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Constitutional Economics of the WTO

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This chapter examines the World Trade Organization (WTO) from the social scientific perspective of constitutional economics. This chapter thus seeks to identify the causes and consequences of constitutionalization. Assuming that states act with intentionality and accuracy in their establishment of organizational features, the cause of constitutionalization is the desire to effect the consequences of constitutionalization, so the focus here is on the potential consequences of constitutionalization in and in connection with the WTO.

1) The WTO in the World

The constitutional aspects and context of the WTO cannot be examined without laying out first the factual setting in which the WTO exists and operates. This section will locate the WTO within the process of globalization and regulation.

a) Globalization

For a number of years, the WTO has served as a lightning rod for criticism of globalization, and many concerns regarding globalization are expressed in terms of the adequacy of the structure and function of the WTO: of both its process and its results. This identification of globalization with the WTO seems correct, insofar as the WTO is an instrument of globalization, where globalization is defined as increasing international economic integration. Of course, the WTO is not the only instrument of globalization, and the WTO even limits international economic integration in important ways, so a more nuanced perspective must examine the WTO within a broader context.

WTO secretariat personnel and others seek to deflect this type of criticism of the WTO by pointing out that the WTO is a “member organization.” This argument, building in part on realist international relations theory, points out that the WTO itself has no power, but is merely a conduit for the exercise of member state power. Therefore, the argument proceeds, it is not appropriate to blame the WTO, either for sins of omission or for sins of commission, because the WTO is no more than a form for member state action. This argument never provided great protection from criticism, largely because, even conceding its force, it leaves the possibility to criticize a *type* of member state action in the form of WTO action or inaction. Moreover, this

¹ This chapter develops some ideas introduced in my *The Constitutions of the WTO*, 17 EUR. J. INT’L L. 623 (2006). I thank Anne van Aaken, Jeff Dunoff, Anne Peters, and Ernst-Ulrich Petersmann, as well as participants at the book workshop for *Ruling the World*, for their helpful comments. I thank Jeremy Leong for his dedicated research assistance.

argument proves too much, for if the WTO were merely a conduit for member state action, there would be no need to cloak member state action in the WTO.

However, increasing economic integration both makes increasing disciplines on national regulatory autonomy useful, and exposes lacunae in the inter-national regulatory structure. Thus, as the ability to generate new international legal rules to discipline national regulation or to fill lacunae becomes important, globalization gives rise to calls for “enabling international constitutionalization” (as defined in the introduction to this volume) in order to facilitate legislation of welfare-improving restrictions on protectionist or other inefficient domestic regulation. “Enabling international constitutionalization” at the WTO—structures that facilitate the production of law—would mean the end of the WTO as a “member organization” in which each member (in formal terms) retains veto power.

To the extent that the WTO becomes an actor itself—albeit accountable to its member states as a group—it will engage responsibility for its acts. It would be analogous to a national legislature, in the sense that, while composed of individual representatives of different subgroups of people, it would be seen to act as a corporate entity while remaining also decomposable into its separate representatives.

There are rising demands for enabling international constitutionalization, not just to restrain protectionism but also to complement restraints on protectionism. At the same time, there are rising concerns regarding the accuracy and accountability of efforts to increase disciplines on national regulatory autonomy, as well as concerns regarding the ability of these efforts to encompass the full scope of public policy desiderata, giving rise to calls for “constraining international constitutionalization” (also as defined in the introduction).

Constraining international constitutionalization might take the form of restrictions on the scope of lawmaking at the international level, either in terms of subject matter or in terms of procedural limitations. Subject matter limitations might take the form of requirements for super-majorities (relative to legislation on other subject matters), or might take the form of carved-out national rights that are, in effect, inalienable, or at least unalienated.²

Finally, the lacunae exposed by globalization give rise to calls for “supplemental constitutionalization,” in some cases in the context of the WTO.³ With greater economic integration comes the possibility of greater regulatory arbitrage, and increasing pressure on domestic regulatory preferences.

² See Dennis Mueller, *Rights and Liberty in the European Union*, 13 SUP. CT. ECON. REV. 1 (2005). Mueller explains that the difference between a rule of unanimity and a “right” is that a right cuts off wasteful negotiation and lobbying to reach unanimous agreement, where it is possible to decide in advance that such negotiation and lobbying will be fruitless.

³ See Anne Peters, *Compensatory Constitutionalism: The Function and Potential of International Norms and Structures*, 19 LEIDEN J. INT’L L. 579 (2006).

And yet, the WTO is but one component of a variegated and increasingly dense tapestry of global governance. So, it would be wrong to examine the WTO separately from the institutional context in which it exists. Furthermore, while it is possible that acts of enabling constitutionalization, constraining constitutionalization, and supplemental constitutionalization may best take place within the organizational confines of the WTO, it is equally plausible that they would best take place in other parts of the international legal system. Here, there are two critical questions. The first is a question of a type of horizontal and vertical constitutional subsidiarity—where should the constitutional function best be addressed? The second is that of coherence—how do the different constitutional functions fit together?

b) Unbalanced Demand for International Law

The demand for additional international law is the driving force behind enabling international constitutionalization. This demand for additional international law can arise from the demand for liberalization (which in turn is caused by other social forces, including changes in technology, changes in the structure of production, and changes in economic understanding), but the production of law to enhance liberalization has two types of knock-on effects: (i) a resulting demand for other types of international law, and (ii) where the initial liberalization measures take the form of negative integration, a resulting demand for positive integration. We see both of these types of knock-on effects in the history of the EU.

