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Constitutional Change and International Government

by

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One year ago, thousands of activists converged on Seattle to protest the biannual Ministerial Conference of the World Trade Organization (WTO). The riotous conditions in Seattle shattered the conventional wisdom that only policy wonks are interested in trade barriers.¹ The protestors hailed from a broad spectrum of causes, and the ruckus they created made headlines² and preoccupied media spin doctors.³

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¹ * Associate Professor of Law, Fordham University School of Law. Thanks for many helpful comments go to my Fordham colleagues Abner Greene, Jill Fisch, Martin Flaherty, Terry Smith, Mark Patterson, Steve Thel and Ben Zipursky, as well as to Dominique Carreau, Bill Davey, Katherine Franke, Rob Howse, David Kennedy, Joel Paul, Paul Stephan, Daria Roithmayr, and Stephen Ross. Drafts of this paper were presented at University of Illinois College of Law and the University of Michigan School of Law workshops, and early versions of this paper were presented at the Fordham University School of Law junior faculty workshop and a Harvard Law School Graduate Program writers workshop. Thanks to all the participants in these workshops for their helpful suggestions. Research for this paper was supported by generous grants from Fordham University School of Law.


³ 3. *E.g.*, *Face the Nation* (CBS television broadcast, Dec. 5, 1999); *Take It Personally*, (CNN television broadcast, Dec. 2, 1999); *The O'Reilly Factor* (Fox News Network television broadcast, Dec. 1, 1999).
The WTO conference and the controversy surrounding it has provoked a sudden, widespread realization that the legal rules that affect our everyday lives—the food we eat, the clothes we wear, the price of medicine, and the taxes we pay—now derive not only from domestic but also from international sources. Quite simply, the rules that affect how our economy operates and how it should be regulated have changed to include a considerable body of international law. In this Article, I argue that the change is so deep that it is constitutional.

By “constitutional,” I mean a fundamental change in the structure of American government. Conventional constitutional theory divides such change into that resulting from changes in constitutional interpretation, and that resulting from amendments obtained through the procedures in Article Five of the Constitution. Some theorists, however, such as Bruce Ackerman have articulated “unconventional” theories of constitutional change. Under Ackerman’s theory, basic constitutional changes can occur outside the Article Five procedure, through a process of informal popular deliberation. Ackerman identifies such changes as “constitutional moments”—moments when cataclysmic social ferment requires fundamental “transformation” in governmental structure.

According to Ackerman, the Great Depression prompted the most important “constitutional moment” of the twentieth century. The challenge posed by the Great Depression to federal governmental structure was met through the establishment of a wide array of federal administrative agencies. The rise of administrative government occurred without amending the text of the Constitution. In every other way, however, it marked a structural change of constitutional proportions that paralleled the post-Civil War

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4. See infra notes 106-09 and accompanying text.
5. Joseph Kahn, U.S. Loses Dispute on Export Sales, N.Y. TIMES, Feb. 24, 2000, at A1 (“The United States has suffered its largest defeat ever in a trade battle, losing a dispute with Europe about tax policies in a ruling that deals a blow to trans-Atlantic relations and could force American companies to pay billions of dollars more in taxes each year.”).
6. The term “unconventional” is used in BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 22-23 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS] The term is a double entendre in that, in addition to the meaning of “unusual,” it also makes reference to the fact that the Article Five procedure typically involves formal meetings of lawmakers, or conventions.
7. Bruce Ackerman, Revolution on a Human Scale, 108 YALE L.J. 2279, 2298 (1999). The founding of the federal Constitution and the adoption of the Civil War Amendments to the Constitution were the first such moments. See ACKERMAN, TRANSFORMATIONS, supra note 6, at 9.
Ackerman argues that this change should be recognized as an "unconventional" constitutional amendment that emerged through a period in which lawmakers solicited and won the endorsement of "an extraordinary number of their fellow citizens," after sustained and widespread popular deliberation, for an initiative that would transform the structure of government.

Ackerman's theory usefully highlights how social transformation can effect fundamental change both in governmental structure and in the legal doctrine that legitimates it. Economic globalization represents a profound social change, and, as such, has required a fundamental alteration of governmental structure—the incorporation into the national government of substantial regulation from international organizations whose mandate is to liberalize economic flow across borders.

The alteration can be instructively compared with the alterations arising from the New Deal era and the establishment of administrative law as a significant force in federal government. This Article argues that the rise of international economic organizations has yielded a source of regulation so significant that it is a fundamental alteration of the constitution of federal government. The rise of this "international" branch transforms the structure of federal government, much as the rise of administrative government did in the early twentieth century. The WTO, with 140 member governments, is the largest example of this "international branch" of federal government. The North American Free Trade Agreement (NAFTA), though currently only with three members—Canada, Mexico, and the United States—is also impressive in its regulatory scope, affecting not only trade but also investment and even the

8. Reconstruction resulted in a dramatic expansion of federal control over state governments through the Thirteenth, Fourteenth, and Fifteenth Amendments to the federal Constitution. Ackerman argues that, here again, the leaders of reform used "unconventional" methods to achieve it—in this case, an unconventional interpretation of the Constitution's formal amendment process. ACKERMAN, TRANSFORMATIONS, supra note 6, at 22-23; see also id. at 375 ("The only real parallel for [the New Deal's] root-and-branch repudiation is Reconstruction.").

9. Id. at 383-420.


11. See infra Part I.

12. See infra Part II.

movement of persons.\textsuperscript{14} Other such organizations hover on the horizon: the United States government hopes to participate in the establishment of a hemisphere-wide trade organization through a Free Trade Agreement of the Americas in 2005; and talks to expand NAFTA have also been waiting in the wings.\textsuperscript{15}

Like domestic administrative government, international government is a solution to a dilemma arising from a deeply challenging economic phenomenon: in this case, it is the phenomenon of economic globalization. While the Great Depression produced unprecedented economic \textit{contraction}, the phenomenon of globalization has produced unprecedented economic \textit{expansion}.\textsuperscript{16} By the late 1980s, it was clear that the power of the global market was straining against a host of trade and investment barriers imposed by national governments. International economic organizations such as the WTO and NAFTA have sought to facilitate international trade by removing or streamlining these barriers.\textsuperscript{17}

At the moment, no clear constitutional position has been articulated on the status of the legal arrangements that have managed this transformation. This lack of clarity reflects an underlying indeterminacy of the constitutional text, particularly with regard to international trade agreements. This Article argues that the lack of clarity in the constitutional text reflects an ambiguity in the political theory fueling prevailing conceptions of democracy. One important aspect of this ambiguity features competing conceptions of democracy that privilege efficiency, on the one hand, and transparency, on the other. Despite the ambiguity, the current mechanism for entering into international trade agreements privileges the conception of democracy, and the interpretation of the Constitution, that favors efficiency. The mechanism should be altered to incorporate more fully the other side of American political and constitutional discourse.

The Article also argues that the process of de facto constitutional amendment caused by the “internationalization” of government has only begun. Ackerman states that, for unconventional structural


\textsuperscript{17} See infra Part I.A for a further discussion of the function of these organizations.
change to legitimately occur, it must be accompanied by a period of widespread popular dialogue, debate and, ultimately, ratification.\textsuperscript{18} Yet the construction of the international branch of government has, over the last quarter-century until very recently, lacked such coalescent popular discussion. Indeed, the protests in Seattle indicate that such widespread awareness and discussion of international government is only now emerging. Consequently, the international branch is defective in some important ways. Substantively, and at least in part as a result of its procedural opacity, it has failed to take into account widespread concern for the preservation of social goals that lie alongside and sometimes compete with free trade, such as environmental protection, employment security, and consumer safety.

This Article challenges the notion that the immediate postwar support for United States participation in such organizations as the International Monetary Fund (IMF) provides the legitimacy for organizations such as the NAFTA and the WTO.\textsuperscript{19} In 1995, Ackerman and David Golove argued that contemporary international economic organizations such as NAFTA and the WTO benefit from a "constitutional consensus" that emerged after World War II. Such a consensus, they argued, endorses structural innovations in federal government that allowed participation in the IMF and its contemporaries, the General Agreement on Tariffs and Trade and the World Bank.\textsuperscript{20} The economic commitments required by those early organizations, however, were substantially fewer than those now required by NAFTA and the WTO, and so were much less important than their modern-day counterparts in shaping domestic economic regulation. Consequently, popular approval of American participation in those earlier organizations should not be taken to signify popular approval of NAFTA and the WTO, whose rules are much broader in scope and whose enforcement powers are much greater.

If the post-World War II constitutional consensus does not grant legitimacy to these latter-day international economic organizations, then how does the Constitution apply to them? This Article reflects that the constitutional text is indeterminate on the question of how the United States government should relate to the rest of the world—

\textsuperscript{18} Ackerman, Foundations, supra note 10, at 266-94.
\textsuperscript{19} See infra Part II.
that is, on the question of "foreign affairs" in United States government. This indeterminacy results from textual susceptibility to conflicting majoritarian and countermajoritarian impulses in American political culture: the desire to uphold public preferences on the one hand, and the fear, on the other hand, that public preferences will undermine the public interest. In the area of foreign affairs, the countermajoritarian impulse has typically informed both the regulatory structure that has evolved, and the ways in which courts have examined—or declined to examine—that structure.

Because the Constitution is indeterminate, the solution to the dilemma of governance posed by globalization is a political one. A balance must be struck between various concerns in devising the new structure. The way forward to reaching that balance promises to be difficult. Widespread mistrust of globalization makes the international branch controversial in a way that the "fourth" administrative branch never was. The structural change is additionally challenging because it does not just rearrange the national distribution of power, but redistributes power to the international order. The path must not be hewn around this dilemma,

21. See infra Part III.A.
22. See infra Part III.B.
23. See infra p. 8 for a discussion of the use of the term "fourth branch" to describe administrative agencies. I have adopted the term "international branch" to describe contemporary international organizations, rather than the term "fifth branch." The term "fifth branch" has been used through the years to describe various phenomena, all of which are seen as dramatically altering the structure of federal government. See, e.g., SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS 61-76 (1990); Harold I. Abramson, A Fifth Branch of Government: The Private Regulators and Their Constitutionality, 16 HASTINGS CONST. L.Q. 165 (1989); William P. Fuller, Congressional Lobbying Disclosure Laws: Much Needed Reforms on the Horizon, 17 SETON HALL LEGIS. J. 419 (1993) (using the term to describe lobbying interests); Allan J. Stein, FOIA and FACA: Freedom of Information in the "Fifth Branch"?, 27 ADMIN. L. REV. 31, 64 (1975) (using the term to describe federal advisory committees). The term was also used by John Rawls to describe the part of his ideal government in which public goods are distributed according to the unanimous decision of all who contribute (Rawl's fifth branch of government, the "exchange branch"). See JOHN RAWLS, A THEORY OF JUSTICE 282 (1971). With the exception of Rawls, all the cited authors argue that a recent development in federal government fundamentally transforms it. The correctness of their claims is beyond the scope of this Article; it is important to note, however, that it is possible for any of these claims and my own included to be simultaneously correct. What is important is not, therefore, the numerical identity of this new aspect of federal government, but rather its emergence. The emergence of other de facto branches of government may well underscore the dynamic that has led to the rise of international government.
however, but through it. The current international regulatory structure, which comparatively evades public input, should be replaced with genuine efforts to generate and sustain broad dialogue as to how the international branch should look.

