceived sovereign autonomy.

B. Multilateral Welfare Rights. Thus, while the case for international property rights is not as strong as that for trade agreements, the factors that should define the proper scope of international political economy do not entirely militate against international property rights. It is interesting to observe, however, that multilateral human rights conventions are notable for their neglect of property rights. The Universal Declaration of Human Rights,²⁹ the International Covenant on Economic, Social and Cultural Rights,³⁰ and the International Covenant on Civil and Political Rights³¹ offer guarantees of all sorts of civil and political rights. They even secure welfare rights against the government, including, in one case, the right to have the government assure paid holidays!³²

The preference of multilateral human rights conventions for welfare rights over property rights illustrates the danger that the multilateral process can be captured by interest groups, including political elites. Politicians (and bureaucrats) negotiate agreements and government programs providing welfare rights. Those agreements and programs then empower politicians (and bureaucrats) because they determine the beneficiaries of programs and the sources of revenues that fund them.³³ Interest groups prefer welfare rights because they are potential beneficiaries. In contrast, property rights restrain the power of politicians, bureaucrats and interest groups, and thus they

28. See McGinnis and Movsesian, 114 Harv L Rev (cited in note 1).

29. GA Res 217A(III), at 71, UN Doc A/810 (1948).

30. 6 ILM 360 (1966).

31. 999 UNTS 171 (1966).

32. See International Covenant on Economic, Social and Cultural Rights, Art 7(d) (cited in note 30). In contrast, none of these conventions contain a right to compensation against takings of property or of other specific property rights, such as the right to contract. Of the three conventions only the Universal Declaration mentions property rights and it provides only the "right to own property" and right not to be "arbitrarily" deprived of "property." Art 17 (cited in note 29). It provides no specification of what constitutes property.

33. See Enrico Colombatto and Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 Cardozo L Rev 925 (1996) (suggesting that politicians and bureaucrats try to expand their jurisdiction and power through agreements).

are less likely to include such provisions in these international agreements.³⁴ The encompassing interest of citizens is unlikely to be able to counteract the influence of interest groups over these formulations, because they have substantial difficulty in monitoring the details of international agreements.³⁵ Moreover, the taxes and regulations that sustain welfare rights in each nation are less likely to be limited by jurisdictional competition if they are coordinated at the international level.

Finally, assuming that some kinds of welfare rights can constitute public goods that the government should supply, it is clear that levels must depend upon the budgetary constraints of individual nations. If such welfare rights are to take account of the differing circumstances of various nations and their traditions, substantial discretion must be given to international institutions charged with their elaboration. This discretion, in turn, gives rise to the problems of bureaucratic aggrandizement and domination of unrepresentative elites—in this case the international law publicists and the international human rights community.³⁶ Thus, the international elaboration of welfare rights is likely to reduce rather than reinforce the ability of the encompassing interest to govern individual nations.

C. Multilateral Civil Rights. The final category of rights is civil rights, such as rights connected to democracy, like voting and the panoply of rights connected to the criminal justice system. Since civil rights do not result in direct transfers of resources, and their effects on the distribution of resources are usually unclear, they are likely to be less interest group-driven than welfare rights and thus centralizing them is less likely to lead to rules favorable to interest groups. But, like property rights, civil rights lack the strongly contingent nature that provides the best justification for multilateralism. The international elaboration of civil rights by a multilateral mechanism in one nation does not directly generate civil rights in another.³⁷

Moreover, centralization through multilateral mechanisms could lead to losses because different bundles of civil rights are likely to be optimal for different jurisdictions. In an ideal world, the advantage of more decentralized structures

34. Some might contend that those with various forms of property might form a rent-seeking faction as well. I do not disagree with this observation but property rights, not welfare rights, would inhibit such factions from using the government to expropriate others' property or to otherwise foreclose their opportunities. Moreover, our era of rapid technological change is always minting new groups of wealthy entrepreneurs, thus reducing the opportunity for any one property-based faction to become entrenched.

35. See note 13 and accompanying text.

36. See Andy Olson, *An Empire of Scholars: Transnational Lawyers and the Rule of Opinio Juris*, 29 *Perspectives Pol Sci* 23 (2000) (showing that international publicists form a closed epistemic community with substantial leverage on shaping content of international law).