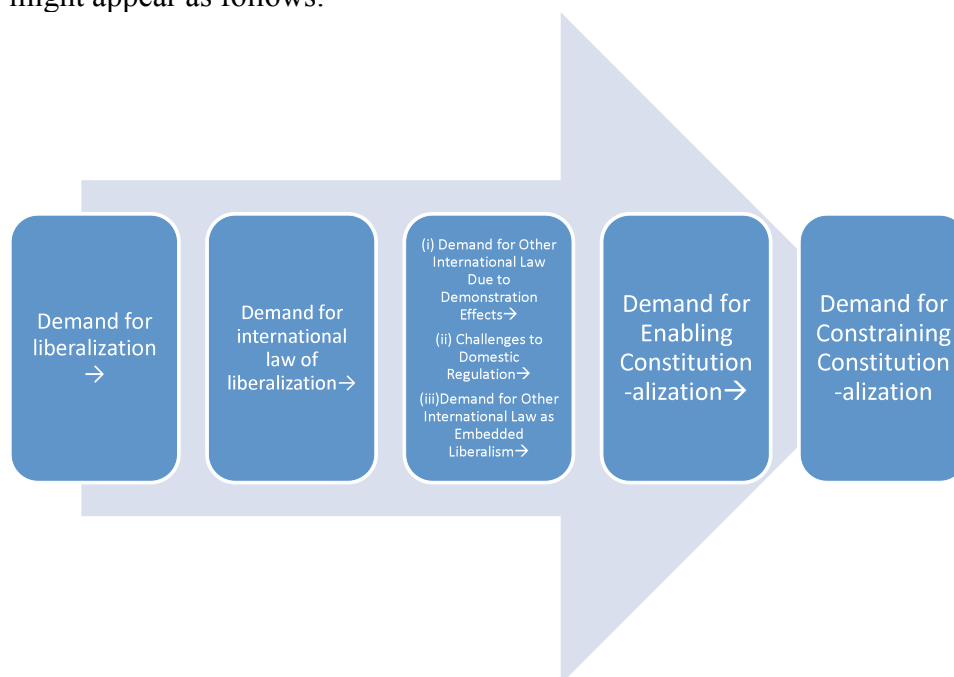
One of the factors giving rise to criticism of the WTO is a possible imbalance in the production of different types of international law. This occurs for three reasons.

- First, business interests often are able to lobby in a concentrated and effective way for government action that provides them with benefits. So it is not surprising that some types of liberalization measures, such as reductions of barriers to trade and disciplines on national regulatory measures that restrict trade, would achieve greater saliency in national politics, and consequently in international politics, than other types of measures. It is also worth noting that business interests also lobby against liberalization, but the overall tendency since the 1940's has been toward liberalization. Moreover, the increasingly nuanced rules of liberalization that result entail the production of increasing volumes of international law, and of international legal institutions. This production of international trade law has demonstration effects: showing environmentalists, human rights activists, and other constituencies that it is possible to establish new international law addressing their concerns. Perhaps most importantly, the establishment of more binding dispute settlement at the WTO than existed prior to 1994 has suggested that more binding dispute settlement, and more binding international law, may be possible in these other areas. Indeed, the move toward more binding dispute settlement at the WTO has upset a pre-existing equilibrium of bindingness in international law, causing re-examination of the binding nature of other areas of law.
- Second, liberalization itself gives rise to recognition of lacunae in the substantive or jurisdictional coverage of national regulation, or to the possibility of adverse regulatory arbitrage. Environmental, human rights, tax, competition, and other types

of regulation are thus challenged by liberalization, and relevant constituencies seek responsive redress. Increasing liberalization gives rise to increasing demands for regulatory harmonization, or regulatory rules of prescriptive jurisdiction. Some of these demands are based on a perception of regulatory competition that is accentuated by liberalization.

- Third, in the “embedded liberalism” sense explained by Karl Polanyi and John Ruggie,⁴ liberalization has distributive effects that make it necessary, in order for liberalization to be sustained, to effect redistributive regulation.

Thus, the demand for liberalization sets off a cascade of demands for the production of other international law. The demand for both liberalization and other international law may more easily be satisfied with greater enabling international constitutionalization. And, as noted above, the establishment of enabling international constitutionalization creates a demand for nuanced controls in the form of constraining international constitutionalization. This cascade might appear as follows:



⁴ John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982). Ruggie modernizes and adapts a perspective earlier elucidated by KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (Beacon Press 1944). Dani Rodrik has considered the application of this perspective to modern global markets. DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* 7 (Peterson Institute 1997). See also Robert L. Howse, *From Politics To Technocracy – and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT’L L. 94 (2002).

One method of discipline on national regulatory measures is the type of “negative integration” provision that establishes a legal standard, enforced and articulated through adjudication, prohibiting certain types of national measures that may create excessive barriers to trade. The most common type of negative integration standard is national treatment-type non-discrimination. In a sense, these rules against protectionism are specialized rules of dynamic subsidiarity. They contingently remove power from the state under a specified range of circumstances. Interestingly, these rules may be understood as serving a “constraining constitutionalization” role at the *domestic* level: they constrain the production of ordinary law. But at the international level, they are *ordinary* international law. On the other hand, to the extent that international judges are authorized, explicitly or implicitly, to interpret or craft these rules of negative integration, the authorization may be understood as a kind of enabling constitutionalization.

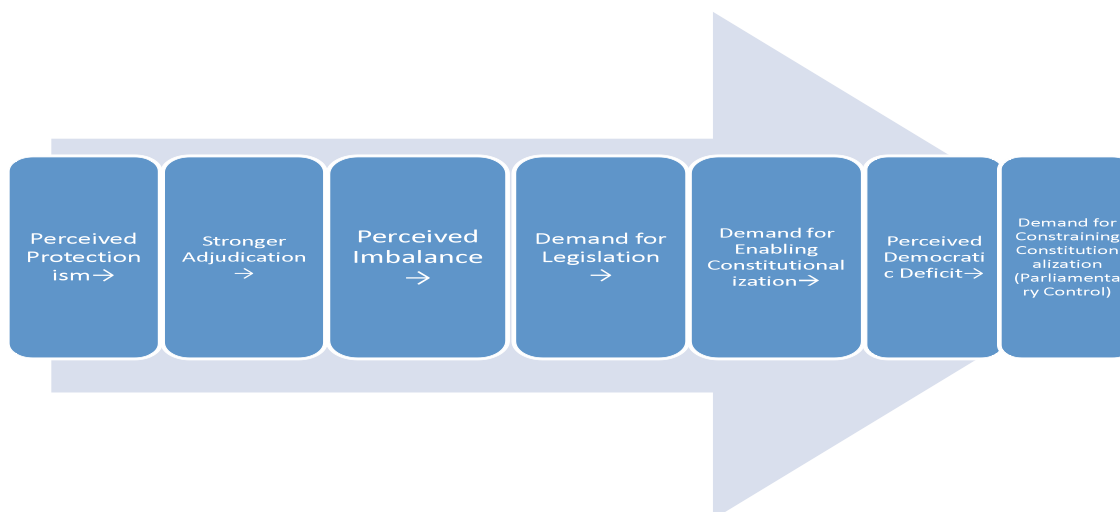
These types of adjudicative standards used in negative integration compete with legislative solutions to the same problems. Legislative solutions—known in this context as “positive integration”—might develop regimes of harmonization or recognition, or blended regimes of harmonization and recognition, as in the EU “essential harmonization” program.⁵ These legislative solutions could enjoy greater political support than judicial decisions addressing the same issues.

