ARTICLES

THE TWO CONSTITUTIONAL VISIONS OF THE WORLD TRADE ORGANIZATION

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1. INTRODUCTION

The legitimacy of one of the most important and ascendant international institutions, the World Trade Organization ("WTO"), is not yet firmly established. Although the WTO has achieved significant institutional maturity and sophistication and is widely admired by international trade specialists, among non-trade specialists the organization is often misunderstood and sometimes reviled. An organization like the WTO expects its decisions to be criticized, but when critics question the WTO's actions they often also question the WTO's right to exercise authority. In the face of the intense public debate and scrutiny to which it is subjected, the

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1 The street demonstrations that marred the WTO's Ministerial Conference in Seattle in 1999, quickly spread to meetings of other international economic institutions such as the IMF, World Bank, and G-8. See generally William Finnegan, After Seattle, NEW YORKER, Apr. 17, 2000, at 40 (studying how the spirit of the Seattle protest gained momentum); THE WTO AFTER SEATTLE (Jeffrey J. Schott ed., 2000) (analyzing the problems and challenges facing the trading system after the Seattle ministerial). Those protests, although muted after the September 11, 2001 terrorist attacks, are now mirrored by the same kind of fundamental resistance on the World Wide Web to the work of the WTO. Among the websites that comment critically on international trade policy are: http://www.tradeobservatory.org/pages/home.cfm; http://www.cid.harvard.edu/cidtrade/; http://www.globalpolicy.org; and http://www.citizen.org/trade/wto/qatar/.

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WTO has yet to find, or project, a focus of legitimacy that grounds its authority to act in widely shared values.

Given the WTO's legitimacy problem, analysts and public officials have advanced a vision for the WTO that emphasizes the WTO's role in helping member countries overcome the special, protectionist interests that lead governments to create trade barriers. This vision is often advanced to support the organic legitimacy of the WTO on the ground that it advances values of constitutionalism, sovereignty, and democracy. I refer to this as the inward-looking and economic vision of the WTO, for it focuses on the role of the WTO in helping member countries address internal political failures in order to improve their internal economies. By attempting to combine economic claims with the universal and appealing values of concepts like democracy and sovereignty, proponents of this vision seek to persuade skeptics that the WTO advances both efficiency and also a broad range of political values.

Although the economic theory underlying this vision is widely accepted, the vision is flawed as a legitimizing or constitutional vision of the WTO and therefore cannot support broad acceptance of the WTO. This constitutional vision is built on unacceptable assumptions about political processes and the role of economic analysis in national economic policymaking. It also presents a flawed understanding of the role of international institutions. Finally, this vision undermines public support for the WTO.

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In its place, I offer an alternative vision of the constitutional role of the WTO that, while consistent with the economic role of the WTO, gives us a stronger sense of the true democratic nature of the WTO—one that can sustain broad support for the WTO, even among non-trade specialists. This vision understands the WTO as overseeing international political processes through which states can seek to influence the policies of other states when they find those policies to be harmful. I call this vision the external, participatory vision because it focuses on the role of the WTO in helping member countries address concerns raised by policy decisions in other countries. This vision is, I claim, consistent with pluralistic policymaking and theories of democratic decision-making. It is also consistent with international political theory and an accurate understanding of the role of international institutions. Moreover, it presents a portrait of the WTO that appeals to shared democratic ideals and thus supports the long-term viability and institutional development of the WTO.

The competition between these two visions could not be more important for our understanding of the future of globalization. Although the two visions are consistent in their understanding of economic theory, and of what the WTO does and how it does it, the two visions are vastly different in their political and institutional portraits of the WTO, and thus in their ability to support the legitimacy of the WTO among a broad range of civil society.

The WTO has assumed a place of preeminence among international economic institutions, and in some respects among all international institutions, in part because of its pervasive reach and in part because it has a near monopoly on effective means of resolving disputes and enforcing treaty commitments. The increasing public visibility of the WTO—and the controversy that surrounds it—attests to the importance of the WTO as an international institution that creates important frameworks within which economic and social arrangements between countries are developed. As it engages other international institutions and its critics among civil society, the WTO must project a vision that will gain wide acceptance—even among its critics—if its important work is to flourish.

A firm vision of the basis of its own claim to exercise authority is important to the WTO and its members as well. The Doha Min-

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3 See sources cited infra note 23.
isterial Conference in November 2001, which launched the Doha Development Round of Negotiations, appears to have overcome the WTO's growing pains, including the "stain of Seattle." But the schisms that divide the members of the WTO and the debates that challenge the relationship between the WTO, other international institutions, and civil society have not decreased; they have simply been given new structure. As the Doha Development Round proceeds, and as the WTO and its members continue to shape the organization, they need a strong foundational understanding of their role and function. Without such an understanding, the WTO may miss opportunities or stumble into counterproductive actions.

Even beyond the implications for the WTO, the contesting visions discussed here raise important questions about our understanding of concepts of democracy in an era of globalization. Because economic markets and social and cultural systems transcend national borders, we are faced with a mismatch between the general unit of governance—the nation-state—and the subjects of that governance. The general unit of governance must respect territory; the subjects of that governance and the phenomena being regulated—markets, communications, and information—need not. In light of this mismatch, how are we to understand our need to retain control over our lives—the essence of the democratic concept—while addressing transnational phenomenon? How are we to understand sovereignty in an interconnected world? Our appraisal of the legitimacy of the WTO is emblematic of our search for new forms of international governance that respect individual autonomy while addressing transnational phenomenon. The search for the WTO's legitimacy is emblematic of our search for effective institutions for global governance.

The next Section of the Article discusses the legitimacy of international institutions and articulates how constitutional and de-

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4 The results of the Doha Ministerial Conference are discussed generally in two recent symposia: *Reflections on the WTO Ministerial Conference*, 17 AM. U. INT'L L. REV. 905 (2002) and *Quick Impressions of the Doha Results*, 5 J. INT'L ECON. L. 191 (2002). The Ministerial Conference meets at least every two years. There have been four such conferences since the WTO was established: Singapore (Dec. 9-13, 1996), Geneva (May 18-20, 1998), Seattle (Nov. 30-Dec. 3, 1999), and Doha (Nov. 9-13, 2001). The Ministerial Conferences are described on the WTO Website, at http://www.wto.org/english/thewto_e/minist_e/minist_e.htm.

5 U.S. Trade Representative Robert B. Zoellick, Address to the National Foreign Trade Council (July 26, 2001) (as prepared for delivery) at 8, at http://www.ustr.gov/speech_test/zoellick/zoellick_7.PDF.
Democratic values can support that legitimacy and lead to wide support for international institutions. This Section presents the basic theory of democratic values that underlies the WTO vision that I endorse. Section 3 of the Article explains the two visions of the WTO in greater detail. After first describing the principle features of the WTO lawmaking regime, I outline the two contesting, constitutional visions of the WTO, noting that the WTO lawmaking regime can be seen as consistent with either vision.

Section 4 of the Article then assesses the two visions of the WTO against concepts of democracy, federalism and sovereignty in order to evaluate their claims to support the legitimacy of the WTO. This Section concludes that the internal, economic vision of the WTO is based on a misunderstanding of the role of efficiency values in democratic policymaking, a mistaken interpretation of federalism concepts and the jurisprudence of the dormant Commerce Clause, and a misconstruction of the concept of sovereignty. Conversely, Section 4 also shows that the external, participatory vision is consistent with principles of federalism, the jurisprudence of the dormant Commerce Clause and concepts of effective sovereignty.

Section 5 of the Article then shows how the external, participatory vision of the WTO—and only that vision—is consistent with the content and interpretation of the treaties that the WTO administers, lending further credence to the conclusion that the external, participatory vision in fact animates the WTO regime. Finally, Section 6 shows why the external, participatory vision of the WTO can command broad respect for the WTO, even among those who do not share a transcendent commitment to values of efficiency, and why the WTO provides important ways by which principles of democracy can be advanced in an age of globalization. This Section elaborates on the challenges to democratic theory that arise when policy in one country impinges on the lives of people in another country, and why the WTO is a healthy antidote to help address those problems of democratic participation.

2. THE LEGITIMACY DEFICIT

Consider the importance of the legitimacy of an institution like the WTO. Legitimacy is the ability of an institution to command

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6 The term "legitimacy" is notoriously difficult to define because it may exist only in the eye of the beholder. Edmund, King Lear's illegitimate son, passion-
respect for the authority it exercises. It is the ability of an institution to influence the behavior of states and private persons such that even critics who disagree with the way the authority is exercised nonetheless accept the right of the institution to exercise its authority. Legitimacy is essential to the effectiveness of the institution; it induces compliance with, and support for, the institution’s authority and affects the ability of the institution to influence personal behavior, ideas, and norms. It is also essential to avoid both attempts to undercut the institution’s authority and attempts to set up counter-institutions. It thus plays “an important role in [the] long-term success” of an institution. “[T]he more an institution is perceived as legitimate, the more stable and effective it is likely to be.”

Skepticism about the legitimacy of international institutions like the WTO comes from various versions of the theory of the “democratic deficit” inherent in international institutions. Global and transnational governance moves the sources of decision-making further away from popular control, and therefore further away from participatory, democratic decision-making that is per-

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8 Bodansky, supra note 7, at 603 (citing 1 MAX WEBER, ECONOMY AND SOCIETY 31 (Guenther Roth & Claus Wittich eds., 1968)). Similarly, Joseph Weiler has identified “social legitimacy” as the “broad, empirically determined, societal acceptance of the system.” J.H.H. WEILER, THE TRANSFORMATION OF EUROPE IN THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION 80 (1999).

9 Bodansky, supra note 7, at 603.

10 Globalization is therefore just an extension of “the problem noted by Rous-seau long ago, namely that, as the scale of government increases, the opportunities for citizen participation decrease.” Bodansky, supra note 7, at 615 (citing Robert A. Dahl, A Democratic Dilemma: System Effectiveness Versus Citizen Participa-
ceived to be such an important source of legitimacy. This aspect of the global "democratic deficit" is well documented and its ramifications are well explored in the literature.\footnote{The literature exploring this aspect of the paradox of global democracy is cited infra in note 11.}

In the face of questions raised by the WTO's "democratic deficit," several sources of legitimacy for an institution such as the WTO have been suggested.

Legitimacy might be derived from consent, and the legitimacy of the WTO is often supported because WTO members have particularly assented to the obligations they have undertaken, including the obligation to be bound when the organs of the WTO's independent dispute resolution system interpret the WTO treaties. However, consent is a problematic source of legitimacy for the WTO.\footnote{The debate occurs both with respect to participation in the deliberations of the various WTO committees, councils, and negotiating groups, and with respect to participation in the adjudicatory process for interpreting the treaties and settling disputes. See, e.g., Krajewski, supra note 2 (discussing non-governmental participation in the work of the WTO, greater involvement by national parliaments, and a Parliamentary Assembly for the WTO). Non-governmental participation in the work of the WTO has been widely discussed. See generally Steve Charnovitz, Participation of Nongovernmental Organizations in the World Trade Organization, 17 U. PA. J. INT'L ECON. L. 331 (1996) (arguing for increased public participation in the WTO); Daniel C. Esty, Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion, 1 J. INT'L ECON. L. 123 (1998) (stating that arguments for excluding NGOs are misplaced); Gregory C. Shaffer, The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters, 25 HARV. ENVTL. L. REV. 1 (2001) (analyzing the accountability of the WTO's decision-making powers regarding environmental policies, and proposing the creation of a World Environment Organization); G. Richard Shell, Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, 44 DUKE L.J. 829 (1995) (conceptualizing and critiquing three competing models of WTO trade legalism).}

In particular, it does not adequately address critics who
fear that when states have consented to delegate some of their sovereign power to the WTO to act in the domain of international trade, the consent has, in fact, spilled over to a far wider range of social concerns, such as health and safety issues. Further, many feel that, even within the trade domain, the consensual delegations of lawmaking power to the WTO have been too general, amorphous, and uncontrolled to be legitimate under a rationale of consent. 13

Legitimacy might also be supported by the substantive validity or effectiveness of the WTO, 14 but that line is also not followed here. Normative arguments, whether formed in terms of the welfare-producing effects of an organization (measured against some accepted welfare matrix) or its effectiveness at reaching some goal, can provide a potent source of legitimacy for an organization. 15 However, substantive legitimacy depends on a settled set of norms against which to measure the validity and effectiveness of the regime. Where those norms are contested—as they are with respect

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13 Commentators use the term "ex ante commitment principle" to indicate that consent is legitimate only if the results are reasonably predictable when the consent is given. See Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. CAL. L. REV. 1307, 1313 (2001) (discussing, among other things, the role of "rule of law" as a factor in the legitimacy of constitutional democracy).

14 The substantive legitimacy of the WTO is discussed in Howse, supra note 12, at 363-70. On substantive legitimacy in general, see THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) (discussing the just result as an element of fairness in international lawmaking). The work of Richard Falk, a highly regarded expert on global politics, is largely grounded in a well specified view of appropriate social policy for the global commons, and he measures the performance of international institutions largely against that view. See RICHARD FALK, PREDATORY GLOBALIZATION 151 (1999) (calling for a "global consensus on 'normative democracy' as the foundation of coherent theory and practice and waging a struggle for the outlook and orientation of institutions of governance with respect to the framing of globalization."). See also Peter M. Gerhart, Reflections: Beyond Compliance Theory – TRIPS as a Substantive Issue, 32 CASE W. RES. J. INT'L L. 357, 361, 385 (2000) (arguing that compliance with international law obligations is dependent upon the substantive validity of such obligations).

15 "A normative argument about the legitimacy of the Security Council . . . can employ such normative criteria as fairness, justice, consent, and so forth." Bodansky, supra note 7, at 602.
to the WTO—any appeal to normative or substantive legitimacy begs the issue of whether a particular institution is the appropriate one for defining the norms in question. The claim of the WTO to legitimacy in exercising authority over tariffs, for example, does not—to most people—support its legitimacy in establishing standards for determining the safety of food products. And not all accept that efficiency or economic growth should be as ascendant values as they appear to be under the WTO regime.