Part One of this Article compares the international branch of government to the “fourth,” administrative branch. Part Two observes that constitutional interpretation has varied on the appropriate structure of the international branch. Part Three assesses underlying constitutional and democratic principles that inform this indeterminacy. Finally, Part Four offers some suggestions for how to move forward towards a fuller reflection of this range of values in the international branch.

I. Comparing the International Branch of Federal Government to the Administrative Branch

We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation . . . . There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because . . . our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.

Elihu Root, President, American Bar Association, (1916).

When Elihu Root gave this address to his peers at the beginning of the twentieth century, he was speaking of the expansion of administrative law that loomed on the century’s horizon. Root could well have been speaking at the end of the twentieth century—but he would not have been speaking about domestic administrative law, whose contours had been refined over the intervening decades. Rather, he would have been describing international administrative law—in particular, the international economic law deriving from such sources as the WTO and NAFTA.

24. See infra Part IV.
26. This Article focuses on such international economic law and leaves open the question of the regulatory function or status of “non-economic” international law, such as civil and political human rights. See Michael J. Sandel, Democracy’s Discontent 339 (1996).
The international organizations that reside at the center of the new branch of government accomplish, on a global scale, many, though not all, of the same purposes as do domestic administrative agencies on a national scale. There are historical and functional similarities between the "fourth branch"—domestic administrative agencies—and international economic organizations. There are also, however, significant differences, some of which augur even greater transformation of United States government than occurred during the New Deal.

A. Parallels Between the "Administrative" and the "International" Branch of United States Government

(1) Response to an Unanticipated Need for Economic Regulation

Both the domestic administrative branch and the international branch set rules intended to manage economic phenomena unanticipated at the founding of the United States Constitution. The swift expansion of administrative agencies under the New Deal was designed to redress the massive contraction of a newly industrialized and increasingly interstate economy. Agencies such as the Securities and Exchange Commission, the Interstate Commerce Commission, and the National Labor Relations Board addressed perceived market failures of excessive and disorderly competition.

Administrative agencies quickly became so important that, in 1935, Supreme Court Justice Jackson declared that they had "become a veritable fourth branch of the Government."27 This description was adopted in 1937 by the President's Committee on Administrative Management,28 and, today, it is commonplace to refer to administrative agencies as a de facto federal branch sitting alongside the executive, legislative, and judiciary branches established by the Constitution.29 There was no formal constitutional amendment

28. PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT 39 (1937) (describing administrative agencies as a "fourth branch" of the Government").
creating this "fourth branch"; yet the rise of administrative government is recognized to have been a change of constitutional importance.

The recent economic environment has radically differed, however, from its early-century counterpart. The perception has not been that an excessively competitive market needs to be reined in, but rather that a reined-in market needs to be set free. By the 1980s, when negotiations to establish the World Trade Organization and NAFTA began, the boundaries that governments had imposed around their national economies were out of keeping with the concept of a globalized economy. This new era of economic globalization meant that economic activity across borders was greater in scale and different in kind (including not just goods but also services and intellectual property) than it had ever been before. In addition to dramatic increases in traditional trade in goods, other areas of international economic activity were newly important. International capital markets now dwarfed the international market for goods. Banks, law firms, and other service-providers sought to market their services internationally; yet they came up against barriers to foreign service providers. Telecommunications providers also wanted to go global. Intellectual property has also generated extraordinary economic activity in the emerging information age. Yet no organization or set of rules existed to govern these aspects of international economic activity needs on a comprehensive scale. The possibilities for economic growth seemed limitless—but the regulations of national governments were holding the global market back.

Established in 1995, the World Trade Organization addressed these issues in a broadly multilateral format. All WTO members adhere to a common core of rules on international intellectual property protection. The WTO also provides a mechanism whereby governments can commit to reductions in barriers to foreign services and foreign investment. Finally, the WTO provides a relatively

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30. In the past few decades, United States trade volume has multiplied nearly twenty-fold. In 1970, the combined value of exports and imports was less than 15% of total gross national product; by 1997 that figure had more than doubled. Cross-border capital transactions have also increased exponentially in the past few decades. Worldwide foreign direct investment in the late 1990s achieved "seven times the level in real terms in the 1970s." Worldwide short-term capital flows have tripled since the 1980s, now reaching over $2 trillion annually. Thomas, supra note 16. For extensive data, and the orthodox view, on globalization, see generally INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK: GLOBALIZATION: OPPORTUNITIES AND CHALLENGES (1997).
strong process for monitoring and enforcing these rules. The Trade Policy Review Body conducts regular review of WTO members' trade policy, and the Dispute Settlement Body (DSB) provides a speedy system for addressing claims that a member is violating the WTO. The DSB enforces decisions by requesting the offending government to either cease the violating practice or provide compensation to the complaining party, or by authorizing the complaining party to retaliate against the offending government. Thus the WTO dispute settlement resolution system is among the strongest multilateral systems ever devised, likely surpassed only by those of the European Union.

Alongside the WTO, the North American Free Trade Agreement accomplishes similar goals, but on a regional rather than a global scale. The three members of NAFTA go even further in the way of reducing barriers and harmonizing regulations amongst themselves, addressing not just trade and investment but also the movement of persons across borders.

In the cases of both the administrative and the international branches, there were early, limited precursors of the regulatory innovations to come. In the case of domestic administrative law, agencies had existed since the very beginning of the Republic. For example, an agency created "pursuant to a statute of September 29, 1789, provid[ed] for military pensions for 'invalids who were wounded and disabled during the late war.'" With the New Deal, however, "[n]ew agencies flew thick and fast." Moreover, by contrast to the narrow mandate of the early agencies, those created in the 1930s—the National Labor Relations Board, the Securities Exchange Commission, and others—"seemingly regulated all economic life."

Similarly, the first international economic organizations, established after World War II, predated the emergence of the international "branch" by several decades: the International Monetary Fund and World Bank came into force in 1945, and the General Agreement on Tariffs and Trade was established in 1948.

32. Id. at 6.
33. Id. at 8.
34. Id.
35. The agreements creating the IMF and the World Bank were ratified by Congress in the Bretton Woods Agreements Act, 22 U.S.C. §§ 286-286kk (1945). The GATT itself was never formally ratified, but the results of subsequent trade negotiations occurring under the auspices of the GATT were. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (3d ed. 1995).
The international economic organizations created in the 1990s exercise authority over a much wider regulatory range than their earlier counterparts, however, and are much more authoritative.

(2) Delegation by Congress of Lawmaking Authority to Specialized Regulatory Bodies

The establishment of both the domestic administrative and the international branches has occurred largely as a result of congressional delegation. In the first half of the twentieth century, Congress enacted dozens of statutes either establishing "independent" agencies, or delegating power to the President to establish "executive" agencies, to regulate various aspects of interstate commerce. The Securities Act of 1933 and Exchange Act of 1934 delegated to the Securities and Exchange Commission the power to control the sale of investment securities; the Communications Act of 1934 delegated to the Federal Communications Commission the power to regulate media broadcasting; and so forth.

In the second half of the twentieth century, Congress has delegated regulatory authority to international economic organizations. Although Congress retains formal powers of ratification, its substantive input is so limited that the action here might be functionally conceptualized as a "double delegation." First, Congress delegates economic regulatory authority to the President to enable him to negotiate international agreements that will affect domestic economic regulation. By entering into such international agreements on behalf of the United States, the President delegates that regulatory authority to the international processes established by the agreement.

(3) Judicial Deference to Legislative Delegation

The delegation of regulatory authority to a specialized body has been criticized as unconstitutional in the case of both the administrative and international branches. Despite this, the courts have generally stayed out of the delegation fray. In the case of the domestic administrative branch, after a brief period of initial resistance, courts generally withdrew themselves from the question

of delegation, intervening to strike a delegation down only when the congressional delegation did not follow the formal requirements of Article I, 38 or when the statute interfered with the powers of appointment allocated to the executive branch by Article II. 39 For the international branch, the courts never even underwent an initial period of trepidation. Even in the height of the "nondelegation" era, the same Supreme Court that struck down congressional delegation of domestic regulatory power upheld congressional delegation of international regulatory power.40

B. Differences Between the Administrative Branch and the International Branch of United States Government

(1) Heightened Judicial Deference

Generally, the courts have come to look at the question of legislative delegation as requiring a solution primarily between the two political branches, with intervention by the courts justified only in very rare circumstances. Courts have been even more reluctant, however, to assess foreign affairs lawmaking.41 Joel Paul has described the jurisprudence justifying such deference as a "discourse of executive expediency."42 This judicial deference has permitted the extraordinary postwar accumulation by the executive branch of lawmaking power in foreign affairs.43

(2) Decreased Accountability

Although neither the administrative branch nor the international branch is directly accountable to the electorate, the international branch is an order of magnitude less accountable than domestic agencies. International agencies are the product of multilateral agreement. As a consequence, the United States has only partial

42. Joel Paul, The Geopolitical Constitution: Executive Expediency and Executive Agreements, 86 CAL. L. REV. 671, 772 (1998) ("The discourse of executive expediency transformed presidential powers relative to Congress. Less visibly, the discourse changed the relationship between the judiciary and the political branches. The expediency principle justified an extraordinary degree of deference to the executive.").
43. Id.
influence (although arguably more influence than any other member) over the nature of the agency, the personnel that run it, and the rules it administers.

(3) Political Undercurrents

In addition, the legitimacy of the international branch in the public mind is far less assured than that of the domestic administrative legal system, and the reasons for this are deeper and more intractable than simply its relative novelty. Although New Deal administrative law transferred accountability away from elected officials, it did so with overwhelming public approval. While the New Deal was overseen by experts and professionals, its populist objective was to restrain market activity and increase economic security for a majority of citizens. The mechanism was counter-majoritarian, but the product directly addressed majority concerns. There is no such compensating dynamic in the counter-majoritarian construction of the international branch. Both the procedure used to construct the international branch and the substantive policies that it pursues are counter-majoritarian. The WTO and NAFTA exist to liberalize rather than constrain markets— a goal that, even if in the long-term interests of an economy, causes short-term dislocations and is therefore viewed with suspicion by a large portion of the public.44

44. Opinion polls consistently reflect widespread misgivings about trade liberalization among the general public, even during these recent times of economic prosperity. See, e.g., Helene Cooper, Shift into Reverse: Ban on Mexican Trucks in U.S. Interior Shows Rise of Protectionism, WALL ST. J., Feb. 5, 1996, at A1 (citing recent Wall Street Journal/NBC News poll which found that 62% of the respondents thought trade agreements “endanger jobs”); Paul Magnuson et al., The Global Economy: Now for the Slow Track, BUS. WK., Nov. 24, 1997, at 36 (discussing attempts by the White House and other advocates of fast track to address “growing public fears that free trade leads inevitably to economic and social disruption”); Louis Harris & Associates, Business Week Survey, Sept. 3-7, 1997 (finding that 56% of those surveyed believed that “expanded trade leads to a decrease in the number of U.S. jobs”); see also Helene Cooper, Experts’ View of Nafta’s Economic Impact: It’s a Wash, WALL ST. J., June 17, 1997, at A20 (“recent U.S. polls show a majority believe trade agreements like Nafta destroy jobs at home”); Greg Hitt, To California Vintners, Promised a Rose Garden, Fast-Track Bill Is Wreathed in Grapes of Wrath, WALL ST. J., Oct. 6, 1997, at A24 (citing recent Wall Street Journal/NBC News poll which found that only 23% of those surveyed said Nafta has had a positive impact on the nation’s economy’); Gerald F. Seib, So Are We All Free Traders? Well, Not Quite, WALL ST. J., June 11, 1997, at A24 (citing recent Wall Street Journal/NBC News poll which found that “by a 43% to 28% margin, Americans tend to think Nafta has had a negative impact on America”); Yankelovich Partners Survey for CNN-Time, April 1997, (51% opposing, 33% favoring, 16% unsure about GATT).
And here lies the crux of the dilemma for foreign affairs law. On the one hand, popular mistrust of economic liberalization is precisely what justifies the use of a countermajoritarian procedure to achieve it, since this mistrust is assumed to be misguided. On the other hand, the use of countermajoritarian procedures to obtain unpopular policy objectives undermines the long-term viability of such policies because they are more likely to be viewed as lacking political legitimacy.