37. I acknowledge the example of civil rights in one nation may powerfully influence citizens in another nation, but this example does not need multilateralism to make itself felt. CNN and other forms of communication, not multilateral agreements, are the connecting forests over which the wildfire of rights is spreading.

preserved by sovereignty is that civil rights, like other public goods, can be adapted to the peculiar circumstances of individual nations.³⁸ More generally, many civil rights concern the proper mix of the personal discipline necessary for republican government to flourish and the personal liberty necessary for citizens to enjoy the benefits of their republic.³⁹ It would be very surprising if that mix did not differ somewhat based on the history and level of development of the society. Even if we were sure that one bundle was right for every jurisdiction, why should we be so sure that an international process will in the long run approximate the correct mix of human rights better than the average domestic process?⁴⁰ Centralizing the elaboration of human rights may in fact perpetuate error.⁴¹

Sadly, however, we do not live in an ideal world in which substantial jurisdictional competition among sovereigns leads to bundles of rights appropriate for different countries. Jurisdictional competition in civil rights is inhibited by the relative immobility of persons. With Professor Movsesian, I have argued elsewhere on the basis of recent economic models that jurisdictional competition is likely to be conducive to nations adopting a good set of regulations that directly affect businesses, because it will tend to force regulations at the margin to be equal to their costs by reducing wages in proportion to costs.⁴² This effect may well not occur in the civil rights area because civil rights, unlike regulations affecting businesses, do not directly affect employee wages. Jurisdictional competition thus cannot be relied upon, at least in the short- or medium-term, to put pressure on nations to move toward providing their citizens with an optimal bundle of civil rights.

D. *The Trade Alternative for Diffusing International Rights.* Because of the inefficacy of jurisdictional competition in this area, the case for multilateralism in civil rights is

38. See Dennis C. Mueller, *Constitutional Democracy* 77 (Oxford 1996).

39. See, for example, Nelson Lund, *Federalism and Civil Liberties*, 45 Kan L Rev 1045 (1997) (suggesting that centralizing civil rights enforcement through the incorporation doctrine has made it more difficult to experiment for the right balance).

40. I recognize that the premise of Kenneth Roth's comments at the AEI Conference was that multilateral processes were likely to generate a better bundle of human rights than our own domestic process, but I do not believe that he provided strong support for this premise. See Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 Chi J Intl L 347 (2000).

41. For instance, centrally incorporating rights will make it harder to change those rights when they cease to be optimal. The world changes and rights that may have been efficient at one time may cease to be efficient. I will take a hypothetical criminal procedure—a *Miranda* type warning—that is not expressly in the ICCPR but which could represent an implementation of the 15(g) requirement that "no one be compelled to testify against himself." The efficiency of such a right at any moment depends on the absence of less costly alternatives that would prevent police misbehavior. The danger of codifying international rights is that they will become difficult to change in light of circumstances. Obviously, this is less of a risk if the multilateral agreement prohibits only activities that could not be justified under any circumstances and in any country, like torture or slave labor. I would put basic property rights in this class as well.

42. McGinnis and Movsesian, 114 Harv L Rev (cited in note 1).

far better than the case for multilateral welfare rights. But we also should consider whether there are alternative ways to promote civil rights—ones that carry less risk of international structures imposing conceptions of rights that are mistaken or do not fit particular countries. In my view, multilateral trade agreements are such a mechanism. These agreements can facilitate the expansion of civil rights not through fiat but through encouraging a process which will generate pressure for such rights internally. Civil rights correlate highly with societal wealth.⁴³ This accords with historical evidence that a rising middle class demands civil and political rights to help secure its swelling wealth against the dangers of tyrannical government and political instability.⁴⁴

Thus, trade agreements are likely to lead over time to a broader diffusion of civil rights. This bottom-up model of diffusing human rights through economic growth will lead, in the long run, to a more optimal bundle of rights that better fits the needs of each nation than the top-down model of human rights conventions. Rights generated internally are more likely to take account of the particular preferences and traditions of individual countries. Moreover, they are more likely to resist political gusts that put pressure on rights because they will be more securely rooted in the soil of these countries.

The potential of multilateral trade agreements to cascade into civil rights has one other important advantage over the direct international pursuit of human rights: it is more likely to be honored by despotic leaders. The most glaring defect of multilateralism in human rights is that it does not appear to help the peoples whose bundle of rights is grossly suboptimal. Many countries that have signed the most important human rights conventions, nevertheless continue systematically to abuse the civil and political rights of their people and resist basic democracy. This is true even of agreements that prohibit universally condemned conduct, like torture.

