
Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law

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Abstract

International legal scholarship, particularly trade scholarship, is preoccupied with questions of constitutionalism. However, neither WTO texts nor practice suggest that the WTO is a constitutional entity. The disjunction between scholarship and practice is puzzling: Why would scholars debate the WTO's (non-existent) constitutional features? Although the term is used in different ways, leading accounts of constitutionalism at the WTO share an impulse to channel or minimize world trade politics. Paradoxically, however, the call for constitutionalism triggers precisely the contestation and politics that it seeks to pre-empt. This creates an even larger puzzle: If constitutional discourse sparks the very politics it seeks to avoid, why do scholars continue to use this discourse? This paper explores the conditions that give rise to debates over constitutionalism, and explores whether the timing and prominence of constitutional debates reflect disciplinary anxieties that have been heightened by recent geopolitical developments. Might international lawyers use constitutional discourse as a rhetorical strategy designed to invest international law with the power and authority that domestic constitutional structures and norms possess? If so, this strategy may be self-defeating. Critical evaluation of constitutional claims may highlight the lack of constitutional structure or legitimating foundations of the WTO, and international law more generally. The paper closes by suggesting that other forms of constitutionalism may be

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imagined, including those designed to invite political debate and contestation, or to empower democratic and deliberative decision-making.

*The problem of international constitutionalism is the central challenge
faced by international philosophers in the 21st century.*¹

I Introduction

Reflecting on revolutionary changes in the international legal order following World War II and the Holocaust, Louis Henkin famously proclaimed ours to be an ‘age of rights’.² But perhaps ‘ages’ lack the staying power that they used to, for we now seem to be entering an ‘age of constitutionalism’ – at least, if international law scholarship is to be believed. A raft of new books address the topic,³ and it is hardly possible to pick up a current volume of a leading international legal journal without finding an article devoted to describing, analysing or debunking various constitutional orders said to be found in diverse international legal regimes.⁴

The turn to constitutionalism has been particularly pronounced in trade law scholarship, and Professor Joel Trachtman’s article builds upon this body of literature.⁵ Trachtman’s analysis explores ‘the relationship among the different facets of the WTO constitution’.⁶ Framing the discussion in this way presupposes that the trade regime is properly understood as a constitutional polity. However, as will be demonstrated below, neither WTO texts nor practice supports this understanding.

¹ Allot, ‘The Emerging Universal Legal System’, 3 *Int’l L. Forum* (2001) 12, at 16.

² L. Henkin, *The Age of Rights* (1990), at ix.

³ See, e.g., G. de Búrca and J. Scott (eds), *New Governance and Constitutionalism in Europe and the United States* (2006); R. St. J. MacDonald and D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005); F. O. Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (2005); C. Joerges and G. Teubner (eds), *Transnational Governance and Constitutionalism* (2004).

⁴ See, e.g., de Wet, ‘The International Constitutional Order’, 55 *ICLQ* (2006) 51; von Bogdandy, ‘Constitutionalism in International Law: A Proposal from Germany’, 47 *Harv. Int’l L. J.* (2006, 223); Symposium on the Proposed European Constitution, 3 *Int’l J. Constit. L.* (2005) 163; Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *EJIL* (2004) 907.

⁵ Trachtman, ‘The Constitutions of the WTO’, this issue, at 623. In addition to the scholarship discussed below, important contributions include Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints’, 98 *AJIL* (2004) 247; Cho, ‘A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future Of Trade Constitution’, 7 *J. Int’l Econ. L.* (2004) 219; T. Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (2004); Howse and Nicolaidis, ‘Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity’, 16 *Governance* (2003) 73; Walker, ‘The EU and the WTO: Constitutionalism in a New Key’, in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001); Howse and Nicolaidis, ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far’, in R. B. Porter, et al., (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001) 227.

⁶ Trachtman, *supra* note 5, at 623.

The striking disjunction between trade scholarship and trade practice gives rise to a puzzle: Why would prominent trade scholars devote their energies to debating the WTO's (nonexistent) constitutional features? As developed more fully below, the leading accounts of constitutionalism at the WTO share an impulse to channel or minimize world trade politics. That is, we can understand the turn to constitutionalism as a mechanism for withdrawing controversial and potentially destabilizing issues from the parry and thrust of ordinary politics. Paradoxically, however, the call for constitutionalism has sparked precisely the sort of contestation and politics that it seeks to pre-empt. Hence, one goal of this paper is to illuminate the self-defeating nature of the turn to constitutionalism.

But this analysis raises an even larger puzzle: If there is no world trade constitution, and if the calls for such a constitution trigger the very politics that constitutionalism seeks to avoid, why do international trade scholars continue to engage in the turn to constitutionalism? Exploration of this question will lead us to deeper and more troubling questions about the current status of the discipline of international law.

The current geopolitical environment – where the war on terror occupies centre stage and realist approaches to international relations are ascendent – places severe pressures on the discipline of international law. In a context where international law's relevance and efficacy is under challenge, the turn to constitutional discourse among international legal academics can be understood as a response to deep disciplinary anxieties about the current status and role of international law. In short, the invocation of constitutional discourse at the WTO – and elsewhere in international law – may be a rhetorical strategy designed to invest international law with the power and authority that domestic constitutional structures and norms possess. However, the constitutional turn may be self-defeating in this respect as well. Critical evaluation of constitutional claims may simply highlight the *lack* of constitutional structure, legitimating foundations, or popular acceptance of the WTO, and international law more generally.

To explore these issues, this paper proceeds as follows. Section 2 outlines the turn to constitutionalism in international law generally, and reviews the three leading understandings of constitutionalism at the WTO developed in international trade law scholarship. These conceptions understand constitutionalism as institutional architecture, as the privileging of a set of normative values, and as a process of judicial mediation among conflicting norms, respectively. Section 3 analyses whether the WTO *acquis* supports any of the three leading constitutional visions. It demonstrates that none of the leading conceptions of constitutionalism find significant support in WTO law or practice. Section 4 discusses whether there are commonalities among the three leading understandings of constitutionalism at the WTO. It develops an argument that the various constitutional visions can be understood as standing in opposition to an expansive and inclusive vision of international trade politics. Section 5 identifies three different potential explanations of why leading scholars focus on questions of constitutionalism at the WTO. It discusses the allure of constitutional discourse, and suggests that the turn to constitutionalism reflects a disciplinary anxiety over international law's status and role that has been heightened by developments in

international relations since 11 September 2001. Finally, Section 6 explores some relationships between Professor Trachtman's analysis and my own, and outlines an alternative version of constitutionalism at the WTO.

2 The Turn to Constitutionalism: Competing Conceptions of Constitutionalism at the WTO

Although international lawyers have long invoked constitutional imagery,⁷ constitutional discourse has become more prominent in recent years. The increased salience of this discourse reflects, in part, radical constitutional changes in the former Eastern Bloc states following the dissolution of the Soviet Union; the increased use of comparative constitutional techniques by various constitutional courts; and, perhaps most prominently, the contentious and highly visible efforts to draft and then ratify a treaty establishing a Constitution for Europe.

In addition to debates over specific domestic and supranational constitutions, international lawyers increasingly use constitutional analogies when discussing the activities of the United Nations and other international organizations. Even a cursory review of the scholarship addressing decisions to use force in Iraq and Kosovo, the dissolution of the former Yugoslavia, and the Lockerbie saga reveals the hold of constitutional imagery on the international legal imagination.⁸ In almost every instance, the scholarly invocation of constitutional discourse has both commented on and contributed to highly visible contemporaneous developments in the social and political world.

In recent years, constitutional discourse has moved to the centre of academic writing about the WTO.⁹ It is tempting to locate the constitutional turn in trade scholarship within the context of the turn to constitutionalism in international law generally. But there is an immediate and dramatic contrast between the WTO context and those mentioned above: in the WTO there has not been and is not currently an ongoing political process of creating a constitutional document, nor is there any likelihood of such a process in the foreseeable future. There is no constitutional court, no constitutional convention, no constitutional drafting process, and no readily identifiable constitutional moment.

⁷ See, e.g., A. Ross, *The Constitution of the United Nations: Analysis of Structure and Function* (1950); H. Lauterpacht, *International Law and Human Rights* (1950), at 463 (arguing that, in the post-World War II era, human rights are at 'the very centre of the constitution of the world'); A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926).

⁸ See, e.g., Alvarez, 'Constitutional Interpretation in International Organizations', in J.-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (2001); Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Colum. J. Transnat'l L.* (1998) 529; Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook of United Nations Law* (1997) 1; Tomuschat, 'International Law as the Constitution of Mankind', in *International Law on the Eve of the Twenty-First Century: Views from the International Law Commission* (1997) 37.

⁹ As noted below, a handful of scholars have discussed constitutionalism at the WTO for many years. However, the level of attention to, and political and scholarly salience of, constitutional arguments have greatly increased in recent years.

Moreover, on their face, the Uruguay Round texts lack a number of features often associated with constitutional entities. Thus, for example, the Uruguay Round Agreements neither create a world trade legislature nor vest autonomous legislative or regulatory capacity in a WTO body. These agreements do not speak in the doctrinal terms often associated with constitutionalism, such as a vertical division of powers or a formal separation of powers doctrine. The WTO agreements do not announce themselves to be directly applicable in the domestic systems of WTO members, and many major trading powers, such as the US, EU and Japan, have refused to give 'direct effect' to the obligations created by the WTO agreements.¹⁰ Immediately, then, we are struck by a puzzle: What do WTO scholars mean when they speak of constitutionalism at the WTO?