Until now, the architects of the international branch have erred on the side of excluding public participation from international lawmaking in order to ensure that such lawmaking will actually reach fruition. The vastly increased scope of current international economic law, however, now renders this approach inappropriate. The increased scope of international administrative law increases its impact on everyday lives. As public awareness has increased, concern has increased. This new era of both increased scope and increased public awareness of the international branch demands revisiting and revamping the procedures that have been used to construct it.

(4) Attenuated Regulatory Function

While many aspects of the international branch render a portrait of a structural change even more dramatic than that effected by the rise of domestic administrative government, there are differences that arguably soften the impact of the international branch. One can distinguish the function of an international economic organization like the World Trade Organization from a domestic administrative agency in at least two ways. First, the WTO does not have direct powers of sanction; rather, it enforces decisions by requesting that errant members reconcile their practices with WTO rules or by authorizing retaliation against the errant state by other members.

45. To wit, the following recollection of free trade economist Jagdish N. Bhagwati: “Paul Samuelson, my old teacher at MIT and the celebrated Nobel laureate in Economics, recalls being asked . . . which proposition in economics is both true and counterintuitive. He scratched his head for a while and then came up with the law of comparative advantage.” Jagdish N. Bhagwati, Challenges to the Doctrine of Free Trade, 25 N.Y.U. J. INT’L L. & POL. 219, 219 (1993).

46. Prepared Testimony of John J. Sweeney, President, American Federation of Labor and Congress of Industrial Organizations: Before the Subcomm. on Trade of the House Comm. on Ways and Means, 107th Cong. (2000) (statement of John J. Sweeney during hearing on the “Outcome of the WTO Ministerial in Seattle” on Feb. 8, 2000) (“If we do not do better in the future—if the global system continues to generate growing inequality, environmental destruction and a race to the bottom for working people—then I can assure you, it will generate broad opposition that will make Seattle look tame.”).

47. See infra Part II for a description of the current process.
Second, new WTO rules are set only through negotiation and ratification by its members.

While these differences are important, it is still appropriate to conceive of the function of an organization like the World Trade Organization as regulatory. As to the first point, although the WTO does not have direct powers of enforcement, it does exercise both formal authority and practical authority. The WTO exercises formal authority because its decisions are binding upon its members under international law. It exercises practical authority because its procedures for compliance have been followed. States have altered their practices in conformity with WTO requests, and, where they have not, other member states have duly followed the WTO's procedures for sanction. As to the second point, while the WTO does not set new rules, its dispute settlement body does enjoy considerable authority in its power to interpret rules, even where there are critical and very wide differences of opinion between members as to the meaning of those rules.

The conventional understanding of these organizations, of course, is precisely that they do not enjoy regulatory authority and that, as such, concern along these lines is only an unfortunate misunderstanding. Although the WTO and NAFTA are not identical to domestic administrative agencies in their regulatory function, it seems important to recognize the regulatory authority they do have. Such recognition is important both to be able to appreciate how contemporary international relations differ from preceding eras, and to be able to appreciate—and respond to—the heart of the concern of opponents to this new regulatory form.

II. The International Branch is Incomplete

They are pouring into Seattle this weekend in vans and on buses, by air and on foot—the college students and the church groups, the environmental campaigners, the Teamsters . . . . All of them say they are outraged at the growing power of a group few even heard about five years ago, the World Trade Organization.48

Substantively, public complaints about international economic organization address outcomes of economic liberalization that are perceived as undesirable. Many activists and commentators have decried the pressure that the WTO exerts on member governments,

as well as on companies engaged in trade, to relax what might broadly be deemed the “social safety net.” This safety net includes a web of regulations to ensure such public goods as clean air, wildlife conservation and food safety, as well as privately arranged workplace conditions such as a certain level of employment security. According to this view, the WTO unravels the social safety net both through its rules, and through the “race to the bottom” fueled by the increased trade and competition it creates. For example, WTO rulings have invalidated United States clean air and wildlife conservation regulations. In addition, the WTO has encouraged “harmonization” of consumer safety regulations which have resulted in a relaxation of United States standards. Finally, labor leaders have repeatedly evoked concerns about the impact of WTO-related trade liberalization on domestic employment security.

These multiple substantive concerns take on particular trenchancy, however, because of a deeper, shared procedural objection: that the WTO operates without popular consent. The Sierra Club, a prominent environmental organization, demonstrates this connection in a pamphlet that summarizes a host of substantive concerns including those listed above, but that is entitled *No Globalization Without Representation*.

And yet the WTO did not simply impose itself, unbidden, on the American electorate. Its relationship to, and authority over, United States government was ratified by both the President and Congress. Why, then, are popular objections to the WTO mounting? One answer is that the procedural mechanism used by the United States for the WTO was devised for an international environment in which international organizations exercised significantly less regulatory power than they do today.

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The foundation for United States submission to international economic law is the "congressional-executive agreement." Under this form, an international agreement is ratified by a simple majority of both houses of Congress. The "congressional-executive agreement" form is not explicitly condoned by the federal Constitution. Indeed, the only sort of international agreement the Constitution explicitly contemplates is the "treaty," defined by it as an agreement that the President negotiates with the advice and two-thirds consent of the Senate. The congressional-executive agreement was developed in the wake of World War II, however, and was used to ease the process of United States commitment to international economic organizations. A simple majority was much easier to obtain than supermajoritarian Senate approval, and general political viability of the agreements was enhanced if the House of Representatives was able to sign off on them. Accordingly, in the wake of World War II, the congressional-executive agreement enabled the United States to join the International Monetary Fund and the World Bank, and to further its commitments under the General Agreement on Tariffs and Trade.

The congressional-executive agreement form allowed the United States to ratify the building blocks of the postwar international economic order. At the same time, the economic commitments these agreements required did not dramatically affect everyday life in the United States. The U.S. had already bilaterally lowered tariff barriers with its major trading partners before World War II, making the General Agreement on Tariffs and Trade a far less significant change to U.S. trade policy than it would otherwise have been. Moreover, the economic commitments that were required were supported by a general political consensus that the United States should be a leader in rebuilding world order after the war.

Thus, in this early period, political support for and interest in American internationalism was higher, and the economic commitments such internationalism required were lower. Even during the prosperity of the 1960s, however, popular support for American internationalism began to wane, and congressional trepidation about commitments made by the President in

54. See U.S. Const. art. II, § 2, cl. 2.
55. See supra note 35.
56. See J JACKSON ET AL., supra note 35, at 470.
57. See Ackerman & Golove, supra note 20, at 804.
international trade negotiations increased, conflicting with presidential ambitions to expand American internationalism. By the early 1970s, popular support for American internationalism had turned into popular suspicion of it. Politically, the Vietnam War had cast a pall over the United States as a world leader, and the Watergate scandal had sparked deep mistrust in the federal executive branch. Economically, "stagflation"—a crippling combination of rising prices and economic contraction—undermined U.S. economic confidence. Moreover, many attributed the country's economic difficulties to its openness to foreign trade. By 1973, American internationalism was in crisis. This crisis manifested in increasing popular pressure on Congress to take a more active role in the congressional-executive agreement form by second-guessing and altering commitments made by the President in international trade negotiations.

The federal response to this crisis was the Trade Act of 1974 (the "Trade Act"), and the strategy behind it is especially striking when viewed through the Ackermanian lens that accords so much weight to popular support for significant change in governmental structure. Where lawmakers had engaged and enlisted the public in supporting internationalism after World War II, they now sought to further internationalism by shielding it from the public eye. The Trade Act established the "fast track" mechanism to expedite and streamline congressional consideration of trade agreements submitted by the President by placing two important constraints on Congress. First, the Trade Act shortened the time frame available to Congress to review and debate an agreement; and second, it prohibited Congress from amending the agreement, instead allowing Congress only to vote it "up or down."

58. Consequently, Congress refused to condone two trade agreements negotiated by President Kennedy, on the grounds that these agreements involved non-tariff commitments. See JACKSON ET AL., supra note 35, at 313.
61. With this modification, a congressional-executive agreement proceeds through the following steps. Congress enacts a statute delegating to the President the authority to negotiate and enter into an international trade agreement. The President does so, and then presents Congress with the agreement, along with a "statement of administrative action" indicating what actions are required to implement obligations imposed by the agreement. Congress approves both through a second statute. Congressional approval of the agreement is highly constrained by the fast track procedure, under which Congress can...
Ackerman and Golove have argued that the original turn away from the treaty form, requiring supermajoritarian Senate approval, and towards the congressional-executive agreement, requiring simple majorities in the Senate and the House, was justified because it was accompanied by a period of wide and deep popular deliberation.62 In their inquiry into the constitutionality of the congressional-executive agreement, Ackerman and Golove adopt the theory of constitutional moments of "higher lawmaking" to argue that, although the congressional-executive agreement broke from constitutional tradition, it was constitutionally legitimate because it was endorsed by a "constitutional consensus."63 This consensus resulted from a shift in the "considered judgments of Americans" following World War II away from isolationism.64 In impressive historical detail, Ackerman and Golove recount how scholars, statesmen, and citizens participated in a full-on public constitutional debate that ended in the popularly endorsed "constitutional solution" that authorized the substitution of the congressional-executive agreement for the treaty.65

According to Ackerman and Golove, no such popular referendum accompanied the modifications established by the Trade Act of 1974,66 even though they describe the Trade Act as the final and crucial component of the internationalist transformation of federal government begun by the introduction of the congressional-executive agreement.67 Rather, they acknowledge that the Trade Act resulted from a professional effort to design a "highly sophisticated tool for modern diplomacy," rather than from any popular consensus.68 Yet international negotiations under the Trade Act have been much more extensive than anything contemplated in the early negotiations that had been ratified through the original and more open-ended congressional-executive agreement form. This substantial expansion of the regulatory power of international economic organizations made them much more important to consider the agreement and statement of administrative action for a limited period of time, but can only vote it "up" or "down" and cannot amend it.