It is in this regard that negative integration devices, such as those in the WTO, that may be used to strike down domestic regulatory regimes, may create demand for positive integration devices, such as those associated with majority voting. Deregulation through negative integration may create demand for re-regulation at the central level through majority voting-based legislative capacity. This results in demand for enabling constitutionalization in terms of legislative capacity. Majority voting among states might give rise to demands for greater democratic accountability: a kind of countervailing constraining constitutionalization. Pascal Lamy has called for a WTO parliamentary consultative assembly for just this reason.⁶

So the causal chain here might appear as follows:

⁵ See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L. J. 333 (1999).

⁶ Pascal Lamy, European Commissioner for Trade, Conference on the Participation and Interface of Parliamentarians and Civil Societies for Global Policy: Global Policy without Democracy (Nov. 26, 2001) *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/01/586&format=HTML&aged=0&language=EN&guiLanguage=en>. See also Gregory Shaffer, *Parliamentary Oversight of International Rule-Making: The Political and Normative Context*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=434420; Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT’L L. 191 (2000); Robert L. Howse, *How to Begin to Think About the Democratic Deficit at the WTO*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER (Stephan Griller ed., 2003).



This conjectural causal chain shows a link between adjudication and legislation. In this model, the power of adjudicative negative integration gives rise to a need for the check of legislative capacity for positive integration. The possibility of centralized legislation gives rise to the need for centralized democratic accountability. This diagram elides much nuance, but it is intended to provide a suggestion of how the commencement of economic integration may set off a cascade of governance demands along a predictable path.

c) The Demand for Enabling International Constitutionalization and the Demand for Constraining International Constitutionalization

In the prior subsection, we began to see a model of the relationship between the demand for law to effect liberalization, the demand for other international law, and the demand for international constitutional law. There is also an interesting relationship between enabling constitutionalization and constraining constitutionalization. Enabling constitutionalization and constraining constitutionalization are two sides of the same coin. As a sculptor adds clay with one tool, and cuts it away with another, so enabling constitutionalization adds to the powers of the international legal system, while constraining constitutionalization refines the grant of powers, and artfully, and often conditionally, cuts back on it.

2) Constitutional Economics

Constitutional economics brings a positive analytical perspective to constitutions. Under this approach, constitutions are simply instruments of human interaction: mechanisms by which to share authority in order to facilitate the establishment of rules. In Buchanan's phrase, they are instruments to facilitate gains from trade—not from trade in the conventional sense, but transactions in authority. In a transaction cost or strategic model, constitutions are assumed to be designed to overcome transaction costs or strategic barriers to Pareto superior outcomes. Once this is accepted, it follows that constitutional rules are not natural law; instead, they are political settlements designed to maximize the achievement of individual citizens' preferences. Enabling

constitutionalization, constraining constitutionalization, and supplemental constitutionalization can all be understood in these terms.

Thus, from this perspective, if there were no potential value to be obtained from cooperation, constitutions would be unimportant, and would not exist. Constitutional economics assumes that constitutions exist to resolve transaction costs and strategic problems that would otherwise prevent the achievement of efficient exchanges of authority. Where there is value to be obtained by agreement, constitutions may be used to facilitate the realization of this value by reducing transaction costs and strategic costs, such as the problem of states holding out or defecting from their commitments.

Much of the political science literature has been skeptical of the possibility for cooperative international constitutional solutions.⁷ Garrett argues that "[i]n situations in which there are numerous potential solutions to collective action problems that cannot easily be distinguished in terms of their consequences for aggregate welfare--and the [EU] internal market is one--the 'new economics of organization' lexicon conceals the fundamental political issue of bargaining over institutional design."⁸ Brennan and Buchanan respond to this criticism by explaining that bargaining over institutional design is cooperative in nature, and that the aggregate increased value will provide incentives for agreement.⁹ They compare such constitutional bargaining with "ordinary politics." First, they agree that in ordinary politics: "the Pareto-optimal set would be exceedingly large."¹⁰ They continue as follows: "[t]his prospect is dramatically modified, however, when the choice alternatives are not those of ordinary politics but are, instead, rules or institutions within which patterns of outcomes are generated by various nonunanimous decision-making procedures."¹¹

The indirectness and broadly reciprocal nature of the distributional consequences of constitutional bargaining erect a Harsanyiian veil of uncertainty that provides incentives for agreement on efficient institutions. This veil of uncertainty is limited because those who negotiate constitutions can predict some of the distributive consequences of constitutional-type bargains. This argument based on a veil of uncertainty suggests that bargaining problems can be overcome in connection with the decision to form an international organization, which can then make decisions in "ordinary politics" terms.

⁷See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POL.* 336, 340 (1991) ("the problem is not how to get to the Pareto frontier, but which point along it will be chosen"); Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 *INT'L ORG.* 533, 541 (1992).

⁸Garrett, *supra* note 7, at 541.

⁹ GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* 28-32 (1985). See also James M. Buchanan, *The Domain of Constitutional Economics*, 1 *CONST. POL. ECON.* 1 (1990).

¹⁰Brennan & Buchanan, *supra* note 9, at 29.

¹¹*Id.*

Constitutional economics allows us to place a number of features associated with constitutionalization into an overall context, and show the relation among them. Importantly, this type of constitutional economics is not predicated upon or even related to economic constitutionalism: the belief that liberalism is threatened by the state and must be blocked through constitutional means, including international law that plays a constitutional function in the domestic system.

Constitutional economics, like economics in general, is agnostic as to the types of preferences that will be articulated, or the way that individuals will value each preference. It assumes only that each individual has a utility function and enters society in order to maximize his or her preferences. While the utility function is by no means limited to the material, constitutional economics does not accept generally preemptive values such as human rights, environmental protection, or wealth maximization. It would accept that some of these preferences are valued more greatly than others, or that it makes sense to *make* some of these preferences pre-emptive, for strategic or transaction costs reasons. For example, it may understand core human rights as preferences that are so highly valued that they rarely are trumped by other values.