As Trachtman notes, 'constitutionalism' is a highly contested term that is used in different ways by different authors. Nevertheless, it is possible to characterize the most prominent of this scholarship as falling into one of three different categories. As described below, the most influential trade scholarship understands the WTO constitution to consist of either (1) the WTO's institutional architecture; (2) a set of normative commitments; or (3) a process of judicial mediation among conflicting values. Each of these understandings is briefly outlined below.

A Constitutionalism as Institutional Architecture

One influential strand of trade scholarship understands the WTO constitution primarily in institutional terms, and the most prominent advocate of this understanding is John Jackson.¹¹ As Jackson himself emphasizes, 'my focus is on the institutional side, on what I call the "constitution" of the world trading system'.¹² As Jackson's 'constitutional' vision has been thoroughly and ably discussed elsewhere,¹³ I offer here only a brief summary of his arguments.

Jackson has long been interested in the constitutional dimensions of institutional design. For example, Jackson's 1969 trade law treatise ends with a chapter entitled 'The Constitutional Structure of a Possible International Trade Institution'.

¹⁰ I do not mean to suggest that the features mentioned above are necessary indicia of a constitutional entity, or that we should necessarily expect to find the features associated with domestic constitutions in an international context. Indeed, as discussed in Section 6, an implicit argument throughout this article concerns the need to think beyond a statist frame of reference when considering constitutional arguments in the international domain.

¹¹ 'Constitutional' arguments run through much of Jackson's international trade scholarship. For a sampling, see, e.g., J. H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (1998); *Idem*, *Restructuring the GATT System* (1990); *Idem*, *World Trade and the Law of GATT* (1969); *Idem*, 'The WTO "Constitution" and Proposed Reform: Seven "Mantras" Revisited', 4 *J. Int'l Econ. L.* (2001) 67; *Idem*, 'Fragmentation or Unification among International Institutions: The World Trade Organization', 31 *NYU J. Int'l L. & Pol.* (1999) 823; *Idem*, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', 36 *Colum. J. Transnat'l L.* (1997) 157; *Idem*, 'The Birth of the GATT-MTN System: A Constitutional Appraisal', 12 *L. & Pol. Int'l Bus.* (1980) 21.

¹² Jackson, 'The Perils of Globalization and the World Trading System', 24 *Fordham Int'l L. J.* (2000) 371, at 375.

¹³ See, e.g., 'A Tribute to John Jackson', 20 *Mich. J. Int'l L.* (1999) 95.

The book concludes with Jackson's reflections on the importance of institutional architecture:

The perpetual puzzle . . . of international economic institutions is . . . to give measured scope for legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare. An additional function . . . [is] to enable its members to pursue common goals without being defeated by competing antisocial conduct of members of the group. . . . What is needed in an institution . . . [T]he structure and machinery [should] enable man [sic] as efficiently as possible . . . [to succeed in] the pursuit of common goals. In the long run, it may well be the machinery that is most important . . . rather than the existence of any one or another specific rule of trade conduct.¹⁴

Despite Jackson's enormous influence, for many years few in the trade world shared Jackson's preoccupation with institutional architecture or heeded his call to understand questions of institutional structure in constitutional terms.

Two decades after issuing his call to focus on institutional design, and in the context of the then ongoing Uruguay Round negotiations, Jackson published *Restructuring the GATT System*.¹⁵ This influential book proposes a 'constitutional' status and structure for the international trade system. In part, Jackson urges a constitutional structure as a pragmatic means of addressing the GATT's famous 'birth defects', including the 'provisional' nature of GATT obligations; a losing party's ability to veto adverse dispute settlement reports; and the doctrinal and practical difficulties resulting from multiple GATT agreements and understandings.

In addition to these characteristically 'pragmatic' arguments,¹⁶ Jackson advances a bold historical-descriptive – and normative – claim: "To a large degree the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach."¹⁷ Jackson emphasizes that, in the economic context, only a rule-oriented approach will provide the security and predictability necessary for decentralized international markets to function. Jackson argues that this new rule-based approach can best occur through a 'constitution' creating a new international organization – the World Trade Organization.

Jackson presented his ideas about the need for a new and strengthened institutional architecture at a London seminar attended by Uruguay Round negotiators; his ideas caught the attention of several trade diplomats and Arthur Dunkel, then the GATT's Director-General. As a result of this diplomatic interest, Jackson was hired as an advisor to the Government of Canada and drafted papers outlining the need for a new international organization and a proposed agreement. Eventually, a draft Agreement Establishing the Multilateral Trade Organization was included in the Dunkel Draft Final Act, which was released in late 1991. After various diplomatic twists and turns, trading nations established a new World Trade Organization at the conclusion

¹⁴ Jackson, *World Trade and the Law of GATT*, *supra* note 11, at 788.

¹⁵ Jackson, *Restructuring the GATT System*, *supra* note 11.

¹⁶ Jackson's 'pragmatic' style is discussed in Howse, 'The House that Jackson Built: Restructuring the GATT System', 20 *Mich. J. Int'l L.* (1999) 107; Kennedy, 'The International Style in Postwar Law and Policy', *Utah L. Rev.* (1994) 7.

¹⁷ Jackson, *Restructuring the GATT System*, *supra* note 11, at 52.

of the Uruguay Round. The new organization includes a Ministerial Conference, composed of all WTO members, that meets at least every two years; a General Council, which has delegated authority to carry out the WTO's day-to-day business; a number of councils and committees; and a highly developed dispute settlement system. It is no exaggeration to state that the WTO's innovative – and controversial – institutional structure owes much to Jackson's voluminous writings and tireless advocacy.¹⁸

Jackson's post-Uruguay Round writings continue to focus on the theme of institutional architecture as constitution. In recent years, Jackson has critiqued the WTO's institutional structure, focusing on the strengths and limitations of the WTO's innovative dispute resolution system and on the institutional obstacles to rule-making at the WTO. While Jackson's immediate concerns have, of course, shifted over time, and he sometimes uses the terms 'constitution' and 'constitutionalism' in different ways, as a general matter his writings continue to focus on questions of the trade regime's institutional architecture.

B Constitutionalism as Normative Commitments

A second strand of constitutional scholarship views constitutionalism as the privileging of a set of normative commitments. Perhaps the most prominent advocate of this position is Professor Ernst-Ulrich Petersmann.¹⁹ For Petersmann, constitutionalism has less to do with institutional arrangements than it does with the elevation of a set of normative values designed to protect against both government overreaching and short-sighted decisions by the population: 'The self-limitation of our freedom of action by rules and the self-imposition of institutional constraints . . . are rational responses designed to protect us against future risks of our own passions and imperfect rationality.'²⁰ In this context, Petersmann invokes the familiar story of Ulysses ordering his companions to bind him to a mast when approaching the island of the sirens; constitutions consist of pre-commitments to norms that 'effectively constitute and limit citizen rights and government powers'.²¹

Constitutions are thus premised upon a series of normative values, including, *inter alia*, the 'rule of law'; substantive rules that constrain governments by subjecting

¹⁸ Steger, 'A Tribute to John Jackson', 20 *Mich J. Int'l L.* (1999) 165.

¹⁹ An incomplete listing of Petersmann's writings linking constitutionalism with international economic law includes: Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *EJIL* (2002) 621; *Idem*, 'The WTO Constitution and the Millennium Round', in M. Bronckers and R. Quick (eds), *New Directions in International Economic Law* (2000) 111; *Idem*, 'The WTO Constitution and Human Rights', 3 *J. Int'l Econ L.* (2000) 19; *Idem*, 'Constitutionalism and International Organizations', 17 *Nw. J. Int'l L. & Bus.* (1996) 398; *Idem*, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations', 10 *Leiden J. Int'l L.* (1997) 421; *Idem*, 'How to Constitutionalize the United Nations? Lessons from the 'International Economic Law Revolution'', in *Liber Amicorum Gunther Jaenicke* (1998) 313; M. Hilf and E.-U. Petersmann (eds), *National Constitutions and International Economic Law* (1993); E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

²⁰ Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?', 20 *Mich J Int'l L.* (1998) 1.

²¹ *Ibid.*, at 13.

government actions that restrain ‘individual freedoms (including the right to import and export)’ to the tests of ‘necessity’ and ‘proportionality’,²² and horizontal and vertical separation of power principles designed to produce ‘rule-oriented rather than power-oriented settlement of international disputes’.²³

Finally and, for Petersmann, most importantly, constitutional systems recognize and protect inalienable ‘human rights, “market freedoms”, and other fundamental rights’ as non-derogable limitations on government powers. Petersmann argues that, in this respect, the WTO performs better than many domestic constitutions:

the WTO guarantees of freedom, non-discrimination and the rule of law go far beyond national constitutional guarantees in most countries which tend to limit economic freedom to domestic citizens and, for centuries, have discriminated against foreign goods, foreign services and foreign consumers (e.g., by permitting export cartels). By extending equal freedoms across frontiers and subjecting discretionary foreign policy powers to additional legal and judicial restraints . . . the WTO rules . . . serve ‘constitutional functions’ for rendering human rights and the corresponding obligations of governments more effective in the trade policy area.²⁴

Petersmann’s latest writings on constitutionalism emphasize that the elevation and enshrinement of fundamental human rights lie at the heart of his constitutional vision. Thus, he has recently argued for ‘the constitutional primacy of the inalienable core of human rights’ that should be applied in the WTO context.²⁵

Perhaps most controversially, Petersmann has argued that economic freedoms constitute the core of his conception of fundamental human rights. Following Jan Tumlir, Fredrich Hayek and others, Petersmann emphasizes the fundamental importance of ‘economic freedoms’ such as the freedom ‘to produce and exchange goods. . .’, and argues that ‘market freedoms are indispensable’ for human autonomy and self-determination.²⁶ Repeatedly, Petersmann praises European integration law for ‘fully recogniz[ing]’ that ‘transnational “market freedoms” for movements of goods, services, persons, capital and related payments’ are judicially enforceable ‘transnational citizen rights’,²⁷ and urges the WTO and other international organizations to follow Europe’s lead in this regard.