62. See Ackerman & Golove, supra note 20, at 835-74.
63. Id. at 801-05.
64. Id. at 813.
65. Id. at 861-96.
66. Id. at 904-07.
67. See id. at 803 ("The Trade Act of 1974 made a comprehensive effort to restructure the modern two-House procedure to suit the needs of economic diplomacy.").
68. Id. at 904.
everyday life at the very same time that the opportunity to debate and discuss their implications declined. 69

As a result, the Trade Act resolved the crisis in American internationalism of the early 1970s, but virtually guaranteed that the crisis would return. As the streamlining procedures of the Trade Act were used to curtail popular debate on increasingly expansive agreements, popular concern about both the procedure and substance of these agreements increased, reaching a fever pitch at the second Ministerial Conference of the WTO in 1999 in Seattle. Popular concern has in turn fueled congressional discomfort with the Trade Act. Significantly, Congress has refused since 1995 to authorize the use of the Trade Act mechanism, despite repeated appeals by the President. 70

All of this suggests that another crisis in American internationalism is upon us. The need to manage globalization has generated international economic organizations of unprecedented regulatory power. The United States has committed itself to adhere to the rules and ruling of these organizations, creating a de facto international branch of federal government. The procedural mechanism by which the United States has made these commitments, however, was designed for international economic organizations whose power was much narrower in scope and much less authoritative. Popular demand has increased for a fundamental reevaluation of the proper relationship of the United States to the international order. Thus, according to the methodology employed by Ackerman and Golove, the public has not extended the consensus

69. See supra pp. 14-15 for a discussion of the regulatory function.
that informally ratified the establishment of the congressional-executive agreement after World War II to agreements like that establishing the WTO.

In short, globalization has generated a "constitutional moment." As yet, however, no constitutional consensus has emerged as to how United States participation in the international regulatory response to globalization—the international branch of United States government—should look. As a consequence, the international "constitutional moment"—the popular deliberation and ratification of the process used to construct the international branch—remains incomplete.

### III. Constitutional Indeterminacy and Democratic Values

In a world where capital and goods... flow across national boundaries with unprecedented ease, politics must assume transnational, even global forms, if only to keep up.\(^7\)

If no constitutional consensus has emerged as to the appropriate structure of the international branch of federal government, the challenge becomes to define a framework for discourse that will enable such a consensus. This challenge is fraught, however, with uncertainty: uncertainty stemming from the Constitution, and uncertainty in underlying democratic principles. Because this uncertainty is particularly acute with respect to international affairs, the task of constructing the international branch is difficult and complex. At the same time, it uncovers a valuable opportunity for public discourse. Ultimately, the construction project must engage the public to succeed, and it must balance competing majoritarian and countermajoritarian values in American constitutional democracy.

#### A. Constitutional Indeterminacy

The federal Constitution is indeterminate because its text is susceptible to more than one plausible interpretation, and this susceptibility cannot be resolved by referring to "objective" indicia.\(^72\)

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71. SANDEL, supra note 26, at 338-39.

72. An illustration by Mark Tushnet is useful here. Tushnet takes on the constitutional clause that is generally held up as the archetype of textual determinacy—the requirement that the President be at least 35 years of age. Tushnet argues that "should substantial political forces ever propel the presidential candidacy of a person who was 33 years old, arguments in favor of flexible interpretation of the presidential age requirement would probably become credible.” Mark Tushnet, Principles, Politics and Constitutional Law, 88 Mich. L. Rev. 49, 51 n.9 (1989); see also MARK TUSHNET, RED, WHITE AND...
Consider, for example, the question whether the Constitution grants individuals a right to privacy. An interpreter of the constitutional text who, like John Ely or Cass Sunstein, is worried about the "countermajoritarian difficulty," might adopt a "democracy-seeking" interpretive lens, and accordingly constrain the finding of such a right because it is not democracy-reinforcing. Another kind of "democracy-seeking" interpreter, such as Lawrence Lessig or Martin Flaherty, might locate such a right because it preserves the value the Founders placed on individual liberty. A "justice-seeking" interpreter, such as Ronald Dworkin or Jim Fleming, might argue for such an interpretation because such a value is necessary to a "moral Constitution." Each of these scholars can find ample support for his interpretation in the text, history and structure of the Constitution. Each interpretation filters "objective," but indeterminate, textual, structural, and historical facts through a lens of social, political and constitutional values. Accordingly, much constitutional theory recognizes that a particular interpretation of the Constitution can only occur by considering the desired outcome.

BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 61-62 (1988). Thus, interpretive plausibility or lack thereof stems not only from the text itself but also from the range of potential and plausible meanings at a given time. Cf. Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518, 526 (1986) (recognizing the constraint on judging imposed by the need to generate "plausible legal arguments"). The difficulties that indeterminacy poses for the concept of objectively identifiable meaning of any sort have been much discussed. See Mark Lilla, The Politics of Jacques Derrida, N.Y. REV. BOOKS, June 25, 1998, at 36.


This indeterminacy has worked remarkably well, helping to make the United States Constitution the longest-standing written constitution. Inevitably, though, the very qualities that have allowed the Constitution to remain relevant have also generated controversies over how best to interpret it. Thus, indeterminacy is the Constitution’s strength and also its weakness. Indeterminacy allows the Constitution to remain an authoritative guideline, preserving the broad objectives of the Framers; yet it gives very little instruction for how to resolve particular issues. As a consequence, the resolution is political. The term “political” is not used here in a derogatory sense. On the contrary, it is used to refer to the vital process of democratic deliberation, that is, of considering and agreeing on desired values and outcomes.

The Constitution gives less instruction on international governance than it does on domestic governance. Moreover, the stakes of agreeing to international governance—which include transferring power outside national boundaries and away from the national populace—are higher. Because there is so little constitutional instruction on the proper relationship between United States government and international law, political values and discourse must play an especially important role. This is particularly true because the international environment has changed dramatically in the past few decades, and more than likely will continue to change rapidly over the next few decades. As during the New Deal, exigencies that were not contemplated by the Constitution’s framers have necessitated bold governmental innovation. Now, as with the rise of domestic administrative law, the consequence is that the question of the constitutionality of the new governmental structure must be determined with minimal assistance from the constitutional text. This era of change warrants a close re-examination of the current regulatory framework.

Constitutional indeterminacy on how to proceed with such an analysis manifests itself in textual silences, ambiguities, and contradictions in several key constitutional provisions. To begin with silence, the possibility of such an international regulatory body appears nowhere in the Constitution, for the simple reason that the Framers anticipated neither economic globalization, nor the need

78. Cf. H. Field Haviland, Jr., The Political Role of the General Assembly 167 (1951) ("Constitutions that do not bend are very apt to break.").
generated by globalization for an international economic regulatory body with significant authority over the United States.

The Constitution does allocate relevant powers to the legislative and executive branches of the federal government, but these allocations only lead to ambiguity and contradiction, because they seem to overlap. Article I gives Congress the power to "regulate commerce with foreign nations." Article II gives the President the power "to make Treaties, provided two thirds of the Senators present concur." The Constitution fails to specify whether the congressional foreign commerce power includes or excludes (thereby leaving to the President) the power to make international commercial agreements.

While the text allocates to Congress the power to regulate foreign commerce, the only explicit allocation of the ability to make international agreements lies in Article II's allocation of authority to the President. Thus, Congress is involved because its regulatory power over foreign commerce is implicated. The President is involved because the President has the power to make international agreements. Both branches are clearly implicated, but little indication is given as to the appropriate division or coordination of responsibilities. The structure that has emerged has been guided by a strong sense of the importance of ensuring the viability of American internationalism. Both the congressional-executive agreement and the "fast track" procedure for enacting it are structures that have

79. U.S. CONST. art. I, § 8, cl. 3.
80. U.S. CONST. art. II, § 2, cl. 2.
81. Indeed, the executive branch has suggested that the President is endowed with the constitutional authority to make such agreements free from congressional oversight. The extreme unpopularity of this view with Congress, however, has prevented Presidents from pressing it, at least since the 1960s. Prior to that period, however, there were marked struggles between President and Congress on this issue, many of which related to the GATT. To begin with, the text of the GATT was never congressionally ratified, either as a treaty or as a congressional-executive agreement (that is, not until the Uruguay Round). Congress resented this oversight for some time. Another well-known example of this tension comes from the so-called "Kennedy Round" of negotiations among members of the GATT. Congress had enacted a statute authorizing President Kennedy only to make tariff concessions. The President returned from the negotiations, however, with agreements regulating the "non-tariff" matters of anti-dumping law and customs valuation. Congress responded by refusing to adopt the agreements, causing some international comment. The fast track procedure was devised largely as a response to this and other incidences of congressional recalcitrance.

82. Of course, these clauses can just as easily be read as not contradictory. In fact, this reading is predominant, and necessary to justify the edifice of trade legislation via congressional-executive agreements.
molded indeterminate constitutional guidelines in such a way as to maximize efficacy and expediency in foreign affairs lawmaking.

(1) The Congressional-Executive Agreement

As discussed above, the congressional-executive agreement was a product of the post-World War II American commitment to internationalism, and had no obvious basis in constitutional text, structure, or history. Yet international law scholars such as Edwin Corwin, Wallace McClure, Myres McDougal, and Ascher Lans produced exhaustive and persuasive textual, structural, and historical arguments that congressional-executive agreements were constitutionally valid instruments for foreign affairs lawmaking. Because text, structure, and history could be mobilized to support either side of the debate, they were necessary but not sufficient in determining its outcome. That outcome—the endorsement of the congressional-executive agreement—resulted from a recognition that, without it, the ability of the United States government to conduct foreign policy effectively, and therefore fully to inhabit its new role as world leader, would be jeopardized. Courts were generally content to defer to this political solution, and did so by privileging the value of international efficacy in their jurisprudence.

The issue was raised anew, however, when Congress considered the agreements establishing the WTO and NAFTA in the mid-1990s. The renewed interest in the constitutional question resulted from a recognition that both organizations would exercise authority much broader and stronger than any other international organization in which the U.S. had been involved up to that point. When the issue

83. See supra pp. 16-18.
84. See generally Edward S. Corwin, THE CONSTITUTION AND WORLD ORGANIZATION (1944); Wallace McClure, INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES (1941); Myres S. McDougal & Asher Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 YALE L.J. 181, 534 (1945). For a detailed discussion of this scholarship, see Ackerman & Golove, supra note 20, at 866-73.
86. See Ackerman & Golove, supra note 20, at 875-89.
87. See HENKIN, supra note 41, at 2 (recounting “the Supreme Court’s . . . prudential avoidance of ‘political questions’” in foreign affairs law); see also Ackerman & Golove, supra note 20, at 925 (“Over the past half-century . . . the [Supreme] Court has been extremely deferential on foreign affairs, allowing Congress and the President to fight out their constitutional battles on their own terms.”); Paul, supra note 42, at 717.
was revived, constitutional scholars argued both sides. Larry Tribe argued that the text and structure of the Constitution compel a conclusion that the congressional-executive agreement form is unconstitutional. Bruce Ackerman and David Golove countered that the validity of the congressional-executive agreement derives from the "constitutional moment" arising out of strong public support for American internationalism following World War II. Congress inquired into and debated the constitutionality of the form in its deliberations over both the WTO and NAFTA. Ultimately, however, these inquiries were put aside because of overwhelming pressure to approve the agreement. As with the last round of debates over the issue, the Supreme Court has remained silent.

Since then, however, public concern has increased about both the substance of these agreements and the machinery used to ratify them. The Trade Act mechanism forestalled the public debate on these agreements, but could not prevent them altogether. As public concern has increased, it has also emboldened congressional resistance to the current arrangement, as evidenced by Congress's repeated refusal to renew presidential negotiating authority despite an economic environment of unprecedented prosperity.