Some of the essays in this volume may suggest that legitimacy is a better metric by which to assess constitutional structures than the normative individualist focus on individual preferences of constitutional economics. Yet, normative individualism sees even the concept of legitimacy through a preference metric. Legitimacy, if it is to be understood in rational terms, is no more than the satisfaction of preferences or, again in constitutional economics terms, the acceptance of reduced satisfaction of preferences pursuant to a structure that was agreed *ex ante* because of the anticipation of maximization of preferences. This is the Harsanyiian, and Rawlsian, concept of stochastic symmetry. In other words, legitimacy is no more than the acceptance *ex post* of the results of a mechanism that was designed and accepted, *ex ante*, to maximize aggregate preferences. “In Constitutional Economics, rules are assumed to be legitimate if rational individuals seeking to maximize utility (can) unanimously agree to them.”¹²

I might add that each of us labors under bounded rationality, and so legitimacy may also include the extent to which we are made aware that our preferences are maximized in the way I have described. This is the public relations, or marketing, function that is so important to legitimacy in practice.

Constitutional economics can be understood as a commitment, as a theory, as a methodology, and as a policy orientation. As a commitment, it is predicated upon normative individualism, holding that institutional arrangements are to be established in order to maximize individual welfare in the eyes of the individual. As a theory, it postulates that citizens in a constitutional moment will agree on a constitution that maximizes their collective welfare. As a

¹² Anne van Aaken, *Deliberative Institutional Economics, or Does Homo Oeconomicus Argue? A Proposal for Combining New Institutional Economics with Discourse Theory*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY, AND DELIBERATIVE DEMOCRACY* 3, 7 (Anne van Aaken, Christian List & Christoph Luetge eds., 2004).

methodology, it derives hypotheses based on this theory, and tests them empirically. As a policy orientation, it advises that the task of framers of constitutions, and of analysts, is to engage in comparative institutional analysis¹³—even if the reference is historical or hypothetical—in order to determine which institutional features will maximize the net achievement of preferences.

In our context, the policy question asked by constitutional economics is, which international constitutional features will maximize the net achievement of global individual preferences? We might begin by comparing the status quo with postulated alternative international constitutional structures. Interestingly, in the international constitutional setting, we do not have multiple global systems existing at once, to be used to structure a comparison. So, any comparative method will be based on historical experience, cross-functional comparison (as for example between the WTO and the ILO), or hypothetical alternatives.¹⁴

Constitutional economics recognizes the possibility of constitutional moments. A “constitutional moment” in the Buchanan and Tullock¹⁵ sense is an historical moment at which a Harsanyiian “veil of uncertainty” allows individuals, or in our case states, to agree on constitutional change even though they are uncertain of the possible future implications. Constitutional moments generally result from a shift in the concerns, or perception of concerns, of constituents: an exogenous shock that disturbs a constitutional equilibrium.

Furthermore, a constitution may produce its own demand: once established, by reducing transaction costs and strategic costs of international arrangements, constitutions would be expected to make attractive a host of arrangements that were otherwise unattractive. There may be a path dependency characteristic to constitutional development, with tipping points that result in lumpy movement or punctuated equilibria. Thus, once a centralized legislative and parliamentary feature is established for one purpose, it may make it easier to use them for other purposes.

Of course, the existing international legal constitution provides that collective decisions are made by unanimity of states—the somewhat contestable consent rule. (Customary international law is not predicated upon unanimity per se.) The consent rule has certain important characteristics. Some would say that it is perfectly democratic (at least among states, as opposed to individuals), insofar as new rules cannot be made unless all consent. On the other hand, it is just as easily understood as perfectly undemocratic, allowing the tyranny of the minority to reign, insofar as the smallest minority can block collective action. The rising importance of global collective goods shows the strategic inadequacy of the consent rule. Of

¹³ NEIL KOMESAR, *IMPERFECT ALTERNATIVES* (1995); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 *NORTHW. J. INT’L L. & BUS.* 470 (1997).

¹⁴ JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (Harvard University Press 2008).

¹⁵ JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT, LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (Ann Arbor: The University of Michigan Press 1962).

course, under formal requirements of unanimity, informal coercion or logrolling can reduce the inhibitive effect of unanimity.

So, assuming that a state is behaving like an individual in determining whether to move from a rule of unanimity, we would expect the state to calculate its position as follows. The state would maximize its expected utility by a cost-benefit analysis, based on its understanding of the probabilities that it would get what it wants from future decision-making. Of course, depending on the issue, it may want action or it may want inaction (eliding the choices in between). If the state could specify a rule of unanimity for the decisions where it prefers inaction, and a rule of the easiest possible approval in areas where it prefers action, this would be its ideal outcome. But it is not possible to predict all the issues that may arise, and all the consequences of each issue, with great accuracy. This is fortunate, because under a veil of uncertainty, it becomes possible for states to reach agreement, whereas under certainty they would experience a greater likelihood that negotiations would break down over the division of the gains.

3) Application of the Method of Constitutional Economics to the WTO

This section suggests some of the ways in which constitutional economics may be applied to certain aspects of the WTO. Of course, as noted above, it is appropriate to view the WTO not as a self-contained constitutional entity, but as a part of a broader international legal system, and in its relation to national and regional legal systems.

a) WTO Decision-Making

WTO decision-making is generally effected by consensus, despite provisions of the WTO Charter that permit decision-making by majority. Furthermore, most significant decisions, aside from dispute settlement, are effected through treaty amendment, which requires unanimity. If we ignore the differences between a requirement of consensus (no objection) and a requirement of unanimity (express assent), these methods are consistent with the general system of treaty-making and amendment in international law. These methods are also consistent with the pre-Single European Act (1987) method for legislation in the European Community: unanimity, or at least no objection, was required for legislation. Interestingly, in both the European Community prior to 1987 and in the WTO today, formal provisions for majority voting are ignored in favor of rules of unanimity.