Thus, Petersmann’s understanding of constitutionalism can be sharply distinguished from Jackson’s. While Petersmann does not ignore institutional issues, his understanding of constitutionalism is centred upon a pre-commitment to the elevation and protection of certain normative values. Human rights are central to these values, which in Petersmann’s understanding should encompass economic rights – including the freedom to trade.

²² Petersmann, ‘Constitutionalism and International Organizations’, *supra* note 19, at 431.

²³ Petersmann, ‘How to Reform the UN System’, *supra* note 19, at 427. Thus, Petersmann shares some of Jackson’s focus on institutional architecture.

²⁴ Petersmann, ‘Time for a United Nations “Global Compact”’, *supra* note 19, at 644.

²⁵ *Ibid.*

²⁶ Petersmann, ‘How to Constitutionalize International Law’, *supra* note 20, at 17.

²⁷ Petersmann, ‘Theories of Justice, Human Rights, and the Constitution of International Markets’, 37 *Loy. L.A. L. Rev.* (2003) 407, at 457.

C Constitutionalism as Judicial Mediation

Perhaps the most common conception of constitutionalism highlights the mediating and norm-generating elements of WTO dispute settlement as the engine of constitutionalism. This strand of thought envisions an incremental, common law form of constitutionalism – the product not of a constitutional moment, but rather the result of a gradual and fitful judicially-led process. This conception of constitutionalism is, I believe, strongly influenced by the literature on European integration that argues that the European Court of Justice developed a constitutional architecture for the EC through, *inter alia*, the judicially-created doctrines of direct effect and supremacy.²⁸

A leading exponent of this view is Professor Deborah Cass, who argues that the WTO's Appellate Body (AB) 'is the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution'.²⁹ Cass argues that the AB generates these constitutional norms through four distinct processes. First, the AB borrows constitutional rules, principles and doctrines from other systems and amalgamates them into the AB's own case law. Cass calls this 'constitutional doctrine amalgamation'.³⁰ Second, through decisions that generate rules on burdens of proof, fact finding and participation by non-state actors, the AB's reports 'are constitutive of a new system of law'.³¹ Third, the AB is incorporating into its jurisdiction issues traditionally viewed as being within national constitutional processes, such as public health. Finally, Cass argues that the AB 'associates itself with deeper constitutional values' in the ways that it carefully crafts and justifies its decisions. It does so by addressing such background constitutional question as 'how to design a fair system of law . . . [and] how policy responsibility will be divided'.³²

Cass argues that, taken in the aggregate, these four features comprise the mechanisms through which 'the emerging jurisprudence of the WTO is beginning to develop a set of rules and principles which share some of the characteristics of constitutional law; and that this in turn is what contributes to the constitutionalization of international trade law'.³³ Behind the doctrine, Cass argues, is a preoccupation with the sorts of issues that preoccupy constitutional courts: 'questions about the division of powers; . . . [of] state sovereignty . . . [questions] about how a legal system is constituted,

²⁸ See, e.g., A. Stone Sweet, *The Judicial Construction of Europe* (2004); J. H. H. Weiler, *The Constitution of Europe* (1999); Burley and Mattli, 'Europe Before the Court: A Political Theory of Legal Integration', 47 *Int'l Org.* (1993) 41.

²⁹ Cass, "The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade", 12 *EJIL* (2001) 39, at 42. Cass expanded and updated her arguments in *The Constitutionalization of the World Trade Organization* (2005), which was published after this paper was substantially completed.

³⁰ Cass, *supra* note 29, at 51.

³¹ *Ibid.*, at 51.

³² *Ibid.*, at 52.

³³ *Ibid.*, at 52. Cass is careful not to argue that these four features automatically make a system 'constitutional'. Rather, it is that the AB is generating 'constitutional-like' doctrine and this doctrine is being understood in the literature as constitutional in nature.

its overall validity, its democratic contours, its very legitimacy'.³⁴ In short, for Cass, the AB is 'building . . . a constitutional system by judicial interpretations emanating from the judicial dispute resolution institution'.³⁵

By way of example, Cass highlights the AB's 'choice of fact-finding method' as illustrating how the AB advances the 'constitutionalization process'. Her argument rests upon the premise that different modes of fact-finding – such as inquisitorial or adversarial – have deep implications for the legal system as a whole; thus, for Cass, 'fact-finding rules can code for one form of system characterization'.³⁶ Cass argues that, in a line of cases, the AB has generated a 'procedurally relatively informal system whereby information can be elicited from a variety of sources, and the tribunal is not hemmed in by any strict rules of evidence and procedure'.³⁷ In this regard, Cass places special emphasis on the *Shrimp-Turtle* AB report that held that panels have authority to accept information from non-state actors. She notes that this decision 'lend[s] credence to the constitutionalization claim and ha[s] significance from a democratic and constitutional design perspective'.³⁸ It does so, in part, by potentially expanding the participants in the trade system beyond states to corporations, NGOs and civil society. This increased participation, in turn, may increase the perceived levels of the legitimacy and fairness of the trade system.

The writings of Jackson, Petersmann and Cass represent three of the most prominent understandings of 'constitutionalism' at the WTO.³⁹ But, as even the brief descriptions above suggest, there are deep and perhaps intractable differences among the various uses of this term. Jackson's conception of constitutionalism rests on a vision of the WTO as a functional and technocratic entity that is an efficiency-oriented, problem-solving, rule-based entity that helps states solve collective action problems. Petersmann's conception of constitutionalism at the WTO draws upon a tradition that views constitutionalism as a constraint on public power that protects private autonomy and freedom, including prominently the freedom to trade. Cass's conception of constitutionalism posits a gradual and incrementalist process whereby dispute resolution panels slowly but inexorably generate new constitutional norms. Trachtman builds upon this literature by directing our attention not to a particular feature of constitutionalism, but rather to the interplay and relationships among various dimensions of constitutionalization.

The obvious question is which, if any, of these understandings best captures WTO law and practice? In the next section of this paper, we turn from legal scholarship to WTO texts and practice. In particular, we examine WTO dispute settlement reports and explore whether these decisions are consistent with any of the constitutional understandings developed in trade scholarship.

³⁴ *Ibid.*, at 72.

³⁵ *Ibid.*, at 52.

³⁶ *Ibid.*, at 60.

³⁷ *Ibid.*, at 60.

³⁸ *Ibid.*, at 61.

³⁹ For an earlier effort to categorize this scholarship, see Dunoff, 'Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas', 1 *J. Int'l L. & Int'l Relations* (2005) 191.

3 What Trade Constitution?

The Uruguay Round Agreements creating the WTO do not explicitly announce themselves to be a world trade 'constitution'; they do not explicitly set out a system of checks and balances among the various institutional components of the organization; they do not explicitly enshrine a 'right to trade'; and they do not explicitly empower the AB to establish a constitutional system through judicial interpretation. So if a WTO constitution exists, its nature and contours are not to be found – directly at least – in the texts that establish the WTO.

Another place to look for evidence of constitutionalism is in WTO dispute settlement reports. The WTO's dispute settlement system is widely celebrated for being the most highly developed and legalized in international law, and in its first decade has considered a remarkable number of disputes. *If* there was a trade constitution, and *if* it centred upon either the WTO's institutional architecture, a fundamental freedom to trade, or the AB's norm-generating capacities, then it is likely that this understanding would find expression in panel or AB reports. Thus, for example, if the Jacksonian concept of constitutionalism at the WTO were descriptively accurate, we might expect to see a number of dispute settlement reports that explore the relationships among the various constituent elements of the WTO's institutional architecture. However, only a handful of cases, at most, address these institutional issues.

The most prominent dispute in this regard is *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India-QRs)*.⁴⁰ That dispute involved a challenge to certain trade measures imposed, India claimed, for balance of payments purposes. India argued that the panel had only limited competence to examine this issue as 'jurisdiction over this matter has been explicitly assigned to the BOP [Balance of Payments] Committee and the General Council'. More broadly, India argued that a principle of 'institutional balance' mandated that the panel adopt a limited and deferential role lest it upset 'the distribution of powers between the judicial and the political organs of the WTO'.

In advancing these arguments, India urged the AB to adopt an understanding of the WTO architecture akin to a 'separation of powers' understanding of domestic governmental systems. Indeed, India explicitly invoked domestic separation of powers systems and argued that

the drafters of the WTO Agreement created a complex institutional structure under which various bodies are empowered to take binding decisions on related matters. These bodies must cooperate to achieve the objectives of the WTO, and can only do so if each exercises its competence with due regard to the competence of all other bodies. In order to preserve a proper institutional balance between the judicial and the political organs of the WTO with regard to matters relating to balance-of-payments restrictions, review of the justification of such measures must be left to the relevant political organs . . .⁴¹

⁴⁰ WT/DS90/AB/R (23 Aug. 1999).

⁴¹ *Ibid.*, at para. 98 (footnote removed).