Other than examining legitimacy on grounds of consent or effectiveness, legitimacy can also be supported by invoking principles of cooperative decision-making that themselves attract wide support, principles underlying concepts such as constitutionalism, democracy, and sovereignty. While all acknowledge that these concepts have no unitary, fixed meaning, appeal to the concepts is a way of supporting the legitimacy of institutions by appealing to the widely held values these concepts enshrine. Although I discuss each of these concepts in greater detail later in the Article, we can understand the values that they encompass in shorthand ways: constitutionalism as the value of dispersing lawmaking power among various actors in a way that makes the exercise of power immune from the passions of the moment; democracy as the ability to participate (in various forms) in the law as it is made; and sovereignty as the authority to make decisions affecting those subject to the sovereign power. Institutions that advance those values increase in legitimacy; institutions that diminish those values decrease in legitimacy.

The two constitutional visions of the WTO that I explore here seek to understand the legitimacy of the WTO by appealing to these foundational concepts. In my view, however, for the reasons articulated in this Article, the internal, economic vision is unsuccessful, while the external, participatory vision is successfully grounded on the kind of principles that will attract wide support.

Underlying my endorsement of the external, participatory vision of the WTO is a view of democratic values that is distinct from the general literature and that can fruitfully be highlighted before exploring the concepts of constitutionalism, democracy, and sovereignty in greater detail. This Article recognizes—as few have before—the democratic paradox of globalization. In an interconnected world, the democratic deficit that occurs when decision-making is moved further from the people is offset by a democratic deficit that would occur if we fail to move decision-making authority to higher levels. On the first side of the paradox we have the
problem of making democratic participation harder by removing it, for example, from Washington to Geneva; the second side of the democratic paradox recognizes that when the policy made in one nation adversely affects people in other nations, those adversely affected people need to have some meaningful way to participate in shaping that policy.

The second side of the democratic paradox of globalization comes because of the mismatch between the polity that makes policy and the polity that is affected by policy. The government of any country is no longer making policy just for its own people; in an interconnected world, it is also making policy for citizens in other countries because the ramifications of policy are not limited by territorial boundaries. Once we admit the premise of interconnected policymaking—that the policy made (or not made) in one any country will affect the welfare of people in other countries—we recognize that globalization has strained the limits of current conceptions of democracy by removing one of the essential assumptions of democratic legitimacy—the assumption that the impact of policy decisions is confined to a defined territory. David Held has precisely identified the democratic assumption that is violated in the modern world:

Throughout the nineteenth and twentieth centuries theorists of democracy have tended to assume a 'symmetrical' and 'congruent' relationship between political decision-makers and the recipients of political decisions. In fact, symmetry and congruence have often been taken for granted at two crucial points: first, between citizen voters and the decision-makers whom they are in principle able to hold to account; and secondly, between the 'output' (decisions, policies, and so on) of decision-makers and their constituents—ultimately, the 'people' in a delimited territory.16


https://scholarship.law.upenn.edu/jil/vol24/iss1/1
In other words, once policy decisions in one country spill over to affect the lives of people in another country, the concept of democratic decision-making loses trenchancy unless those adversely affected by the decision are given a voice in influencing the decision. There are not one, but two democratic deficits in an interconnected world and we need to rethink our concepts of democracy in the globalized world in light of the paradox of global democracy. On the one hand, we must deal with the fact that international governance—insti tutions that invite transnational participation and new forms of democratic representation—takes decisions further away from the direct sovereignty of the people. On the other hand, we cannot afford to be without institutions that allow representatives of the people of one country to have meaningful input into the policy made in other countries that might affect them, which I claim is the essential, and legitimizing, role of the WTO.

In short, the democratic paradox of globalization requires us to find new forms of democratic institutions and participation that recognize both aspects of the democratic deficit brought about by globalization. We need to increase participation by one country in the policy decisions of another country when those decisions have external effects. That is the primary legitimizing focus of international institutions. It is within that context that we need to determine what forms of participation in the work of the international institution will advance the mission of the institution in spreading global democracy and rights of participation.

state, the state no longer represents the uniquely appropriate site for democratic decision-making.” (footnote omitted).

17 David Held captures in a single sentence both sides of the paradox of democracy in an interconnected world. He writes:

The argument in this volume suggests not only that both routine and extraordinary decisions taken by representatives of nations and nation-states profoundly affect citizens of other nation-states—who in all probability have had no opportunity to signal consent or lack of it—but also that the international order is structured by agencies and forces over which citizens have minimum, if any, control and in regard to which they have little basis to signal their (dis)agreement.

DEMOCRACY AND THE GLOBAL ORDER, supra note 16, at 139.
3. THE TWO VISIONS OF THE WTO

3.1. Shared Understanding of What the WTO Does

The two visions of the WTO share an understanding of what the WTO does and how it does it. The WTO—a kind of joint venture between its members—is an institution of barter, surveillance, and adjudication.18 As an institution of barter, the WTO oversees a process for negotiating and renegotiating treaties. As an institution of surveillance, it administers the treaties and an intricate process for overseeing compliance with the treaties. As an institution of adjudication, the WTO oversees a dispute resolution process that interprets and applies the treaties. The treaties, and the associated surveillance and dispute resolution, constrain national decision-making on a host of issues that are loosely characterized as trade-related, but that in fact involve matters as diverse as public health and intellectual property.19

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As an institution of barter—a forum for negotiating treaties—the WTO (as did its predecessor organization, the General Agreement on Tariffs and Trades ("GATT")) sponsors "rounds" of negotiations on a comprehensive set of topics,\(^{20}\) and an evolving set of negotiating working groups on specific matters. During these negotiations each country takes a position on the topics to be discussed and the members work to find the common ground and ways of aligning the interests of the members in some reciprocally beneficial way. The negotiating rules reflect a mixture of consent and compulsion. No country is bound by any obligation if it does not consent to the obligation, but each member must accept all the obligations as the price of WTO membership. In the original rounds, the topic was tariffs, and member countries would agree, for example, to lower tariffs on widgets if other countries would lower their tariffs on gidgets. As tariff barriers came down and the members began turning their attention to so-called non-tariff barriers, the subject matter of the negotiations expanded, ranging from internal domestic policies that were thought to have an effect on trade to the regulation of so-called "unfair" trading practices, dumping and unlawful subsidies.

As an institution of surveillance, the WTO provides formal and informal mechanisms by which each member can raise questions about the policies of other members,\(^{21}\) either to evaluate compli-
ance with the existing treaties or to raise issues with other countries that might be the subject of new rounds of negotiations. Members are required to report on the measures they have taken to meet their treaty obligations. The members meet regularly in formal meetings, and national delegations to the WTO meet informally, to discuss issues that one country raises about the policies of another country. As those policy differences become crystallized through these discussions, the issues can either be relegated to new negotiations about the topic or, if the matter concerns an alleged breach of existing treaty obligations, to dispute resolution.

As an institution of dispute resolution—the WTO’s adjudicatory function—members may bring disputes before panels for decision, subject to appeal to the Appellate Body. The jurisdiction of the panels and Appellate Body is compulsory and subject to relatively tight time limits. This function is now independent of the legislative, treaty-making function of the WTO, removing the lawmaking function from the direct control of the members, at least as far as the panels and Appellate Body exercise their interpretive powers to make new law. Decisions are effectively bind-

22 Members raise issues unilaterally, of course. Many countries have ongoing processes for examining the trade and other policies of foreign countries and issuing reports on those policies. Sections 301-309 of the Trade Act of 1974, 19 U.S.C. §§ 2411-2419 (“Section 301,” amended several times, is one American statute allowing unilateral action). See generally Bhala & Kennedy, supra note 18, at 1009-80 (discussing Section 301 actions). A Section 301 investigation, which may result in a sanction, can be brought by either a private individual or the U.S. Trade Representative. Id. at 1017. The aim of the investigation and possible retaliatory action is to “persuade another country’s government to alter its behavior with respect to the treatment of American exports of goods and services to that country, or with respect to the treatment of that country’s exports of goods and services to the United States.” Id. at 1011. If the trade practice of a foreign country is one that concerns intellectual property, then the statute used is “Special 301,” 19 U.S.C. § 2242. Id. at 1009 n.1. There are important, mostly procedural, differences between Section 301 and Special 301, but the ultimate aim is the same. Id. The statutory provision known as “Super 301,” 19 U.S.C. § 2420, forces “the USTR to initiate Section 301 investigations against all significant trade barriers and market distorting practices” identified in the USTR’s National Trade Estimate Report (“NTE”). Id. at 1073.

23 See generally Bhala & Kennedy, supra note 18, at 26-48 (discussing dispute settlement system); Dispute Resolution in the World Trade Organisation (James Cameron & Karen Campbell eds., 1998); Jackson, supra note 18, at 107-37 (discussing the dispute settlement system); David Palmer & Petros C. Mavroidis, Dispute Settlement in the World Trade Organization: Practice and Procedure (1999).
ing so that when a treaty is interpreted through dispute resolution, a losing party must resort to a new series of negotiations to get the interpretation overturned.

The WTO's subject matter domain is itself a constant subject of debate between the members. The topics covered by the GATT/WTO treaties continue to expand, both to reflect a broader range of non-tariff barriers and to link trade issues with other issues that bear on national prosperity. Two fundamental principles of non-discrimination underlie the WTO system—the principle that each member should treat each other member equally (the Most Favored Nation principle), and the principle that no foreign business should be treated less favorably than a domestic business (the National Treatment principle). But each principle has important exceptions, and the scope and complexity of the provisions needed to implement these basic principles and their exceptions are staggering.

Most of the WTO obligations are prohibitory; they tell a country what it cannot do. Falling into this category are the prohibitions on discrimination and the prohibitions against raising tariffs

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25 Among the many works that discuss the domain of WTO lawmaking, the recent ones are included in Symposium, The Boundaries of the WTO, 96 Am. J. Int'l L. 1 (2002).

26 GATT 94, supra note 19, art. 1. See generally BHALA & KENNEDY, supra note 18, at 60-78 (discussing the Most Favored Nation principle ("MFN")); JACKSON, supra note 18, at 157-73 (discussing MFN policy). In addition to the MFN commitment in article I, there are nine subject-specific MFN commitments in GATT, and several of the twelve Uruguay Round agreements also have MFN or MFN-like clauses. BHALA & KENNEDY, supra note 18, at 68-69. For example, the SPS Agreement states that "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members." SPS Agreement, supra note 19, art. II, para. 3.

27 GATT 94, supra note 19, art. III. See generally BHALA & KENNEDY, supra note 18, at 90-105 (discussing the national treatment principle); JACKSON, supra note 18, at 213-28 (discussing the national treatment principle).

28 Exceptions to the MFN principle include Customs Unions and Free Trade Areas, GATT Final Agreement art. XXIV, and the Generalized System of Preferences, which allows nations to favor developing countries in certain respects. See BHALA & KENNEDY, supra note 18, at 417-30. Settling issues involving the National Treatment principle may require decisions on issues of subsidies and products standards. See TBT Agreement, supra note 19; SCM Agreement, supra note 19.
once they have become "bound." Some obligations, however, are conditionally permissive; they tell a country what it can do if, but only if, the country meets certain prerequisites. The rules relating to safeguards against rapidly increasing imports, and the rules allowing the imposition of antidumping duties or countervailing duties, are of this type. These treaties are permissive in the sense that they authorize countries to erect trade barriers, but they seek to channel those trade barriers through procedurally constricted and substantively controlled paths. One WTO treaty, however, is neither prohibitory nor conditionally permissive; it creates wholly positive obligations by requiring member countries to act, even if they are not in any way affecting trade. The agreement relating to intellectual property rights, TRIPS, requires each member to enact minimum levels of intellectual property protection and an independent means by which owners of the rights can enforce their rights.

One can perceive from this brief sketch the outlines of the popular debate about the legitimacy of the WTO. To defenders of the WTO, the WTO obligations are the product of the policies of its member countries, which in turn reflect each country's polity. In this view, the positions that WTO members take during WTO negotiation, and their agreement to the outcome of the negotiations, are the expression of national sovereignty rather than the antithesis of national sovereignty. To the extent that member governments are democratic, the positions of their countries must represent democratic values. To the WTO critics, however, the policies of the WTO are too far removed from democratic law-making and consent to serve as a source of legitimacy. To them national policies taken to the WTO are weighted too heavily by trade and corporate

29 See generally BHALA & KENNEDY, supra note 18, at 78-90 (discussing tariff bindings).
30 See Safeguards Agreement, supra note 19.
31 See Antidumping Agreement, supra note 19.
32 See SCM Agreement, supra note 19.
33 The commitments of WTO members in telecommunications also impose a form of positive obligation on those countries that adhere to the agreement, since they require policing of monopolistic practices, but these are plurilateral agreements. Marco C.E.J. Bronckers, Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO, 2 J. INT'L ECON. L. 547, 560 (1999). See generally Marco C.E.J. Bronkers, & Pierre Larouche, Telecommunications Services and the World Trade Organization, 31 J. WORLD TRADE, June 1997, at 5 (analyzing the Fourth Protocol to the GATS).
34 See TRIPS Agreement, supra note 19.
interests, are too heavily influenced by the non-democratic negotiating process, and are too dependent on interpretation through the unelected and unrepresentative dispute resolution system.

The two constitutional visions of the WTO assessed here ask how an international institution that binds national policymaking could be legitimate under concepts of democracy, federalism, and sovereignty. The two visions provide strikingly different responses to the fundamental legitimacy issue.

3.2. The Internal, Economic Vision

The internal, economic vision of the WTO views the WTO to be an important protection against misplaced domestic policy that impairs economic efficiency. This vision proceeds from the well-

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known economic analysis showing that free trade is good for a country. Free trade is in the national interests (except in special circumstances) because the gains to consumers from free trade always outweigh the losses to producers. Even if one were concerned about the losses that free trade causes to workers and domestic producers, one could simply compensate workers and producers for those losses through transfer payments financed out of the gains from trade. Therefore, free trade is the best policy, and under this view, the majority of voters should want free trade because that leaves them better off than protectionist policies. Most voters are consumers and if they vote in their economic self-interest, they would choose non-protectionist policies. Thus, it follows that if free trade is not the chosen policy it must be because the democratic process has been skewed away from the majority, or democratic will, to the will of the special interests.

The explanation of how the free trade inclinations of the majority of voters are hijacked by special interests is also a familiar one, supplied by the literature on public choice. As one prominent account puts it:

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37 The "optimal tariff" analysis shows that when a country purchases a large percentage of the international output of a product, a tariff may induce foreign producers to sell for less in order to continue selling in the country. When that occurs, the country imposing the tariff gets the tariff revenue without having to pay more for the product and (assuming that other countries do not retaliate) is therefore better off. See, e.g., Alan V. Deardorff & Robert M. Stern, Current Issues in Trade Policy: An Overview, in U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY 15, 37 (Robert M. Stern ed., 1987).