In contrast, despots are more likely to honor trade multilateralism, because expanding trade will make their nations richer and therefore redound to their personal advantage by permitting them to increase their tax revenues and other exactions. By offering attractive bait to hook despotic regimes, multilateral trade agreements may actually provide a more effective, if circuitous, route to securing civil and political rights than civil and political rights conventions themselves.

IV. REGULATORY MULTILATERAL AGREEMENTS

With one important possible exception, multilateral agreements that seek agreement on regulatory issues are more problematic than either trade agreements or

43. See James D. Gwartney, et al, *Economic Freedom of the World, 1975–1995* xxii (Fraser Institute 1995) (showing that citizens in wealthier countries enjoy greater protection for civil rights than those in poorer countries).

44. See John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 *Cath L Rev* 1029, 1032 (1999).

human rights agreements (except for those on welfare) because they require many more complex institutions of elaboration that give additional leverage to special interests. By weakening jurisdictional competition they are also likely to strengthen the power of special interests as against the power of encompassing interests. Nevertheless, one cannot rule out completely the need for multilateral regulatory agreements when nations impose substantial externalities on other nations, as may be the case with some forms of global pollution.

First, a word on terminology. The push for new international regulatory regimes often goes by the name of "harmonization." When used in the context of regulatory regimes this term conjures up an image of citizens of many nations happily singing in harmony. But nations, like individuals, differ in their circumstances and endowments, and therefore the process of imposing similar regulations is likely to give rise to the opportunity for some nations to take resources from others. Of course, some individuals and groups will also systematically benefit from harmonization because they will either be in a position to influence them to their advantage or to gain status and power from implementing the regulatory changes. For this reason, there is always the danger that regulatory harmonization will become the song of the oligarchs.⁴⁵

Harmonization creates particular danger in the international context, at least where there are no clear externalities among countries. First, mutual gains are unlikely to arise from international multilateral regulations in such circumstances. Countries differ in their level of development, traditions, and preferences of their people and are likely to choose different regulations. While it is true that a multilateral regulatory regime could permit different nations to have different regulations, the principle of subsidiarity suggests that it is best not to allow one jurisdiction to have a formal input into another jurisdiction's regulatory regime.⁴⁶ Moreover, absent externalities, the beneficence of one nation's regulatory regime is not contingent on the beneficence of another nation's regulatory regime.⁴⁷

Second, unlike the case of trade multilateralism, international regulation interferes with the operation of markets. This necessarily also makes its enforcement more bureaucratic, because the relevant agreements will have to formulate regulations rather than simply remove barriers. As we have seen in the case of international welfare rights, such multilateral structures can narrow rather than expand the

45. My colleague Arthur Jacobson has made this point. In an excellent essay he shows that Plato understood the limits of the harmonizing function of law. See Arthur J. Jacobson, *Origins of The Game Theory of Law and the Limits of Harmony in Plato's Laws*, 20 Cardozo L Rev 1335, 1336-37 (1999).

46. See note 11 and accompanying text.

47. Some have argued that one regulatory system is contingent on another because of races to the bottom, but I do not believe races to the bottom are pervasive (see note 42 and accompanying text).

encompassing interest that should govern even in a domestic society.⁴⁸ Multilateral regulatory regimes also may reduce jurisdictional competition among sovereign nations. For reasons discussed above, this reduction strengthens hierarchy and narrows the encompassing interest that should ideally govern society. If trade multilateralism has the virtues of the original Constitution, regulatory multilateralism has all the dangers of centralized New Deal regulation. Moreover, special interest groups will have even greater advantages at influencing international regulatory bodies, both because they are more distant from the diffuse citizenry and because their exactions will not be limited by regulatory competition.⁴⁹

The one area in which the welfare gains from coordinating a uniform standard might outweigh the losses are cases of externalities—where one nation, for instance, pollutes the territory of another. Such externalities create incentives for free-riding;⁵⁰ since each country does not pay the full cost of its pollution, each country lacks the appropriate incentives to reduce pollution to reflect its real costs and benefits. Nevertheless, it does not follow that global multilateral structures of regulation provide the proper solution to international externalities.

Because of interest group capture and the reduction of regulatory competition, even domestic regulation to resolve externalities may cause more welfare losses than gains.⁵¹ As discussed above, the problems of interest group capture and the loss of jurisdictional competition are likely to be even more severe at the level of global

48. As with the case of welfare rights, interests groups are likely to be even more empowered by international regulatory structures than by domestic structures, because these structures are even more distant from the average citizen.