Notably, the AB flatly rejected India's approach. After reviewing the relevant WTO texts and prior panel reports, the AB concluded that 'India failed to advance any convincing arguments in support of the existence of a principle of institutional balance that requires panels to refrain from reviewing the justification of balance-of-payments restrictions . . .'.⁴² Instead, the AB relied upon the text of the DSU and a footnote to the Balance of Payments Understanding that explicitly provided for dispute settlement mechanisms to be available 'with respect to any matters arising from the application of restrictive import measures taken for balance of payments purposes'.⁴³

In one sense, of course, the *India-QR* report addresses issues at the heart of a Jacksonian constitutional vision: the relationship between different parts of the WTO's institutional architecture. However, what is more significant for current purposes is the AB's explicit and unequivocal rejection of the invitation to adopt a theory of separation of powers, or to articulate anything approaching a constitutional theory concerning the relationships between the WTO's 'political and judicial organs'. The AB does not understand – or at least declare – itself to be articulating a constitutional vision of the relationships among coordinate branches of an overarching institution or to be policing the jurisdictional lines that separate these coordinate branches.⁴⁴

To the contrary, the AB's decision does not turn on an extended inquiry into the role and function of WTO dispute settlement *vis-à-vis* other WTO organs. Rather, the *India-QRs* report is written in an extremely narrow manner that studiously avoids 'constitutional' rhetoric or reasoning. There can be little doubt that the AB's larger, if implicit, message – that it will not adopt or articulate a 'constitutional' understanding of the WTO's institutional architecture – was widely understood. In no subsequent dispute has a panel or the AB mentioned – nor did a WTO member even deign to raise – an argument invoking 'institutional balance', 'separation of powers', 'checks and balances' or similar arguments.⁴⁵

⁴² *Ibid.*, at para. 105.

⁴³ *Ibid.*, at para. 87.

⁴⁴ To be sure, on occasion the AB does evidence a concern over horizontal division of powers issues. For example, the AB refused to address the sequencing issue that arose in the Bananas litigation and indicated that the issue should be addressed by the WTO's political organs. But statements like these are a far cry from setting out a full blown 'constitutional' theory of how the various entities that make up the WTO interrelate.

⁴⁵ In *Turkey-Textiles*, the panel addressed the question of whether dispute settlement panels have the competence to assess the GATT consistency of a measure taken under a regional trade agreement, particularly given the existence of the WTO Committee on Regional Trade Agreements which evaluates the overall WTO compatibility of regional trade agreements. *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (31 May 1999), paras 9.52–9.54. While this specific issue was not raised on appeal, the AB went out of its way to 'note in this respect' its ruling in *India-QRs*. *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 Oct. 1999), at para. 60. In *Philippines – Measures Affecting Trade and Investment in the Motor Vehicle Sector*, WT/DS195, the US requested that a panel review certain trade-related investment measures maintained by the Philippines beyond the permitted implementation period. At the time of this request, the Philippines had sought an extension of the implementation period from the Council for Trade in Goods. However, the panel in this dispute was never composed.

Similarly, neither the AB nor any panel has embraced the fundamental individual freedom to trade that Petersmann advocates.⁴⁶ Although the question has never been squarely presented in a WTO dispute, the panel report in the *Section 301* dispute provides the most relevant discussion:

... Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect [i.e., as creating legally enforceable rights and obligations for individuals]. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both ... Members and their nationals.⁴⁷

The panel goes on to say that 'it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix', for a primary purpose of the GATT/WTO is 'to produce market conditions' that permit 'individual activity to flourish',⁴⁸ The panel therefore opines that it may be convenient 'in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect'.⁴⁹ While this is surely an important acknowledgment of the role of individuals in the international trade system, it is hardly a ringing endorsement of a legally binding individual freedom to trade of constitutional dimension. No other WTO panel or AB report has discussed the 'direct effect' (or indirect effect) of WTO law on individuals or an individual freedom to trade. In brief, the AB has not adopted the freedom to trade that Petersmann urges.

Finally, relatively few reports use the various mediating methods that Cass identifies and, when they do, their reports often fail to resolve the underlying value conflicts. Consider one of the key examples that Cass uses to illustrate 'the way the [AB's] decisions herald a constitutionalization process',⁵⁰ namely the AB's decision to permit submissions from a range of sources, including non-state actors. However, close examination of what panels and the AB *do*, rather than what they *say*, with these submissions tends to undermine Cass's thesis about the constitutional dimensions of judicial norm-generation.

The background to this issue is that, from time to time, non-state actors have attempted to participate in WTO dispute resolution through submission of amicus briefs. In *Shrimp-Turtle*, the panel held that such amicus briefs were inadmissible as a matter of WTO law.⁵¹ On appeal, the AB explicitly rejected the panel's legal conclusion that amicus briefs were inadmissible, and held that panels had discretionary authority to accept these briefs.⁵²

⁴⁶ This may mean that we should understand Petersmann's writings as largely normative or aspirational, rather than descriptive.

⁴⁷ *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, para. 7.72, (27 Jan. 2000) (footnote removed, emphasis added). The panel report was not appealed.

⁴⁸ *Ibid.*, at para. 7.73.

⁴⁹ *Ibid.*, at para. 7.78.

⁵⁰ Cass, *supra* note 29, at 60.

⁵¹ *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/R (15 May 1998).

⁵² *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 Oct. 1998).

In a subsequent case involving a Canadian challenge to a French ban on asbestos, it became apparent that many NGOs wished to submit briefs. *Sua sponte*, the Appellate Body issued a ‘communication’ with a procedure for interested parties to request leave to file amicus briefs.⁵³ Several developing states requested a special meeting of WTO members to discuss this communication and the larger issue of amicus briefs. An overwhelming majority of states who spoke at this meeting severely criticized the Appellate Body for issuing this communication. The Chair of the meeting announced that he would forward a note to the Appellate Body urging it to exercise ‘extreme caution’ on this issue. The Appellate Body denied each of the 17 requests to file amicus briefs that were submitted in the *Asbestos* appeal.⁵⁴ Since then, in virtually every dispute involving amicus briefs, panels and the AB have only addressed the arguments presented in NGO briefs when a party to the dispute appended the amicus brief to its own submission.⁵⁵

Thus WTO practice regarding amicus briefs undermines Cass’s claim that the AB has played a constitutional, norm-generating role here. In practice, a large number of WTO members strongly objected to the new norm that the AB tried to generate. After member states communicated their displeasure, the AB backed away from the supposedly constitutional norm it had created. As one recent panel report stated, ‘in light of the absence of consensus among WTO Members on . . . how to treat amicus submissions’, it would ‘not . . . accept’ amicus briefs.⁵⁶

* * *

In short, panel and AB decisions lend little support to any of the leading theories of constitutionalism. Few dispute settlement reports address the issues of institutional architecture that Jackson’s scholarship would suggest is central to the WTO’s ‘constitution’. Few address and none adopt the individual ‘freedom to trade’ that Petersmann would have at the heart of the WTO’s constitution; the only report to even address the issue finds that individual rights do not exist under WTO law. And few resolve the

⁵³ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Communication from the Appellate Body*, WT/DS135/9 (20 Nov. 2000).

⁵⁴ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (3 Dec. 2001) at paras 55.30–56.32.

⁵⁵ For the most recent examples of this pattern, see *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (6 March 2006); *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R (12 Sept. 2005); *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R (28 April 2005). There are a few exceptions to this general practice. In *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW (18 Feb. 2000), the panel accepted a letter from the ‘Concerned Fisherman and Processors’ in South Australia. *Ibid.*, at paras. 7.8–7.9. In *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (27 Sept. 2002), the panel ‘accept[ed] for consideration’ an unsolicited amicus brief from a Canadian NGO. However, the panel rejected three other amicus briefs. *Ibid.*, at para. 7.2.

⁵⁶ *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R at 88, n. 75 (22 March 2004). Notably, the AB then stated that it ‘would consider any arguments raised by *amici curiae* to the extent that these arguments were taken up in the written submissions . . . of any party or third parties . . .’.

sorts of disputes that Cass says are central to the constitutionalization process, such as whether non-state actors will have access to WTO dispute resolution. Thus, we are left with a puzzle. Sophisticated and experienced trade scholars develop increasingly elaborate theories of constitutionalism at the WTO. But the most prominent example of WTO practice, WTO dispute settlement reports, provides little evidence to support any of the specific conceptions of constitutionalism found in the scholarly literature, let alone a move to constitutionalism in general. What explains this disquieting disconnect between WTO scholarship and practice?

4 Constitutionalism as Antidote to Trade Politics

The discussion above illustrates just some of the diverse ways that trade scholars have used the term 'constitutionalism'. Should we conclude that the scholars surveyed above are referring to dramatically different 'constitutions'? Do the different understandings of constitutionalism signal a dispute over competing political visions, or different visions of the commitments that define the trade regime? Or is there a conceptual, or even ideological, link between these competing conceptions of constitutionalism at the WTO? Stated differently, what is gained through the invocation of constitutional rhetoric?

Constitutional practice, precedent, discourse and scholarship – in the US, at least – frequently emphasize the distinction between the 'constitutional' and the 'political'. 'Political' decisions, in this view, are often driven by legislative pandering and self-interest, or reflect pork-barrel bargaining among legislators or constituents. 'Constitutional' decisions, on the other hand, reflect principle rather than partisanship, and reasoned deliberation rather than special-interest pleading. President Franklin Roosevelt famously invoked this distinction when he urged the Congress *not* to consider the constitutionality of proposed New Deal legislation but instead to limit itself exclusively to political concerns, such as legislative ethics, morality, consequentialist public welfare maximization, and other similar factors.⁵⁷ This distinction also finds support in Supreme Court precedent including, for example, cases suggesting that certain types of grievances are better addressed through the political process than through constitutional adjudication.⁵⁸ Finally, an enormous and influential scholarly literature elaborates on the various ways that 'constitutional' and 'political' decisions can be distinguished.⁵⁹ Thus, '[a] higher law background

⁵⁷ See F. Roosevelt, 'Draft Speech on the Gold Clause Cases (Feb. 19, 1935)', in E. Roosevelt (ed.), *F.D.R.: His Personal Letters, 1928–1945* (1950), at 459–460.