If the benevolent government assumption were true, e.g., that governments maximize the public interest of their citizens, a liberal trade order should emerge spontaneously pursuant to the today worldwide economic insight that trade liberalization tends to maximize consumer welfare by enabling citizens to buy more, better and cheaper goods and services in the best markets.

Id. at 400-01 (emphasis in original).
As a result of real monetary losses [to domestic workers and producers] and the patterns of human psychology [that limit the ability of displaced workers and owners to see a better future for themselves], then, workers and owners in industries adversely affected by free trade will try to persuade the government to erect protectionist barriers. The realities of interest group politics suggest that they will enjoy significant success. As concentrated groups, workers and owners can obtain substantial benefits from government action. Consequently, these groups have strong incentives to provide campaign contributions and electoral support in return for protectionist policies. In contrast, groups that benefit from free trade, such as consumers, are diffuse, and their gains, though large in the aggregate, tend to be small on an individual basis. These groups have comparatively few incentives to contribute time and money to lobby for free trade policies. Moreover, they face high agency costs in monitoring legislators to determine whether their representatives are yielding to interest groups at the expense of society as a whole.39

The crux of this internal, economic vision is that the WTO promotes the “power of national democratic majorities by constraining the influence of protectionist interest groups” (footnote omitted).40 The WTO serves as a healthy antidote to these “special interests,” and restores majoritarian will by restraining the ability of politicians to serve the special interests. In this sense, the WTO helps preserve democratic values and important individual economic freedoms by supporting the will of the majority in the face of special interests who would otherwise capture the mechanisms of public policy.41

39 McGinnis & Movsesian, supra note 35, at 523-24 (footnotes omitted). See also Petersmann, Trade Policy, supra note 35, at 406-07 (”Governments depend on political support and accommodate interest group pressure. The asymmetries in the organization and political influence of interest groups represent a permanent threat to the equal rights of domestic citizens.”).

40 McGinnis & Movsesian, supra note 35, at 514.

41 Petersmann, Hobbesian International Law, supra note 35.

Just as economic theory demonstrates the individual and social benefits of unilateral trade liberalization and deregulation, legal and democratic theory confirms that ‘democratization’ and ‘privatization’ of international guarantees of freedom of trade . . . enhance the legal freedom and
The internal, economic vision of the WTO has "garnered wide acceptance as the raison d'être of the WTO."\(^{42}\) This internal, economic vision is sometimes interpreted as a constitutional argument by invoking the analogy of the dormant Commerce Clause, which restrains the power of the states of the United States to interfere with interstate commerce. Just as the dormant Commerce Clause restrains the power of the states to be captured by special interests and discriminate against out-of-state citizens, the argument goes, the WTO restrains the power of special interests to unduly influence national economic policy. The thought has been expressed as follows:

In promoting both free trade and accountable democratic government, the WTO reflects many of the principles that inform federalism—the keystone of our own Constitution. One effect of our original federal structure was to prevent discrimination against interstate trade and thus restrain protectionist interest groups. This free trade regime, in conjunction with an open national capital market, also restrained special interests more broadly, making it more difficult for them to exact resources from state governments. In this way, federalism reinforced the power of majorities within states while promoting a continental economy. Our domestic trade constitution thus achieved the goals James Madison set out for constitutionalism in general: '[t]o secure the public good and private rights against the danger

social welfare of domestic citizens and protect governments from protectionist pressures by 'rent-seeking' interest groups.

Id. at 198.

\(^{42}\) Steve Charnovitz, *Triangulating the World Trade Organization*, 96 AM. J. INT'L L. 28, 44 (2002) (discussing this rationale for WTO action as the "Self-Restraint" rationale). Indeed, Charnovitz points out that the WTO itself, on its website, proclaims that "[g]overnments need to be armed against pressure from narrow interest groups, and the WTO system can help." Id. (quoting World Trade Organization, Ten Benefits of the WTO Trading System, No. 9, at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Mar. 22, 2001)). The website also says that "governments use the WTO as a welcome external constraint on their policies . . . ." Id. No. 10. The vision was endorsed by the United States Trade Representative. See United States Trade Representative Robert B. Zoellick, The WTO and New Global Trade Negotiations: What’s at Stake, Speech before the Council on Foreign Relations 3 (Oct. 30, 2001) (as prepared for delivery), at http://www.ustr.gov/speech-test/zoellick/zoellick_10.pdf ("WTO's procedural approach to counter protectionism and discrimination against commerce reflects many of the insights that underpin our own Madisonian Constitution.").
This vision thus combines the traditional, economic argument for free trade with an argument for majoritarian democracy, drawing heavily on supposed principles of federalism that are embedded in constitutional regimes. It thus claims to support a constitutional vision of the WTO. It is not, however, the only constitutional vision of the WTO. Before showing why this internal, economic vision is inaccurate and unduly narrow, let me sketch the contours of the alternative constitutional vision: the external, participatory vision.

3.3. The External, Participatory Vision

The alternative vision of the WTO is the vision that animates any federal system—the need to situate policymaking at a level that includes representatives of all those who are affected by the policy. As I now discuss, this vision recognizes that when governments make economic policy, they often impose costs on people in other countries, and that those people who are adversely affected have little influence over, or participation in, the policymaking. The WTO provides a forum that allows those who are adversely affected by the policy made in other countries to have a voice in changing that policy.44


The world-wide guarantees of freedom, non-discrimination, intellectual property rights and quasi-judicial dispute settlement procedures in WTO law illustrate that liberal international trade organizations can serve 'constitutional functions' for the protection of freedom, non-discrimination, private property rights and access to courts across frontiers. In a globally integrated world, the lesser protection of transnational transactions than of purely national transactions, and of the transnational exercise of citizen rights, no longer make economic or democratic sense. Id. at 31 (emphasis in original) (footnote omitted). See also Raustiala, supra note 12, at 414 ("The protection of foreign interests that may be 'stakeholders' but lack formal representation is the primary benefit [of the WTO]."); DeBurca & Scott, supra note 16, at 28 ("[I]t may be argued that the WTO, through the constitution of due process requirements, promotes transnational political engagement which may serve to accentuate the gap between atomistic political community and mul-
Take the most basic subject of WTO lawmaking—tariffs—for example. The first, internal vision focuses on the effects of a tariff on the consumers in the country imposing the tariff. It finds the tariff objectionable on the basis of economic policy and views the WTO to be a helpful antidote to special interests that would injure consumer welfare with a tariff. The second, external vision looks at the impact of a tariff on people in other countries. This vision sees tariffs as a kind of taxation without representation—a tax on foreign producers who in the absence of an international organization have no voice in either opposing or shaping the tariff.\textsuperscript{45} The damage from the tariff that this vision highlights is not just the

\textsuperscript{45} The theory articulated here is similar in spirit and emphasis, but different in detail, from the external, market access theory developed over a series of articles by several prominent trade experts. See Kyle Bagwell, Petros C. Mavroidis, & Robert W. Staiger, It's a Question of Market Access, 96 AM. J. INT'L L. 56 (2002); Kyle Bagwell & Robert W. Staiger, An Economic Theory of GATT, 89 AM. ECON. REV. 215 (1999); Kyle Bagwell & Robert W. Staiger, Domestic Policies, National Sovereignty, and International Economic Institutions, 116 Q. J. ECON. 519 (2001); Kyle Bagwell & Robert W. Staiger, The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues, 15 J. ECON. PERSP. 69 (2001); KYLE BAGWELL & ROBERT W. STAIGER, GATT-THINK, Nat'l Bureau of Econ. Research, (Working Paper 8005 (2000)), at http://www.nber.org/papers/w8005 .pdf. The usual economic account assumes that prices in the country imposing the tariff rise by the amount of the tariff so that foreign producers who sell in the market receive higher prices. The account of Bagwell, Mavroidis, and Staiger turns on demonstrating that part of the cost of a tariff is borne by foreign exporters. To them, because prices in the protected market do not rise by the full amount of the tariff, foreign exporters must lower their price in order to get into the market, giving the tariff an external effect by reducing the profits of foreign producers. Once one finds an external effect of the tariff in this way, it follows that governments of the exporting country will want to bargain away those adverse effects, which in turn explains why we need an international institution to allow countries to bargain over these external effects. This account is similar to mine because it emphasizes the external impact of the tariff on foreigners and portrays those external effects as the engine that drives the WTO. My account, however, avoids the issue of the effect of tariffs on the prices received by exporters into the protected market. I simply point out that the external effect of a tariff is not necessarily that foreign producers make fewer profits after the tariff, but that they make fewer sales. Whatever happens to prices, the country providing the protection makes sales that could efficiently have been made by foreign firms. That alone is enough to give foreign countries an interest in the decision of whether a country should impose the tariff, and therefore is enough to give foreign countries the incentive to seek to avoid that harm through an international institution.
economic inefficiency in the country imposing the tariff but the representational, participatory deficiency that results because the tariff distorts the competitive opportunities and market freedoms of people in foreign countries who have no voice in determining whether the tariff will be imposed and how the costs of the tariff will be distributed. The WTO provides the forum in which the governments of those adversely affected people seek to ameliorate that harm. The WTO is a form of participatory policymaking for foreigners who would otherwise not have effective influence over economic policies that hurt them.\textsuperscript{46}

Economic policymaking in one country routinely imposes costs on foreigners and discounts the interests of the foreigners who are adversely affected by the policy. A subsidy in one country hurts the competitive prospects of manufacturers in other countries.\textsuperscript{47} Regulatory decisions mandating technical standards for products or licensing requirements often impose disproportionate costs on foreigners. Without a forum for challenging those economic decisions, foreigners are denied the basic right to have input into policy that affects their lives and livelihoods.\textsuperscript{48}

Indeed, costs are often imposed on foreigners precisely because the foreigners do not vote, and because their voices have less resonance than domestic voices in any policy debate. Sometimes these costs are imposed to gain support or overcome resistance from domestic industries that are also regulated. A domestic industry resistant to regulation can be "bought off" by imposing dispropor-

\textsuperscript{46} The point is not, of course, that any person has a right to import or export or that free trade is a form of protected constitutional interest. The point, instead, is that under any meaningful concept of democracy, those who are adversely affected by policy ought to have a voice in shaping that policy. This participatory right transcends and is separable from the right to trade in itself.

\textsuperscript{47} For a particularly poignant depiction of the way that American subsidies to American cotton farmers almost directly take money away from cotton farmers in Mali, see Roger Thurow, \textit{Hanging by a Thread: In U.S., Cotton Farmers Thrive; In Africa, They Fight to Survive}, \textit{WALL ST. J.}, June 26, 2002, at A1, A4.

\textsuperscript{48} The phenomenon of policymaking without representation is not limited, of course, to economic or trade policy. The range of policy matters in which one country can adversely affect the interests of the people of another country by acting (or refusing to act) in a way that is detrimental to them, but without their participation, is the single greatest force driving international law. It is the force underlying cooperation in all regulatory fields—environmental and digital, criminal and civil. Indeed, it is the pervasiveness of the need for dealing with these external effects of under-inclusive democratic institutions that makes the external, participatory vision of the WTO a widely acceptable—and therefore attractive—one. See infra text accompanying notes 169-71.
tionate costs on foreign rivals. At other times, the costs are imposed on foreigners not to discriminate against them, but to avoid disproportionate costs on domestic businesses. When the United States imposed costly regulations on U.S. shrimp fishermen to help save endangered sea turtles, Congress soon required that similar costs be imposed on foreign shrimp fishermen. This not only helped protect endangered sea turtles in other countries, it also took away the competitive advantage that foreign shrimp fishermen would have had were they able to catch shrimp without the costly equipment. Protection of the sea turtle required that these costs be imposed on foreigners.

When a country imposes costs such as these, it does so without the effective participation of people who are adversely affected by the costs. Admittedly, foreign companies with a presence in a country can be active participants in the policymaking of that country. But participation by foreigners is sharply regulated by countries and is protected by neither international law nor most domestic constitutions. And for most foreigners and foreign companies who have no presence in a country, participation in the policymaking of that country is functionally unavailable. Without that participation, costs can be imposed on them without any ability to influence the policy decisions.

The WTO masterfully addresses the problem of unrepresentative decision-making in national forums by allowing countries to represent their interests, and the interests of their people, to the governments of other countries in a way that can bring about policy changes and reduce the harms. In a stylized version, the negotiating forum provided by the WTO allows one country to identify a tariff of a second country that is particularly harmful, and to bargain to have that tariff (and that harm) removed. When the second country faces a reciprocal harm from a tariff imposed by the first country, the two countries can agree to lower their tariffs on each other’s products and thus avoid the harms. Through the WTO ne-

49 See, e.g., Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Committee on Finance, 103d Cong., 240, 252 (1994) (statement of Ralph Nader) (claiming that domestic laws such as bans on the export of raw logs are necessary to buy the loyalty of domestic industry in exchange for accepting conservation limits on logging).

50 McGinnis & Movsesian recognize that “foreign producers, the interest group that would naturally benefit most from reduced domestic barriers, are not represented in the [national] polity.” McGinnis & Movsesian, supra note 35, at 527.
negotiations, the countries have participated in cooperative policy-making that allows the policy of each country to reflect (and avoid) the costs that would otherwise be imposed on the other country. It is a wonderful economic benefit that through these negotiations the global economy becomes more efficient. But, I would argue, the broader importance of the negotiations is not economic but political. In a world where economic and social forces are not naturally confined by borders, the WTO process allows all of those adversely affected by policy to participate in shaping that policy.

The external, participatory vision of the WTO therefore sees the WTO as a complex, multiparty forum for barter between nations that allows each nation to represent the interests of its constituents to other nations, and facilitates agreements that reduce the harmful external effects of national policy. The forums that the WTO maintains for negotiation, consultation, and surveillance allow countries to comment on, and influence, the policies of other countries. 51

Some will be surprised to see that the WTO, which is so commonly thought of as a trade, and therefore an economic organization, is in fact legitimized on an essentially political basis. It must be remembered, however, that the WTO's predecessor, GATT, was born out of the experience of the competitive devaluations and escalating tariffs between the two World Wars. 52 The designers of GATT understood the organization to be an important way of promoting stability and peace following World War II; they fully understood that tariff increases could be a form of assault on another country. Their vision for the GATT was part of a larger po-

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51 To be sure, the WTO system for allowing one country to represent the interests of its people in challenging the policies of other countries is not perfect. The bartering system is heavily weighted by wealth, and is subject to the imperfections of any bartering market. Nor is the WTO system truly representative of democracy. Interests within a country are not individually represented. Rather, each country determines, based on its internal political process, how much weight to give to the contending interests within the country as it adopts its negotiating position. Environmental interests that are strong across borders may be less forceful than they would be in an international representational forum because each country may downplay environmental interests in determining what its position at the WTO should be. Nonetheless, the WTO fosters a form of participatory lawmaking that would otherwise be unavailable, and that provides a healthy antidote to economic parochialism in an interconnected world.

