Why Constitutionalism *Now*? Text, Context and the Historical Contingency of Ideas

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INTRODUCTION

I am pleased to contribute to the first issue of the *Journal of International Law & International Relations*. In this short essay, I wish to comment upon the current debate over constitutionalism at the World Trade Organization (WTO), and use this debate to reflect on the interdisciplinary nature of trade law scholarship and some of the current challenges facing international law. To do so, I will review the three leading accounts of WTO constitutionalism found in the legal literature. I will then suggest that these otherwise divergent views of constitutionalism share an impulse to channel or minimize world trade politics. Paradoxically, however, the call for constitutionalism has sparked precisely the sort of politics that it seeks to pre-empt. Hence, one part of this article will be devoted to illustrating the self-defeating nature of the turn to constitutionalism.[1]

But this raises a puzzle: if there is no world trade constitution, and if the calls for such a constitution trigger the very politics that constitutionalism seeks to avoid, why do leading trade scholars continue to debate the WTO's 'constitution'? Exploration of this question will lead us to deeper and more troubling questions about the current status of the discipline of international law, as well as to some reflections on the historical conditions under which IL/IR scholarship is most likely to flourish. In particular, I will discuss the relationship between the scholarly preoccupation with constitutionalism at the WTO and a geopolitical context where the ascendance of realist approaches to international affairs poses serious challenges to international law.

I THE TURN TO CONSTITUTIONALISM

Although international lawyers have long invoked constitutional imagery,[2] constitutional discourse has become more prominent in

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1 These ideas are drawn from a larger work-in-progress, tentatively titled 'Constitutionalism's Conceits' [unpublished, on file with author].

2 See e.g. Alf Ross, *The Constitution of the United Nations: Analysis of Structure and Function* (New York: Rinehart, 1950); Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens, 1950) at 463 (arguing that, in post-World War II era, human rights are at 'the very centre of the

recent years. The increased salience of this discourse reflects, in part, radical constitutional changes in the former Eastern Bloc states following the end of the Cold War, the increased use of comparative constitutional techniques by various constitutional courts, and the ongoing ratification debates over the treaty establishing a Constitution for Europe.

In recent years, WTO scholarship has also experienced a turn to constitutionalism. It is tempting to locate the constitutional turn in trade scholarship within the context of the broader focus on constitutionalism throughout international law. But there is an immediate and dramatic contrast between the trade context and the other contexts mentioned above: in the WTO, of course, there is no ongoing political process intended to generate a constitutional document, nor any likelihood of such a process in the foreseeable future. There is no constitutional convention, no constitutional drafting process, and no readily identifiable constitutional moment. Immediately, then, we are struck by a puzzle: what do WTO scholars mean when they speak of constitutionalism at the WTO?

Not surprisingly, 'constitutionalism' is a highly contested term that is used in different ways by different authors.[3] Nevertheless, it is possible to characterize the most prominent of this scholarship as falling into one of three different categories. As described below, the most influential trade scholarship understands the WTO constitution to consist of either (1) the WTO's institutional architecture; (2) the privileging of a set of normative commitments; or (3) a process of

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constitution of the world'); Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) at v.

3 In addition to the authors discussed below, important discussions of constitutionalism at the WTO can be found in Joel P. Trachtman, *The WTO Constitution: Tertiary Rules to Untangle Intertwined Elephants* [unpublished, on file with author]; Tomer Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (London: Cameron and May, 2004); Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints' (2004) 98 Am. J. Int'l L. 247; Robert L. Howse & Kalypso Nicolaides, 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?' (2003) 16 Governance 73; Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key' in Grainne De Burca & Joanne Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart, 2001); Robert Howse & Kalypso Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far' in Roger B. Porter *et al.*, eds., *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings, 2001) at 227; G.E. Evans, *Lawmaking Under the Trade Constitution: A Study in Legislating by the World Trade Organization* (Boston: Kluwer, 2000); John O. McGinnis & Mark L. Movsesian, 'The World Trade Constitution' (2000) 114 Harv. L. Rev. 511.

judicial mediation among conflicting values. Each of these understandings is briefly described below.

The WTO Constitution as Institutional Architecture

The most prominent strand of trade scholarship understands the WTO constitution primarily in institutional terms, and the most prominent advocate of this understanding is John Jackson. Because Jackson's 'constitutional' vision has been ably discussed elsewhere,[4] I will offer here only a brief summary of his arguments.

'Constitutional' arguments run through much of Jackson's scholarship.[5] The most influential version of these arguments appears in *Restructuring the GATT System*, published during the Uruguay Round negotiations. This short book proposes a 'constitutional' status and structure for the international trade system. In part, Jackson justifies a constitutional structure as a practical way to address the General Agreement on Tariffs and Trade (GATT)'s famous 'birth defects', including the 'provisional' nature of GATT obligations; the losing state's ability to veto adverse dispute settlement reports; and the difficulties in modifying GATT rules.

In addition to these characteristically 'pragmatic' arguments,[6] Jackson advances a bold historical-descriptive—and normative—claim: 'To a large degree the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rule-oriented approach.'[7] Jackson emphasizes that, in the economic context, only a rule-oriented approach will provide the security and predictability necessary for decentralized international

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

5 For a sampling, see e.g. John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998); John H. Jackson, *Restructuring the GATT System* (London: Royal Institute of International Affairs, 1990); John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merril, 1969); John H. Jackson, 'The WTO "Constitution" and Proposed Reform: Seven "Mantras" Revisited' (2001) 4 J. Int'l Econ. L. 67; John H. Jackson, 'The Perils of Globalization and the World Trading System' (2000) 24 Fordham Int'l L.J. 371; John H. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results' (1998) 36 Colum. J. Transnat'l L. 157; John Jackson, 'Reflections on Constitutional Changes to the Global Trading System' (1996) 72 Chi.-Kent L. Rev. 511; John H. Jackson, 'The Birth of the GATT-MTN System: A Constitutional Appraisal' (1980) 12 Law & Pol'y Int'l Bus. 21.