(2) The Delegation of Regulatory Power

In a congressional-executive agreement, Congress delegates the power to make rules governing foreign commerce to the President, who in turn delegates them, subsequent to congressional ratification, to an international organization. This "double delegation" arguably is more extreme than any delegation of congressional power in the domestic context. In its original form, however, Congress had an opportunity to engage in open-ended debates over agreements

89. See id.
90. See, e.g., 140 CONG. REC. S15104 (daily ed. Nov. 30, 1994) (statement of Sen. Byrd) ("It is my belief that the approval mechanism that ought to have been used, especially for the WTO portion of the GATT agreement, is the constitutional procedure for treaty ratification."); 139 CONG. REC. H9953 (daily ed. Nov. 17, 1993) (statement of Rep. Gonzalez) ("NAFTA will undermine the fundamental constitutional principle of a balance of powers among three coequal branches of government by transferring functions from one branch of government to another.").
91. See infra text accompanying notes 93-94.
92. See supra p. 18.
submitted for its approval, making congressional ratification of these early agreements relatively meaningful. The innovation of the fast track procedure with the Trade Act of 1974, however, has rendered congressional approval of subsequent agreements largely pro forma. The short period of time before the vote that the agreement becomes available to congressional review, together with the sheer volume and complexity of the proposed agreements, makes meaningful congressional review much more difficult. Consequently, although Congress technically reserves the right to reject implementing legislation, rejection is highly improbable under the Trade Act mechanism. Members of Congress are therefore virtually compelled to ratify contemporary trade agreements, as even their proponents have recognized.\textsuperscript{94} The senior Senator Robert Byrd issued this condemnation during the debates over the agreement implementing United States obligations under the World Trade Organization:

"Fast track" is nothing more than a quick shuffle designed to ram through this agreement without much scrutiny. Therefore, Mr. President, here we are at this late hour, faced with an upcoming vote on a matter about which we know little and under such restrictions as will limit debate and tie our legislative hands with respect to amendments, leaving us only with a choice of voting this important legislation up or down.\textsuperscript{95}

The text of the Constitution offers no definitive answer to the question of whether this highly constrained legislative mode is valid. The value of preserving political efficacy, however, has caused courts to stay out of the issue. This judicial deference stems from a belief in the priority of international effectiveness—"expediency"—in foreign affairs lawmaking.\textsuperscript{96} "Expediency" jurisprudence began with judicial construction of an "inherent" foreign affairs lawmaking power accruing to the President.\textsuperscript{97} This was the view espoused by the Supreme Court in

\textsuperscript{94} See Harold Hongju Koh, The Fast Track and United States Trade Policy, 18 BROOK. J. INT'L L. 143, 168 ("The Fast Track critics' most persuasive critique is of the President's tactic of bundling disparate trade proposals... and placing them before Congress for a single vote. Taken to extremes, they argue, bundling makes it too painful for Congress to vote against a completed trade accord....").

\textsuperscript{95} 140 CONG. REC. S15104 (daily ed. Nov. 30, 1994) (statement of Sen. Byrd); see also 137 CONG. REC. S6777 (daily ed. May 24, 1991) (statement of Sen. Hollings) (describing fast track as a "gun at our heads").

\textsuperscript{96} See Paul, supra note 42, at 715.

\textsuperscript{97} As Louis Henkin has noted, the term "foreign affairs" is not to be found in the constitutional text, it has long been used to apply to the power to conduct affairs, both
United States v. Curtiss-Wright Export Corp., a 1936 case involving a congressional delegation to the President of authority to prohibit arms sales to certain countries.\textsuperscript{98} Here, the Court finessed a move from the assertion that "inherent" foreign affairs powers constitutionally accrue to the federal government to the conclusion that these powers accrue specifically to the Executive branch, on the grounds that it was important that the United States "speak with one voice" in foreign affairs. In doing so, Curtiss-Wright established the view elevating the value of "executive expediency" as paramount in international lawmaking.\textsuperscript{99}

Curtiss-Wright's approval of legislative delegation to the President, as well as its dictum describing sweeping "inherent" presidential foreign affairs power, might be distinguishable from the modern international trade organization, however. The Curtiss-Wright Court focused on foreign affairs in the context of international war,\textsuperscript{100} rather than international commerce. Yet the Supreme Court has upheld legislative delegations in international commerce as well. In J.W. Hampton & Co. v. United States, the Supreme Court upheld a statute in which Congress delegated to the President the power to fix tariffs for the purpose of equalizing the prices of foreign imports and domestic goods in domestic markets.\textsuperscript{101}

Indeed, Congress has had a long history of delegating to the President its authority to set tariffs. These delegations sought not only to realize the policy at issue in the J.W. Hampton case of tariff
“equality” of import prices with domestic prices, but also the policy of “reciprocal trade” — that is, of allowing foreign producers benefits from trade in the United States only to the extent that U.S. producers were allowed to benefit from trade in foreign countries. In the latter category, such delegations began in the form of authorizing the President to modify tariffs unilaterally in response to tariff modifications, either increases or decreases, by foreign nations. In the 1930s, they became authorizations allowing the President to modify tariffs via bilateral “reciprocal trade agreements.” Curtiss-Wright, J.W. Hampton, and their progeny all indicate a foreign affairs jurisprudence that views effectiveness in the international sphere with utmost priority.

102. In The Brig Aurora, 11 U.S. (7 Cranch) 382, 383-84 (1809), the Supreme Court upheld the Act of March 1, 1809, expiring on May 1, 1810, forbidding importation of goods from Great Britain and France provided that the President, by proclamation, is authorized to revoke or modify these restrictions with these countries if they “revoke[d] or modifi[ed]” their trade laws “as that they shall cease to violate the neutral commerce of the United States.” On May 10, 1810, Congress passed another law declaring that if Great Britain or France revoked or modified their trade laws “as that they shall cease to violate the neutral commerce of the United States, which fact the President of the United States shall declare by proclamation, and if the other nation shall not” then certain restrictions in the 1809 act would be revived. In Field v. Clark, 143 U.S. 649, 700 (1892), the Supreme Court upheld the Tariff Act of Oct. 1, 1890, chap. 1244, 26 Stat. 567. The Act imposed tariffs on woolen dress goods, apparel, silk embroideries and laces, and colored cotton cloths, but provided that the President could suspend provisions of the Act allowing duty-free entry of certain goods and levy duties on such goods as provided by statute, if he finds that the exporting country has imposed duties on U.S.-made like goods that “he may deem reciprocally unequal and unreasonable.”


104. See, e.g., HENKIN, supra note 41, at 174-77. There has been one case complaining about the fast track procedure, which was dismissed. See Made in the USA Found. v. United States, 56 F. Supp. 2d 1226, 1250-73 (N.D. Ala. 1999). To say that the Supreme Court will likely never rule on the fast track procedure is not then to conclude that constitutional theory is irrelevant, although that is one interpretation. The other possibility is a question of constitutional interpretation that the Court views as a “political question,” better left to resolution by the political branches. Mark Tushnet, Principles, Politics and Constitutional Law, 88 Mich. L. Rev. 49, 80 (1989) (defending “the proposition that in cases involving separation of powers, the Constitution adopts a scheme of pure procedural justice: whatever results from the operation of the political process is constitutionally acceptable”). For a discussion of the tension between the “political questions doctrine” and the interpretive supremacy claimed by the Supreme Court in Marbury v. Madison, see id. at 60-61, 68-80. Many commentators have advocated nonjudicial resolution of separation of powers questions. Id.; HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 163-73 (1962).
And yet, there is a strain of Supreme Court jurisprudence that is less passive toward areas implicating foreign affairs, when they also implicate issues of domestic law. First, contemporary delegations of trade legislation authority are quite different from those discussed in *J.W. Hampton*. Modern trade agreements require legislation in areas that have historically been understood as domestic rather than international. They explicitly mandate, for example, modifications of domestic government procurement law, environmental protection law relating to domestic environmental regulation, health and safety regulation relating to domestic consumption, and intellectual property rights for domestic property rights holders.

105. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952), steel companies brought suit for declaratory and injunctive relief to prevent the Secretary of Commerce from seizing steel mills in conjunction with an Executive Order which sought to take over steel mills in the middle of a work stoppage and labor dispute between companies and the United Steelworkers of America. Congress had provided for seizure of real and personal property under two statutes (the Selective Service Act of 1948 and the Defense Production Act of 1950), but the conditions for those statutes were not met in this case. *Id.* at 587-601.

In *United States v. Guy Capps*, 204 F.2d 655, 660 (4th Cir. 1953), the Fourth Circuit voided an executive agreement which contradicted tariff policy set by Congress and the Tariff Commission. This case suggested that foreign affairs power does not extend to trade issues or at least “foreign commerce”; however, it expressly left aside this issue (i.e., whether the Executive could make trade agreements when there is congressional silence) since here there was contradictory legislative policy. In that sense the case is similar to *Youngstown*. However, the court decided the case on other grounds, and may have thought that the executive in fact did possess an inherent power to sign trade agreements. See *Jackson ET AL.*, *supra* note 35, at 105-06.

The cases upholding the executive branch’s exercise of the foreign affairs power were *Dames & Moore v. Regan* and *Consumers Union v. Kissinger*. In *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981), the issue was perhaps distinguishable from *Youngstown* on the grounds that it was (1) partially specifically authorized, (2) partially not directly conflicting with, but rather incidental to, a legislative policy, (3) it was not an important internal economic area, and (4) there was legislation which, although it did not expressly delegate, it was congruent with policies underlying the President’s actions in the present case. Also, the part not expressly authorized was an “executive practice.”

106. See Uruguay Round Agreement on Government Procurement.


108. Several federal harmonization measures resulting from NAFTA may have reduced domestic requirements for ensuring disease-free meat. Some argue that, in addition to such explicit modifications, trade agreements eventually impact the regulatory scheme in a much more fundamental way, by increasing international pressure to liberalize.

109. For example, the WTO extended the term of protection granted by U.S. patent law from 17 to 20 years, but made it start from the date of filing rather than the date of grant. Domestic intellectual property groups were bitterly critical of this measure, arguing that it significantly reduced their actual term of protection. This dissatisfaction was predicted by
least with respect to these areas, the fast track procedure cannot only
be understood as an exercise of the foreign commerce power, but also
as a delegation of *domestic* commerce power, and consequently
properly subject to higher levels of congressional participation.

Support for such an approach lies in the 1952 case *Youngstown
Sheet & Tube Co. v. Sawyer*, in which the Supreme Court overturned
an Executive Order issued by President Truman to preempt the
lengthy resolution by processes established through the National
Labor Relations Act of a domestic labor dispute in the steel industry.
The Order seized steel mills and directed production to ensure raw
materials critical to the U.S.'s military campaign in Korea. In
*Youngstown*, the Supreme Court defied the argument of international
expediency. Justice Frankfurter expressed this sentiment in his
concurrence:

> A scheme of government like ours no doubt at times feels the lack
> of power to act with complete, all-embracing, swiftly moving
> authority. No doubt a government with distributed authority... labors under restrictions from which other governments are free. It
> has not been our tradition to envy such governments. In any event
> our government was designed to have such restrictions. The price
> was deemed not too high in view of the safeguards which these
> restrictions afford.