52 See generally BHALA & KENNEDY, supra note 18, at 1-3 (summarizing the origins of GATT); JACKSON, supra note 18, at 27-28 (recounting the history of GATT as derived from the Bretton Woods organizations, including the IMF and the World Bank).
itical vision that would help to prevent economic warfare from threatening economic cooperation and stability.

As a result, the value that underlies this vision of the WTO can be seen not as the value of free markets from an economic standpoint, but as the value of free markets from the standpoint of freedom—the freedom to produce and sell what and where one wants\(^\text{53}\)—and the importance of not taking away that freedom without hearing from those whose freedom is being curtailed.\(^\text{54}\) The value is participation in policymaking that affects one's important freedoms. This is a constitutional value of great importance and one that is fully consistent with concepts of federalism, sovereignty, and democracy.

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\(^{53}\) For a good statement of the relationship between economic freedom and political freedom, see Amartya Sen, Development as Freedom (1999).

\(^{54}\) F.A. Hayek, writing during World War II, understood both the problem of economic nationalism and the institutional solution to it. The problem was clear. He took it to be axiomatic that:

[T]here is little hope of international order or lasting peace so long as every country is free to employ whatever measures it thinks desirable in its own immediate interest, however damaging they may be to others . . . . Many kinds of economic planning are indeed practicable only if the planning authority can effectively shut out all extraneous influences; the result of such planning is therefore inevitably the piling-up of restrictions on the movements of men and goods. . . . If the resources of different nations are treated as exclusive properties of these nations as wholes, if international economic relations, instead of being relations between individuals, become increasingly relations between whole nations organized as trading bodies, they inevitably become the source of friction and envy between whole nations.

F.A. Hayek, The Road to Serfdom 220-21 (1944). As for the institutional solution, Hayek wrote:

[W]e cannot hope for order or lasting peace after this war if states, large or small, regain unfettered sovereignty in the economic sphere. But this does not mean that a new superstate must be given powers which we have not learned to use intelligently even on a national scale, that an international authority ought to be given power to direct individual nations how to use their resources. It means merely that there must be a power which can restrain the different nations from action harmful to their neighbors, a set of rules which defines what a state may do, and an authority capable of enforcing these rules. The powers which such an authority would need are mainly of a negative kind; it must, above all, be able to say 'No' to all sorts of restrictive measures.

Id. at 232-33.
4. DEMOCRACY, FEDERALISM, AND SOVEREIGNTY

When we assess the two visions of the WTO against the interrelated concepts of democracy, federalism, and sovereignty, we find that the internal, economic vision is an inappropriate application of these concepts, while the external, participatory vision is fully supported by them.

4.1. The External, Participatory Vision Better Reflects Democratic Values for Making Policy Within a Country

Both visions of the WTO are grounded in an understanding of the appropriate scope of economic policymaking within a country. The external, participatory vision is based on domestic policymaking that is subject to a full range of values in a pluralistic society, including both efficiency and non-efficiency values. These values are subject only to the constraint that they be subject to international negotiation when the policies impinge on the welfare of others. The internal, economic vision is based on economic policymaking that is one-dimensional—directed at only efficiency values, with little room in policy decisions for distributional or other non-efficiency values. As an economic vision, the internal vision has much to offer. However, as a vision that purports to stand on—or advance—democratic and constitutional goals, the internal, economic vision is flawed in fundamental respects. It is based on the misperception that protectionist policies can result only from government failure to adequately protect against special interests, and it seeks to return public policy to the time when the constitution was construed to advance efficiency values over non-efficiency values. Neither conception is valid.

4.1.1. Trade Policy and Special Interests

The internal, economic vision is supported on the basis of familiar public choice arguments\textsuperscript{55}—that special interests capture the policymaking process and skew policy from the public interest. This argument turns, of course, on the assumption that what matters to voters is the effect of policies on their pocketbooks—that voters in a democracy always prefer a policy that enhances their individual economic well-being over a policy that reduces their individual economic well-being. Without that assumption, the pub-

\textsuperscript{55} See supra text accompanying notes 35-41.
lic choice story cannot demonstrate that the economic policy of protectionism is necessarily adverse to the interests of most voters, or the result of political failure.\textsuperscript{56} The logical argument underlying the public choice analysis—that voters want free trade and that if a different policy is chosen it must be because of a political failure and capture by special interests—collapses if in fact voters vote not in their economic self-interest but out of an altruistic interest in the welfare of others. In fact, we have no reason to believe that people always vote for their narrow economic interest, and therefore no reason to believe that majority politics will lead automatically to free trade policies if special interests did not capture the political process.\textsuperscript{57}

I am not, of course, challenging the assumption that voters are rational or that they vote in a self-interested way in some broad sense. Naturally, voters act rationally and in their interests (as they define them) in the sense that they vote for what they find to be appealing, right, or in accord with their preferences. But, that makes the assumption of the rational or self-interested voter a mere tautology and of no analytical value.\textsuperscript{58} What I am challenging is the assumption that the rational voter will always define the

\textsuperscript{56} Raustiala, supra note 12, at 415 (claiming that the internal, economic vision “rests on the assumption that the majority’s only political preference is for economic gain”).

\textsuperscript{57} Even if voters were always self-interested, of course, the public choice analysis underlying the internal, economic vision of the WTO falters on its assumption that lawmakers always vote in a way that reflects their narrow interest, when, in fact, legislators sometimes vote for what they believe to be in the public interest even if doing so hurts them politically. See Vincent Di Lorenzo, \textit{Legislative Chaos: An Exploratory Study}, 12 YALE L. \\& POL’Y REV. 425, 433 (1994) (discussing seven factors involved in legislation).

\textsuperscript{58} Some economists seek to interpret voting behavior in favor of distributive programs as self-interested. See, e.g., Steven E. Rhoads, \textit{The Economist’s View of the World: Government, Markets, and Public Policy} 83, 130-36 (1985) (interpreting support by middle-class and upper-class voters for welfare proposals as self-interested because it is thought to reduce crime, and interpreting personal charity as reducing guilt). I have no quarrel with that view, but it does not advance analysis. The issue is not whether voting behavior is in accord with preference functions or broad self-interest—of course it is. The issue that is key to understanding public choice analysis is whether voting behavior is dictated by the voter’s narrow economic self-interest or whether the voting behavior takes the interests of others into account. The motivation for voting for distributive programs could be described as either self-interested (in the economist’s sense) or altruistic, and neither description is demonstrably right or wrong. It is the behavior that matters, and the fact that voters do not always vote in their immediate self-interest defeats the premise on which the internal, economic vision of the WTO is based.
“correct” policy as the policy that improves the voter’s immediate economic position. The claim here is that voters are often influenced by factors other than their own immediate self-interest, and thus there is no a priori support for the proposition that sound public policy would, in the absence of political capture, lead to policies that aggregate the individual welfare of each citizen.

A voter will deviate from narrow self-interest when the connection between any particular policy and a particular voter’s well-being is attenuated or disputed, making it difficult for the self-interested voter to know where his or her self-interest lies. Steel tariffs raise the price of automobiles, but bring economic benefits to communities. Even members of the community who are not steel workers may find their self-interest undefined. Voters may therefore easily fall back on available symbols and heuristics to make decisions, thereby removing decision-making from the sphere of narrow self-interest.59 We have no doubt, of course, that general economic conditions influence voting behavior, a conclusion well supported by the available empirical studies60 long before the first Clinton campaign for President rode to victory on the phrase, It’s The Economy, Stupid. But as one researcher reported, studies “have found little evidence that the aggregate level findings [concerning the economy and voting patterns] can be explained by people voting in accord with changes in their personal well-being.”61

Moreover, voting behavior often can be explained by the altruistic voter, one who is willing to sacrifice his or her own immediate economic interest to support the welfare of another, one whose preference function includes a preference for the welfare of oth-


A person may take pleasure in seeing the state help others, or may define his or her own welfare in terms of the welfare of others. A citizen could, for example, rationally feel better if steelworkers were not thrown out of work by imports (even if the citizen had to pay more for an automobile). This could be either because of genuine empathy for the steelworkers and the satisfaction one gets from helping others in need, or because she hopes that if she is laid off, public policy will return the favor. Under any of these scenarios, the voter is not acting in his or her short-term economic interest.

Further, experimental research supports the view that voters often choose policies that avoid risks and uncertainties. Policy driven by the general interest (as opposed to special interests) may well be path dependent: policy makers may have a healthy regard for existing expectations and property rights or a cautious response to the uncertainties associated with change. For similar reasons, it has been suggested that public policy is often skewed toward avoiding harm rather than embracing possible benefits, reflecting the fact that voters prefer policies that avoid the infliction of pain to small numbers of people over policies that provide small bene-

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It is evident, however, that such considerations as equity, social justice, and patriotism may also affect public policy choices. Thus the fact that a high proportion of the labor force employed in textiles consists of low-income workers may account partly for the protection granted this industry in many developed countries.


64 Some public policies may therefore be seen as types of insurance policies, not only for those directly benefited by the policy, but also by those who fear that they might need the benefits in the future and are willing to buy the insurance now.

65 George A. Quattrone & Amos Tversky, Contrasting Rational and Psychological Analyses of Political Choice, 82 Am. Pol. Sci. Rev. 719 (1988) (noting that people value policies that avoid losses more highly than policies to increase gains even when the projected payoff is identical).
fits to many. Under any of these theories, because policy is motivated by a preference function that does not reflect the voter's own economic benefit from policy, public policy will deviate from efficient policy.

Admittedly, good empirical evidence of voter motivation is difficult to find; empirical studies of voter motivation are fraught with methodological problems. Data sets usually contain aggregate voting information covering disparate classes of voters, making it difficult for researchers to generalize about why a group of voters with an identified interest voted the way they did. Moreover, most candidates represent a multitude of issues, making it difficult to match any particular candidate with any particular interest group. And even when results show a relationship between a homogeneous voter group and an identifiable issue, the results are difficult to interpret.

The available empirical evidence, however, supports the view that voters sacrifice their narrow economic interests to endorse policy that reaches broader objectives. One study looked at voting behavior in a single-issue referendum to finance flood control in a flood plane, a result that would impose costs on all voters but directly benefit only those living or working in the flood plane. The study showed that a model of narrow self-interest could predict neither the actual voter turnout nor the voting results. The voting could only be explained by voters' understanding of, and motivation by, community benefits and civic pride. Similarly, support for welfare policies is highest among groups that have homogeneous racial, ethnic, or religious characteristics, and lower among

66 See, e.g., W.M. Corden, Trade Policy and Economic Welfare 107-08 (1974) (The "conservative social welfare function" expresses a number of ideas: that it is "unfair" to see the income of any significant portion of the population reduced without offsetting benefits; that it serves as a form of social insurance system that increases everyone's real income; and that it preserves social peace by reducing inequalities in income).


68 See Shabman & Stephenson, supra note 67, at 1194.
heterogeneous groups, suggesting that voting patterns for welfare are influenced by group identity not individual self-interest.

Similarly, the notion that people make decisions based on altruistic rather than narrow selfish interests runs throughout the literature now emerging under names such as "law and behavioral science," "behavioral decision theory," or "behavioral economics." By exploring the ways in which people choose fair outcomes rather than rationally self-interested outcomes, and by showing the ways that people expend resources to help achieve public goods, this literature provides clear evidence that a voter's decisions need not be guided only by her immediate and direct self-interest.

The problem, of course, is our inability to disentangle the "special interests" that the democratic majority desires to avoid from the interests that the public deems to be special because they touch people's notion of appropriate non-efficiency goals. More con-
cretely, we have no test, and certainly no constitutional test, for determining whether public institutions place restrictions on steel imports because special interests override the majority desire for lower prices, or whether the majority of voters would rather not see their neighbors thrown out of work. The fact that public policy takes a protectionist, non-efficiency turn does not necessarily mean it has been captured by "special interests." It could have been captured by a non-efficiency goal that is special to a majority of voters.

Moreover, the difficulty of differentiating "special interests" from the interests that in fact guide public policy is exacerbated by the problem that the special interests have superior access to information; consequently, we must ask their opinion about policy in order to form appropriate policy.\(^\text{74}\) When we want to know the optimum length of patent protection, for example, we need to ask the inventive community about the cost and risks of inventive activity and we need to take seriously their responses. If we then increase the rewards to inventive activity, perhaps by increasing the length or geographic scope of patent protection,\(^\text{75}\) we cannot tell from the identity of those giving us the information and asking us to act whether we have responded to rent-seeking behavior or to the genuine need for greater incentives in the patent system. Similarly, if we want to know the impact of imports on the steel industry, the steel industry is in the best position to get us the information. Whether and how we act on that information is up to us, but the fact that we got the information from "special interests" does not make the resulting policy illegitimate.

In short, the internal, economic vision of the WTO shortchanges the values that animate any democracy by assuming that voters care, or should only care, about efficiency values. This vision would freeze public policy in an efficiency-only mode and would put the WTO in the position of blocking out policies that reflect the values of the altruistic voter. By contrast, as already mentioned, the external, participatory vision lets democratic policymaking reflect the full range of values that people care about and thus supports a broader vision of democratic policymaking.

\(^\text{74}\) McGinnis & Movsesian, supra note 35 (recognizing this difficulty).