6 For an analysis of Jackson's 'pragmatic' style, see Robert L. Howse, 'The House that Jackson Built: Restructuring the GATT System' (1999) 20 Mich. J. Int'l L. 107; David Kennedy, 'The International Style in Postwar Law and Policy' (1994) 1994 Utah L. Rev. 7.

7 Jackson, *Restructuring the GATT System, supra* note 5 at 52.

markets to function.

Jackson argues that this new rule-oriented approach can best occur through a 'constitution' creating a new international organization. Jackson's proposed new trade constitution provides an 'institutional structure' for the trade regime. It addresses 'governance issues' by creating an 'assembly' of all members and a smaller 'executive council,' and provides a 'panel procedure' for dispute settlement.[8] Jackson argues that a successful conclusion of the Uruguay Round talks 'will only reinforce the need' for a trade constitution.[9] Jackson closes this book with a challenge to trade negotiators, asking them whether the emerging trade constitution 'will be carefully thought through or be merely the result of the happenstance of the negotiation endgame?'[10] Jackson's proposals helped spark negotiations over the need for a new trade organization, and delegates involved in the Uruguay Round talks confirm that much of the WTO's innovative and controversial institutional structure owes much to Jackson's writings and advocacy.[11]

The WTO Constitution as Normative Commitment

A second strand of scholarship views constitutionalism as the privileging of a set of normative commitments. Perhaps the most prominent advocate of this position is Professor Ernst-Ulrich Petersmann.[12] For Petersmann, constitutionalism is less an institutional

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8 *Ibid*. at 94-100.

9 *Ibid*. at 103.

10 *Ibid*.

11 Debra P. Steger, 'A Tribute to John Jackson' (1999) 20 Mich. J. Int'l L. 165 at 166 (Canada's Senior Negotiator on the Establishment of the WTO and Dispute Settlement in the Uruguay Round states that '[i]ndeed, he [Jackson] can be credited with having sown the seeds of the idea to establish a World Trade Organization'). See also Debra Steger, 'The World Trade Organization: A New Constitution for the Trading System' in Marco Bronckers & Reinhard Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) at 135.

12 An incomplete listing of Petersmann's writings on constitutionalism includes: Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 Eur. J. Int'l L. 621; Ernst-Ulrich Petersmann, 'The WTO Constitution and the Millennium Round' in *New Directions in International Economic Law*, *supra* note 11 at 111; Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 J. Int'l Econ L. 19; Ernst-Ulrich Petersmann, 'Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition' (1999) 34 New Eng. L. Rev. 145; Ernst-Ulrich Petersmann, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations'

arrangement than a set of normative values that protect against both government overreaching and short-sighted decisions by the population: 'The self-limitation of our freedom of action by rules and the self-imposition of institutional constraints … are rational responses designed to protect us against future risks of our own passions and imperfect rationality.'[13] In this context, Petersmann invokes the familiar story of Ulysses ordering his companions to bind him to the mast when approaching the island of the sirens;[14] constitutions consist of pre-commitments to norms that 'effectively constitute and limit citizen rights and government powers.'[15]

Moreover, Petersmann's most recent writings on constitutionalism suggest that the elevation and protection of fundamental human rights lie at the core of his constitutional vision.[16] More controversially, Petersmann has argued that economic freedoms lie at the heart of fundamental human rights. Following Jan Tumlir, Fredrich Hayek, and others, Petersmann emphasizes the fundamental importance of 'economic freedoms' such as the freedom 'to produce and exchange goods', and argues that 'market freedoms are indispensable' for human autonomy and self-determination.[17] Petersmann repeatedly praises European integration law for 'fully recogniz[ing]' that 'transnational "market freedoms" for movements of goods, services,

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(1997) 10 Leiden J. Int'l L. 421 [Petersmann, 'How to Reform the UN System']; Ernst-Ulrich Petersmann, 'How to Constitutionalize the United Nations? Lessons from the "International Economic Law Revolution"' in Volkmar Gotz, Peter Selmer & Rudiger Wolfrum, eds., *Liber Amicorum Gunther Jaenicke* (1998) at 313 [Petersmann, 'How to Constitutionalize the UN System']; Meinhard Hilf & Ernst-Ulrich Petersomann, eds., *National Constitutions and International Economic Law* (Deventer: Kluwer, 1993); Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg: University of Fribourg Press, 1991).

13 Ernst-Ulrich Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?' (1998) 20 Mich. J. Int'l L. 1 at 1 [Petersmann, 'How to Constitutionalize International Law'].

14 *Ibid*.; Ernst-Ulrich Petersmann, 'How to Reform the United Nations: Lessons from the International Economic Law Revolution' (1997-98) 2 UCLA J. Int'l L. & Foreign Aff. 185 at 223; Petersmann, 'How to Reform the UN System', *supra* note 12 at 436. In invoking this image, Petersmann follows Jon Elster's pathbreaking work. See e.g. Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1984).

15 Petersmann, 'How to Constitutionalize International Law', *supra* note 13 at 13.

16 Ernst-Ulrich Petersmann, 'Human Rights and the Law of the World Trade Organization' (2003) 37 J. World Trade 241.

17 Petersmann, 'How to Constitutionalize International Law', *supra* note 13 at 17.

persons, capital, and related payments' are judicially enforceable 'transnational citizen rights'[18] and urges the WTO and other international organizations to follow Europe's lead in this regard.