*Youngstown* involved an executive order which exceeded the
instructions of Congress as laid out in other statutory delegations. It
could be argued that a President who contravened congressional
expectations underlying his initial grant of trading authority would
have exceeded his authority in a similar way.

Sparse constitutional instruction has left an open field on which
to construct the international branch of government. Courts have
elected not to intervene in the results of this construction project.
And yet, from time to time, contrary movements emerge in the
courts' constitutional interpretation. The resolution of indeterminate
constitutional text has been guided not primarily by the text itself, but
rather by weighing the value of efficacy in international affairs against
competing values. These values—and the tension between them—are

Joel R. Reidenberg, *Trade, TRIPPS and NAFTA*, 4 FORDHAM INTell. PROP. MEDIA &
ENT. L.J. 283, 284 (1993) ("Because the final GATT and NAFTA texts will necessarily
contain compromises on substantive standards, American industry is likely to have
objections....").

111. *Id.* at 613.
deeply rooted in democratic principles. In particular, this tension in constitutional interpretation is intimately related to a tension within American democracy between competing conceptualizations of the public good.\textsuperscript{112}

B. Competing Concepts of the Public Good

Opponents of the WTO have objected most immediately to actions it has taken that conflict with particular policy goals, such as protecting the environment or preserving human rights.\textsuperscript{113} But a deeper objection, one in which the policy objections are almost always framed, is that the WTO has acted undemocratically, because there is little or no access to WTO decisionmaking fora either by legislative representatives or by members of the public.\textsuperscript{114}

The absence of public access to or representation in the WTO would seem to support the conclusion that the WTO is antidemocratic. An investigation of American democratic theory,

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\item[112.] While writers outside the critical tradition may find this possibility defeatist, critical theory views it as the only real step towards resolution, since it is the only step that acknowledges the truth (according to critical theory) that all constitutional theory is “always and already” politicized anyway. \textit{See, e.g.}, Robin West, \textit{Progressive and Conservative Constitutionalism}, 88 MICH. L. REV. 641, 712 (1990) (“Rather than discuss our divergent attitudes toward social and private power, modern constitutionalists who have abandoned pretensions to constitutional neutrality avoid politics and ethics by discussing instead their manifestations in conflicting jurisprudential conceptions.”).

Of course, this position also deprivileges the legal academic, since it renders the question a political one rather than a constitutional one. This problem has been encountered by other writers employing a critical method of constitutional interpretation. Mark Tushnet aptly described this dilemma in an essay on another aspect of the separation of powers doctrine (namely, the requirement of Senate confirmation of Supreme Court nominees):

The analysis developed here suggests that this legal scholar may then be caught in a rhetorical trap. For his or her prescriptions to be taken seriously, they must be cast in terms of constitutional requirements. Yet, as I have argued, all the Constitution really requires is that politics be given its ordinary range of operation . . . . In the end, then, there may indeed be no distinctive contribution that legal scholars can make . . . except, of course, that academic lawyers have peculiar rhetorical resources and have come to occupy positions of influence in discussions of constitutional structure. To that extent, an academic lawyer who adopts the model of the Sophist can continue to offer policy prescriptions that will be taken seriously. Whether that is an admirable model has been controverted since Socrates.

Tushnet, \textit{supra} note 72, at 81. Tushnet might find a more compelling constitutional case against the fast track procedure, however, since it seems to reduce the “ordinary range of operation” of politics.

\item[113.] \textit{See supra} Part II.

\item[114.] \textit{See supra} Part II.
\end{enumerate}
\end{footnotesize}
however, disallows such an easy condemnation, because a significant strand of democratic theory endorses avoiding direct forms of public participation when doing so is necessary to preserve the public interest. This section of the Article explains the sources of this theoretical strand, and why it holds particularly strongly in economic policy.

(1) The Tension Between “Public Preferences” and “Public Interest”

“Democracy” translates literally to “rule by the people.” This definition can be developed in opposite directions, and the opposition follows from an elemental tension in Western theory, between what might be called the “is” and the “ought.” This tension poses the

115. The word derives from the Greek roots demos (people) and kratia (rule or authority). See, e.g., ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 3 (1989) [hereinafter DAHL, DEMOCRACY]; JAMES L. HYLAND, DEMOCRATIC THEORY: THE PHILOSOPHICAL FOUNDATIONS 40 (1995); Michael Seward, Democratic Theory and Indices of Democratization, in DEFINING AND MEASURING DEMOCRACY 6, 6 (David Beetham ed., 1994). Crucial to the ancient Greek notion of democracy was the idea that people would actually take turns governing. ARISTOTLE, THE POLITICS (Trevor J. Saunders ed., T.A. Sinclair trans., rev. ed. 1981) (“A basic principle of the democratic state is liberty.... ‘Ruling and being ruled in turn’ is one element in liberty.”). Modern democratic theory has excised the commitment to ruling-in-turn, instead identifying democratic government as government legitimated through popular consent. For classical definitions of this “social contract,” see JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) and JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., Penguin Books 1968) (1762). For manifestations in American political culture, see, for example, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments.... [derive] their Just powers from the consent of the governed....”). The definitional difference between ancient and modern Western theory is generally attributed to the increased size and heterogeneity of the modern electorate, and the increased complexity of modern government. See DAHL, DEMOCRACY, supra, at 24-33. Thus, the principles of openness and public participation, while still central to most contemporary democratic theories, do not translate in modern versions to a mandate that the electorate rule in turn and are instead viewed as necessary for the proper formulation and registration of popular consent or governmental accountability. For a narrower conception of democracy which eschews openness and public participation and rests only on popular election, see JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 262 (1976).

116. The best-known theory of the relationship between “is” and “ought” is Hume’s “naturalistic fallacy,” which posits that “ought” cannot be derived from “is.” DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge ed., 2d ed., Oxford Univ. Press 1978) (1739-40). This fallacy is commonly referenced in rights discourse exploring the relationship between positivism and natural law. See, e.g., George C. Christie, On the Moral Obligation to Obey the Law, 1990 DUKE L.J. 1311 (1990). I do not explore the naturalistic fallacy in this Article, since I am using the terms descriptively rather than normatively. The relation of the terms to theory about government is most commonly found in works on communitarianism. See, e.g., Jeffrey Friedman, The Politics of Communitarianism, 8 CRITICAL REV. 297 (1994).
question whether government should reflect what the popular will is—that is, public preferences—or what the popular will ought to be\textsuperscript{117}—the public interest. This further develops into a tension between, on the one hand, reflecting the aggregate actual preferences of the electorate,\textsuperscript{118} and even more specifically, of a majority of the electorate;\textsuperscript{119} and, on the other hand, requiring a determination of the public interest,\textsuperscript{120} often as reached through the deliberations of a governing elite.\textsuperscript{121} As a result of this tension, democratic theory does

\textsuperscript{117} There are various relationships between the “is” and the “ought” here. For example, both pluralism and republicanism in American democratic theory hold that the best government allows a fairly direct expression of preferences by the electorate. Thus, during the Founding period republicans favored a more direct version of democratic government than that proposed by the Federalists; and in our own time, pluralists have advocated the same in opposition to those who would insulate government from the electorate. However, pluralists and republicans take very different views of the relationship between “is” and “ought.” Republicanism invests in the existing or potential virtue of the electorate and believes that the actual preferences of the electorate will coincide with a government that embodies higher virtues. Pluralism, a descendant of utilitarianism and therefore of liberalism, does not posit that electoral preferences will coincide with any prior notion of the good, but attaches normative value to the capacity of the electorate to register preferences regardless of whether these preferences coincide with a prior notion of the good. \textit{But see} Wilfred Binkley \& Malcom Moos, \textit{A Grammar of American Politics} 7, 8 (1950) (contending that aggregate preferences will actually accord with a prior or independent notion of the public good). The relationship between the “is” and the “ought” illuminates the inquiry of political theorists into a democratic society that may achieve “justice.” \textit{See generally} John Rawls, \textit{A Theory of Justice} (1975). Note also that because pluralism is an incarnation of liberalism, this dichotomy also roughly maps on to the liberalism-republicanism divide in political and constitutional theory. \textit{See, e.g.}, Morton Horwitz, \textit{Republicanism and Liberalism in American Constitutional Thought}, 29 WM. \& MARY L. REV. 57 (1987). For a critique of this dichotomy, see Sunstein, supra note 73, at 1571.


\textsuperscript{119} Dahl, Preface, supra note 118; 1 Alexis De Tocqueville, \textit{Democracy in America} 220 (Francis Bowen ed., Henry Reeve trans., 1862) (1835) (“[T]he majority governs in the name of the people . . . in all countries in which the people are supreme.”). For criticism of the majoritarian viewpoint, see, for example, John Stuart Mill, \textit{Considerations on Representative Government} 102-07 (Currin V. Shields ed., Liberal Arts Press 1958) (1861). This Article does not explore the meaning of the term “preference.” Some controversy exists over the nature of preferences. In particular, Cass Sunstein has maintained that preferences do not exist prior to the political process. \textit{See} Cass R. Sunstein, \textit{Democracy and Shifting Preferences}, in \textit{The Idea of Democracy} 196 (John Murphy ed., 1992).

\textsuperscript{120} \textit{See generally} Plato, \textit{The Republic}, in \textit{The Collected Dialogues of Plato} 575 (Edith Hamilton \& Huntington Cairns eds., Princeton Univ. Press 1963); Mill, supra note 119; Rousseau, supra note 115.

\textsuperscript{121} Of course, that an elite will rule in the public interest is a normative assumption. \textit{See William Alton Kelso, American Democratic Theory: Pluralism and Its Critics} 49-53 (1978); Currin V. Shields, \textit{Introduction} to Mill, supra note 119, at xxxi-
endorse, if counterintuitively, the notion of a governing elite if the elite has the public's best interests in mind. Preserving the inalienability of individual rights necessary to sustaining a robust democracy, such as the right to vote and the right of expression, exemplifies this "democracy-reinforcing" countermajoritarianism.

The conceptual tension between public preferences and the public interest is also exemplified by the equivocal treatment by American democratic theory of the values of governmental openness and public participation. On the one hand, such values are manifestly necessary to ensure democratic government, since they help to effectuate the public's expression of its preferences. These principles are, as such, foundational to American democratic theory. In contemporary democratic theory, both pluralism, as the predominant strand of modern American democratic theory, and its rival, often described as "civic republicanism," value the principles of openness and public participation, albeit for different reasons.

Moreover, there is an important tradition of republicanism that does not stress the importance of ruling elites but rather holds that the public interest can be reached by the electorate themselves through the inculcation of civic virtue and citizen deliberation. I wish to stress that I am not making any claims to the normative desirability of the conceptions of democracy explored here. There are many conceptions of democracy that compete with the liberal conception prevalent in American theory. See, e.g., N. Scott Arnold, The Philosophy and Economics of Market Socialism: A Critical Study 34-64 (1994) (exploring concepts of economic democracy in socialism); Tracy Higgins, Democracy and Feminism, 110 HARV. L. REV. 1657 (1997).

122. Kelso, supra note 121, at 7 (describing these values as common to rival political theories such as "pluralism," "populism," and "participatory democracy"). The theory of civic republicanism also stresses these values.