\(^\text{75}\) See TRIPS Agreement, supra note 19, § 5, art. 27 (governing patentable subject matter).
4.1.2. The Constitution and Efficiency Values

The constitutional claim of the internal, economic vision is misguided precisely because it seeks to return constitutional jurisprudence to the *Lochner* era, the era when the Supreme Court invalidated legislation on the ground that the legislation interfered with freedom of property and contract. During this period, the Court tried to give the U.S. Constitution some efficiency-based content—to find some basis for balancing the value of free markets against the interest of the people in promoting non-economic values. Although the assault on legislation was primarily directed at domestic legislation—the Supreme Court invalidated, among other things, laws setting maximum prices, laws restricting entry into certain businesses, and laws setting minimum wages—the assault might just as easily have freed up foreign trade. Because an


77 The "judges who developed substantive due process... hid, suppressed, or trivialized underlying conflicts about how wealth should be distributed. Their political economy convinced them that questions about economic regulation should be treated as nothing more than questions about economic efficiency." HOVENKAMP, supra note 76, at 176. "The Court was widely (even if not always correctly) perceived as substituting its own judgment, in the absence of any actual constitutional mandate, for that of the legislature." TRIBE, supra note 76, at 12. See also GILLMAN, supra note 76, at 12 (arguing that the Court was looking only at whether the legislation was truly in the public interest or was instead only a wealth transfer from one group of citizens to another).


79 See *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (manufacture of ice); *Adams v. Tanner*, 244 U.S. 590 (1917) (employment agencies who charge potential employees a fee).

import quota or tariff can impair the ability of economic actors to enter into mutually beneficial contracts, it is not farfetched to suggest that tariff restrictions themselves might have been invalidated under _Lochner_.

As is well known, the _Lochner_ era attempt to give efficiency values some explicit weight in the Constitution was unsustainable and the doctrine was abandoned. The Court could find no workable framework for defining the economic principles to which freedom of contract and property were dedicated and no basis for balancing interference with contract and property against the public interest ideals of sound legislation. The collapse of the _Lochner_ era represents an explicit recognition that the Constitution protects efficiency values only as a by-product of protecting values implicit in other constitutional provisions, such as procedural due process, the _Takings_ Clause, and dormant Commerce Clause juris-

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81 A right to free trade has, of course, never been recognized under the Constitution and has been explicitly denied both before and after _Lochner_. See, e.g., Arjay Assoc. Inc. v. Bush, 891 F.2d 894, 898 (Fed. Cir. 1989) ("When the people granted Congress the power 'To regulate Commerce with foreign nations,' they thereupon relinquished at least whatever rights they, as individuals, may have had to insist on the importation of any product ....") (quoting U.S. Const. art. I, § 8, cl.3). Nonetheless, the _Lochner_ cases recognized rights to contract that could not be abridged by the legislature, and it is not clear why the right to sell one's services for below a minimum wage or the right to enter a business should be protected for domestic citizens while the analogous rights should not be protected for foreigners. That the right to import has never been constitutionally recognized is a testament to the arbitrary and differential treatment of foreigners and foreign trade rather than to the logic of legally protected economic rights. The proponents of the internal, economic vision would reverse this differential treatment, seeing a constitutional value in the right to free trade.

82 United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding federal law prohibiting mixed milk and vegetable oil beverage); West Coast Hotel v. Parish, 300 U.S. 379 (1937) (upholding minimum wage law for women employees).

83 See U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty or property, without due process of law ...."); see also U.S. Const. amend. V (containing a parallel provision not directly addressed to the states). Representative cases in which economic regulation was struck down because of procedural improprieties in its adoption include: Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (holding that the determination of when free markets should be regulated should not be left to those with a "substantial pecuniary interest" in the outcome of the decision); Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (ruling that "one [private] person may not be entrusted with the power to regulate the business of another, and especially of a competitor"). See also A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down delegation of power to President to regulate fair competition); Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (invalidating city zoning ordinance); Eu- bank v. City of Richmond, 226 U.S. 137 (1912) (striking down city building ordinance). Of course, not all due process challenges to economic regulation are ac-
prudence. Outside the ambit of those particular provisions, the
having enacted a reasonable general scheme of business regulation, California
was not required to provide for a prior individualized hearing each and every
time the provisions of the Act had the effect of delaying the consummation of the
business plans of particular individuals."). See generally Peter M. Gerhart, Consti-
tutional Limits on State Regulatory and Protectionist Policies, 48 ANTITRUST L. J. 1351
(1980). See also City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674
n.8, 679 (1976) (discussing the City charter provision which required that any
change in land use agreed to by the city council be approved by fifty-five percent
vote in a referendum, and concluding that "[a]s a basic instrument of democratic
government, the referendum process does not, in itself, violate the Due Process
Clause of the Fourteenth Amendment when applied to a rezoning ordinance").
The court also stated:

By its nature, zoning “interferes” significantly with owners’ uses of prop-
erty. It is hornbook law that “mere diminution of market value or inter-
ference with the property owner’s personal plans and desires relative to
his property is insufficient to invalidate a zoning ordinance or to entitle
him to a variance or rezoning.

Id. at 674 n.8 (citation omitted); General Elec. Co. v. New York Dept. of Labor, 936
F.2d 1448, 1455 (1991) (stating that the Eubank and Roberge lines of cases “still
stand for the proposition that a legislative body may not constitutionally delegate
to private parties the power to determine the nature of rights to property in which
other individuals have a property interest, without supplying standards to guide
the private parties’ discretion”).

84 U.S. CONST. amend. V ("[N]or shall private property be taken for public use
without just compensation."). For background and history on the takings clause
see CHEMERINSKY, supra note 76, at 504-24, and William Michael Treanor, The
Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L.
REV. 782 (1995). Although originally understood to require physical seizure by
the government, since 1922 the Court has recognized that government regulation,
if it is restrictive enough, can be considered a taking. Id. at 782. See Lucas v. S.
Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (preventing construction on
beachfront property of any habitable structures considered a taking since the
“regulation denies all economically beneficial or productive use of the land”);
building a historical landmark, thus preventing owner from constructing an ex-
ansion on top, is not considered a taking).

85 See infra Section 4.2. in text accompanying notes 92-116. As that discussion
makes clear, the fundamental goals of the dormant Commerce Clause jurispru-
dence is not economic freedom but protecting the political, participatory interests
of out-of-state citizens from parochial in-state interests.

86 Other clauses in the Constitution place only insignificant limitations on
state regulation. Under the equal protection clause, U.S. CONST. amend. XIV, § 1:

Unless a statute employs a classification that is inherently invidious or
that impinges on fundamental rights, areas in which the judiciary then
has a duty to intervene in the democratic process, this Court properly ex-
ercises only a limited review power over Congress, the appropriate rep-
resentative body through which the public makes democratic choices
among alternative solutions to social and economic problems.
Constitution embodies no general protection of efficiency values and no particular view of how economic activity should be organized or regulated. In a very real sense, the Constitution is agnostic on the organization of the economy. In particular, after the demise of _Lochner_, the Constitution is unavailable to police the democratic process against so-called special interests.


But the Supreme Court has been unwilling to scrutinize closely either the public purpose or the rationality of the classifications, invalidating "only that government choice which is 'clearly wrong, a display of arbitrary power, not an exercise of judgment.'" _Tribe, American Constitutional Law_ § 16-4, at 997 (1st ed. 1978) (quoting _Mathews v. De Castro_, 429 U.S. 181, 185 (1976)). _See_ City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding exemption of two vendors from regulation of businesses in French Quarter); _Williamson v. Lee Optical Inc._, 348 U.S. 483 (1955) (upholding regulation of opticians that was not also applied to sellers of ready-to-wear glasses); _Kotch v. Bd. of River Port Pilot Commrs_., 330 U.S. 552 (1947) (upholding apprenticeship requirement that effectively preserved the business for relatives and friends). Another possible limitation on economic regulation is the contracts clause, _U.S. Const._ art. I § 10. _See_, e.g., _Allied Structural Steel Co. v. Spannaus_, 438 U.S. 234 (1978) (invalidating Minnesota pension legislation); _United States Trust Co. v. New Jersey_, 431 U.S. 1 (1977) (invalidating legislation that relieved state of contractual obligation). However, these are the only two cases since 1937 where the Supreme Court invalidated a law based on the contracts clause. _Chemerinsky, supra_ note 76, at 495. _See_ General Motors v. Romein, 503 U.S. 181 (1992) (rejecting challenge to changes imposed by state law in workers' compensation program); _Energy Reserves Group v. Kansas Power & Light_, 459 U.S. 400 (1983) (upholding a Kansas law prohibiting natural gas producers from raising prices, an entitlement under contracts with customers, based on rates set by federal authorities).

87 _See_, e.g., _Ferguson v. Skrupa_, 372 U.S. 726, 731-32 (1963) (stating that the Supreme Court "emphatically refuse[s] to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of line with a particular school of thought'") (quoting _Williamson v. Lee Optical Inc._, 348 U.S. 483, 488 (1955)); _see also_ Cass R. Sunstein, _Lochner's Legacy_, 87 _COLUM. L. REV._ 873, 882 (1987) (suggesting the defect in _Lochner_ is, among other things, the assumption of market ordering under the common law as the base line against which to test legislation).

88 _See_ COOTER, supra note 73, at 282 ("'[T]he new understanding of the U.S. Constitution allows different ideals to contend for political power.'").

89 Cass Sunstein has pointed out that in _Lochner_: [The] Court appeared to be referring to what we may call 'raw' interest-group transfers [when it referred to the impermissible ends of legislation]. Because the only available public justifications were insufficient, the minimum wage statute was invalidated as an interest-group deal, reflecting nothing other than political power.

Sunstein, _supra_ note 87, at 878. By implication, the demise of _Lochner_ means that ends such as so-called rent transfers are no longer subject to a constitutional judicial remedy. Since the demise of _Lochner_, the Supreme Court has upheld legisla-
The reason for that is not difficult to see. Undoubtedly, economic efficiency is an important value, and we are not surprised that considerations of economic efficiency pervasively animate public policy. But that does not mean that the majority of voters are bound (by either the Constitution or by good sense) to choose efficient policies. As has already been argued, voters have many reasons to favor non-efficiency values over efficiency values. It is therefore wrong to assume that what is best for the majority of people in an economic or efficiency sense will be reflected in democratically determined policy, and it is wrong to equate democratic choice with economic efficiency. Statements to the effect that "protectionist groups pose serious obstacles for democracy at home" or that "protectionist groups frustrate democracy" present a deeply flawed view of democracy and the relationship of efficiency values to public policy.

4.2. The External, Participatory Vision Reflects Principles of Federalism and Commerce Clause Jurisprudence; The Internal, Economic Vision Does Not

As we have seen, the internal, economic vision of the legitimacy of the WTO is sometimes supported on constitutional grounds by arguing that the WTO performs a role similar to the role played by dormant Commerce Clause jurisprudence. This

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90 See McGinnis & Movsesian, supra note 35, at 526.
91 Id. at 528.
92 See supra text accompanying note 35. The thought has been expressed as follows:

In promoting both free trade and accountable democratic government, the WTO reflects many of the principles that inform federalism—the keystone of our own Constitution. One effect of our original federal structure was to prevent discrimination against interstate trade and thus restrain protectionist interest groups. This free trade regime, in conjunction with an open national capital market, also restrained special interests more broadly, making it more difficult for them to exact resources from state governments. In this way federalism reinforced the power of majorities within states while promoting a continental economy. Our
view is mistaken; it misinterprets the dormant Commerce Clause and gets the relationship between the WTO and dormant Commerce Clause principles exactly backwards. In fact, because the dormant Commerce Clause was designed to protect out of state citizens, not to protect against political capture by factions within a state, the correct understanding of the dormant Commerce Clause jurisprudence supports the external, participatory vision of the WTO—external control is necessary because state (or national) lawmaking may be parochial in the sense that it undervalues the impact of policy on those not in the jurisdiction. The dormant Commerce Clause performs in a federal system the same function that the WTO performs in the international system—to make it harder for lawmaking sovereigns to devalue or ignore the effect of policy on others.

The modern approach of the Supreme Court to state regulatory laws affecting interstate commerce is a two-part test centered on the discriminatory nature of the law. According to the Court: "When a state statute clearly discriminates against interstate commerce, it will be struck down... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." Indeed, if the state statute "amounts to simple

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93 State taxation of interstate commerce is subjected to a different, although analogous, test. See Chemerinsky, supra note 76, at 338-50.

94 Id. at 316. The dormant Commerce Clause jurisprudence is coming under increasing fire from commentators and members of the bench in the context of reducing the power of the federal government. See Patrick C. Mcginley, Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra, 71 OR. L. REV. 409, 420 (1992) ("In the absence of specific constitutional authorization or delegation, use of the dormant Commerce Clause to overturn state legislative action similarly seems 'an unconstitutional assumption of powers by courts of the United States.'") (quoting Erie R.R. v. Thompkins, 304 U.S. 64, 79 (1938)). According to Justice Thomas, "The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting). None of these questions about the dormant Commerce Clause have yet been found to be persuasive. See Tribe, supra note 76, § 6-2, at 1030-43.

95 Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992). See Tribe, supra note 76, § 6-3 (discussing the breadth of the Court's definition of 'discrimination' as applicable to businesses, users, and products); Daniel A. Farber & Robert E. Hudec, Free
economic protectionism, a 'virtually per se rule of invalidity'" applies.96 On the other hand, if the state statute treats in-state citizens and out-of-state citizens alike, the court balances the state's legitimate interest against the burden on interstate commerce.97 The state statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."98

Under this jurisprudence, the dormant Commerce Clause clearly protects out-of-state interests from the parochialism of in-state lawmakers, and forces state lawmakers to consider the effect of their policies on out-of-state interests. As a result, the external, participatory vision of the WTO is the international counterpart to the "process based" or "representational" theories that permeate modern dormant Commerce Clause jurisprudence.99 As Justice Stone explained:

Trade and the Regulatory State: A GATT's Eye View of the Dormant Commerce Clause, 47 VAND. L. REV. 1401, 1414 (1994) (referring to the term "discrimination" as "hardly self explanatory, and the courts have not developed a clear test"). See generally CHEMERINSKY, supra note 72, at 317-22 (discussing what constitutes discrimination, when legislation is discriminatory on its face or facially neutral).


98 Id.

99 In dormant Commerce Clause literature, the external, participatory vision is often referred to as "process-based" theory or "representation" theory. See generally Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425, 443 (1982) (arguing the only "justification for judicial displacement of state legislative judgments in the commercial area" is "the process-oriented protection of representational government"). However, Eule goes on to argue that such review should be conducted under the Privileges and Immunities Clause of Article IV of the Constitution. Id. See also TRIBE, supra note 76, § 6-5 (discussing the theme of political representation in dormant Commerce Clause jurisprudence). Tribe notes that cases striking down state statutes rarely articulate this process-based rationale, but that the rationale "should be seen as underlying the forms of economic discrimination which the Supreme Court has treated as invalidating certain state actions with respect to interstate commerce." Id. § 6-5, at 1057. Sometimes, the process-based rationale is expressed in economic terms: "the theory 'can be viewed as a political application of the economists' theory of externalities: because a legislative body may underestimate the burdens that its proposals place on people who do not participate in its selection, the resulting statutes may be inefficient.'" Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 WIS. L. REV. 125, 128 n.14 (1979). The process-based theory is not without its critics. See Steven Breker-Cooper, The Commerce Clause: The Case for Judicial Non-Intervention, 69 OR. L. REV. 895, 911.