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

The WTO Constitution as a Judicial Mediating Device

Perhaps the dominant conception of constitutionalism focuses upon WTO dispute settlement as the engine of constitutionalism. A leading exponent of this view is Professor Deborah Cass, who argues that the WTO's Appellate Body (AB) 'is the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution.'[19]

Cass argues that the AB generates constitutional norms through four distinct processes.[20] First, the AB borrows constitutional rules, principles and doctrines from other systems and amalgamates them into the AB's own case law. Second, the AB's decisions 'are constitutive of a new system of law.' That is, through decisions that generate rules on burdens of proof, fact finding and participation by non-state actors, the AB is 'inaugurating a [specific] type of legal system.' Third, the AB is incorporating into its jurisdiction issues traditionally viewed as being within national constitutional processes, such as public health. Finally, Cass argues that the AB 'associates itself with deeper constitutional values' in the ways that it carefully crafts and justifies its decisions. It does so by addressing such background constitutional questions as 'how to design a fair system of law … [and] how policy responsibility will be divided.' In addressing these sorts of issues, Cass argues, the AB associates its jurisprudence with that of other constitutional systems.

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18 *Ibid.*; Ernst-Ulrich Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets' (2003) 37 Loy. L.A. L. Rev. 407.

19 Deborah Z. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 Eur. J. Int'l L. 39 at 42. For another argument that the AB is an agent of constitutional change, see G.E. Evans, 'Confronting the Constitutional Imperative: The Jurisprudence of Intellectual Property in the Supreme Court of the World Trade Organization' [unpublished manuscript, on file with author].

20 Cass, *ibid.* at 51-2.

Cass argues that, taken in the aggregate, the four features she identifies are the mechanisms through which 'the emerging jurisprudence of the WTO is beginning to develop a set of rules and principles that share some of the characteristics of constitutional law; and that this in turn is what contributes to the constitutionalization of international trade law.'[21] Behind the doctrine, Cass argues, is a preoccupation with the sorts of issues that preoccupy constitutional courts: 'questions about the division of powers; ... [of] state sovereignty ... [questions] about how a legal system is constituted, its overall validity, its democratic contours, its very legitimacy.'[22] In short, for Cass, the AB is 'building ... a constitutional system by judicial interpretations emanating from the judicial dispute resolution institution.'[23] Moreover, Cass suggests, these various techniques are often employed to help 'mediate' among conflicting values that are present in the trade system, and hence to resolve issues that WTO members are presumably unable to resolve in WTO negotiating fora.

What Constitution?

To be sure, the short summaries above do not do justice to a rich and nuanced literature.[24] But all of the competing conceptions of constitutionalism confront an inescapable problem: there is no world trade constitution. The WTO texts do not announce themselves to be a world trade 'constitution'; indeed they do not even create a world trade legislature or vest autonomous legislative or regulatory capacity in a WTO body. Moreover, the WTO texts surely do not set out a constitutional system along the lines set out in trade scholarship; they do not contain features commonly associated with the institutional structures of constitutionalism, such as a system of separation of powers or checks and balances; they do not explicitly enshrine a 'right to trade'; and they do not explicitly empower the AB to establish a constitutional system through judicial interpretation. Indeed, despite the development of a rich and complex jurisprudence, WTO dispute settlement reports do not contain even a single reference to a trade constitution, whether understood as institutional architecture, a fundamental right to trade, or the AB's norm-generating capacities.[25] Additionally, many states,

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

22 *Ibid*. at 72.

23 *Ibid*. at 52.

24 For a fuller discussion, see e.g. 'Constitutionalism's Conceits', *supra* note 1; *supra* note 3.

25 This argument is developed at length in 'Constitutionalism's Conceits', *supra* note 1.

including major trading powers such as the United States and the European Union, have refused to give 'direct effect' to WTO treaty obligations, meaning that private parties cannot invoke WTO rules in domestic courts. In short, despite the burgeoning scholarly literature, the WTO does not establish a world trade constitution.

Moreover, the various and diverse uses of the term constitutionalism by different trade scholars raises the question of whether we should even consider the writings on constitutionalism as engaged in a common project: is the term constitutionalism too protean and indeterminate to be of analytic use? Is there a link between the various uses of the term? Most fundamentally, what is gained by the invocation of constitutional discourse?

II CONSTITUTIONALISM AS ANTIDOTE TO TRADE POLITICS

For current purposes, there is another way to understand these three visions of constitutionalism at the WTO: each can be understood as standing in opposition to a broad and inclusive vision of world trade politics. That is, in each of the three leading accounts, we can understand constitutionalism as a mechanism for withdrawing an issue from the battleground of power politics and as a vehicle for resolving otherwise politically destabilizing political disputes through reference to a meta-agreement. This constitutional 'agreement'—whether embodied in institutions, in foundational text, or in judicial doctrine and traditions that gloss the text—can then be used to resolve and pre-empt debate over what would otherwise be controversial issues that threaten the realm of ordinary politics. In short, the constitutionalist move is designed to 'bring[ ] international power politics under the strong arm of the "rule of law."'[26]

Consider again, for example, Jackson's constitutional vision. As noted, Jackson's constitutional gaze is fixed on institutional architecture. This attention is eminently understandable; '[s]tructural design is the basic hardware for constitutional practice, and the most familiar, visible and tangible index of constitutional continuity and change.'[27] However, recall the purpose of this institutional architecture: to introduce a 'rule based' system that will replace the pre-existing 'power based' trade system. Jackson is explicit that, at bottom, the new rules based system is designed as an antidote to the corrupting influence that the exercise of 'power'—that is, politics—has heretofore exerted on international trade politics.[28]

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[26] Broude, *supra* note 3 at 82 (describing and critiquing the constitutionalist move).