⁵⁸ See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974).

⁵⁹ See, e.g., B. Ackerman, *We the People, Transformations* (1998) (detailing a theory of 'constitutional dualism' whereby 'We the People' express our sovereign will in transformative and rare constitutional moments that thereafter constrain the actions of legislative agents engaged in 'ordinary politics'); P. Bobbitt, *Constitutional Interpretation* (1991) (identifying and distinguishing six modalities of argumentation that distinguish constitutional discourse from political and moral argument); A. Bickel, *The Least Dangerous Branch* (1962) (constitution represents 'enduring values' as distinguished from 'the current clash of interests' that inform and drive politics).

runs deep in our constitutional thinking. . . . [in which] the Constitution is understood to stand above and against politics, a legal constraint on the power of democracy and elected officials'.⁶⁰

Within traditions that distinguish constitutionalism from ordinary politics, one of the virtues of constitutional decision-making is thought to be that, by removing issues from the political arena, constitutionalism can promote the principled and authoritative settlement of divisive issues.⁶¹ While this settlement function is a critical aspect of all types of law, it is particularly notable and important in a constitutional context, given the supremacy of constitutional norms over other forms of law. Authoritative constitutional settlement is useful, in part, because continuous reconsideration of the same issues is wasteful, unsettling, and potentially destructive of social stability. Authoritative constitutional settlement can also help coordinate atomistic self-interested actors and promote common interests that might otherwise be difficult to obtain. In addition, finality can provide the stability and certainty which are particularly important in certain contexts, such as planning economic activities. Again, these and similar justifications for constitutional finality find expression in US politics and jurisprudence; for example, Madison defended such a view in opposing Jefferson's proposal for a new constitutional convention every generation, the Supreme Court has recognized the strong interest in constitutional finality in cases such as *Planned Parenthood v. Casey*, and a large body of scholarly literature debates the virtues and limits of the finality associated with constitutionalism.

For current purposes, I am less interested in the descriptive accuracy of the distinction between constitutionalism and ordinary politics than in its prominence and influence in legal discourse.⁶² The question this raises is whether the three leading visions of constitutionalism at the WTO outlined above are trading on this feature of constitutionalism – and whether this feature provides a common link among the otherwise disparate visions?

In other words, can we understand each of these three visions of constitutionalism at the WTO as offering constitutionalism as a mechanism for withdrawing an issue from the battleground of power politics and as a vehicle for resolving otherwise politically destabilizing political disputes through reference to a meta-agreement. This constitutional 'agreement' – whether embodied in institutions, in foundational text, or in judicial doctrine and traditions that gloss the text – can then be used to resolve and pre-empt debate over what would otherwise be controversial issues that threaten the realm of ordinary politics. Under this understanding of constitutionalism, constitutional norms can be used to shut down or short circuit normal political debate and

⁶⁰ Whittington, 'Extrajudicial Constitutional Interpretation: Three Objections and Responses', 80 *N. Car. L. Rev.* (2000) 773, at 774.

⁶¹ See, e.g., Alexander and Schauer, 'On Extrajudicial Constitutional Interpretation', 110 *Harv. L. Rev.* (1997) 1359.

⁶² To be clear, in invoking this conventional distinction, I do not mean to suggest that constitutional principles are somehow apolitical, or that political entities with strong constitutional traditions cannot or do not also engage in 'normal' politics.

action, for '[c]onstitutional principles . . . possess an authority superior to that of politics, including, of course, democratic politics'.⁶³

With this in mind, let us revisit Jackson's understanding of constitutionalism at the WTO. As noted, Jackson's constitutional gaze is fixed on institutional architecture. This attention is eminently understandable; '[s]tructural design is the basic hardware for constitutional practice, and the most familiar, visible and tangible index of constitutional continuity and change'.⁶⁴ However, it is instructive to recall the purpose of this institutional architecture: to introduce a 'rule-based' system that will replace the pre-existing 'power-based' trade system. Jackson is explicit that, at bottom, the new rules-based system is designed as an antidote to the corrupting influence that the exercise of 'power' – that is, the 'diplomatic process' marked by bargaining among states with wide disparities in power, influence and resources⁶⁵ – has heretofore exerted on the international trade system.

Petersmann similarly understands constitutionalism as a necessary corrective to the pathologies of politics: '[c]onstitutionalism emerged in response to negative experiences with abuses of political power in order to limit such abuses through rules and institutions'.⁶⁶ Or, as Petersmann memorably suggests, constitutionalism's foundational insight is that the central political question is not who shall govern, but rather 'how must laws and political institutions be designed . . . so that even incompetent rulers and politicians cannot cause too much harm'.⁶⁷

Cass, as well, presents a vision of constitutionalism that can be understood in opposition to politics. Her focus, as we have seen, is on the generation of constitutional norms by the WTO's judicialized dispute resolution process. But to use a highly judicialized process for generating and applying norms is effectively to turn legislative and interpretative powers to a small cadre of Appellate Body members. And while this may be a highly deliberative process, WTO dispute resolution is hardly a site for participatory or democratic politics.

Thus, a common link between these three different understandings of the WTO's constitution is that, for each of the scholars surveyed, the turn to constitutionalism can be understood as being made in the service of a larger turn away from politics.⁶⁸

⁶³ Rubinfeld, 'Unilateralism and Constitutionalism', 79 *NYU L. Rev.* (2004) 1971, at 1992. Rubinfeld contrasts this understanding of constitutionalism with 'democratic constitutionalism', where 'a constitution is not to be conceptualized as something prior to or outside of democratic politics', but rather made through democratic processes. See also Klabbers, 'Constitutionalism Lite', 1 *Int'l Org. L. Rev.* (2004) 31 ('one of the main attractions of constitutionalism is to suggest that there is a sphere beyond everyday politics comprising values that cannot . . . be affected or changed').

⁶⁴ Walker, 'After the Constitutional Moment', in I. Pernice (ed.), *The Draft Constitution* (2004).

⁶⁵ Jackson explicitly equates a 'power'-oriented system with the diplomatic process. See, e.g., Jackson, 'Fragmentation or Unification', *supra* note 11, at 826–827.

⁶⁶ Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?', 31 *NYU J. Int'l L. & Pol.* (1999) 733, at 758.

⁶⁷ Petersmann, 'How to Reform the UN System?', *supra* note 19.

⁶⁸ For an insightful analysis of the ways that world trade politics have migrated from the WTO to other fora in the context of intellectual property issues, see Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Lawmaking', 29 *Yale J. Int'l L.* (2004) 1.

That is, for each of the scholars surveyed, the rise of the WTO as a constitutional entity can be understood as a corrective or replacement for unruly and potentially destructive trade politics.⁶⁹

The paradox is that constitutionalism – at least the kind advocated by Jackson, Petersmann and Cass – cannot possibly deliver the escape from politics that it promises. Jackson would house trade politics within the WTO’s institutional apparatus. Of course, only states can be members of the WTO.⁷⁰ But this means that WTO institutions reinscribe the very state-centric political order that many of the most controversial trade disputes put at issue. The most dramatic examples of world trade politics, including the Seattle Ministerial and controversies over access to essential medicines, highlight the ways in which trade politics can no longer be understood simply as inter-state politics – and, more importantly, that in their current configurations the WTO’s institutions do not and cannot contain world trade politics. Indeed, the structural limitations of the WTO’s institutional architecture almost guarantees an inadequate amount of the democratic participation and accountability necessary for the social legitimacy that any successful effort to constitutionalize the trade system would need.

Similarly, Petersmann would enshrine and elevate economic freedoms, including an individual freedom to trade. Petersmann argues that, in proper constitutional orders, government restrictions on economic rights, including the ‘freedom to trade’, should be subject to a strict ‘necessity’ test. As Professors Howse and Alston have persuasively argued, this ‘necessity’ test reveals how significantly Petersmann’s vision of constitutionalism privileges economic rights as opposed to other important social interests.⁷¹ In practice, such an elevation of economic rights would necessarily limit governments’ ability to pursue many non-economic goals, such as environmental protection and other social policies.

More specifically, Petersmann’s arguments about the need to integrate market freedoms into human rights law reflects one very particular – and contested – vision of human rights. There is a much larger debate, or political struggle, here, both within and among nations, about the appropriate balance among economic and non-economic

⁶⁹ In this sense, however, the turn to constitutionalism can be understood more as a step backwards than a step forwards. As Robert Keohane and Joseph Nye have argued, the original GATT was premised upon a ‘club model’ of international cooperation. Keohane and Nye, *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, in Porter *et al.*, *supra* note 5, at 264. That is, during GATT’s early years a relatively small number of economists and diplomats from like-minded states worked quietly to make trade policy without much public input or oversight. For a discussion, see Howse, ‘From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime’, 96 *AJIL* (2002) 94.

⁷⁰ Technically, the WTO is open to both states and any ‘separate customs territory possessing full autonomy in the conduct of its external commercial relations and [other matters provided for in the Uruguay Round agreements].’ Agreement Establishing the World Trade Organization, Art. XII.

⁷¹ See, e.g., Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, 13 *EJIL* (2002) 815; Howse, ‘Human Rights in the WTO: Whose Rights, What Humanity?’, 13 *EJIL* (2002) 651.

policy goals. Efforts to constitutionalize one controversial view of that balance are, in effect, efforts to pre-empt that debate and that struggle.