Whatever the merits of process theory, in the commerce clause area it is certain that its most thorough developers do not wholeheartedly believe
Underlying the stated rule has been the thought, often expressed in judicial opinions, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.\footnote{100}

This external, participatory rationale for the dormant Commerce Clause\footnote{101} is also reflected in the two exceptional instances in which states are permitted to discriminate against or burden interstate commerce.\footnote{102} The first exception allows a state to burden interstate commerce when Congress has approved that action. “If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.”\footnote{103} Under this exception, when Congressional legislation allows states to pass parochial legislation, out-of-state citizens are not foreclosed from participation because they can challenge the law in Congress. As a result, their right to participate is vindicated, and the dormant Commerce Clause need not be invoked to protect their rights.

The second exception, the “market-participant” exception, allows a state to favor its own citizens vis-à-vis out-of-state citizens when a government-owned business is involved or when a busi-

\begin{footnotes}
\footnotetext{100}{S.C. Highway Dep’t v. Barnwell Bros., Inc., 303 U.S. 177, 185 n.2 (1938); see also S. Pac. Co. v. State of Ariz. ex rel. Sullivan, 325 U.S. 761, 767 n.2 (1944).}
\footnotetext{101}{The political process rationale for invoking the dormant Commerce Clause is consistent with the Court’s bifurcated analytical approach to examining state laws.” Russell Korobkin, The Local Politics of Acid Rain: Public Versus Private Decisionmaking and the Dormant Commerce Clause in a New Era of Environmental Law, 75 B.U. L. REV. 689, 750 (1995).}
\footnotetext{102}{CHEMERINSKY, supra note 76, at 333.}
\footnotetext{103}{W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652-53 (1981). Naturally, even when Congress expressly or impliedly authorizes the action, the state law [or federal law] will still be subject to constitutional challenges on equal protection, privileges and immunities, or other constitutional grounds. CHEMERINSKY, supra note 76, at 334.}
\end{footnotes}
ness receives benefits from a government program. The Court's justification for the market-participant exception is one of original intent: the framers gave "no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." However, in a plurality opinion, the Court held that a State cannot "impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." This market-participant exception is also consistent with the external, participatory view because the burdens of market participation are felt by in-state taxpayers who are likely to represent out-of-state interests. Again, the purpose of the dormant Commerce Clause is fulfilled.

104 CHEMERINSKY, supra note 76, at 336.

Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980). See generally TRIBE, supra note 76, § 6-11 (discussing market-participant doctrine). Commentators, of course, have offered others. Benjamin C. Bair argues that only two of several justifications for the market-participant exception are bona fide: (1) "[P]refering residents when spending their money is a legitimate state objective as a matter of moral and political theory;" and (2) "[P]references that require the expenditure of state funds have built-in restraints that may make them less politically and economically divisive than other discriminatory state laws." Benjamin C. Bair, The Dormant Commerce Clause and State-Mandated Preference Laws in Public Contracting: Developing a More Substantive Application of the Market-Participant Exception, 93 MICH. L. Rev. 2408, 2420 (1995). Bair reasons that under justification (2), the higher cost (as compared to discriminatory taxes and tariffs) of contractual preferences is likely to limit the scope of the measure. Id. at 2422. Also, contractual preferences are less likely to engender retaliation from other states because those states may recognize justification (1). For a discussion of several other justifications, see id. at 2420-25. Another justification analogizes the state as a participant to a private enterpriser reasoning that the state as a participant should have all the freedom of a private actor. See Michael J. Polelle, A Critique of the Market-Participant Exception, 15 WHITTIER L. Rev. 647, 661-64 (1994) (disagreeing with the soundness of the analogy's rationale and arguing that original intent cannot serve as a justification for the market participation exception).

106 South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97 (1984) (White, J.,) (plurality decision). Polelle suggests there is another restriction on the market-participant exception implicit in Reeves that government marketing of its natural resources is subject to the balancing test. See Polelle, supra note 105, at 672. As with the first exception, laws falling under the "market-participant" exception are still subject to other constitutional challenges. CHEMERINSKY, supra note 76, at 336.


In situations where the state merely regulates to accomplish an arguably legitimate local purpose, there is not necessarily any direct cost to the state's citizenry. The dormant Commerce Clause accordingly steps in to make sure the state regulation is not primarily taxing outsiders for in-
Further demonstrating the pervasiveness of the external, participatory vision in dormant Commerce Clause jurisprudence, the Court has upheld severe burdens on interstate commerce in other instances where in-state interests have provided "surrogate" representation. The "surrogate" representation theory suggests that in cases where in-state interests adequately represent out-of-state interests, the state regulation complies with the dormant Commerce Clause precisely because out-of-state interests are adequately represented. In short, however the analysis is phrased,
the jurisprudence of the dormant Commerce Clause supports the constitutional underpinnings of the external, participatory vision.\footnote{Other analyses of the dormant Commerce Clause are not inconsistent with this conclusion. Historically, a justification for the dormant Commerce Clause has been that one state’s protectionist measure would trigger retaliatory protectionist measures from another state, leading to political disunion. CHEMERINSKY, supra note 76, at 309. The continued validity of the justification under modern circumstances has been challenged. See Eule, supra note 99, at 435. Even were it valid, the justification assumes the external, participatory vision. The retaliating states are forced to pass protectionist measures, because without political representation in the offending state they have no other recourse for protecting their citizens. Mark Tushnet has suggested that the retaliating state can subsidize the lobbying efforts of the offending state’s consumers and utilize consumer advocate groups within the state. Mark V. Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037 (1980). This, however, incorrectly assumes that the state legislation will not be in the interests of consumers in that state. As is noted in the text, it confuses state protectionist interests with special interests. Moreover, to the extent that out-of-state interests can be protected through in-state surrogates, analysis under the dormant Commerce Clause will less intrusively impinge on state legislation. In his own analytical framework for thinking about the problem presented in dormant Commerce Clause cases, Donald H. Regan distinguishes between a protectionist test and a balancing test, endorsing the former and rejecting the latter. Donald H. Regan, Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing, Da Capo, 99 MICH. L. REV. 1853, 1856 (2001). He rejects the balancing test because, within his framework, it applies only when the legislation is not protectionist and, within his framework, that occurs when interests inside a state adequately represent out-of-state interests. Under those circumstances there is nothing to balance. Id. at 1860. He seems to reject the participatory model of vision two (what he refers to as the “virtual representation” argument). Id. at 1854. But, he admits that the protectionist test can be viewed as a way of preventing failures of the political process in the treatment of local interests, to the indirect benefit of foreign producers. Id. at 1878 n.37. Professor Regan’s analysis differs from the analysis here because it is confined to efficiency analysis, and therefore seems to assume that voters are motivated only by their own economic welfare. That analysis makes the mistake of assuming that voters may not be altruistic, a mistake refuted above. See supra text accompanying notes 57-75. Once that assumption is relaxed, Regan can no longer conclude that all protectionist legislation is also the result of capture by special interests, or that the anti-protectionist test is all that is needed to support the values of the dormant Commerce Clause. An alternative, Korobkin suggests that the difference when “regulations harm local consumers but not when they harm local producers is that the costs to consumers of such regulations are disguised, making consumers unlikely to exercise fully the political power they do possess.” Id. at 753. Cf. Cox, supra note 106, at 205 (explaining the market-participant exception where in-state citizens’ interests are more than those of mere consumers). “The citizens whose funds are being expended are like the shareholders of a corporation who can vote the management out when their investment is not being properly managed. But the criteria by which citizens decide what is good or bad public investment is not solely economic.” Id.}
The claim that the internal, economic vision supporting the WTO is somehow aligned with the constitutional purposes of the dormant Commerce Clause, which is based on the suggestion that the clause restricts special interest groups and thereby fosters free trade and democracy, mistakes the effect of the dormant Commerce Clause with its purpose. There is no doubt that the dormant Commerce Clause prevents some measures that have been sought and secured by special interest groups (and that are therefore adverse to the general interests of the people inside the state as well as people outside the state). But this is only the effect of the dormant Commerce Clause. As I have just shown, the purpose of the dormant Commerce Clause is to protect out-of-state citizens, and the protection of in-state citizens against special interest groups is only incidental to that purpose. The confusion is caused by the broad and undisciplined use of the term "protectionist" in connection with both international trade restrictions and state legislation. The protectionist state legislation that the dormant Commerce Clause seeks to address is that which advances the interests of people within a state over the interests of people outside the state, not the legislation that seeks to protect one class of people within a state from the "special interests" of others within a state.

The Commerce Clause does not establish either free trade or a national market as a constitutional value. If it did, there would
be no market-participant exception under dormant Commerce Clause jurisprudence, because when a state acts as a market-participant to the detriment of out-of-state interests, its actions are lawful even though they decrease the economy's efficiency.\footnote{112}

In summary, the dormant Commerce Clause jurisprudence fully supports the federalism and democratic impulses underlying the external, participatory vision of the WTO. As social problems and social opportunities move from local to regional to interna-

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\footnote{112}{Indeed, "[t]he main criticism offered against market-participant exemption is that when the state acts in a market, it almost never acts like a regular participant, but instead usually skews free market forces, thereby destroying competition." Cox, \textit{supra} note 107, at 202. "Ironically, the Court in \textit{Alexandria Scrap} [where the Court introduced market-participant doctrine] extols in principle the virtues of free trade that inform the Commerce Clause, but then proceeds to develop a theory of subsidies thoroughly at odds with the ideological godfather of the market system." Polelle, \textit{supra} note 105, at 663. Similarly, the Congressional legislation exception and the rule's allowance for states to exercise their police powers hurt national economic efficiency but are not prohibited.}

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at 1058. "We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978). Cf. Farber & Hudec, \textit{supra} note 95, at 1407 ("Process and substance are closely intertwined, however, in the area of free trade. Free trade is a substantively valuable goal, but receives legal protection because of process issues, while such protection is feasible, in part, because free trade provides tribunals with a substantive baseline."). Farber & Hudec go on to argue that both should play a role in the analysis. \textit{Id.} at 1408. See Korobkin, \textit{supra} note 101, at 748-49.

If Congress believes free trade is sound economic policy or desires to encourage neighborliness among the states, it has the power to preempt any state law that interferes with commerce in the slightest degree. This grant of power to Congress obviates any need for the courts to protect these values proactively.... Congress's power to regulate interstate commerce in the name of free trade, political comity, or any other majoritarian value makes it unnecessary and redundant for courts to make substantive policy choices for or against protectionist state laws. In contrast, this grant of substantive power to the majoritarian branch does not render the institutional ability of courts to protect the interests of unrepresented or underrepresented groups any less important.

\textit{Id.} Cf. McGinley, \textit{supra} note 94, at 452-53:

The Commerce Clause, then, is used as a device to export both environmental and political problems to neighboring states all in the name of free-trade rights of trash generators, collectors, haulers, and disposers. One must wonder whether the framers could have envisioned such a use of the commerce power they delegated solely to Congress.

\textit{Id.} (commenting on Phila. v. N.J., 437 U.S. 617 (1978)).

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tional arenas, the development of federalist structures to address those problems and opportunities is not only natural, it is also desirable. Without those federal structures, the lawmakers will revert to forms of parochialism that naturally exclude the voices of those who are affected by the policy. Although the Federalist Papers were concerned primarily with the advantages of union, they spoke also of the need to combat the parochialism of the states of the confederacy. See THE FEDERALIST NO. 6:

[The subdivisions into which [the states] might be thrown would have frequent and violent contests with each other . . . . To look for a continuation of harmony between a number of independent, unconnected sovereignties, situated in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.]

THE FEDERALIST No. 6, at 21-22 (Alexander Hamilton) (Buccaneer Books, 1992); THE FEDERALIST No. 7 (“The competitions of commerce would be another fruitful source of contention.”); THE FEDERALIST No. 22, at 102 (Alexander Hamilton) (Buccaneer Books, 1992) (“It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance that more strongly demands a Federal superintendence.”) (In context, the writer seems to be talking about the possibility of war, but does not exclude economic warfare.). See also THE FEDERALIST No. 45, at 232 (James Madison) (Buccaneer Books, 1992) (referring to “security against contentions and wars among the different States”).

Moreover, the democratic impulses behind federalism, and thus behind the external, participatory vision of the WTO, are straightforward. “[A] decision can be called democratic if those affected by the decision were the participants in the decision-making process . . . . Accordingly those who have to comply with the decision—or in other words: who are governed by it—have to be the decision-makers.”

Where, however, those affected by a decision are outside the territorial boundaries of the lawmaking unit, the notion of democracy is strained, for their views are not necessarily included when the decision is made. The democratic, representational legitimacy of the WTO lies in the ability of the WTO to increase participation in the political process by those foreign interests that would otherwise be shut out of it, just as the dormant Commerce Clause protects out-of-state citizens from state parochialism.

This analysis does not assert that the WTO members have always struck the correct balance when determining which powers

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113 Although the Federalist Papers were concerned primarily with the advantages of union, they spoke also of the need to combat the parochialism of the states of the confederacy. See THE FEDERALIST NO. 6:

114 Krajewski, supra note 2, at 171-72 (citing DEMOCRACY AND THE GLOBAL ORDER, supra note 16, at 147).

115 McGinnis & Movsesian recognize that “foreign producers, the interest group that would naturally benefit most from reduced domestic barriers, are not represented in the polity.” McGinnis & Movsesian, supra note 35, at 527.
will be delegated to the collective and which will be retained by individual states. The balance between central and decentralized lawmaking will always be difficult; in any federal system it will be subject to sharp and detailed debate. The point of the analysis is that the existence of an international body like the WTO to curb parochialism and police external lawmaking is legitimate because it is in the best tradition of federalist principles. Those principles advance important interests of giving voice and participation to those who would otherwise be unable to influence policymaking. This is an important source of legitimacy for the WTO.