I have suggested above that there may be a kind of dynamic imbalance, or cascade, leading from strong dispute settlement to greater capacity for legislation: from one type of enabling constitutionalization to another. There is a dynamic relationship between enabling constitutionalization of the judicial type and enabling constitutionalization of the legislative type. Strong dispute settlement at the international level might not immediately be recognized as enabling international constitutionalization. However, to the extent that strong international dispute settlement is understood as contributing to the capacity to make law at the international level, its establishment must be understood as a type of enabling international constitutionalization.

Thus, in 1995, at the inception of the WTO, including its Dispute Settlement Understanding, the global community engaged in a type of enabling international constitutionalization. In fact, in functional terms (as opposed to formal terms), the WTO exhibits no other significant features of enabling international constitutionalization. That is, its main transnational (as opposed to intergovernmental) feature is dispute settlement.

Consensus or unanimity-based decision-making presents a significant formal limitation. By “limitation” I do not mean to convey a negative judgment: it may be that this limitation is normatively attractive in particular contexts. The limitation is that unanimity, especially in a multilateral context, makes legislation exceedingly difficult. In formal terms, any legislative measure must present benefits to each state: there is no room to achieve legislative “transactions” that are Kaldor-Hicks efficient, but that harm one state, even a small state, and even mildly. Thus, much welfare is left on the table. This formal limitation thus cries out to be overcome. In fact, we might say that a formal unanimity-based system involves no enabling international constitutionalization at all: all decisions are still dependent on each member’s determination.¹⁶ There are formal and informal methods by which to overcome this limitation. The formal method is to amend the WTO constitution to provide for majority voting. The informal method is to engage in log-rolling type transactions, or “package deals” that, on a net basis, benefit all parties. In a sense, enabling constitutionalization may be understood simply as a particularly broad “package deal.”

Interestingly, as suggested above, unanimity-based decision-making cannot be defended by a reference to democracy. It can only be defended by such a reference to the extent that the national desire is negative, or defensive—to the extent that the goal is to defeat legislation that may be adverse, in contrast with a goal to pass legislation that is beneficial. This can easily be seen where a single state has the capacity to block decisions that are desired by the overwhelming majority of states.¹⁷ This cannot be explained in terms of democracy.

Furthermore, for a similar reason, unanimity-based decision-making cannot be defended by a reference to rights, or national autonomy. We might begin by saying that a decision rule of unanimity in international law protects national autonomy, just as a supermajority or unanimity rule in municipal legislation protects individual autonomy. Yet, again, this is seen purely from a defensive standpoint, where autonomy means being left alone, and does not include the ability to influence the behavior of others. For, assuming for a moment that a state has equal interests in avoiding constraints on its behavior and procuring constraints on other states’ behavior, then any voting rule should be equally attractive to any other voting rule. What you lose in legislation

¹⁶ On the other hand, if we take a step farther back, we might understand the rule of *pacta sunt servanda* as a type of enabling international constitutionalization.

¹⁷ A good example is the 2008 rejection by Ireland of the proposed Treaty of Lisbon, establishing a constitutional structure for the EU. In response, German interior Minister Wolfgang Schäuble made the following statement: “Of course we have to take the Irish referendum seriously, but a few million Irish cannot decide on behalf of 495 million Europeans.” Stephen Castle & Judy Dempsey, *Rejection of Treaty Hints at Split in EU*, INT’L HERALD TRIB., June 16, 2008 at p.1, col.5.

constraining others, you gain in autonomy, and vice-versa. But if there is a surplus to be gained from making a certain amount of international law, a constitutional arrangement that results in a less than optimal amount of international law is undesirable.

Of course, where you expect to be in the minority more often—where you expect the costs of lost autonomy to exceed the benefits of constraints on others—that reduced capacity to legislate becomes attractive. Under these circumstances, a rule of unanimity or a supermajority rule would be desirable. But it may be even more desirable for other states to compensate you in advance for your willingness to accept an arrangement that is otherwise efficient.

This perspective explains constitutional moments. A constitutional moment would occur when an exogenous shock changes constituent perceptions of the value of legislation. Constituents would be expected to engage in enabling constitutionalization when the anticipated value of constraint on others rises in relation to the anticipated cost of lost autonomy.

And yet, assuming that log-rolling, package deals, linkage, side payments, or vote buying are possible without transaction costs, we would expect the efficient level of constraint and autonomy to emerge under any voting rule, just as an efficient allocation of property rights would arise in domestic society under zero transaction costs. So the choice of a voting rule must be based on differential transaction costs. How is this transaction cost-based explanation consistent with the idea, expressed in the prior paragraph, that constitutional moments arise from changes in the value of legislation: from transaction benefits? Constituents would examine the combination of transaction benefits and transaction costs; an increase in transaction benefits would justify greater transaction costs, and a decrease in transaction costs would enable the achievement of transaction benefits that were otherwise out of reach. Changes in transaction benefits result from changing technology, preferences, social structures, or other factors, which are not likely to be immediately malleable through purposive action. On the other hand, the transaction cost component of the equation may be addressed through purposive action, in the form of enabling constitutionalization, assuming that changes in voting rules have effects on transaction costs.

Therefore, in theory, while enhanced dispute settlement may increase the possibility that enhanced legislative capacity at the WTO would be desirable, much depends on the question of whether sufficient impetus in the form of transaction cost improvements would motivate states to move towards some form of voting. This type of shift seems to have taken place in the 1980s in the EU.¹⁸

Interestingly, a move toward enabling international constitutionalization in the form of enhanced legislative capacity would demand a move toward constraining international constitutionalization. In this case, constraining international constitutionalization might take the form of restrictions on the subject matter of legislative capacity exercised at the WTO, as well as human rights limitations on the types of measures that could be legislated.

¹⁸ See Trachtman, *supra* note 13.

b) Accountability and the Democratic Deficit

As suggested above, accountability is a subtle concept, as is the idea of a democratic deficit. The subtlety arises from the conundrum, discussed above, of positive legislative capacity versus negative (or blocking) legislative capacity. The principle is that democracy in the sense of majority rule is not necessarily enhanced by supermajority provisions, or by other devices that constrain international governmental action, because these devices prevent the majority from achieving its goal. This issue is at the core of most claims of “American unilateralism”—many of these are claims that the US fails to join a multilateral treaty, such as the Kyoto Protocol or the Rome Statute of the International Criminal Court, thereby defeating the will of the majority.