[27] Neil Walker, 'After the Constitutional Moment' [forthcoming].

[28] Ironically, Jackson has recently begun to lament the fact that the quest for a

Petersmann similarly understands constitutionalism as a necessary corrective to the pathologies of politics: '[c]onstitutionalism emerged in response to negative experiences with abuses of political power as a means to limit such abuses through rules and institutions.'[29] Or, as Petersmann memorably suggests, constitutionalism's foundational insight is that the central political question is not who shall govern, but rather 'how must laws and political institutions be designed … so that even incompetent rulers and politicians cannot cause too much harm.'[30]

More specifically, Petersmann's arguments about the need to integrate market freedoms into human rights law reflects one very particular—and contested—vision of human rights. There is a much larger debate, or political struggle here, both within and among nations, about the appropriate balance among economic and non-economic policy goals. To constitutionalize one controversial view of that balance is, in effect, to pre-empt that debate and that struggle.

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

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rule-oriented system may have succeeded too well. He has, with implicit disfavour, compared the AB's essentially unreviewable power with that of national courts whose decisions are subject to legislative overrides (John H. Jackson, 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism' in *Brookings Trade Forum* (Washington, DC: Brookings, 2000) 179 at 200). He notes that, while the GATT's underdeveloped institutional provisions permitted a certain 'ability to evolve through trial and error' the WTO's quite formalized and difficult voting requirements 'seems to place unwarranted limits on this approach.' The resulting inflexibility 'raises the substantial risk of impasse in addressing the problems that the WTO faces' (*ibid*. at 205). See also John H. Jackson, 'International Economic Law: Jurisprudence and Contours' (1999) 93 Am. Soc'y Int'l L. Proc. 98 at 103 ('And one of the problems of the WTO Charter is … [that t]he negotiators were jealous of each other and worried about the impact on sovereignty of this new organization. They were fearful of some of its potential powers. In particular during the last six months of the active negotiation, the negotiators put into the WTO Charter a series of checks and balances and constraints which arguably may have gone a little too far').

29 Ernst-Ulrich Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?' (1999) 31 N.Y.U. J. Int'l L. & Pol. 753 at 758.

30 Petersmann, 'How to Reform the UN System', *supra* note 12 at 422.

Thus, a common link between these three otherwise quite different understandings of the WTO's constitution is that, for each of the scholars surveyed, the turn to constitutionalism is that made in the service of a larger turn away from politics. That is, for each of the scholars surveyed, the rise of the WTO as a constitutional entity can be understood as a corrective or replacement for unruly and potentially destructive trade politics.[31] In this sense, the constitutionalists' turn away from politics is consistent with the prescriptive mission of most international law scholarship: 'to replace politics—bad, old-fashioned, violent, nationalist, particularist, rent-seeking politics—with law … .'[32]

However, considering the broad historical trajectory of the trade regime, the turn to constitutionalism can be understood more as a step backwards than a step forwards.[33] As Robert Keohane and Joseph Nye have argued, the original GATT was premised upon a 'club model' of international cooperation.[34] That is, during GATT's early years a relatively small number of economists and diplomats from like-minded states worked quietly to make trade policy without significant public input or oversight, in other words, without much politics:

> The GATT successfully managed a relative insulation from the 'outside' world of international relations and established among its practitioners a closely knit environment revolving around a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long-term first-name contacts and friendly personal relationships. GATT operatives became a classical 'network' ….[35]

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31 Others have noted the distinction between WTO norms and ordinary politics. See e.g. Laurence R. Helfer, 'Constitutional Analogies in the International Legal System' (2003) 37 Loy. L.A. L. Rev. 193 at 202 ('[a] … characteristic that buttresses WTO's incipient constitutional character is its *de facto* separation of international trade from ordinary domestic politics').

32 David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (1999-2000) 32 N.Y.U. J. Int'l L. & Pol. 335 at 401.

33 For an insightful account of this trajectory, see Robert Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 Am. J. Int'l L. 94.

34 Robert O. Keohane & Joseph S. Nye, 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy' in *Efficiency, Equity, and Legitimacy*, *supra* note 3 at 264.

35 Joseph H.H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of Dispute Settlement, in *Efficiency, Equity and Legitimacy, supra* note 3 at 334. For a critique of Weiler's argument, see Jeffrey L. Dunoff, 'The WTO's Legitimacy Crisis: Reflections on the Law and Politics of WTO Dispute Resolution' (2002) 13

The Club Model's 'politics-free zone' lasted for many years because it was successful, in the sense that it oversaw dramatic decreases in tariffs and other trade barriers, and a corresponding increase in global trade and prosperity.

Paradoxically, however, the advantages of the Club Model of trade policy-making contained the seeds of its own destruction. First, increasing trade liberalization caused citizens to be more sensitive to further liberalization.[36] This sensitivity complicated future efforts at liberalization. In addition, the Club Model was not sustainable in a context where developing states and civil society began to demand a greater role in trade negotiations and policy-making.

Today, the WTO is no longer an obscure body dealing with tariffs, but a highly visible component of an emerging regime of global economic governance: 'The days of major agreements being hammered out in Geneva hotels by a trade cognoscenti operating under the radar of public view are gone forever. Whatever the virtues of keeping special interests off balance and out of the way, the closed-door style of negotiations that lies at the heart of the Club Model is no longer workable.'[37] The pressures on the WTO strongly suggest that whatever replaces the old Club Model must be more transparent and participatory. In this sense, the turn to constitutionalism—a turn away from politics—is precisely not what the WTO needs.