4.3. The External, Participatory Vision Supports Sovereignty; The Internal, Economic Vision Subverts It

Both the internal, economic vision and the external, participatory vision of the WTO appeal for support to concepts of sovereignty and seek to repel the criticism that the WTO acts as an unwarranted encroachment on national sovereignty. However, the internal, economic vision is incompatible with any meaningful concept of sovereignty, while the external, participatory vision fully supports effective national sovereignty in an interconnected world.¹¹６

Sovereignty, of course, is neither a one-dimensional nor an immutable concept.¹¹７ The "contemporary surfeit of definitions"¹¹８

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¹¹６ One frequently made argument is that when a country accepts the obligations of the WTO, that acceptance is an exercise of sovereignty, rather than an invasion of, or reduction in, sovereignty. I do not endorse the view that we should accept the legitimacy of the WTO simply because that work is the product of sovereigns, for much the same reason that we should not support the legitimacy of the WTO on the basis of consent. See discussion and text infra, accompanying note 12. The WTO obligations are binding, and countries incur a cost for violating them. Moreover, although each country engaged in an act of sovereignty when it agreed to be bound by interpretations of the treaty obligations by the independent and autonomous organs of the dispute resolution system—the panels and Appellate Body—states have, by subjecting themselves to this independent interpretive force, given up some internal sovereignty. The argument developed here is rather that a state must give up some forms of sovereignty to make its sovereign power effective.

¹¹７ RICHARD FALK, ON HUMANE GOVERNANCE, TOWARD A NEW GLOBAL POLITICS 79-103 (1995) (emphasizing the variegated and transforming nature of sovereignty).

of the term sovereignty makes any discussion of the term depend on the definition of sovereignty that the analyst uses. Even with the wide range of sovereignty definitions, however, the internal, economic vision of the WTO cannot be squared with notions of sovereignty. It has been argued that sovereignty is closely aligned with democracy and that the WTO's ability to combat special interests supports a state's sovereignty by supporting its democracy. The assault on sovereignty that is perpetuated by this rendition of the internal, economic vision of the WTO is apparent. In particular, it is wrong to assume that sovereignty is designed to provide a particular outcome (namely, those policies that are thought to maximize efficiency or wealth), just as it was wrong to assume that democracy implies that particular policies will be followed. To equate sovereignty with a particular outcome is to subvert the central concept of sovereignty—the freedom to choose—and to replace it with a judgment about whether the nation reached a predetermined outcome. This line of analysis undercuts the very notion of sovereignty, which is to preserve the right of a people to choose the outcomes that they think are best for them, including the desire to forego wealth in order to achieve other values. Far from supporting sovereignty, the argument that the WTO helps bind the hands of the people so that they avoid unwise policy is, in fact, an attack on sovereignty.

How then are we to understand the WTO as anything other than an encroachment on national sovereignty, especially in response to the many analysts who believe that because the WTO binds national action it also binds national sovereignty? In particular, how does the external, participatory vision square with notions of sovereignty? Clarity can be brought to the matter if we keep in mind the distinction between formal sovereignty and effective sov-

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119 Thus, McGinnis & Movsesian write:

The fact that protectionist groups frustrate democracy as well as free trade casts doubt on the conventional wisdom that international trade regimes like the WTO pose a threat to representative government in member states . . . . An international body that acts to restrain protectionist groups can both promote free trade and help domestic majorities to achieve their goals. The WTO's potential to improve domestic democracy also belies another frequent criticism, namely that the organization inevitably will encroach on members' sovereignty.

McGinnis & Movsesian, supra note 35, at 528.
ereignty, a distinction that is at the core of the diverse sovereignty literature. Once we understand this distinction, we understand the relationship between the concept of sovereignty, the interests that sovereignty protects, and the external, participatory vision of the WTO.

Formal sovereignty is the right of a nation to make policy within its territorial jurisdiction without interference from outside political forces. It is the right to be let alone by other nations and by international institutions. An example of formal sovereignty is the right of a nation to withdraw from the WTO—a right that is unilateral and unfettered by formal or informal institutional constraints from other countries or from the WTO itself. Effective sovereignty, on the other hand, is a form of autonomy—the ability to control policy and welfare within a country without being hampered by the decisions made in other nations or by international institutions. Again, the decision to withdraw from the WTO provides an example. A member deciding to withdraw from the WTO has minimal effective sovereignty; the economic consequences of withdrawal make withdrawal an unpalatable, and therefore unlikely, policy option. Effective sovereignty is the ability to control one’s fate by making policy that is not contingent on the decisions made by those not within the sovereign’s jurisdiction.

The difference between formal and effective sovereignty could not be starker. Formal sovereignty is the right to be let alone; effective sovereignty is the right to control one’s circumstances, which might include the ability to affect the behavior of individuals or nations outside of one’s jurisdiction. Formal sovereignty is defensive; effective sovereignty if offensive. Formal sovereignty is the right to be independent; effective sovereignty is the ability to make independence work for a sovereign people.

120 The distinction between formal and effective sovereignty is similar to the distinction between sovereignty and autonomy made by David Held in DEMOCRACY AND THE GLOBAL ORDER, supra note 16, at 99-102. The distinction is sometimes also seen as a distinction between internal and external sovereignty, although that distinction performs other functions as well.

121 See, e.g., JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 2 (1998) ("Sovereignty denotes independence. A sovereign state is one that acknowledges no superior power over its own government. . . .").

122 Cf. DEMOCRACY AND THE GLOBAL ORDER, supra note 16, at 100 (stating that autonomy is the “capacity of state managers and agencies to pursue their policy preferences without resort to forms of international collaboration or cooperation”).
The interplay between formal and effective sovereignty is a unifying theme that helps to synthesize the diverse perspectives of the sovereignty literature. One perspective, perhaps the dominant one, decries the loss of sovereignty, and the powerlessness of the state, in the face of transborder phenomena. This strand is most often aligned against globalization, global forces, and global institutions. It points to the limited space states have to maneuver in response to global forces. As applied to the WTO, this perspective often condemns the WTO for unleashing the economic forces that limit national sovereignty.

This literature is perched on top of the notion of effective sovereignty because the literature rests on the assumption—implicit or explicit—that nations will underregulate transnational phenomena, particularly economic phenomena. Under this view, sovereignty is "at bay" precisely because the regulatory powers of the modern state are too weak in the face of global capital and global communications. Under this view, sovereigns have under-inclusive lawmaking power because the phenomena they are regulating are inherently transborder and because people or companies will undercut any attempt to regulate their conduct by moving or threatening to move. From this perspective, global forces make effective sovereignty impossible while also reducing formal sovereignty.

A second strand of the sovereignty literature, the anti-sovereignty genre, sees sovereignty as an obstacle to achieving cer-

123 See Richard N. Cooper, The Economics of Interdependence: Economic Policy in the Atlantic Community (1968); Falk, supra note 117, at 104 (emphasizing pressures to promote competitiveness at the expense of welfare and environmental protection); id. at 79 (discussing the displacement of the state); Kenichi Ohmae, The End of the Nation State The Rise of Regional Economies (1995); Rabkin, supra note 121, at 42 (pointing out the dangers of the growing influence of transnational non-governmental organizations); Walter B. Wriston, The Twilight of Sovereignty: How the Information Revolution Is Transforming Our World (1992).

124 See, e.g., Falk, supra note 117, at 131 (noting that GATT is an indicator of deepening globalization).

tain public goods, such as universal human rights. From the anti-sovereignty perspective, sovereignty is a misplaced shield that perpetuates offensive national policies. This literature also endorses the distinction between formal sovereignty and effective sovereignty because it is built on the universality of the norms that are sought to be imposed on another nation. Its assumption is that the conduct of people in one state is so offensive to the welfare of people in another state—precisely because it violates universal norms—that it reduces their welfare and therefore the effectiveness of their sovereignty. Here, the argument is that the formal sovereignty of one nation must give way because the effective sovereignty of other nations—and in particular their allegiance to certain universal norms—would otherwise be undermined. Whereas the loss of sovereignty literature sees the loss of effective sovereignty, even though formal sovereignty is retained, the anti-sovereignty literature would limit the formal sovereignty of one nation in order to increase the effective sovereignty of another nation.

A third genre of the sovereignty literature argues that sovereignty has never been as widespread or respected as people have believed; that in fact sovereignty is, in the words of one prominent analyst, only “organized hypocrisy.” Here, analysts ask whether the idea of sovereignty has ever had the traction that is commonly attached to it. Analysts here also ground their analysis in the distinction between formal and effective sovereignty. By pointing out the exceptions to the sovereignty norm—instances in which one nation has disregarded the formal sovereignty of another nation—this literature shows that respect for formal sovereignty has often given way where another nation’s interests (i.e., effective sovereignty) are at stake. This literature is built on instances in which one country felt that in order to protect its effective sovereignty—it's ability to choose


127 Krasner, supra note 122; See Michael Ross Fowler & Julie Marie Bunck, Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty 2 (1995) (quoting Krasner’s statement that the term sovereignty has “lost meaning and analytical relevance”).
The policy that is best for it—the nation had to challenge, and sometimes even infringe, the formal sovereignty of another nation.

The importance of distinguishing between formal and effective sovereignty arises from the interdependence of national policy. Historically, the analysis of sovereignty did not require the analyst to make a distinction between formal and effective sovereignty because the problems being addressed were local, not transnational. As long as the subject matter being regulated is confined to a specified territory, formal sovereignty is effective sovereignty. When political boundaries match the problem being addressed, formal sovereignty gives a nation the right to control what happens within its territory, and the nation has formal sovereignty because neither its own policy decisions nor those of other nations have an extraterritorial effect. The nation is therefore free to make the decision that they believe to be correct for them. It is only when political boundaries and policymaking boundaries diverge that formal and effective sovereignty diverge—for then the decision made in one nation has an impact on the decisions made in another nation, and policymaking becomes interdependent.

As nations have become more interconnected, however, the divergence between formal sovereignty and effective sovereignty has grown significantly. What the diverse perspectives of the sovereignty literature have in common is the implicit acknowledgement that policy decisions in one nation have an impact on the welfare of people in other nations—the same premise that underlies the external, participatory vision. In other words, each viewpoint of the scholarly debate about sovereignty is based on the same understanding—that sovereignty over internal affairs—that is, the power to order one’s society to reflect the preferences of the members of the society—that cannot be sustained unless there is a measure of sovereignty—that is power to influence—the policy adopted in other nations and social orders.

The divergence between formal and effective sovereignty leads to the paradox of sovereignty—and to the “new” sovereignty that is at the core of the work of Abram and Antonia Chayes. That paradox is that in an interconnected world, a nation, in order to preserve effective sovereignty, must give up some forms of its for-

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mal sovereignty. That explains why even powerful countries must support international cooperation when they seek to preserve their policymaking autonomy in the interests of the welfare of their people. As the Chayes remind us, “For all but a few self-isolated countries, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in good standing in the regimes that make up the substance of international life.” To be a player, the state must submit to the pressures that international institutions impose.

The new sovereignty is, in effect, the search for new forms of democracy in an interconnected world and the search for international mechanisms for overcoming the parochial character of state lawmaking. Again, David Held has best stated the dilemma of sovereignty in the same context that he has explained the dilemma of democracy:

In his important book on sovereignty and the modern state, The Sovereign State and Its Competitors, Hendrik Spruyt concludes that the statist world of modernity arose out of an organizational competition between states on the one side and city-leagues and city-states on the other. The state won out over these rivals for organizational preeminence in late

129 See Falk, supra note 14, at 33 (“Somewhat paradoxically, to retain primacy they must give up many of its Westphalian attributes, especially those resting upon the claims and practices of territorial sovereignty.”). See also Joseph A. Camilleri & Jim Falk, The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World (1992).


131 Chayes & Chayes, supra note 128, at 27.

Sovereignty, in the end, is status—the vindication of the state’s existence as a member of the international system. In today’s setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system. Isolation from the persuasive and rich international context means that the state’s potential for economic growth and political influence will not be realized. Connection to the rest of the world and the political ability to be an actor within it are more important than any tangible benefits in explaining compliance with international regulatory agreements.

Id.
medieval Europe. According to Spruyt's well-argued and documented appraisal, 'States won because their institutional logic gave them an advantage in mobilizing their societies' resources.' I think we are living at a time when states are losing their organizational advantage in the provision of public goods, with the revealing exception of security, though only then if security is conceived in the narrowly artificial terms of military/police activities.132

The WTO serves to confer important effective sovereignty that responds to the interdependence that is the foundation of the various theoretical perspectives about sovereignty. Without the WTO, the "sovereignty" of nations would consist of responding as best they can to the policies of other nations, a kind of sovereignty without substance.133 This form of "defensive" sovereignty—which would basically be to make the best policy in light of what other nations do—gives each nation the illusion of control over its own affairs without giving the nation actual control over its own affairs. The WTO restores potential effectiveness to each nation's sovereignty—by giving each nation the opportunity to confront the policies of foreign governments that it finds to be objectionable and to bargain to have those objectionable policies changed.

5. **WTO Jurisprudence Fully Reflects the External, Participatory Vision**

WTO treaties constrain national autonomy. By themselves, therefore, the WTO treaties are consistent with either vision discussed here—the WTO that constrains national policy to keep a nation from making mistakes in determining the best policy for its own people or the WTO that constrains national policy to protect foreigners. When we examine WTO jurisprudence, however, it is clear that the second vision animates the content and interpretation

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133 Such sovereignty is not, of course, an academic matter. When the United States recently increased subsidies to its farmers, it effectively took bread off the table of farmers in poor countries, an inevitable result of the fact that U.S. legislators consider the well-being of U.S. consumers and farmers, but not the well-being of foreign farmers. With the WTO, foreign farmers have an opportunity, through their governments, to exercise their sovereignty and at least raise objections to U.S. policy.
of the WTO treaties. A central concern of WTO treaty provisions and interpretive jurisprudence is the harm to foreigners and the quality of the process given to foreigners—and not the quality of the internal political process in member countries.