Here, it is necessary to link the WTO’s constitution to its member states’ constitutions. To the extent that the WTO is truly a “member organization”—an international as opposed to transnational organization—perhaps the democracy deficit critique is misguided, and the real question is one of member state democracy. Thus, under circumstances of decision-making by unanimity, direct accountability at the international level would not serve as constraining international constitutionalization, as there is little capacity at the international level to constrain. It might be understood as a type of supplemental constitutionalization: addressing an accountability issue that arises with globalization. The accountability issue under these circumstances of decision-making by consensus must be that the national government is not sufficiently accountable at home, in connection with the commitments it accepts at the WTO.

Alternatively, if the concern is that even under a rule of unanimity, some member states lack sufficient influence in the WTO, perhaps the democracy deficit would be addressed through empowerment of those states, rather than the addition of parliamentary control at the WTO level. Indeed, it may be that the Uruguay Round was concluded through threats of exclusion from the “Single Undertaking” in a way that gave weaker states insufficient influence.

However, under (hypothetical) circumstances of decision-making by majority, where the WTO would no longer be considered a “member organization,” arrangements for direct accountability may be understood differently, as a type of constraining constitutionalization. As constraining constitutionalization, accountability measures would ensure that decision-making is accountable to constituents. Constituents desire procedures that ensure that their voices are heard, especially under majority voting, where they have accepted that their preferences may not hold sway.

In this context also, under majority voting, concern for fundamental rights serves as a form of constraining international constitutionalization, specifying areas into which international legislation may not infringe. Thus, if majority voting were implemented at the WTO, it would seem appropriate also to implement a set of human rights constraints on the decisions taken by majority vote. A similar process took place in the EU, where the Solange decisions gave rise to the establishment of an EU human rights capacity.

On the other hand, one might argue that since the WTO dispute settlement system already holds significant legislative power—since there was a move toward enabling

constitutionalization in 1994—the WTO should already be subjected to human rights constraints. One response to this argument lies in the textualism of the WTO dispute settlement system. Under an interpretative approach that sees itself as constrained by text, there is reduced scope for significant legislative action under the mantle of dispute settlement, and so no significant legislative authority. WTO law, according to this argument, is comprised of more specific “rules,” rather than more general “standards,”¹⁹ with minimal judicial discretion.

Of course, another response to this argument that the WTO system has legislative power by virtue of its authority to adjudicate is again the claim that the WTO is a member organization, and that each of its members is already subject to a broad set of human rights obligations. Combined with this response is the argument that, so long as the human rights are implemented *somewhere*, they need not be implemented at the WTO *per se*. This latter point is based on a broader vision of the international legal system, rather than an isolated vision of the WTO. This argument puts great pressure on the relationship between WTO law and human rights law—on coherence. If there were sufficient coherence, there would be no need for supplemental constitutionalization in this context. A further response is that there already is a somewhat uncertain relationship between WTO dispute settlement and human rights, within WTO dispute settlement. Certainly under Article 31 of the Vienna Convention on the Law of Treaties, at least universal human rights rules would be used in the *interpretation* of WTO law. Some argue that human rights rules would be directly applicable, as law, within WTO dispute settlement, but this argument is increasingly untenable.

c) WTO Dispute Settlement, Supremacy, and Direct Effect

The prior paragraph already addresses a critical issue in connection with WTO dispute settlement: the extent to which it may be understood as a form of legislative action. There is an important quasi-legislative role for dispute settlement to play at the international level. Often this role is one of elaboration and application of general “standards” set by legislatures, as opposed to more specific “rules.”

Often, in connection with EU legal affairs, supremacy and direct effect are noted as features of constitutionalization. Indeed, these features, along with judicial review, are seen as the central features of constitutionalization, or at least of judicial constitutionalization. However, these features of EU law must be understood primarily as constitutionalization *at the domestic level*: they enabled EU law to have constitution-like power at the domestic level in the EU context. They act to restrict the scope of ordinary law at the domestic level, and thus play a quasi-constitutional role at that level. The same would be true in the case of supremacy and direct effect of WTO law. Interestingly, of course, WTO law, as international law, is already supreme over municipal law within the international legal system (of course, the same was true of the Treaty of Rome). However, it is within the domestic legal system that this supremacy, and effect, is contested. So, in connection with supremacy and direct effect, the interesting international aspect is the *source* of the *domestic* constitutional rule: whether it is a matter of domestic law or international law. But the main point is that supremacy and direct effect are

¹⁹ See Trachtman, *supra* note 5.

generally only “constitutional” in the domestic legal system, and not in the international legal system.

But before we move on, concluding that the discussion of supremacy and direct effect as *international* constitutional issues is merely a category mistake, we must note that there is another, more subtle, effect that can be understood in terms of international constitutionalization. Under the prevailing horizontal structure of the international legal system, with only limited mandatory adjudication, and where even such adjudication as exists cannot generally form the basis for strong enforcement, international law often lacks the compliance force of municipal law. But direct effect allows the international legal system, and such international law as is directly effective, to take advantage of the strong compliance force provided by the municipal legal system. In this sense, direct effect is a component of enabling *international* constitutionalization: it provides legislative capacity to the international system by lending the relevant international law greater force than it would otherwise have. Supremacy within the municipal setting plays a similar role.

d) Fragmentation and the WTO

Fragmentation—the phenomenon of diverse functional sources of international law and diverse tribunals applying international law—is not necessarily a problem. There are components of fragmentation that must be understandable as benevolent functional pluralism. On the other hand, there may be fragmentation that results from inadequate integration of different functional goals. While globalization is an integrated phenomenon, with complementarities and spillovers, most legal instruments have been developed in single-issue contexts.

The constitutional issue here is one of allocation of subject matter, or jurisdictional, authority among functional entities. The rules that make this allocation are termed by Hart “secondary rules,” to distinguish them from ordinary laws, which are termed “primary rules.” In our context, relating the WTO to the UN, UNEP, WIPO, ILO, UNCTAD, etc., can be understood as relating different constitutional structures to one another. Hence, I have called the rules that would allocate authority among these entities “tertiary rules.” These tertiary rules allocate authority among constitutions: among state constitutions, between state constitutions and international organization constitutions, and among international organization constitutions. It should be noted at the outset that the structure of the international legal system itself might be understood as the one true constitutional structure, with all of these functional entities, and states, being mere sub-structures. However, the residual authority in this system is not clearly allocated, unlike for example the US federal structure in which the central government seems under current historical circumstances to be the residual authority.