124. See generally Edward C. Banfield, Political Influence (1945); James Buchanan & Gordon Tullock, The Calculus of Consent (1958); Dahl, Preface, supra note 118; Robert Dahl, Who Governs? (1961); V.O. Key, Politics, Parties and Pressure Groups (1958); William Kornhauser, The Politics of Mass Society (1959); Charles Lindblom, A Strategy of Decision-Making (1962); David B. Truman, The Governmental Process (1951). Pluralism does not embrace the principles of openness and political participation as much as other contemporary theories such as participatory democracy. See generally Alan Altshuler, Community Control (1970); Benjamin Barber, Strong Democracy: Participatory Politics for a New Age (1984); Michael Harrington, Toward a Democratic Left (1968); Jack Newfield & Jeff Greenfield, A Populist
American democratic theory is characterized by a general orientation towards the "is" side of the equation—that is, towards a conceptualization of democracy that privileges the expression by the electorate of its actual preferences, rather than one which seeks to determine the public will through some other means.

At the same time, however, American democratic theory, including contemporary pluralism and civic republicanism, recognizes the importance of countervailing values in governance, such as "efficiency," and "expertise" or "enlightenment." The orientation toward openness and public participation, consequently, is partial. Indeed, much of American democratic theory concerns itself precisely with the question of the extent to which public preferences should be tempered by the public interest in government.

MANIFESTO (1972); ROBERT P. WOLFF ET AL., A CRITIQUE OF PURE TOLERANCE (1965). Participatory democracy embraces a strong communitarian and decentralizing bent and is more concerned with the socioeconomic bias in the current legislative process. See, e.g., WOLFF ET AL., supra, at 3-53. Within legal and political scholarship, pluralism has faced a significant challenge from a "revived republicanism." See Suzanna Sherry, Civic Virtue and the Feminist Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986); Sunstein, supra note 73; Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, Interest Groups]. This tradition has generally been opposed to contemporary pluralist theory because it does not envision public preferences as existing prior to the lawmaking process (with the lawmaking process merely aggregating them), but rather sees them as a result of deliberation on the public good among the citizenry. See, e.g., Sunstein, Interest Groups, supra, at 31.

125. See KELSO, supra note 121, at 7; see also THEODORE LOWI, THE END OF LIBERALISM (2d ed. 1979); MILL, supra note 119, at 72-74, 83-84; SCHUMPETER, supra note 115. I understand the terms "expertise" and "enlightenment" to describe different manifestations of the phenomenon wherein a ruling elite is better equipped to decide in the public interest. "Expertise" describes situations in which that superior decisionmaking capacity stems from particular empirical knowledge. "Enlightenment" describes situations in which the capacity stems not from any greater empirical knowledge but from a disinterested ability to create policy which opposes current majority will but which, it is believed, will further the long-term interests of society as a whole. It is interesting to note that policy decisions traditionally viewed as "enlightened" can fall across the political spectrum. Civil rights law, for example, is a well-known example of countermajoritarian lawmaking. In the area of economic policy, however, countermajoritarian policy has tended to be conservative, rather than liberal—that is, has tended to mean free-market policy, while the majoritarian view has generally supported a more protective economic policy. The values of democracy and efficiency have not always been viewed as contrary. See, e.g., Cass R. Sunstein, Democratizing America Through Law, 25 SUFFOLK U. L. REV. 949, 950 (1991).

126. The federalist view "willingly abandoned the classical republican understanding that citizens should participate directly in the processes of government." Sunstein, Interest Groups, supra note 124, at 42 & n.58; see also WOOD, supra note 123. Rather, the federalists viewed all potential rulers, whether the general citizenry or a ruling elite, as corruptible. Hence the famous statement that "ambition must be made to counteract..."
(2) The Tension—As Related to Governmental Structure

The tension between public preferences and public interest described above inhabits theory about constitutional structure. American constitutionalism posits the necessity of a framework both to secure democratic government (for example, by disallowing monarchical or other structures of government), and to constrain the actions of any particular government, irrespective of popular will (for example, by protecting individual rights against governmental intrusion).

The principle of representative government provides an illustration of this tension. On the one hand, representation in government ensures the expression of popular will. On the other hand, pronounced strains in democratic theory from the Federalists onward envision the principle of representation as providing a means for constraining the popular will and preventing against the "excesses" of direct democracy. Tensions within the principle of representative government are commonly expressed as whether elected legislators should serve as "representatives" of their ambition. THE FEDERALIST NO. 51 (James Madison). Thus the Federalists, while assuming the dominance of the electorate, sought to ensure that governmental structure would protect not only individual rights but the "permanent... interests of the community." See FEDERALIST NO. 57 (Alexander Hamilton). The Federalists therefore favored structure as a limit on democracy. Part of this structure included a means "to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society." Id.

127. Attention to the constitutional text is particularly pronounced in American political thought. See Albert Morris, Political Culture and the Constitution, in THE IDEA OF DEMOCRACY 335 (John Murphy ed., 1992).

128. See ELY, supra note 73, at 45 (arguing that constitutionally protected rights "reinforce" democracy by ensuring the preconditions for effective democracy); STEPHEN HOLMES, THE MAJORITARIAN PARADOX 87-97 (1989). There is a separate strand of constitutional theory that does not justify individual rights according to democratic theory, but according to prior notions of the good. See James E. Fleming, Constructing the Substantive Constitution, 72 Tex. L. Rev. 211, 247-56 (1993); Cass R. Sunstein, Constitutions and Democracies: An Epilogue, in CONSTITUTIONALISM AND DEMOCRACY 327 (Jon Elster & Rune Slagstad eds., 1988).

129. The Federalists' view:

When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.

THE FEDERALIST NO. 71 (Alexander Hamilton); see also THE FEDERALIST NO. 49 (James Madison); Sunstein, Interest Groups, supra note 124, at 50-56. The establishment of an electoral college for the election of the Senate and the President is another good example.
constituencies, acting in perfect reflection of the actual preferences of those constituencies; or as "delegates," charged with determining the best interests of constituencies even if they depart from constituencies' preferences. Even more controversial is delegation outside the legislature to entities which may or may not be electorally accountable—for example, in the area of trade legislation.

(3) The Tension—As Related to Economic Policy

Trade policy exemplifies the tension between public preferences and the public interest, because the very basis of trade-liberalization policy lies in the self-consciously "counterintuitive" principle of comparative advantage. The principle of comparative advantage holds that by increasing vulnerability to extranational market competition, societies increase their benefits from trade even if they are less competitive in overall terms than other societies. That this proposition is "counterintuitive" is borne out by the fact that, by generally used measures, policies that favor more rather than less trade liberalization are almost always anti-majoritarian. Opinion polls, for instance, consistently show a majority position against lowering national trade barriers. Presidents are arguably elected despite, rather than because of, their positions on trade. And Congress consistently favors more rather than less protection against international market competition. Indeed, the brand of American politics that emerged in the late nineteenth century under the rubric of "populism" is known primarily for its advocacy of anti-liberalization economic policy.

Free trade advocates respond to this majoritarian stance against trade liberalization by arguing that it is nonetheless in the public interest (because it increases national wealth and consumer choice).

130. Within the legislature, controversy surrounds the proper scope of authority of legislative committees. While it has received less attention, the issue of legislative committees in some ways poses at least as strong a challenge to democratic principles as extra-legislative delegation. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1956); Symposium, The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives, 20 CARDOZO L. REV. 73 (1999).


132. See supra note 44.

133. See Chantal Thomas, Democracy in the Fast Lane: The Debate over Fast Track Trade Legislation (unpublished manuscript, on file with author).
In doing this, free trade advocates fall squarely within a well-established tradition of privileging a vision of the public interest over public preferences.\textsuperscript{134}

If free trade is in the public interest despite being contrary to public preference, then a governmental structure which delegates the task of trade policy formulation to entities more capable of acting in a countermajoritarian fashion is preferred over one in which actors are more closely beholden to direct expression of public preferences. Consequently, countermajoritarianism in trade policy can claim justification in democratic theory.\textsuperscript{135} More generally, tensions discussed above in constitutional interpretation and between democratic principles explain why the WTO and other international trade organizations can claim legitimacy despite their isolation from the public.

The constitutional "discourse of executive expediency,"\textsuperscript{136} and the countermajoritarian allegiance to the "public interest" over public preferences, may well have been essential to laying the groundwork for the international branch of government. That groundwork, however, is now securely established. As a consequence, the time is right to reexamine the balance between the norm of governmental expediency, and the value of openness and accountability in international government.

IV. The Way Forward: Striking a Balance

If we do not do better in the future—if the global system continues to generate growing inequality, environmental destruction, and a

\begin{itemize}
  \item \textsuperscript{134} A majority of the Federalists were pro-free trade, with some notable exceptions such as Alexander Hamilton. \textit{See} Paul A. Samuelson \& William D. Nordhaus, \textit{Macroeconomics} 362 (15th ed. 1995).
  \item \textsuperscript{135} Civil rights is another prominent area. It is interesting to note that, in economic discourse the countermajoritarian stance falls on the opposite end of the political spectrum from the countermajoritarian stance in rights discourse. That is, strong pro-free trade positions are generally associated with political conservatism, while strong pro-rights positions are generally associated with political liberalism or progressivism. Conversely, weaker rights positions are associated with political conservatism, whereas weaker free trade positions are associated with political liberalism or conservatism. All of this points to a consistency of political viewpoint, but not of theory or method, and supports my claim of, and support for, indeterminacy. By "support for," I mean a support for explicitly prioritizing political outcomes in theoretical discourse.
  \item \textsuperscript{136} \textit{See} Paul, \textit{supra} note 42, at 671.
\end{itemize}
race to the bottom for working people—then I can assure you, it will generate broad opposition that will make Seattle look tame.\textsuperscript{137}

The construction of the fourth branch began, but did not end, with the massive legislative delegations of the 1920's and 1930's. Substantial modifications of the administrative process continued well afterwards.\textsuperscript{138} In particular, concerns about accountability and transparency led to efforts to define a clear role for judicial review and to establish "procedural safeguards" through guidelines for formal agency adjudication and rulemaking.\textsuperscript{139} Such efforts generated, for example, the 1946 enactment of the Administrative Procedure Act.\textsuperscript{140}

Similarly, the construction of the international branch began with the massive delegations of the 1990's to the WTO and NAFTA; but there remains much to do to ensure that the international branch sufficiently reflects the values of American constitutional democracy. Just as the structure and process of administrative law continued to be refined after the establishment of administrative agencies as a significant source of law, the structure and process of international economic law must continue to be reexamined and modified to incorporate the legitimate concerns of the populations it governs.

There are two levels at which the international branch of United States government should become more transparent and accountable. The first level is the process by which the United States joins an international economic organization. At present, under the Trade Act of 1974, the President receives authority, and broadly defined instructions, from Congress to negotiate an international agreement. The agreement is then brought back to Congress for review on the "fast track," that is, within an expedited time frame and without possibility of amendment.

The last two uses of the Trade Act, to implement the North American Free Trade Agreement and the World Trade Organization, indicated that the breadth and complexity of this new generation of organizations have overwhelmed the capacity of Congress to absorb

\textsuperscript{138} DAVIS, supra note 31, at 2.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 9; Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946).
and evaluate them within the current framework. Moreover, the "all-or-nothing" dimension creates enormous and even coercive pressure on Congress to approve an agreement.