49. Thus, even if one is an enthusiast for the New Deal as opposed to the original Constitution, there is reason to be more worried about centralized international regulatory regimes. I am not sure that Professor Slaughter has responded adequately to these concerns. See Anne-Marie Slaughter, *Building Global Democracy*, 1 Chi J Intl L 223 (2000). Her international network of regulators could easily fail to be controlled by the encompassing interest of society and degenerate into a regime in which elites and interest groups would please themselves at the expense of the public. Professor Kal Raustiala suggests that the analogy to the New Deal may actually strengthen the case for regulation, because society now demands the New Deal structures. See Kal Raustiala, *Sovereignty and Multilateralism*, 1 Chi J Intl L 401 (2000). My own view is that most of our New Deal structures exist because of inertia. When we consider new government programs today we do not build them on New Deal principles. Witness, for example, the enthusiasm for personal savings accounts as opposed to more collectivist retirement programs inaugurated in the New Deal. Professor Slaughter herself acknowledges that the New Deal paradigm could lose its luster internationally as it loses luster domestically. See Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in John G. Ruggie, ed., *Multilateralism Matters: The Theory and Praxis of an Institutional Form* 125, 147 (Columbia 1993).

50. Barry C. Field and Cleve E. Willis, *Environmental Economics: A Guide to Information Sources*, 64–81, 422–470 (Gale 1994) (explaining international tragedy of the commons in pollution).

51. See Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 Colum J Envir L 153, 154 (1988) (suggesting that American environmental policy “has grown to a point where it amounts to nothing less than a massive effort at Soviet-style central planning of the economy to achieve its goals”).

multilateralism. Moreover, monitoring compliance in the international context may also pose peculiar difficulties. For instance, nations will be unlikely to enter into an agreement to solve an environmental tragedy of the commons problem unless there exists some mechanism for policing compliance by other parties.⁵² But such mechanisms may raise substantial concerns about sovereignty. On the other hand, if enforcement mechanisms are weak, compliance failures lead to an increase in free-riding. A global multilateral agreement would then simply cause administrative costs and distract from other possible solutions.⁵³

Accordingly, the political externalities of global multilateral regulatory agreements may well outweigh the regulatory externalities that need to be addressed.⁵⁴ Indeed, regulatory regimes liable to be influenced by special interests create a tragedy of the commons problem similar in its structure to that caused by externalities of productive activity, because the special interests are able to use government to gain resources for themselves and impose losses on the diffuse public.⁵⁵ And, unlike the case of productive activity, special interests do not create useful goods and services while imposing these losses!

Thus, given these costs and the danger that large international regulatory bureaucracies will metastasize and eradicate jurisdictional competition, other more decentralized solutions to externalities should be sought before considering regulatory multilateralism. I do not have space to give examples, but the development of common law providing against externalities is one possible route.⁵⁶ For instance, under common law principles, individuals who are harmed by pollution can sue the offenders even if

52. Id. See also Robert P. Inman and Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 Tex L Rev 1203, 1222 (1997) (noting that bargaining costs can make it hard to reach agreements to solve commons problems).

53. I should make clear once again that I am talking about *global* multilateralism. Multilateral environmental regulation in the European Union and surrounding states, for instance, is likely to cause fewer problems. Such states are likely to be closer in development and in values. Such affinity will make it easier to agree on the scope and seriousness of the environmental problem and solve it. Any regional multilateral mechanism for enforcement is also likely to seem less distant and cause fewer fears about sovereignty. Above all, the rent-seeking potential of regional regulatory multilateral arrangements will be disciplined by the open capital markets in the international trade regime. Thus, one implication of my discussion is that the jurisdictional competition facilitated by the international trade regime may make *regional* regulatory arrangements to address externalities more attractive.

54. For an excellent exploration of this problem in the context of domestic environmental regulation, see Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 Tulane L Rev 845 (1999).

55. See McGinnis and Rappaport, 98 Pol Rev at 49 (cited in note 4) (describing the manner in which big government and special interests create a tragedy of the commons).