Thus, we operate in an era of uncertainty as to the residual authority among international organizations, or different functional sources of international law. However, this uncertainty is not necessarily inefficient. If conflicts between these rules were not sufficiently frequent and important, we would not expect states to expend the negotiation resources to establish either specific rules or more general standards by which to resolve these conflicts. The establishment

of these rules would be an important component of both enabling constitutionalization and of constraining constitutionalization, as it would enable and constrain the legislative authority of different functional entities in the international legal system.

Thus, another facet of constitutionalization addresses the extent to which broad social values are integrated with one another, and more specifically, the way in which market concerns are integrated with non-market concerns. It is striking that both the US and the EU began with emphases on commercial relations, and developed broader capacities over time. It is also striking that each domestic government has the institutional capacity to deal with inter-functional trade-offs.

It is in this sense that constitutionalization is concerned with capacities: here the capacity to integrate diverse values. Functional subsidiarity counsels against aggregating all multilateral power to the WTO, while increasing functional linkage makes some kinds of intersectoral coherence useful.²⁰ In order to assess the degree of coherence, we must look both within and without the WTO.

Within the WTO, we can see the development of a modest approach to intersectoral coherence in the WTO's reference to standards promulgated by international standards organizations. We can also see it in the Appellate Body's *Shrimp-Turtle* decision, which referred to an international environmental agreement in order to assist in interpreting some of the exceptional provisions of the WTO Agreements. But the international community may need to develop more complete and predictable mechanisms to promote coherence between trade policy and other policies. These will not necessarily result in a perfect hierarchy, or in uniform enforceability of all international law. States need flexibility to create both harder and softer international law, and indeed to avoid answering some questions. This counsels against blanket calls both for direct effect of WTO law in domestic legal orders,²¹ and for the enforcement of other international law in WTO dispute settlement. Each legal rule, and its binding effect based on the institutional structure available to implement it, responds to a specific social setting and set of incentives. Given diverse social settings, it would be wrong to prescribe uniformity of institutional structure or binding effect.

Developing countries have been reluctant to bring human rights, labor rights, or environmental protection inside the WTO more directly, for fear that social clauses will be used as bases for protectionism. Implicit in this position is the assumption that social clauses cannot today be used as bases for protectionism. In order to advance coherent policy-making in these areas, at levels that will satisfy the wealthier states, it will be necessary to establish mechanisms to guard against protectionism. It may also be necessary to provide compensation to poorer

²⁰ See Joel P. Trachtman, *Transcending "Trade and . . ."—an Institutional Perspective*, 96 AM. J. INT'L L. 77 (2002). Robert L. Howse & Kalypso Nicolaides, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity*, 16 GOVERNANCE 73 (2003), refer to the same concept as "horizontal subsidiarity."

²¹ Joel P. Trachtman & Philip Moremen, *Whose Right is it Anyway? Private Parties in EC-U.S. Dispute Settlement at the WTO*, 44 HARV. INT'L L.J. 221 (2003)

states in exchange for their willingness to accept standards that may otherwise be inappropriate, or simply too costly, for their society or level of development. Compensation could be provided through trade liberalization or even through direct monetary settlements.

Outside the WTO, the broader international system responds to the problem of coherence, but perhaps in too limited a fashion. The broader international system is characterized by decentralized global lawmaking, and decentralized global adjudication. This decentralized system does not satisfactorily respond to the need, under circumstances of varying and shifting legislative sources, to resolve conflicts between rules.

Conflicts between rules are the legal face of conflicts between different values. The core issue is a choice of law problem, not between states in a horizontal legal order, nor between component political entities and a central government. Rather, it is an inter-functional choice of law problem, between law that arises in different sectors of the international legal system, from different functional and institutional contexts—indeed from different constitutional structures. These contexts overlap like tectonic plates, and sometimes collide with one another, causing discontinuity and disruption.

The current structure of the international legal system for dealing with diverse legal rules from diverse sources is certainly imperfect, utilizing formal last-in-time rules or perhaps a *lex specialis* rule to address some of the most important normative issues faced by international society. These problems of policy integration are not susceptible to simple solutions. For example, even a rule to the effect that human rights trumps other international law, if it existed, would not solve the problem, partly because the rights revolution has asserted many rights that conflict with one another. While we may delegate the policy integration job to judges, we do not do so wholesale in the domestic sphere. So there is little reason to expect that judges will make all these decisions in the international sphere.

Over the next 50 years, we may expect to see more negotiations in an effort to develop more nuanced means to integrate different global values, such as trade, environment, and human rights. These negotiations will take place in response to perceptions of real conflict, and will result in nuanced rules and institutional development. They will no doubt reduce the indeterminacy arising from wide variation in the arrangements for adjudication in different subject areas—from functionally decentralized international adjudication. But they will not eliminate it. Thus, in order to mediate and deal with conflicts in the allocation of authority among international organizations, and indeed between different rules of international law, we can expect development of interfunctional constitutionalization both within and without the WTO legal system. The tertiary rules developed may be of the nature of either rules or standards, and to the extent that standards are utilized it may indeed be appropriate to delegate the application of these standards to judges.

Interfunctional constitutionalization can thus be understood in terms of constitutional economics. Interfunctional constitutions facilitate intersectoral tradeoffs among different categories of preferences. In terms of the theory of the firm, they bring within a single institution the different categories of preferences that otherwise would intersect in the market of the general

international legal system. This theoretical perspective provides a ready understanding that there will be some functional areas that should be addressed together within a single international organization, and others that will be better addressed separately.²²

e) Trade and Redistribution

The work of John Rawls fits well into the constitutional economics tradition.²³ His “veil of ignorance” can be understood as a means to simplify negotiations of constitutional principles by putting the particular distributive consequences in the background. He uses this mechanism to speculate on the principles that would be agreed. One of the principles relevant here is the “difference principle,” which holds that economic inequality can only be justified to the extent that it redounds to the benefit of the poorest. To the extent that trade liberalization may cause increased economic inequality, it would appear appropriate to develop a redistributive mechanism in order to ensure that an appropriate portion of the benefits from free trade are redistributed to the poor.