Trade scholars invoke constitutional discourse because of the undoubted power that this discourse has in legal circles. However, the ideological and symbolic power associated with constitutional discourse has prompted vigorous responses from those who would counterclaim or deny constitutional authority. Paradoxically, while the turn to constitutionalism can be seen as a method of closing down debate and removing issues from the domain of political contestation, in practice the advocates of constitutionalism have inadvertently triggered a robust normative debate. Thus, Jackson's vision of constitutionalism has sparked a growing literature on whether the WTO's institutional structure is or should be considered 'constitutional',⁷² Petersmann's efforts to 'constitutionalize' a human right to trade within WTO law prompted heated debates,⁷³ and Cass's vision of the AB's constitutional powers joins a large literature debating the norm-generating and constitutional dimensions of WTO dispute resolution.⁷⁴ In short, the advocates of constitutionalism have – perhaps unintentionally – helped to fuel a vibrant debate over 'the empirical and normative validity of a vision of the WTO as a constitutional polity'.⁷⁵

Stated more abstractly, the turn to constitutionalism is self-defeating because constitutionalism does not and cannot generate finality on highly contested issues; it cannot deliver on its promise to remove divisive issues from the domain of politics. As Klabbers argues:

The very idea of constitutionalism presumes that constitutionalism helps mankind into an a-political, a-ideological space, a realm somewhere beyond politics where people would no longer disagree with each other. Such a realm, however, does not exist, cannot exist, and would be abhorrent at any rate. The idea of overcoming politics by insisting on adhering to certain fixed values is bound to fail, because reference to those values itself is immensely and intensely political.⁷⁶

Domestic experience confirms this insight. In the United States, for example, courts have generated constitutional doctrine addressing many of the most socially divisive issues facing the country, such as abortion, same-sex marriage, and affirmative action. Whatever one thinks of the legal rationale supporting these doctrines, there can be little doubt that these constitutional decisions have done little to resolve the underlying political controversies. Paradoxically, efforts to constitutionally resolve contentious political issues have tended to exacerbate political conflict.

⁷² See, e.g., Howse and Nicolaidis, *supra* note 5, at 227.

⁷³ See, e.g., Marceau, 'WTO Dispute Settlement and Human Rights', 13 *EJIL* (2002) 753; Alston, *supra* note 71; Howse, *supra* note 71. For Petersmann's response, see Petersmann, 'Taking Human Rights, Poverty and Empowerment of Individuals More Seriously: A Rejoinder to Alston', 13 *EJIL* (2002) 845.

⁷⁴ See sources cited, *supra* note 5.

⁷⁵ Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO', 15 *EJIL* (2004) 307, at 347–348.

⁷⁶ Klabbers, *supra* note 63, at 54.

5 The Allure of Constitutionalism

In championing a constitutionalist understanding of the WTO, constitutionalism's advocates trade on established theories of constitutionalism on the domestic plane. In particular, constitutionalism's advocates seem to share a desire to channel political conflict into a constitutional domain, where contentious disputes can be more easily resolved. But, as argued above, this strategy cannot succeed; constitutional decisions cannot quiet or resolve underlying political conflicts. To the contrary, efforts to authoritatively resolve contentious political issues through constitutionalized decision-making often tend to reinforce and aggravate the underlying conflicts. This paradox creates an even more difficult puzzle than the ones explored above: given the self-defeating nature of constitutional discourse – and the manifest absence of a true world trade constitution – why are so many trade scholars preoccupied with debating constitutionalism at the WTO now?

A The Expansionist Impulse: International Trade Law as First Among Equals?

One possible explanation for the turn to constitutionalism is rooted in debates over the relationship between trade and other bodies of international law. This debate has several different dimensions. One dimension relates to the substantive reach of WTO rules. What issue areas are properly considered within the trade system? What topics are, or should be, appropriately addressed in other international fora? The WTO already has rules on topics that are not primarily, or at least exclusively, about trade, including rules on intellectual property, service industries, and health and safety measures. There is significant disagreement with the diplomatic and scholarly communities as to whether there should be WTO rules on, for example, environment, human rights, competition, labour, and other topics.

A related dimension of the debates over the relationship between trade and other bodies of international law focuses on the status and use of non-WTO law in WTO dispute settlement proceedings. Although GATT panels rarely used public international law in their reports, WTO panels and the AB have invoked multilateral treaties, bilateral agreements, customary international law, and non-binding international legal instruments. Trade scholars have engaged in a spirited debate over whether the Uruguay Round Agreements confer upon panels the legal competence to apply non-trade law to resolve trade disputes.⁷⁷ Other commentators question whether the trade

⁷⁷ See, e.g., J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003); Trachtman, 'Book Review of Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law', 98 *AJIL* (2004) 855. In *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (6 March 2006), the Appellate Body held that, for purposes of the GATT Article XX(d) exception, the phrase 'laws and regulations' does not include international law. From one perspective, this is an appropriately 'modest' result, as it means that panels will not attempt to determine whether non-WTO international law is consistent with international trade rules. From another perspective, it may mean that trade measures designed to secure compliance with non-WTO international law can more readily be deemed GATT-illegal, which some will see as a doctrine permitting panels to privilege trade norms over conflicting non-trade international legal obligations. I have outlined a more satisfactory approach that panels can take to these sorts of conflicts in Dunoff, 'The Death of the Trade Regime', 10 *EJIL* (1999) 733.

specialists who serve on panels have the expertise to apply non-trade law, and whether it is normatively desirable that they do so.⁷⁸

A third dimension of the debate over the relationship between trade and other bodies of international law focuses on the relationship between the WTO and other international organizations. In its early years, the GATT had relatively little interaction with other international organizations. Over time, the development of informal consultations and working linkages eventually led to the conclusion of formal agreements with the World Bank, International Monetary Fund (IMF), World Intellectual Property Organization (WIPO) and specialized World Health Organization (WHO)/ Food and Agricultural Organization (FAO) organizations. However, relations with several other international organizations have been more problematic. For example, the WTO engaged in a very pointed exchange with the United Nations High Commissioner for Human Rights after a draft report prepared for the sub-commission on the Protection of Human Rights characterized the WTO as a 'veritable nightmare' for certain populations, and the WTO withdrew an invitation for the ILO's Director-General to address a Ministerial conference. Moreover, negotiators in a variety of international fora have felt compelled to address the question of whether norms created outside the WTO are inferior to WTO norms.⁷⁹ Thus, while there is broad consensus on the desirability of increased coherence and coordination of the WTO with other international organizations, there is no consensus on which bodies the WTO should cooperate with, or what form that coordination should take.

All of these issues raise questions of institutional and doctrinal coherence.⁸⁰ They are particular instantiations of larger questions about whether the decentralized international legal order will be marked by increasing fragmentation or increased unity and coherence. To claim that the WTO is a constitutional entity suggests a certain approach to these types of questions. A constitutional perspective seems to envision a relatively broad substantive scope for WTO norms. As constitutional norms are superior to other legal norms, a constitutionalist approach implies a certain outcome when WTO norms conflict with other legal norms. Finally, it suggests that other international organizations should accord some measure of deference to the WTO when they interact. In short, the turn to constitutionalism might be a strategic move in the context of debates over the status and reach of WTO norms. So the turn to constitutionalism might grow out of an expansionist, perhaps even imperialist, view of the trade system.

⁷⁸ Dunoff, 'Border Patrol at the World Trade Organization', 9 *YB Int'l Envtl L.* (1999) 20.

⁷⁹ For examples, diplomats negotiating the Cartagena Protocol on Biosafety, the Kimberly Process, the WHO Framework Convention on Tobacco Control and the ILO resolution concerning Burma's human rights violations all addressed issues concerning consistency with WTO norms.

⁸⁰ Trachtman addresses these issues under the rubric of 'interfunctional constitutions'. I read his observation that the WTO has developed a 'modest approach to intersectional coherence' and his prediction that '[o]ver the next 50 years, we may expect to see . . . an effort to develop more nuanced means to integrate different global values' as implicitly acknowledging that no constitutional mechanism currently exists in the WTO to address institutional and doctrinal coherence. See Trachtman, *supra* note 5, at Sect. 5.

B *The Constructivist Insight: Toward a New Understanding of the Trade Regime?*

A second potential explanation for the scholars' turn to constitutional discourse finds root in the self-referential nature of constitutional discourse. That is, constitutional traditions find expression in self-consciously constitutional discourse, and there can be no constitutional tradition without this form of discourse. This observation is not, of course, to suggest that the mere existence of constitutional discourse can, as if by magic, generate a constitutional entity. But it is to suggest that constitutionalism's advocates may hope that their claims can spark a tradition of constitutional discourse that itself can help transform the WTO into an entity that relevant elites understand in constitutional terms.

To be sure, efforts to spark a tradition of constitutional discourse by advancing constitutional claims may appear to be a form of boot strapping or wish fulfilment; but such a strategy is consistent with various strands of constructivist thought that emphasize the extent to which legal concepts – such as constitutionalism – rest upon intersubjective beliefs that arise out of ongoing and repeated interactions. As Ken Abbott has explained:

Economic and political structures are not corporeal things; they owe their existence to constitutive ideas, constitutive in the sense of defining or creating a social institution or relationship that would not otherwise exist. The nation state itself, a mere legal fiction, is based on such ideas: if we did not accept the notion that the state is a legitimate way of organizing social life, national boundaries would mean nothing and governments would be just another group of brigands trying to take our money. The same is true of other social constructs like . . . international regimes Constitutive ideas are regularly contested, however, and are subject to change, in both the short and long term. As the underlying ideas change, the norms, rules, and institutions that embody them, at all levels of political activity, evolve along with them.⁸¹

Perhaps constitutionalism's advocates understand that entities 'become constitutional if they are accepted as such'⁸² and are engaged in what can be understood as a 'constructivist gambit'.⁸³

Constitutionalism's advocates could have a particularly strong motivation for engaging in a constructivist strategy at this time. For many years the existence of an international body or institution provided its own justification; today something more is required. This is particularly true in the WTO's case. Since the public protests in Seattle and Cancun it is clear that the international trade regime is no longer an isolated and technocratic body, and that its continued viability depends upon finding a level of popular acceptance. From this perspective, the turn to constitutionalism can be understood as an effort to find a legitimating principle for a system that faces a legitimacy crisis, and the explosion of theories of constitutionalism can be understood

⁸¹ Abbott, 'Economic' Issues and Political Participation: The Evolving Boundaries of International Federalism', 18 *Cardozo L. Rev.* (1996) 971, at 974.