56. See Zywicki, 73 Tulane L Rev at 847 (cited in note 54) (recommending the common law rather than centralized environmental regulation as a solution to the commons problem).

they are in another jurisdiction.⁵⁷ To be sure, for these suits to be effective there must be agreements that enable the plaintiff to gain personal jurisdiction over the offender and for the plaintiff to enforce his judgment. But the latter agreements are already implicit in international notions of comity and the former would not require international agencies to make substantive decisions that could be subject to undue influence by interest groups. Indeed, like trade regimes, the only requirement should be that, in order to gain jurisdiction over foreign nationals, nations commit to apply their laws against pollution in a non-discriminatory way. In that way, the same accountability that results in fair treatment of nationals will be extended to foreigners.

On the basis of this review of the political economy of global multilateralism, multilateral agreements on regulations should be limited to areas that meet four conditions. First, the externalities must be clear. Second, the agreements must offer a real prospect that the externality problem can be solved. Third, other less centralized mechanisms that would accomplish the job must be unavailable. Fourth, restraints must be devised to prevent multilateral institutions addressing externalities from becoming an engine of interest group rent-seeking. If these conditions are all met, global regulatory multilateralism may well be a sensible approach. Even under these conditions, however, global regulatory multilateralism does not reinforce the decentralized order and generate the cascading benefits of global trade multilateralism. In other words, global regulatory multilateralism is at best a necessary evil, while the right kind of global trade multilateralism could be an almost unmitigated good.

V. INTERNATIONAL CRIMINAL COURT

While the United States has not yet acceded to the jurisdiction of the International Criminal Court ("ICC"), most nations of the world have become parties to the treaty by which it was established. Its jurisdiction is so far limited to such matters as genocide and war crimes.⁵⁸ In my view, the ICC suffers from many of the same problems as other multilateral regulatory regimes because criminal law is a species of regulation. The apparatus for enforcing international criminal law, like that for enforcing international regulations, would be less accountable than criminal law enforcement in particular countries. Moreover, as a result of the lack of accountability, interest groups could have disproportionate influence on the formulation and

57. At the conference Professor Raustiala was openly skeptical of the possibility of this kind of approach to environmental problems. But others more familiar than I with the details of environmental regulation have suggested that these schemes are feasible. In the domestic context, Richard Epstein has recently recommended reviving common law nuisance suits (brought by the state, if necessary, on public trust grounds) in order to vindicate property rights against pollution. See Richard A. Epstein, *Too Pragmatic by Half*, 109 Yale L J 1639, 1652 (2000) (reviewing Daniel Farber, *Eco-Pragmatism: Making Sensible Environmental Decisions in an Uncertain World* (Chicago 1999)).

58. For a description of the international court's jurisdiction, see Cara Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 Am U Intl L Rev 805 (1999).

enforcement of the rules. In the case of the ICC, the interest groups would be less likely to be economic interest groups like trade associations, than groups arranged around an ideology, ethnicity or nationality. For the same reasons, discussed above, the diffuse citizenry will be less well-positioned to monitor and counteract the influence of such interest groups than they would be in the domestic context.

In particular, the ICC necessarily contemplates, as do all systems of justice, lodging substantial discretion in a prosecutor. A domestic prosecutor is subject to all sorts of checks that make it easier for the diffuse public to monitor his conduct.⁵⁹ He is either elected or appointed by an elected official. Moreover, his performance is of substantial interest to the public because putting people in jail in the numbers domestic prosecutors do affects the crime rate where they live.

The lack of formal and informal constraints on an international prosecutor is striking. While he would be appointed by a consensus of governments, he would be accountable to no particular official. Because his docket would consist of cases that, for all their moral importance, would not be likely to affect the crime rates in many jurisdictions, he will come under less popular scrutiny. Nevertheless, ethnic and ideological interest groups will be very concerned with the symbolic value of prosecutions in the areas over which the court has been given jurisdiction. Thus, just as monitoring will be particularly difficult, interest group pressure will be particularly intense.

The result of the combination of interest group pressures and public inattention creates a risk that the international prosecutor will not follow neutral principles in carrying out his mandate. In this way the ICC may become a threat to the very rule of law its advocates want to inculcate in the international order, since the multilateral structure is not amenable to the control by the encompassing interest of society. It is very surprising to me that enthusiasm for an international criminal prosecutor continues unabated in many quarters of the United States, when we have become disillusioned with our own institution of the independent counsel. The lack of accountability and risk to neutral principles that an international criminal prosecutor poses are very similar to those created by the office of independent counsel.