The deeper paradox, of course, is that constitutionalism—at least the versions most prominent in trade scholarship—cannot possibly deliver the escape from politics that it promises. Jackson would house trade politics within the WTO's institutional apparatus. Of course, only states can be members of the WTO. But this means that WTO institutions reinscribe the very state-centric political order that many of the most controversial trade disputes put at issue.[38] The most dramatic examples of world trade politics, including the Seattle Ministerial and controversies over access to essential medicines, highlight the ways in which trade politics can no longer be understood simply as inter-state politics—and, more importantly, that in their current configurations the WTO's institutions do not and cannot contain world trade politics.[39]

Am. Rev. Int'l Arb. 197.

36 Jeffrey L. Dunoff, 'The Death of the Trade Regime' (1999) 10 Eur. J. Int'l L.733.

37 Daniel C. Esty, 'The World Trade Organization's Legitimacy Crisis' (2002) 1 World Trade Review 7 at 12.

38 Jeffrey L. Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence' (2001) 33 Geo. Wash. Int'l L. Rev. 979.

39 Sylvia Ostry, 'The WTO—In Dire Need of Reform' (2003) 17 Temple Int'l & Comp. L.J. 109. Of course, much the same is true in domestic systems; for example, the US Supreme Court's 'constitutional' decisions in

Indeed, the strength and durability of the legitimacy critique of the WTO suggests the inevitable failure of the WTO's current institutional structure. That is, the structural limitations of this architecture almost guarantee an inadequate foundation of the democratic participation and accountability necessary for the social legitimacy that any effort to constitutionalize the trade system needs to succeed.

As we've seen, Petersmann would enshrine and elevate economic freedoms, including a 'right to trade'. Petersmann argues that, in proper constitutional orders, government restrictions on economic rights, including the right to trade, should be subject to a strict 'necessity' test.[40] As Professors Robert Howse and Philip Alston have shown, this 'necessity' test underscores how significantly Petersmann's vision of constitutionalism privileges economic rights as opposed to other important and competing social interests.[41] In practice such an elevation of economic rights would necessarily limit governments' ability to pursue many non-economic goals, such as environmental protection and other social policies. But WTO efforts to discipline states in areas of social policy—particularly through the dispute settlement process that Cass champions—are precisely what triggers world trade politics, as the response to WTO reports in trade-environment disputes illustrates.

Trade scholars invoke constitutional discourse because of the undoubted power that this discourse has in legal circles. However, the ideological and symbolic power associated with constitutional discourse has prompted powerful responses from those who would counterclaim or deny constitutional authority. Paradoxically, while the turn to constitutionalism can be seen as an effort to close down debate and remove issues from the domain of political contestation, in practice the advocates of constitutionalism have inadvertently triggered a robust and productive normative debate. Jackson's vision of constitutionalism has sparked a growing literature on whether the WTO's institutional structure is or should be considered 'constitutional'.[42] Similarly, Petersmann's efforts to 'constitutionalize' a human right to trade within

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contentious areas such as abortion and affirmative action hardly ended public debate on these contentious issues.

40 Petersmann, 'How to Reform the UN System?', *supra* note 12 at 431.

41 See e.g. Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 Eur. J. Int'l L. 815; Robert Howse, 'Human Rights in the WTO: Whose Rights, What Humanity?' (2002) 13 Eur. J. Int'l L. 651.

42 See e.g. Howse & Nicolaidis, *supra* note 3 at 227; Peter M. Gerhart, 'The Two Constitutional Visions of the World Trade Organization' (2003) 24 U. Pa. J. Int'l Econ. L. 1.

WTO law prompted a vigorous response,[43] and Cass's vision of the AB's constitutional powers joins a large literature debating the norm-generating and constitutional dimensions of WTO dispute resolution.[44] In short, the advocates of constitutionalism have—perhaps inadvertently—helped to fuel a vociferous debate over 'the empirical and normative validity of a vision of the WTO as a constitutional polity'.[45]

III Does the Debate Over Constitutionalism Signal a Maturation of the Field or a Discipline in Crisis

If the analysis above is accurate, we confront an even more difficult puzzle than the ones already discussed: given the problems with constitutional discourse—and that arguments about constitutionalism have been available for years—why are so many scholars *now* preoccupied with debating constitutionalism at the WTO?

There are many possible answers to this question. As the arguments above contradict most recent trade scholarship, it is possible that I am mistaken in claiming that the current trade regime is not properly considered a constitutional entity. From the mainstream perspective, constitutional discourse provides a useful vocabulary with which to understand the WTO's robust and legalistic approach to dispute resolution, innovative enforcement mechanisms, and the superiority of WTO norms over conflicting domestic statutes. More broadly, constitutionalism's advocates argue that the enhanced trade regime is just one instantiation of the broadening and deepening of international legal norms across subject areas, and the turn to constitutionalism should be celebrated as a welcome and, indeed, overdue development in international law.

But what if the critique of constitutionalism presented above is correct? If we flip the conventional wisdom about constitutionalism on its head, should we also question the prevailing orthodoxy concerning the flourishing of international law? In particular, might we entertain the counterintuitive argument that the turn to constitutionalism is less a

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43 See e.g. Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 Eur. J. Int'l L. 753; Alston, *supra* note 41; Howse, *supra* note 41. For Petersmann's rejoinder, see Ernst-Ulrich Petersmann, 'Taking Human Rights, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 Eur. J. Int'l L. 845.

44 See e.g. Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, DC: AEI Press, 2001); Dunoff, *supra* note 36.

45 Joanne Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 Eur. J. Int'l L. 307 at 347-8.

sign of international law's flourishing than a sign of a discipline in crisis?