⁸² G. Wills, *James Madison* (2002), at 76.

⁸³ Cederman, 'Nationalism and Bounded Integration: What it Would Take to Construct a European Demos', 8 *Eur. J. Int'l Rel.* (2001) 139.

as an effort to bridge the gap between the WTO's power and the lack of a broad popular basis for exercising that power.

To the extent that constitutionalism's advocates point toward a constructivist understanding of the trade system, their arguments have implications that extend well beyond the debate over the WTO's constitutional dimensions. In particular, to the extent that we understand the debate over constitutionalism as at least in part a constructivist undertaking, the debate challenges dominant understandings of the trade system.⁸⁴ Realist approaches to the WTO focus upon the interests and the geopolitical and economic capacities of different states to explain much of trade law and politics. Institutionalists highlight the various ways that international organizations, such as the WTO, help states address collective action problems by reducing transaction costs, increasing transparency, and raising the costs of non-compliance. Liberal international relations theorists break open the 'black box' of the state to highlight the roles played by domestic political actors. Under this understanding, international relations resemble a two-level game where foreign policy represents the pursuit of state preferences, as determined through domestic politics and as constrained by strategic interactions with other states. To date, constructivist insights, which highlight the role of ideas in international relations, have exerted limited influence in trade scholarship.

The debate over constitutionalism implicitly asks us to pay as much attention to the power of ideas as the power of states or special interest groups. In this sense, the debate over constitutionalism may provide trade scholars not only with a new subject of inquiry – the world trade constitution – but may point the way toward a new ontology of the trade regime.⁸⁵ To the extent that the constitutionalism debates implicate ideational factors rather than material factors, and foreground non-state actors as well as states, these debates may lead to a much richer understanding of the trade regime than that found in much international trade law scholarship.

C A Discipline in Crisis

Yet a third possibility presents itself. Perhaps the turn to constitutionalism is less a sign of international law's flourishing than of it being in a state of crisis. A constellation of events in the 1980s and 1990s – the end of the Cold War, the fall of the Berlin Wall, the apparent revitalization of the United Nations – gave rise to heady claims about the reality and the promise of international law. The creation of the WTO was just one of many developments that led prominent scholars to declare that international law had finally entered a 'post-ontological' age⁸⁶ and to proclaim that 'international legal rules, procedures and organizations are more visible and arguably more

⁸⁴ This issue deserves much more attention than I am able to give it here. For an important discussion of the ways that constructivist insights can inform trade law scholarship, see Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime', 9 *J. Int'l Econ L.* (2006) 81.

⁸⁵ *Ibid.*

⁸⁶ T. M. Franck, *Fairness in International Law and Institutions* (1995), at 6.

effective than at any time since 1945'.⁸⁷ International lawyers worried about how to manage the welcome but potentially problematic proliferation of international norms, institutions and tribunals,⁸⁸ and a central jurisprudential task was the choosing of sides in the debate over how best to explain high levels of compliance with international law.⁸⁹

But international law's triumphalist moment quickly faded, and today the discipline faces severe challenges, both from within and without. From within, empirical studies raise serious questions about international law's effectiveness⁹⁰ and a revisionist literature attacks international law's premises and foundations.⁹¹ From without, realist approaches to international relations, which minimize the importance of international legal norms, seem ascendant. The planet's sole superpower, in particular, has recently had a decidedly uneasy relationship with international legal norms and institutions, as illustrated by the refusal to ratify the Kyoto Protocol, the 'unsigned' of the Rome Treaty creating the International Criminal Court, the rejection of the Land Mines and Comprehensive Test Ban Treaties, the repudiation of the ABM treaty, and, perhaps most ominously, the assertion of a doctrine of preventive war that is in considerable tension with conventional understandings of the norms governing the use of force.

In short, contemporary international law is a discipline under siege. The UN Secretary-General has stated that, given recent trends, international law and institutions face 'a fork in the road' as momentous as that faced in 1945, when the post-War order was built.⁹² He warns that we 'can no longer take it for granted that our multilateral institutions are strong enough to cope with all of the challenges facing them'.⁹³ More pessimistically, Thomas Franck observes that, 'in the new millennium, after a decade's romance with something approximating law-abiding state behaviour, the law-based system is once again being dismantled'.⁹⁴ And John Jackson observes that

The reality we face at the beginning of 2005 . . . reveals dark clouds of perplexing characteristics of societies and international discourse pointing towards deep and fundamental changes in the way many peoples and their leaders think about government and civil affairs. Of course, international law and its progeny, international economic law, cannot escape these troubling

⁸⁷ Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205.

⁸⁸ On the proliferation of international courts and tribunals, see, e.g., Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003); Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle, 31 *NYU J. Int'l L. & Pol.* (1999) 679.

⁸⁹ See, e.g., A. Chayes and A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) (managerial theory of compliance); T. M. Franck, *The Power of Legitimacy Among Nations* (1990) (compliance as function of law's legitimacy); Koh, 'Why Do Nations Obey International Law?', 106 *Yale L.J.* (1997) 2599 (transnational legal process explanation for compliance).

⁹⁰ See, e.g., Hathaway, 'Do Human Rights Treaties Make a Difference', 111 *Yale L.J.* (2002) 1935.

⁹¹ See, e.g., J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2005).

⁹² Secretary-General's Address to the General Assembly, 23 Sept. 2003.

⁹³ Implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc. A/58/323 (2003), at para. 4.

⁹⁴ Franck, 'What Happens Now? The United Nations After Iraq', 97 *AJIL* (2003) 607, at 608.

reflections. . . . The basic concepts of international law now have to face great, and at times disturbing, challenges.⁹⁵

This uneasy sense of dark foreboding pervades WTO circles as well. Informed observers fear that the spectacular crash of the Cancun Ministerial 'crippled' efforts to improve WTO rules,⁹⁶ and the WTO's Director General has candidly admitted that the current round of negotiations 'are in trouble'.⁹⁷ Perhaps the most visible manifestation of the widespread sense that the WTO is under stress was the Director General's effort to appoint a distinguished panel of trade experts to diagnose the challenges facing the WTO and help chart a more successful path forward.⁹⁸ The malaise surrounding the institution has not, of course, escaped scholarly notice.⁹⁹

Efforts to constitutionalize the WTO can be understood as efforts to address these concerns, as well as broader concerns about the discipline of international law. A constitutionalized WTO would possess a strength and vigour that other international legal norms may lack; a constitutionalized WTO would have a stability that other treaty norms lack; and a constitutionalized WTO would no longer be understood as 'a complex, messy negotiated bargain of diverse rules, principles and norms' but rather as a coherent, integrated structure.¹⁰⁰ In short, to constitutionalize the WTO is to give it 'the legitimacy of higher law – irreversible, irresistible, and comprehensive'.¹⁰¹

Moreover, it is not surprising that constitutionalism's advocates have singled out the WTO. There can be little doubt that '[w]hatever its flaws, the [WTO] is the envy of international lawyers who are more familiar with less efficient and more compliance-resistant legal regimes, including those within the International Labour Organization (ILO), United Nations (UN) human rights bodies, and other adjudicative arrangements such as the World Court or the ad hoc war crimes tribunals'.¹⁰² Hence, if any international legal regime would display the features associated with constitutionalism, it would appear to be the WTO.

In recent years, constitutionalism's advocates have occupied substantial scholarly space. However, to date, they have not persuaded a critical mass of trade officials or citizens that the WTO should be considered a constitutional entity. On the other hand, the WTO is a relatively young international organization, and it is highly likely

⁹⁵ Jackson, 'The Changing Fundamentals of International Law and Ten Years of the WTO', 8 *J. Int'l Econ L.* (2005) 3, at 9.

⁹⁶ See, e.g., 'WTO Talks Crashed When Developing Nations Balked at Taking Up Some "Singapore Issues"', *BNA WTO Reporter*, 16 Sept. 2003.

⁹⁷ Supachai Panitchpakdi, 'These negotiations are in trouble,' speech of 8 July 2005, available at http://www.wto.org/english/news_e/spsp_e/spsp40_e.htm.

⁹⁸ The Future of the WTO, Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, January 2005.

⁹⁹ See, e.g., Huftbauer, 'Inconsistency Between Diagnosis and Treatment', 8 *J. Int'l Econ L.* (2005) 291 (WTO 'exhibit[s] arteriosclerosis'); Gathii, 'Process and Substance in WTO Reform', 56 *Rutgers L. Rev.* (2004) 885 (outlining processual and substantive shortcomings of the WTO).

¹⁰⁰ Howse and Nicolaidis, *supra* note 5, at 239.

¹⁰¹ *Ibid.*

¹⁰² Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime', 7 *Widener L. Symp. J.* (2001) 1.

that current understandings will evolve. Thus, while it is impossible to predict whether constitutionalism's advocates will ultimately prevail, it is clear that their claims should not be taken as descriptively accurate at this point in time.

Rather, I believe that, at this stage in the development of the WTO system, we can best understand the term 'constitutionalism' as a metaphor. Here, I understand metaphor in a conceptual, rather than a literary, sense; a metaphor's significance lies not only in its images, but in its implications. That is, if we accept the metaphor that life is a journey, then the implication is that we should expect obstacles and seek movement toward a destination. If the WTO is a constitutional system, then the implication is that we should expect WTO norms and institutions to have a resilience that 'ordinary' rules of international law may lack. More importantly, we should expect this 'constitution' to remove contested issues from the domain of ordinary politics and resolve them by reference to some meta-agreement.