Once again, a better way of vindicating justice in the long run may be to increase wealth through trade. As countries become wealthier they become more serious about prosecuting official abuse, even that which does not rise to the seriousness of genocide and war crimes. Extradition treaties can extend the reach of domestic criminal law of willing sovereigns without endangering principles of accountability.

59. John Bolton highlights the relative accountability of international and domestic prosecutors. See John Bolton, *Reject and Oppose the International Criminal Court*, in John Bolton, *Toward an International Criminal Court?* 37–38 (Council on Foreign Relations 1999).

VI. MULTILATERAL ARMED FORCE

The framework offered here also can address the benefits and dangers of mechanisms for multilateral armed force. First, we need to assess the mutual gains from multilateral armed force on behalf of international peace. The argument for global multilateralism in this area must rest on a version of the externalities argument that justifies international regulations. Peace is a benefit to all nations because wars kill people, reduce wealth, and create the dangers of even wider conflicts, thus causing potential harm to the citizens of all nations. Intervention to prevent war, however, is also costly both in terms of lives lost and productive opportunities forgone and therefore nations tend to free-ride on the actions of others. This tendency produces less peacekeeping intervention than would be mutually beneficial. Accordingly, multilateral mechanisms through the United Nations or other organizations are useful to create a force for joint action.

But even if the gains from global multilateralism could be mutual in theory, there is a serious question of whether they will prove so in practice. Threats to peace around the world have differential impacts on various nations. A war in Africa is a tragedy for the nations involved and perhaps their neighbors but it makes little difference for those in South America. Thus, the calculus involved in joining a global multilateral military structure differs substantially from that involved in joining a regional structure with more defined goals. For instance, NATO faced a very substantial potential threat from the Soviet Union. The mutual gains garnered by facing down this threat in large measure accrued to all members of NATO. It might be argued that given the very unpredictability of threats, there are nevertheless mutual gains to be achieved through such global multilateralism. But as the gains become more speculative, the cohesiveness of the multilateral approach will decrease as nations tend to focus on the near term.

Assessing the degree of mutual gains is essential before acceding to global military multilateralism because such multilateralism has costs that are now familiar. Once again it will be difficult to make sure that the multilateral use of force will be controlled by the encompassing interest of nations for the common good. This problem besets even our own domestic use of force.⁶⁰ The US Constitution requires Congress to declare war because, as a popularly elected body it represents the encompassing interest of society. It makes the president the commander-in-chief so that there is political accountability even in the operational decisions of war-making.

It will be a daunting task to build similar checks and balances into the exercise of multilateral forces. The United Nations is not a legislature with elected

60. See John O. McGinnis, *The Spontaneous Order of War Powers*, 47 Case W Res L Rev 1317 (1997) (arguing that the central purpose of the War Powers Clause is to ensure that the President's decision to go to war reflects the public interest, rather than his personal ambition).

representatives. The military commanders of UN forces also have less than clear lines of accountability. As we have discussed above, a diffuse citizenry has more difficulty exercising control over international institutions. The corollary here, as elsewhere, is that organized interests and elites will wield more influence. Thus, the institutional structure of global multilateralism cannot generate much confidence that military multilateralism will operate in the public interest.

This is not to say, of course, that multilateral interventions will never be in the interest of US citizens. But we need to rely on our own domestic institutional arrangements to these determinations rather than agree to participate in multilateral mechanisms that will bind us to determinations made elsewhere. For instance, we should not accept the idea offered by some academics that UN authorization should become a substitute for our own domestic processes for authorizing wars.⁶¹ We can pool our military resources with other countries when necessary without acceding to global multilateral mechanisms in the area of national security.

VII. CONCLUSION

Because of the decline in information and transportation costs, globalization is inevitable and with globalization comes a new world order. Nevertheless, this new world order is still inhabited by the same humans, shaped by millions of years of evolution to acquire resources through both exchange and hierarchy. Because the new world order addresses old political problems, we can use the tools of political economy and constitutionalism to address which forms of global multilateralism are justified. In my view such considerations suggest that trade multilateralism is the best form of global multilateralism because it can extend exchange by sustaining a global market. It also promotes the rule of nations by their encompassing interests. Other forms of global multilateralism may sometimes be necessary, but even these instances are unlikely to create the pervasive benefits of trade multilateralism.

61. See, for example, Thomas M. Franck and Faiza Pael, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 *Am J Intl L* 63, 74 (1991).