The question, then, becomes, how to modify this process to allow for greater transparency and accountability in the process of entering into international agreements, without undermining the efficacy of the United States as an actor in the international community. From the perspective of international plausibility, the prohibition of congressional amendment to international agreements must remain intact. A unilateral amendment by Congress to an international agreement would upset a long, complicated, multilateral negotiation process between heads of state, and undermine its viability. Extending the time frame for Congress to evaluate the agreement is also not the sole solution, because it would not by itself address concerns about transparency and accountability.

A. Opening up the Legislative Process in International Economic Law

The best way forward, then, is to consider how the process of international negotiations might itself be opened up, to allow broad input during, rather than merely after, the formation of the agreement. Just as domestic legislative processes are open to public input, the processes of international rulemaking, currently closed to the public, should also become more transparent. There are at least two possible preliminary models. One would seek to increase direct voter participation, along the lines of an innovation made by the European Union: a European Parliament, elected directly by voters in member countries. The other participatory model would seek to increase participation through non-governmental organizations (NGOs). This model has been followed by international organizations, such as the United Nations and the International Labor Organization, which have established extensive mechanisms for consultation with and participation by non-governmental organizations.\textsuperscript{141} NGOs function as interest groups, providing more

\textsuperscript{141} For an account of the evolution of the role of NGOs in international public institutions, see Steve Charnovitz, Two Centuries of Participation: NGOs and International Governance, 18 MICH. J. INT'L L. 183 (1997). The germ for the contemporary role lay in Article 71 of the United Nations Charter, which allowed the United Nations Economic and Social Council (EcoSoc) to accord "consultative status" to national (after consultation with home Government) and international nongovernmental organizations. U.N. CHARTER art. 71; see also Charnovitz, supra, at 210. The United Nations Economic and Social Council has established several categories of observer and
information and a broader spectrum of political representation than government actors might operate on otherwise.

A predictable objection here is that opening up the international rulemaking process will render the process susceptible to capture by interest groups much in the same way as has been attributed to domestic legislatures. It would be naive, however, to believe that the current process, though closed to the public, is immune from input by interest groups. Rather, the current opacity likely only skews access in favor of highly sophisticated and organized actors. To open up the process is not, therefore, to create a problem of capture, but merely to change, and probably improve, dynamics that already exist.

B. Opening up the Administration of International Economic Law

The second level of this construction project is the process by which these international organizations administer rules once they are created. Richard Shell has argued on civic republican grounds for increased public participation in dispute settlement procedures under the World Trade Organization. Shell has recommended a “Trade Stakeholders Model” that

emphasizes direct participation in trade disputes not only by states and businesses, but also by groups that are broadly representative of diverse citizen interests. It also eschews reliance on any ideology such as free trade theory to define an objective ‘good’ for global society. Rather, the priorities for global society are open-ended and subject to deliberation by those whose lives will be affected by economic decisions.”

consultative status, which accord nongovernmental organizations the rights to attend and speak during EcoSoc meetings, make written submissions to EcoSoc, and obtain EcoSoc documents. R. SYBESMA-KNOL, THE STATUS OF OBSERVERS IN THE UNITED NATIONS 295 (1981). “Article 71 gave NGOs a hunting license to pursue involvement in the U.N. beyond EcoSoc.” Charnovitz, supra, at 256. United Nations organizations such as the World Health Organization, the Intergovernmental Maritime Consultative Organization, and UNESCO accord NGOs consultative status. Id. at 254-56. In the United Nations Environmental Programme, “nongovernmental observers representing both industry and environmental organizations have been freely accredited as observers to formal intergovernmental meetings, with the prerogative of speaking in formal meetings and the entitlement freely to receive preparatory documentation.” David A. Wirth, Public Participation in International Processes: Environmental Case Studies at the National and International Levels, 7 COLO. J. INT'L ENVT'L L. & POL'Y 1, 29 (1996). As for other international public institutions, in the International Labor Organization, delegates representing “workers’ and employers’ organizations… are equal in total number to those representing governments.” Id. at 29-30.

Shell observes that

individuals and NGOs will need to become more deeply involved in
the legislative process by which the world trade community creates
rules and standards—not just the adjudicative processes by which
these rules are applied... If the WTO legal system is to escape the
twin problems of over reliance on states to represent public
interests and over commitment to economic theory as the
foundation for a jurisprudence of world trade, it must evolve new
political mechanisms that will permit broader participation for
those affected by trade decisions.143

Some, though very modest, movement has been made in this
direction. In the WTO, committees have been established for both
environmental and labor regulation. The most movement has been
made in the area of environmental regulation, in particular in the
WTO, and in no small part due to the initiative of environmental
NGOs.144 But the WTO is still quite closed to NGOs.145

Opening up international lawmaking is critical to ensuring the
legitimacy of the newly expanded international order. Legitimacy is
not complacency, however. To the contrary, latent controversies that
currently haunt the process would almost certainly come to the fore.
For example, one consequence of expanding politics at the
international level would likely be that, generally speaking,
representatives from Western countries would prefer higher levels of
“social” regulation than representatives from other countries. This is
because in many countries comparative advantage is constituted
significantly by a cost advantage that results partially from the

143. Shell, Trade Legalism, supra note 142, at 922.
144. See James Cameron, The GATT and the Environment, in GREENING
INTERNATIONAL LAW 100, 102-03 (Phillippe Sands ed., 1993) (describing how the World
Wildlife Fund organization obtained a confidential draft of the agreements, sparking
international mobilization on environmental issues).
145. For example, the WTO had a symposium on trade facilitation that included groups
representing businesses, but not labor or consumers. WTO Symposium on Trade
Facilitation, Geneva, March 9-10, 1998. Represented were companies (from the US,
Federal Express, General Motors, General Electric Information Systems, Mattel),
industry groups, and business NGOs (International Chamber of Commerce, International
Air Transport Association, and the International Chamber of Shipping). See Major
Companies to participate in WTO Trade Facilitation Symposium, available at
http://wto.org/english/news_e/pres98_e/pr93_e.htm; see also Steve Charnovitz, The
Influence of International Labour Standards on the World Trading Regime, 126 INT'L LAB.
REV. 565, 574-75 (discussing “long-term efforts to raise labor issues in GATT”).
relative absence of government restrictions on business, such as minimum wage rates, maximum hour rates, workplace regulations, environmental regulations, and so on. On the other hand, it is possible that representatives from industrialized and non-industrialized states would both endorse some regulatory initiatives, such as raising levels of labor and environmental protection, or protecting other functions of the welfare state.\textsuperscript{146} Introducing democratic politics\textsuperscript{147} to the international sphere does not conclude the effort to construct the international branch; but it does potentially mark a new beginning.\textsuperscript{148}

For internationalists, the specter of the 1930s haunts any discussion of opening up the process of international lawmaking to public input. During this interwar era, populist protectionism and isolationism fueled hostile international policies of the United States, Germany, France, and Britain, eventually facilitating the onset of the second World War. The “Horrors of the 1930s” were precisely what cemented the commitment to American internationalism that in turn nourished the modern “discourse of executive expediency” in foreign affairs law. Conventional wisdom within American international legal scholarship is, consequently and rightly, acutely aware of the protectionism and isolationism that often accompanies popular input. Such awareness is heightened even further within human rights and environmental law, where isolationist sentiments have seemed

\begin{footnotes}
\textsuperscript{146} See Globalisation Must Not Be at the Expense of People, Declaration of NGOs attending the UNCTAD-IX Conference, in preparatory meetings in Midrand, South Africa, April 24-28, 1996 (“The uncontrolled spread of globalization and liberalization cannot be accepted passively as inevitable and irreversible. Civil society demands that governments and international institutions take an active role to control regulate and rechannel the globalization process, and mak[e] it socially and environmentally accountable.”).

\textsuperscript{147} By this I do not mean to suggest that it is possible to achieve perfect democracy through politics, or that such national politics have achieved it. Rather, I mean a politics that values democracy as opposed to one that does not.

\textsuperscript{148} A few potential objections also come to mind. First, that allowing in wider representation of interest groups would privilege the West over other countries, much in the same way as some have argued would result from the judicialization of the dispute resolution system. My response is, similar to my response to judicialization, that this is not necessarily true, and it seems at least no more likely in the latter structure than in the current structure. The second objection would be similar— that the notion of pluralism is a highly specific notion; this cultural institutional objection may be accurate but also would apply to all institutions of the GATT. The third objection, in my mind, is the most interesting—this is the objection that at the international level why should public representation be demarcated according to nationality—why not according to area of interest or some other standard?
\end{footnotes}
particularly effective in undermining the authority of international instruments and organizations.  

Through this lens, the protests in Seattle and other misgivings about international economic organizations might be viewed as a resurgence of suspicion and mistrust of international law which, if heeded, might have destructive consequences for American participation in the international order, and indeed endanger the integrity of the order itself. From this perspective, an argument for increasing popular input and participation in the process of international rulemaking and adjudication courts disaster by nurturing protectionist impulses.

The lessons of history must unquestionably be heeded. And yet, the conventional concerns about popular input are misplaced, or at least outsized, in the current environment. The first decades after World War II saw a mighty, even heroic, struggle to secure a process by which the United States could maintain viable commitment to and involvement in international affairs commensurate with its new status as a world power. These early architects of the postwar international economic order succeeded admirably. Precisely because of their success, the prospect of increasing public participation in international lawmaking must be viewed differently than it has been in the past. Globalization—ushered in by the success of the postwar international economic order—has ensured that the lives of the world’s citizenries are more interconnected than ever before. Rather than undoing the progress that has been made in cementing the world order, introducing democratic politics to international lawmaking furthers its progressive evolution.

Perhaps the best exemplar of such modification at the international level is the European Union. Established in 1958 as the European Economic Communities, the EEC began as a customs union regulating regional trade in a few specific sectors. Over the decades, the EEC established increasingly broad control over the regulatory power of its member states. By the early 1990s, widespread concern had developed that the arrangement suffered from a “democracy deficit”—that is, that the regulatory powers of the system were not sufficiently informed by procedures for popular


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observation of and participation.\textsuperscript{150} The response was the introduction of greater public participation that has proved critical to the legitimacy of the modern structure.\textsuperscript{151}

The increasingly common concerns voiced about the WTO and NAFTA indicate that the international branch of the United States government suffers from similar problems. The opportunities for public observation of and participation in the lawmaking that occurs within these international agencies, however, have remained severely truncated.

\textbf{Conclusion}

In this Article, I have argued that the rise of economic regulation by international organizations is transforming federal government in much the same way as the rise of administrative agencies transformed it at the beginning of the twentieth century. Just as administrative agencies came to be recognized as a de facto “fourth branch” of federal government, United States participation in international economic organizations has generated a de facto “international branch” of federal government.

The construction of this international branch, however, remains incomplete. There has not yet been a period of widespread popular deliberation on and input into how the international branch should look, and, as a result, there are some important defects in its current structure. The text of the federal Constitution cannot offer clear guidance, because it is indeterminate on the proper relationship between the United States government and the international order. The construction effort must fall back, therefore, on a consideration of fundamental values in American democracy. Ultimately, the new, international branch of federal government must balance the competing values that American democratic theory places on governmental expertise and governmental accountability. In this light, the ongoing effort to construct the international branch must correct its current tendency to privilege expediency over openness.