The irony is that constitutionalism cannot deliver on its promise to remove disputed issues from the domain of politics. Just as courts in the US cannot quiet debate over same-sex marriage or affirmative action with their 'constitutional' decisions, even less can WTO institutional architecture, substantive values, or panels and AB reports end debate over controversial topics in the trade world. Attempts to do so simply highlight constitutionalism's conceits.

6 Towards a New Wave of Constitutionalism Scholarship

Professor Trachtman and I offer quite different accounts of the debate over constitutionalism at the WTO. His paper carefully details what he views as the various dimensions of the WTO constitution, explores the relationships among these dimensions, and examines how the WTO constitution interacts with other legal regimes and with domestic constitutions. I argue, in contrast, that there is no WTO constitution, and that scholarly invocation of constitutional discourse represents an effort to invest international legal structures with the power and authority that domestic constitutional entities possess. Thus, Trachtman sees, I believe, something akin to what Joseph Weiler saw when he reviewed the state of the EU in the 1990s: 'a constitutional order the constitutional theory of which has not been worked out'.¹⁰³ Surveying the same terrain, I see the converse: an abundance of constitutional theory, but little constitutional order.

However, despite our rather different perspectives, I wish to end my analysis where Professor Trachtman's starts. Trachtman's paper begins with the observation that 'constitutional discourse may foreclose possibilities, or it may expand possibilities'.¹⁰⁴ I fully agree. I believe that the most influential scholarship on constitutionalism at the WTO has, to date, employed a conception of constitutionalism that is designed to close down, rather than open up, political debate and contestation. However, this does not mean that alternative conceptions are unavailable. Indeed, trade scholars

¹⁰³ Weiler, *supra* note 28, at 8.

¹⁰⁴ Trachtman, *supra* note 5, at 623.

can – and should – articulate forms of constitutionalism designed to open up spaces for political dialogue and contestation, rather than pre-empt such discourse. While the articulation of such a vision is beyond the scope of this article, it may be useful to offer a few preliminary thoughts that might help inform the next wave of scholarship.

This paper has tried to foreground one aspect of the debates that has received insufficient attention: the political dimensions of constitutional discourse. I do not pretend to have exhausted this topic, and hope that this paper will encourage others to extend, or correct, my arguments. Similarly, future scholarship should explore the distributional consequences of different conceptions of constitutionalism. Trachtman properly emphasizes the fact that constitutions have distributive effects and may serve redistributive functions.¹⁰⁵ It follows that different constitutions have different distributive effects; like other important legal and political institutions, they privilege some constituencies over others. Trade scholars have not addressed who is advantaged and who disadvantaged, who is empowered and who disempowered, under different conceptions of constitutionalism.¹⁰⁶

Moreover, future scholarship on constitutionalism at the WTO would benefit greatly from engagement with the extensive literature on post-national constitutionalism. This scholarship foregrounds yet another issue that has remained submerged in the trade literature: the 'problem of translation'. This term refers to the difficulties raised by the transposition of the key normative concepts associated with constitutionalism from a state-centric setting to a supranational or post-national setting.¹⁰⁷ As writings on post-national constitutionalism properly emphasize, the central concepts and categories associated with constitutionalism have been debated and refined for centuries within the context of the sovereign state. The translation of these concepts, including separation of powers, subsidiarity and human rights, to the transnational plane is neither simple nor straightforward. While national and post-national forms of government may well face many of the same puzzles of governance, it should not be assumed that strategies effective on the domestic plane can be easily transferred to a very different institutional and political context. Of course, this general idea is hardly late-breaking news to trade law scholars; but the literature on constitutionalism has paid insufficient attention to this difficulty. Future scholarship would benefit from explicitly and self-consciously addressing the problem of translation, for it would help illuminate both the possibilities and the limitations of constitutionalism at the WTO.

Relatedly, as Trachtman notes, analysis of constitutionalism at the WTO should focus on the interplay of domestic constitutional structures, WTO norms, and general international law. This analytic move highlights another reality that has

¹⁰⁵ *Ibid.*; see also Trachtman, 'Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid"', 6 *J. Int'l Econ L.* (2003) 3.

¹⁰⁶ For an account of constitutionalization on the domestic plane as the entrenchment of the preferences of elites, see R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

¹⁰⁷ See, e.g., Weiler, *supra* note 28, at 270; Walker, 'Postnational Constitutionalism and the Problem of Translation', in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (2003) 27.

been under-appreciated in the trade literature, namely, that we inhabit a world of ‘constitutional pluralism’. As Neil Walker explains:

Constitutional pluralism . . . is a position which holds that states are no longer the sole locus of constitutional authority, but are now joined by other sites, or putative sites of constitutional authority, most prominently . . . and most relevantly . . . those situated at the supra-state level, and that the relationship between state and non-state sites is better viewed as heterarchical rather than hierarchical.¹⁰⁸

Again, acknowledging this complex reality will aid understanding of constitutionalism’s possibilities and limits. But if Trachtman is correct that we need to explore the interactions among various constitutional orders, future scholarship might question his suggestion that constitutional economics is the most appropriate analytic approach for understanding these interactions. Constitutional economics views constitutional processes as mechanisms ‘designed to maximize the achievement of individual citizens’ preferences’.¹⁰⁹ But this approach to the WTO’s constitutionalism debate is likely to be of limited utility, because the core of the WTO debate is not about preference maximization.

Rather, what is ultimately at issue in the constitutionalism debate is the WTO’s legitimacy. By invoking this term, I have in mind less the legal legitimacy suggested by arguments about institutional architecture, or the moral legitimacy associated with a focus on normative values, than sociological legitimacy. Sociological legitimacy exists when a relevant public considers a constitutional regime as justified or appropriate and worthy of support for reasons other than narrow self-interest or fear of sanctions.¹¹⁰ At this point in time, the WTO as a constitutionalized regime lacks sociological legitimacy. A vocal public opposition to the WTO manifested itself at the 1999 Seattle Ministerial and subsequent meetings. This public opposition sparked a literature addressing the WTO’s democracy deficit and related legitimacy crisis. More recently, trade scholarship has been marked by the debate over the WTO’s constitutional character. I’ve suggested above that scholars offer constitutionalism as a response to the WTO’s increasingly evident legitimacy deficit – and that the simple assertion that the WTO is a constitutional entity is insufficient. Rather, the WTO must seek ways of enhancing sites for debate and contestation so that those who are affected by WTO norms and decisions feel they have had a meaningful say in the creation and application of those norms. Against this background, the WTO’s constitutionalism debate is more about deliberation than preference satisfaction, and more about enhancing meaningful participation than reducing transaction costs. Hence, at this point in time, a constitutionalism that enhances political debate and participation is a constitutionalism worthy of the name.

¹⁰⁸ Walker, ‘Late Sovereignty in the European Union’, in N. Walker (ed.), *Sovereignty in Transition* (2003), at 4.

¹⁰⁹ Trachtman, *supra* note 5.

¹¹⁰ The idea derives, of course, from Weber. G. Roth and C. Wittich (eds), *Max Weber, Economy and Society: An Outline of Interpretive Sociology* (Ephraim Fischhoff et al. trans., 1978).

Conclusion

Trade scholars are preoccupied with the debate over constitutionalism at the WTO. While this phrase is used in many different ways, I've tried to demonstrate that constitutionalism is almost invariably seen as a mechanism to defuse or resolve potentially destabilizing political conflicts. However, constitutionalism – whether on the international or domestic plane – cannot pre-empt or displace political debate on controversial issues. Paradoxically, constitutionalism creates precisely the sort of politics that it seeks to pre-empt. Hence, one goal of this paper has been to demonstrate the self-defeating nature of the turn to constitutionalism.

But if the turn to constitutionalism triggers the very world trade politics that constitutionalism seeks to avoid, why do leading trade scholars engage in this debate? Another goal of the paper has been to inquire into the conditions that have given rise to the debate over constitutionalism at the WTO. I have suggested that the timing and prominence of this debate may shed light on the current status of the discipline of international law. In short, the turn to constitutionalism may reflect a deep disciplinary anxiety that has been heightened by international events since 11 September 2001. Constitutional discourse may be a defensive reaction of international lawyers who perceive that international law is under severe stress.

However, the arguments developed above should not be understood as a categorical rejection of the turn to constitutionalism at the WTO. As the discussion above suggests, constitutionalism can come in many different forms. The forms most prominent in the trade scholarship to date seem designed to pre-empt political debate and contestation. But other forms of constitutionalism may be designed to invite political debate and contestation, or to empower democratic and deliberative decision-making. Institutional architecture can be used to support or to undermine broader political participation and contestation. Many scholars have suggested ways for the WTO to be more open and inclusive. Similarly, to the extent that emerging trade constitution is understood as privileging certain values over others, or as the result of judicial decision-making, those values and decisions can be directed toward openness and participation. In short, as a general theoretical matter, there is no simple answer to normative questions about the desirability of constitutionalism at the WTO.

Finally, both Professor Trachtman and I challenge conventional understandings of the debate over constitutionalism at the WTO. These papers should interest not only trade scholars, but all international lawyers interested in constitutional questions, as both papers locate the debate over the WTO's constitution in the context of larger debates over international law's constitutional features. Hence, both papers might be considered as opening salvos in an emerging 'new wave' of scholarship on WTO constitutionalism that builds upon and extends earlier scholarly work in this area, as well as recent developments in international relations.