A constellation of events in the 1980s and 1990s—the end of the Cold War, the fall of the Berlin Wall, the apparent revitalization of the United Nations—gave rise to heady claims about the reality and the promise of international law. The creation of the WTO was just one of many developments that led prominent scholars to declare that international law had finally entered a 'post-ontological' age[46] and proclaim that '[I]nternational legal rules, procedures and organizations are more visible and arguably more effective than at any time since 1945.'[47] In this context, international lawyers occupied themselves with arguments regarding how to manage the welcome albeit potentially problematic proliferation of international norms, institutions and tribunals,[48] and a central jurisprudential task was to determine which of the various theoretical explanations of why nations comply with international law was the most persuasive.[49]

But international law's triumphalist moment quickly faded, and today the discipline faces severe challenges, both from within and without. From within, empirical studies question international law's effectiveness[50] and a revisionist literature attacks international law's

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46 Thomas M. Franck, *Fairness in International law and Institutions* (Oxford: Clarendon Press; New York: Oxford University Press, 1995).

47 Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 Am. J. Int'l L. 205.

48 On the proliferation of international courts and tribunals, see e.g. Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford, New York: Oxford University Press, 2003); Thomas Buergenthal, 'The Proliferation of International Courts and Tribunals: Is It Good or Bad?' (2001) 14 Leiden J. Int'l L. 267; *Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle* (1999) 31 N.Y.U. J. Int'l L. & Pol. 679; Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 Australian YBIL 191; Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 217 Rec. des Cours 101.

49 See e.g. Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995) (managerial theory of compliance); Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) (compliance as function of law's legitimacy); Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale L.J. 2599 (transnational legal process explanation for compliance). For an insightful overview of competing compliance theories, see Kal Raustiala & Anne-Marie Slaughter, 'International Law, International Relations, and Compliance' in Walter Carlnaes *et al.*, eds., *The Handbook of International Relations* (London: Sage Publications, 2002).

50 See e.g. Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference' (2002) 111 Yale L.J. 1935. Hathaway's empirical claims about

premises and foundations.[51] From without, realist approaches to international relations, which minimize the importance of international legal norms, seem ascendant. Most pointedly, in recent years the world's hegemon has recently had a rather uneasy relationship with international legal norms and institutions, as illustrated by the refusal to ratify the Kyoto Protocol, the 'unsigning' of the Rome Treaty creating the International Criminal Court, the rejection of the Land Mines and Comprehensive Test Ban Treaties, the repudiation of the ABM treaty, the denigration of the Geneva Conventions and norms against torture, and, perhaps most ominously, the invasion of Iraq and assertion of a doctrine of preventive war that is in considerable tension with conventional understandings of the norms governing the use of force.[52]

In short, today the discipline of international law is under siege. United Nations Secretary General Kofi Annan diplomatically states that, given recent events, international law and institutions face 'a fork in the road' as momentous as that faced in 1945, when the post-War order was built.[53] More pessimistically, Thomas Franck observes that, 'in the new millennium, after a decade's romance with something approximating law-abiding state behavior, the law-based system is once again being dismantled.'[54] Against this backdrop, we should examine whether the scholarly turn to constitutionalism reflects international law's strength and vigour—or precisely the opposite. My thesis is that international lawyers invoke rhetorical tropes, like constitutionalism, out of a sense of disciplinary anxiety and a felt need to invest international legal bodies with the power and authority that domestic

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the relative ineffectiveness of human rights treaties have sparked substantial debate. See e.g. Ryan Goodman & Derek Jinks, 'Measuring the Effects of Human Rights Treaties' (2003) 14 Eur. J. Int'l L. 171; Oona A. Hathaway, 'Testing Conventional Wisdom' (2003) 14 Eur. J. Int'l L. 185.

51 See e.g. Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Jack L. Goldsmith & Eric A. Posner, 'A Theory of Customary International Law' (1999) 66 U. Chi. L. Rev. 1113.

52 A large literature addresses the challenges that US hegemony poses to international law. See e.g. Michael Byers & Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003); José E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 Am. J. Int'l L. 873; Henry J. Richardson, III, 'U.S. Hegemony, Race and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq' (2001) 17 Temple International and Comparative Law Journal 27; Detlev F. Vagts, 'Hegemonic International Law' (2001) 95 Am. J. Int'l L. 843

53 Secretary-General's Address to the General Assembly, 23 September 2003, UN GAOR, 58th Sess., 7th mtg., UN Doc. A/58/PV.7 (2003), at 3.

54 Thomas M. Franck, 'What Happens Now? The United Nations After Iraq' (2003) 97 Am. J. Int'l L. 607 at 608.

constitutional mechanisms possess.

Against this backdrop of disciplinary anxiety the trade regime might seem an apt setting within which to offer constitutional arguments. There can be little doubt that '[w]hatever its flaws, the [WTO] is the envy of international lawyers who are more familiar with less efficient and more compliance-resistant legal regimes, including those within the International Labor Organization (ILO), United Nations (UN) human rights bodies, and other adjudicative arrangements such as the World Court or the ad hoc war crimes tribunals.'[55] Hence, if any international legal regime would display the features associated with constitutionalism, it would appear to be the WTO.