This constitutional principle could be converted into positive constitutional law through negotiations. Constitutional reforms may be a necessary part of a redistributive settlement at the WTO. These constitutional reforms may include a modification of decision-making that would provide more power to the poor, or the establishment of rights that effect redistribution to the poor. At the WTO, the main focus for the poor in the near future will be on mechanisms to produce greater liberalization in sectors in which the poor could compete.

However, it is not necessary that these negotiations, or their results, be located within the WTO. It would not be impossible for the WTO to evolve into the “ministry of efficiency” for the world, while some other organization, such as the World Bank, the UNDP, or something else evolved into the “ministry of redistribution.”

Similarly, the embedded liberalism concept of Karl Polanyi and John Ruggie may also be understood within the constitutional economics tradition. Under this concept, mechanisms for redistribution through regulation are a price to be paid to those who would otherwise lose from liberalization, in order to ensure the continuity of the benefits of liberalization. The WTO is both a result and a cause of greater global interdependence, and of the development of global society. To avoid disruption of this global society, by demarches in trade, economic catastrophes or violent upheavals in member states, or terrorism, it is morally and politically necessary to develop mechanisms to enhance the position of the poor.²⁴

f) The WTO Demos?

²² For arguments regarding the scope of issues that might be addressed within the WTO, see Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT’L L.J. 303 (2004).

²³ See Mueller, *supra* note 2.

²⁴ Joel P. Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and “Global Apartheid,”* 6 J. INT’L ECON. L. 3 (2003).

Is it necessary to have a *demos* in order to have a constitution, and does the WTO have one? Joseph Weiler points out that the EU itself lacks a “constitutional demos,” and so is not rooted in a central federal-type power.²⁵ The WTO has much less of a constitutional demos. Claims of existence of a *demos* are based on a type of cultural or ethnic affinity that motivates loyalty to a social structure. Indeed, a shared history, with its attendant values, concerns, and camaraderie may be understood in institutional economics terms itself, and may indeed shape behavior. These informal institutions may be seen as complements or substitutes for formal constitutional structures, depending on the circumstances.

While constitutional economics tends to highlight formal institutions, and would not ordinarily be *demos*-dependent, it is open to the possibility that cultural or ethnic factors may enter its analysis, either as informal institutions as discussed above, or as preferences of two types. First, we may prefer a society composed of our compatriots in a cultural or ethnic sense. Second, we may have a greater preference for altruism vis-à-vis our cultural or ethnic compatriots than vis-à-vis others.

Constitutional economics is allied with the concept of constitutional patriotism: it highlights not the exogenous cultural or ethnic causes of constitutional loyalty, but the structural and contextual reasons why a constitution allows the greater satisfaction of individual preferences. But constitutional economics recognizes the place of shared experience and shared characteristics, in terms of informal institutions and preferences.

So, the lack of a WTO-demos, today, does not stand in the way of the existence of a WTO constitution, but it does suggest that a WTO constitution would be different, in terms of the informal complements and in terms of preferences for solidarity, from a typical image of a national constitution. To the extent that the informal institutions of a *demos* are substitutes for other forms of constitutionalization, the lack of such a *demos* at the WTO would suggest a place for greater constitutionalization at the WTO than at the national level.

4) Conclusion: The Level of Analysis Problem

The above discussion shows that the international legal system indeed has a constitution, with enabling, constraining, and supplemental features. There is also no doubt that the WTO constitution is a part of this broader constitution, and that it too has enabling, constraining and supplemental features vis-à-vis states, other international organizations, and the international legal system in general. Indeed, it is these enabling, constraining, and supplemental features that define—that constitute—the WTO in relation to these other entities.

A constitutional matrix is a useful tool of taxonomy, but it cannot answer the question, at any particular level, of what constitutional features are needed. Rather, it is constitutional economics that provides the answer to this question. Constitutional economics examines the

²⁵ Joseph H.H. Weiler, *Federalism without Constitutionalism: Europe's Sonderweg*, THE FEDERAL VISION, Nov., 2001, at 54-71; See also Jurgen Habermas, *So, Why Does Europe Need a Constitution?*, 11 NEW LEFT REVIEW, Sep. -Oct., 2001.

existing structure for decision-making and evaluates the existing structure in comparison to other potential structures as a device for producing legal rules. It recognizes that it may be costly to fail to produce legal rules that could benefit citizens, and that it also may be costly to produce legal rules that harm citizens. So, constitutional economics assumes that states, in the international constitutionalization process, use enabling constitutionalization, constraining constitutionalization, and supplemental constitutionalization to establish the types of constitutions that are optimal. Optimal constitutions are those that maximize the benefits of production of international law, net of transaction costs.

Of course, there is a public choice critique of this rosy picture: the establishment of constitutional rules is an exercise of power, and constitutional discourse may constrain the good and enable the bad.²⁶ Yet one may respond that this is the human condition, and it applies to all law: men and women have found it good to depart anarchy and to establish constitutional rules in many contexts.

The most difficult work will be at the margins: at the places where different constitutions engage one another. These places will require delicate management. Delicate management does not necessarily require formal, specific, legal rules; in fact it seldom does in the most important areas. Rather, it is not unusual to find these marginal areas ruled by comity in the form of mutual deference, by muddied rules that give rise to negotiations in specific cases, by threats, and by conflict. This is true even in the domestic setting. For example, there are many areas in US constitutional law of give and take, of uncertainty, and of conflict. If such murkiness were simply wrong, or inefficient, would it not have been addressed by now?

Where rules, or standards, are developed in order to mediate between the constitutions of different international organizations, or between the constitutions of international organizations and those of states, we might understand these as “tertiary rules.” Constitutional economics can provide a perspective and a set of tools that can be brought to bear on whether tertiary rules are needed, and what their structure should be. For example, the perspective of constitutional economics would endorse a rule of constitutional subsidiarity, allocating authority at the constitutional level that may address the relevant issue most efficiently. Furthermore, a kind of interfunctional rule of constitutional subsidiarity, allocating authority to the international organization best able to address the relevant issue, is also consistent with constitutional economics.

²⁶ See Jeff Dunoff’s contribution to this volume.