Moreover, the current disciplinary anxiety would also explain another curious aspect of WTO scholarship – the excessive attention given to WTO dispute resolution. As I've explained elsewhere, this focus can be extraordinarily misleading, particularly given how few trade disputes actually make their way into the WTO's formalized dispute resolution system, and how much WTO activity—in WTO counsels, committees and elsewhere—goes largely unnoticed and unexamined in trade law scholarship.[56] However, in the face of the realist challenge, WTO dispute settlement has an attribute that international law is always criticized for lacking: effective enforcement mechanisms. WTO dispute resolution thus possesses the allure of an international legal regime with teeth, and hence a simple and compelling answer to realist sceptics who doubt that international law is really 'law'.[57]

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[55] Jose E. Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7 Widener L. Symp. J. 1 at 1.

[56] Jeffrey L. Dunoff, 'Lotus Eaters: The Varietals Dispute, the SPS Agreement, and WTO Dispute Resolution' in George Bermann & Petros Mavroidis, eds., *Health Regulation in the WTO* (Cambridge: Cambridge University Press) [forthcoming in 2005]

[57] Indeed, a significant body of writings explicitly take up this theme. Consider, for example, the observations of a former member of the WTO's Appellate Body:

> '[I]nternational law remains a primitive legal system.' And no doubt this is how the current status of international law is best described in terms that are familiar to theorists of jurisprudence. … International law might best be described as being, so to speak, out on the legal frontier.
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> And out on the legal frontier, out where the bluebonnets grow, out where the lonesome prairie stretches as far as the eye can see, *out there* is international law. … Out there are the open ranges of lawlessness that are still awaiting the fences of law that alone can secure true freedom. And out there, above the far horizon, shining brightly in the big sky, is the 'lone star' of the WTO
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> No, the WTO is not by any means the *only* star that shines in the

There is yet another reason to suspect that the turn to constitutionalism reflects vulnerability rather than strength. For many years the existence of an international body or institution provided its own justification; today something more is required. This is particularly true in the WTO's case. Since the public protests in Seattle and Cancun it is clear that the trade regime can no longer present itself in technocratic terms without need of popular acceptance.[58] From this perspective, the turn to constitutionalism can be understood as an effort to find a legitimating principle for a system that faces a 'legitimacy crisis' and the explosion of theories of constitutionalism understood as an implicit acknowledgment of both the WTO's power and the lack of a broad popular basis for exercising that power.

IV INTERDISCIPLINARY SCHOLARSHIP AND THE LAUNCH OF IL/IR

The analysis above suggests that scholarly arguments and trends often reflect specific historical contexts. At the founding of this new interdisciplinary journal, it may be appropriate to offer a few thoughts on the historical circumstances in which IL/IR scholarship is most likely to flourish.

Among American legal academics, it is a truism that 'we're all realists now.'[59] I take this claim to mean that much of what was a radical realist assault on the previously dominant form of legal thought—often called formalism—is now accepted as mainstream legal thinking. Legal realism challenged formalist notions that rules generated determinate outcomes to specific legal controversies, and that legal questions could be answered by reference to the inherent nature of

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firmament of international law. And the WTO is not by any means the only star that *must* shine if we hope to shed light on the darkness of all the wide-open spaces that face all those who would free humanity by building the fences of law. But the WTO is, for now, the brightest star. Ours is a time of aggressive unilateralism. Ours is a time of retreat from multilateralism.

Ours is a time when the hopes of all those who march for freedom depend on a renewed internationalism that relies on international law. And, at this time when we are so much in need of increased support for international law, the WTO is a 'lone star.' Often alone among global tribunals, the WTO is proving that international law can work, that international law can be real, and that international law can be upheld. The WTO is offering new and needed proof to the world every day that multilateral approaches to multilateral challenges can result in multilateral successes (James Bacchus, 'Lone Star: The Historic Role of the WTO' (2004) 39 Tex. Int'l L.J. 401 at 406-7).

58 Howse, *supra* note 33.

59 See e.g. Joseph William Singer, 'Legal Realism Now' (1988) 76 Cal. L. Rev. 465. This phrase, of course, refers to legal realism, and not political science realism.

abstract legal categories like 'contract' or 'liberty'. For the realist, '[l]egal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends.'[60] Hence, the realists helped move policy analysis, interest-balancing and process concerns into academic legal thought. Of course, these contemporary truisms were not always considered truths, and formalism held sway in the legal academy for many decades.

Among international legal academics, at least those trained in American law schools, it is increasingly a truism that 'we're all interdisciplinary scholars now.' That is, most international lawyers would accept the claim that international law is not an autonomous discipline; rather, international law is increasingly understood as a discipline that is itself interdisciplinary. Hence, arguments about the need for international institutions often rest, at least implicitly, on theories regarding the comparative advantages of centralized versus decentralized governance, or rational choice arguments about externalities, transaction costs, focal points or the like. Similarly, it is impossible to explain much of international trade law without implying economic theories of comparative advantage, or game theoretic accounts of prisoner's dilemmas, or public choice accounts of well-concentrated producer interests, or the like; or much of international environmental law without implying an economic theory of market failure, or rational choice theories of public goods and collective action problems, and so on. IR thinking has helped international lawyers become more aware of and more sophisticated about these theories and almost all international lawyers today are conversant with the main schools of IR thought, use IR tools (with greater or lesser sophistication) to explore international legal issues, and address research questions suggested by IR approaches.

Of course, contemporary truisms about international law were not always considered truths, and international law scholarship has gone through many different phases.[61] Prior to World War II, for example, the American international law academy was dominated by the 'positivists' who focused upon formal law and sovereign autonomy. But the war discredited dominant ways of thinking about international law, and a period of disciplinary anxiety and contestation ensued. This disciplinary ferment opened the door to new ways of thinking in and about the discipline, and over the next decade or so pragmatic and functionalist approaches gained currency. By the 1960s, a 'Columbia school' gained ascendancy, focused upon building an international legal

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60 *Ibid*. at 474.

61 For one account of these changes, see Kennedy, *supra* note 32.

order centered upon the United Nations system and a system of norms that could bridge the East-West divide.

But the end of the Cold War brought about a new period of anxiety and contestation. As after World War II, this current period of anxiety and disputation has opened the intellectual space for new methodological and conceptual approaches. Perhaps following larger trends in legal scholarship[62] international legal scholarship in recent years has taken an interdisciplinary turn.[63] In particular, during the early stages of this period, international law 'discovered' international relations theory. Groundbreaking work by Ken Abbott, Anne-Marie Slaughter, and others introduced international lawyers to various strands of rationalist and liberal IR thought.[64] Later works brought constructivist insights into international legal thought.[65]

International legal scholars use IR theory in various ways. In particular, IR insights help legal academics 'to diagnose substantive problems and frame better legal solutions; to explain the structure or function of particular international legal rules or institutions; and to reconceptualize or reframe particular institutions or international law generally.'[66] Stated more generally, IR theory helps international lawyers move from their occasionally excessive focus upon text and usefully contextualize legal phenomena:

> [W]hile lawyers *describe* rules and institutions all the time, we inevitably—often subconsciously—use some intellectual template (frequently a positivist one) to determine which elements of these complex phenomena to emphasize, which to omit. The carefully constructed models of social interaction underlying IR theory remind us to choose these templates carefully, in light of our purpose. More specifically, IR helps us describe legal institutions richly, incorporating the political factors that shape the law: the interests,

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62 See e.g. Richard A. Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100 Harv. L. Rev. 761.

63 See e.g. Steven R. Ratner & Anne-Marie Slaughter, eds., *Symposium on Method in International Law* (1999) 93 Am. J. Int'l. L. 291.

64 See e.g. Slaughter Burley, *supra* note 47; Kenneth W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1999) 14 Yale J. Int'l L. 335

65 See e.g. Jutta Brunnée & Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Colum. J. Transnat'l L. 19.

66 Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 Am. J. Int'l L. 367 at 369.

> power, and governance structures of states and other actors; the information, ideas and understandings on which they operate; the institutions within which they interact.[67]

Hence, international lawyers have successfully adopted IR approaches in various ways to address diverse problems.[68] International trade scholars, in particular, have been highly receptive to IR methods and insights, and have usefully employed, *inter alia*, game theory, public choice theory, liberal theory, and institutionalist approaches to shed light on various aspects of international economic law. This is one reason to expect IL/IR work to continue, at least in the trade area. More broadly, international legal scholarship is still in a time of deep methodological ferment, exacerbated by the post September 11, 2001 challenges to the discipline. Thus, both internal and external dynamics suggest that this is a particularly opportune time for international lawyers to engage in interdisciplinary work, including IL/IR work.

While mapping out a progressive IL/IR research agenda is well beyond the scope of this short article, we might expect international lawyers to use newly emerging IR insights and approaches to explore many difficult and important issues including, for example, the puzzle of states creating an independent tribunal at the WTO;[69] the contentious debates over the relationship between the WTO and other international

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[67] Kenneth W. Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 Am. J. Int'l L. 361 at 362.

[68] For a sense of the range of applications, see e.g. Peter J. Spiro, 'Disaggregating U.S. Interests in International Law' (2004) 67 Law & Contemp. Probs. 195 (combining liberal and constructivist insights to argue that disaggregated non-state actors will pressure the US to participate more fully in international regimes); Laurence R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes' (2002) 102 Colum. L. Rev. 1832 (using IR theory to explain the limits of legalization in human rights context); Jutta Brunnée & Stephen J. Toope, 'The Changing Nile Basin Regime: Does Law Matter?' (2002) 43 Harv. Int'l L.J. 105 (applying constructivist insights to explain evolution of legal regime to protect the Nile basin); Steven R. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 N.Y.U. J. Int'l L. & Pol. 591 (using IR theory and negotiation theory to analyse problems of ethnic minorities); Eyal Benvenisti, 'Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law' (1996) 90 Am. J. Int'l L. 384 (freshwater management as collective action problem).

[69] See e.g. Laurence R. Helfer & Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' 93 Cal. L. Rev. 899; Eric Posner & John Yoo, 'Judicial Independence and International Tribunals' (2005) 93 Cal L. Rev. 1.

legal regimes;[70] the vexing problem of non-state actors at the WTO;[71] the WTO's ongoing legitimacy crisis;[72] non-compliance and the optimal level of compliance with panel and AB decisions[73]—and, perhaps, even the turn to constitutionalism at the WTO.

CONCLUSION

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

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

Finally, I've outlined some of the ways in which ideas are rooted in particular historical circumstances. International law's current disciplinary ferment—and external challenges—creates the intellectual space for international law scholars to explore interdisciplinary approaches, and to build on the fruitful insights generated by IL/IR scholarship.

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70 See e.g. Andrew T. Guzman, 'Global Governance and the WTO' (2004) 45 Harv. Int'l L.J. 303; John O. McGinnis & Mark L. Movsesian, 'Against Global Governance in the WTO' (2004) 45 Harv. Int'l L. J. 353.

71 See e.g. Steve Charnovitz, 'The WTO and Cosmopolitics' (2004) 7 J. Int'l Econ. L. 675; Jeffrey L. Dunoff, 'The Misguided Debate over NGO Participation at the WTO' (1999) 1 J. Int'l Econ. L. 433.

72 See Robert Howse, 'The Legitimacy of the World Trade Organization' in Jean-Marc Coicaud & Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: UN University Press, 2001) at 355; Dunoff, *supra* note 35; Esty, *supra* note 37.

73 Andrew T. Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 Cal. L. Rev. 1823.