We see the external, participatory focus of WTO jurisprudence in two situations: first, when a nation seeks to impose the costs of its legitimate regulatory goals on foreigners; and second, where national policy might otherwise give inadequate consideration to the views of foreigners.\textsuperscript{134}

\subsection*{5.1. Policing Disproportionate External Costs}

In a large number of WTO disputes, a nation takes action to protect an important GATT-consistent goal—for example, to protect the health or safety of its citizens or to form a lawful customs union—and the nation imposes costs on foreigners as a part of its action. In such cases, the WTO panels and Appellate Body reviewing the national action do not undertake any searching examination of the political process that led to the action to see whether the process was captured by "special interests," as would be suggested by the internal vision of the WTO. But the WTO adjudicatory bodies regularly examine the costs that the measures impose on foreigners and ask whether those costs should be borne by foreigners or by those who benefit from achieving the policy goal—those who live within the country. These interpretations, while not clearly compelled by the language of the treaties (and thus not direct evidence of the understanding of the member countries), demonstrate

\textsuperscript{134} In addition, of course, WTO treaties guarantee the expectations of foreign private parties to the rights provided by the treaty provisions. \textit{See}, e.g., WTO—Report of the Panel on India-Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, para. 6.2 (Sept. 5, 1997), \textit{available at} http://docsonline.wto.org.

In establishing a mechanism that preserves novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the [TRIPS] transitional period, India should take into account the interests of those persons who would have filed patent applications had an appropriate mechanism been maintained.\ldots

\textit{Id.} This decision was modified by the WTO Appellate Body Report on India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/AB/R, para. 93, 96 (Dec. 17, 1997) (finding that the provision interpreted by the panel was not adequately challenged by the United States in its request for consultations), \textit{available at} http://docsonline.wto.org.
that, at least in the mind of those interpreting the WTO obligations, it is the external, participatory vision that animates the WTO.

In the *Korean Beef* case, for example, South Korea had adopted measures to segregate the sale of imported and domestic beef, purportedly to help avoid deceptive sales practices. Although the segregation of retail outlets was easily found to treat foreign producers "less favorably" than domestic consumers, and therefore to be a prima facie violation of the national treatment obligation, South Korea argued that the less favorable treatment was permitted under the general defenses in Article XX. Some South Korean meat merchants had been selling low-priced (imported) beef as if it were high-priced (domestic) beef, a practice similar to passing off that is acknowledged to be inimical to an efficient market. This kind of passing off was easier to police when the beef was sold from segregated locations. The Appellate Body never questioned the goal of prohibiting deceptive practices, for that is indeed a legitimate goal of state action under Article XX (d) of GATT. The issue in the case was whether South Korea's decision to segregate the selling outlets was "necessary" to reach that goal under Article XX (d).

Under the first, internal vision of the WTO, we might have expected the Appellate Body to examine whether protectionist forces within South Korea had captured the political process and subverted the well-intentioned government apparatus for defining and addressing deceptive practices. It might, for example, have looked at the history of the measure to see whether its support came from the domestic meat lobby (a potentially protectionist force) or from consumer advocates (a group that would have

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137 Of course, any such inquiry would have been perilous, not only because it intrudes upon the lawmaking process of South Korea, but also because any evidence of the source and motivations of the measure are inherently ambiguous. For example, if some unscrupulous merchants were selling low-value beef as if it were high-value beef, one would expect that honest and competitive beef merchants would be the most likely to notice this and complain. This might be misinterpreted as protectionism when in fact it might simply be the self-interested pro-
more interest in regulating deceptive practices). It might have then asked whether consumer advocates were really shills for the domestic protectionist lobby. The Appellate Body did none of this; its goal was not to police the political process in South Korea. Instead, it sought to determine whether in addressing a legitimate goal South Korea had unlawfully discriminated against foreigners; as it turned out, that depended on the disproportionate impact of the measure on foreigners.

Instead of looking inside the South Korean political process, the Appellate Body looked to the external impact of the measure. The Appellate Body undertook its analysis by considering who should bear the cost of the measures to support South Korea's legitimate goal of preventing deceptive practices—should it be those in South Korea who benefit from the measure or should it be foreign producers. This issue was raised because South Korea claimed that the separation of foreign and domestic beef outlets was the best, and least costly, way of preventing deceptive practices. The alternative method—investing more resources in directly enforcing rules against the deceptive practices—would have increased the costs of reaching South Korea's goal of preventing deceptive practices. The segregation of outlets was necessary, according to South Korea, because the alternative was expensive.

The Appellate Body responded to this argument by pointing out that the method chosen by South Korea to conserve its enforcement dollars in fact imposed costs on foreigner producers. The segregation of sales made it more expensive for domestic sellers to sell imported goods and thus increased the cost that foreign producers had to absorb to gain access to the market.\footnote{138} As between the two methods by which South Korea could have reached its goal—one that imposed costs on foreigners and one that absorbed the costs within the country—the Appellate Body did not hesitate to say that it was impermissible for South Korea to give its consumers the benefit of consumer protection while imposing the cost of that protection on foreign producers.\footnote{139} This is an application of consumer rights. Our trademark system harnesses just such a self-interested motivation by competitors to police unlawful trademark use and other deceptive practices in order to benefit consumers.

\footnote{138} This was the basis for finding that the segregation treated imported goods "less favorably" than domestic goods. Korean-Beef, supra note 135, para. 145.

\footnote{139} The Appellate Body found the following:

It is pertinent to observe that, through its dual retail system, Korea has in
tion of the external, participatory vision of the WTO. Foreign producers did not participate in, but were adversely affected by, the South Korean action; the WTO prohibition against discrimination protected foreigners from paying a disproportionately high cost of achieving a legitimate goal.

Admittedly, by striking down the South Korean regulation, the Appellate Body increased the efficiency of the South Korean economy—a result embraced by the internal, economic vision of the WTO. It did not, however, endorse that vision. Because the decision of the Appellate Body left South Korea free to regulate in a way that was inefficient but did not impose disproportionate costs on foreigners (by, for example, allowing South Korea to set up a non-discriminatory regime that applied a local but inefficient definition of deceptive practices), the Appellate Body diverged from, rather than endorsed, the internal, economic vision.

This is not an isolated example. Whenever a country seeks to achieve a legitimate goal, it makes choices about whether the costs of achieving that goal should be imposed on foreigners or on those who benefit from the goal. The WTO is often required, therefore, to determine whether the imposition of costs on foreigners is appropriate.

As another example, in Turkey—Restrictions on Imports of Textile and Clothing Products (from India), Turkey joined the customs union formed by the European Community, a preliminary step to joining the European Union. Incident to that affiliation, and con-

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...effect shifted all, or the great bulk, of these potential costs of enforcement (translated into a drastic reduction of competitive access to consumers) to imported goods and retailers of imported goods, instead of evenly distributing such costs between domestic and imported products. In contrast, the more conventional, WTO-consistent measures of enforcement do not involve such onerous shifting of enforcement costs which ordinarily are borne by the Member's public purse.

_id_, para. 181.

140 See WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 35 I.L.M. 603 (Apr. 29, 1996) (finding that the United States imposed disproportionate burdens to comply with the Clean Air Act on foreign refiners), available at http://docsonline.wto.org. Indeed, Ralph Nader has argued against NAFTA and the WTO precisely because he wants countries to be free to impose costs on foreigners in order to reduce opposition to regulation by domestic interests and purchase their loyalty. See _supra_ note 49.

sistent with the concept of a customs union, 142 Turkey conformed its external regulations to those of Europe and imposed quotas on textiles and clothing from India that were similar to a lawful European-wide quota. This disadvantaged India, whose textile and clothing goods had not previously been subject by Turkey to a quota.

Turkey’s affiliation with the European Community was clearly lawful; the issue was whether the imposition of the quota that conformed Turkey’s policy to the European system of external restraints was a necessary by-product of that affiliation. 143 The analysis of this problem is similar to that in the Korean Beef case. Turkey and the European Union had a lawful goal—to make sure that the affiliation between Europe and Turkey did not provide India with a way of circumventing Europe’s lawful restrictions on Indian textiles and clothing. But they had two means of achieving that goal. One—the one they chose—was to restrict imports of Indian textiles and clothing into Turkey; if the goods never got into Turkey, they could never get into Europe. The other method of achieving their goal was to allow the Indian textiles and clothing into Turkey but require country of origin labeling in order to make sure that those textiles and clothing never got across the Bosphorus and into Europe. The first method imposed costs on India, the second imposed costs on Turkey and the European Community, who would have to police the arrangement and bear the risk that the restrictions could be circumvented.

In the face of these choices, the Appellate Body easily found that it was impermissible for Turkey to impose the cost of meeting the legitimate goals of the European Communities on India. With-

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142 Under Article XXIV 8(a)(ii) of GATT, countries forming a customs union must ensure that “substantially the same duties and other regulations of commerce are applied by each member of the union to the trade of territories not included in the union.” GATT Final Agreement art. XXIV, para. 8(a)(ii) (1994).

143 The precise issue as formulated by the Appellate Body was whether the “formation of the customs union [between Turkey and the European Communities] would be prevented” if it were not allowed to adopt these quantitative re-

restrictions. Turkey Textiles, supra note 141, para. 46. According to the Appellate Body, Turkey was not required to have exactly the same policy as the European Communities because GATT requires a common external policy only with respect to “substantially all” the rules and regulations. Id. para. 48. This standard al-

lowed the policies of Europe and those of Turkey to diverge somewhat. The issue therefore became whether the restrictions on imports into Turkey were necessary to protect the legitimate interests that the European Communities had in protecting the integrity of their lawful quota system.
out explicitly invoking the external, participatory vision, the Appellate Body invoked the notion of less restrictive alternatives to hold that:

Turkey could adopt rules of origin for textile and clothing products that would allow the European Communities to distinguish between those textile and clothing products originating in Turkey, which would enjoy free access to the European Communities under the terms of the customs union, and those textile and clothing products originating in third countries, including India.\textsuperscript{144}

In essence, the Appellate Body held that the costs of achieving a lawful goal must be internalized rather than imposed on foreigners, a conclusion that reflects the importance of an international institution that can restrain the proclivity of democratic decision-makers to reach their internal goals by imposing costs on foreigners.

5.2. Providing Adequate External Process

In addition to restraining states' ability to impose disproportionate or unreasonable costs on foreigners, the WTO regime provides—through treaty provisions and treaty interpretation—a set of procedural protections for foreigners when a state takes action that affects their interests.\textsuperscript{145} Across a range of actions, WTO members must give participatory rights to foreign interests in good faith before taking particular actions. This too confirms the external, participatory vision of the WTO.


It is no exaggeration to say that the WTO treaties form a kind of Administrative Procedure Act\textsuperscript{146} for foreigners who might be adversely affected by government action. Although principles are not of general applicability and the details vary from treaty to treaty.

\textsuperscript{144} Id. para. 62.

\textsuperscript{145} Petersmann, "Hobbesian International Law, supra note 35, at 180 ("WTO law and European integration law, for instance, have introduced comprehensive guarantees of access to domestic and international adjudication with far-reaching limitations on the right to unilateral reprisals and retortions.").

treaty depending on the context, the procedural rights that are
given to foreign governments and, sometimes, foreign producers,
provide a pervasive set of procedural guarantees.147 The treaties
guarantee foreigners access to information that is necessary for ac-
cess to markets. They guarantee foreigners access to procedures by
which foreigners can influence administrative decision-making. They guarantee access to appeals of agency action. And in the field
of intellectual property they guarantee foreigners access to effec-
tive judicial or quasi-judicial procedures through which their intel-
lectual property rights can be enforced. The WTO treaties are, in
this respect, truly constitutional, for they extend to non-citizens
forms of due process that are generally available, under national
constitutions, only to citizens.

For example, when governments regulate product standards
and production methods they must comply with the Agreement on
Technical Barriers to Trade (the “TBT Agreement”).148 When a
WTO member adopts a technical standard that “may have a sig-
nificant effect on the trade of other Members,”149 it must publish

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147 The type of process guarantees discussed in this Section—those that en-
able participation in administrative proceedings—are supplemented by other
process-related guarantees that are given to foreign governments and that are also
important to the effectiveness of the international trade regime. For example,
transparency guarantees allow states to monitor compliance by other countries
with the GATT obligations. See generally Bhala & Kennedy, supra note 18, 121-122
(discussing the effectiveness of transparency). In addition, the Trade Policy Re-
view Mechanism provides a form of systematic surveillance of foreign govern-
ment practices that gives other countries opportunities to observe compliance
with WTO obligations and raise questions about domestic policies that have ex-
ternal impacts. On the Trade Policy Review Mechanism generally, see Joseph
Francois, Trade Policy Transparency and Investor Confidence—The Implications of an
Effective Trade Policy Review Mechanism (Nov. 1999) (discussing the relationship of
the Trade Policy Review Mechanism to investor confidence in developing coun-
tries), at http://www1.worldbank.org/wbi/tm/trade/papers_2000/francois-
Trade Organization, 31 J. WORLD TRADE 49 (1997) (discussing some procedural
problems experienced in the operation of the TPRM); Donald B. Keessing, Improv-
ing Trade Policy Reviews in the World Trade Organization (1998) (discussing the pro-
gress of Trade Policy Review Mechanism since its inception in 1989 and the chal-
genies ahead) available at http://www.iie.com/publications/pub.cfm?pub_id=60;
ECON. 227 (1991) (discussing the importance of transparency); Peter Mavroidis,
INT’L L. 374 (1992) (analyzing the TPRM); CHAYES & CHAYES, supra note 128, at 244-
148 TBT Agreement, supra note 19.
149 Id. art. 2.9.
notice of the proposed standard, notify other members of the pro-
posed standard and its rationale, and provide members an oppor-
tunity to comment in writing, to discuss these comments, and to
have the comments and discussions taken into account in deter-
mining the standard. Further, the country undertaking the
product standards must also explain the ways in which the stan-
dard is consistent with the substantive requirements of the TBT
Agreement, a requirement of international justification that goes
beyond a mere participatory right. These procedural rights are
supplemented by the requirement that every WTO member com-
ply with a Code of Good Practices for the Preparation, Adoption,
or Application of Standards in Annex 3 of the TBT Agreement,
which extends procedural rights to interested parties on a non-
discriminatory basis, thus providing procedural rights to private
businesses that might be affected by the standards.

Procedural rights when countries set product standards extend
beyond the process by which the standards are adopted. Trans-
parency rules require WTO members to set up "enquiry points" to
answer questions and provide documents about the standards, a
right that is given both to governments and to interested private
parties in foreign countries. When a member country assesses
whether imported products conform to the relevant standards,
those procedures—called conformity procedures—are subject to
rules prohibiting discrimination against foreign products and to
procedural rights for member countries and their enterprises to en-
sure confidentiality, a right to a reasoned analysis of conformity,
and an opportunity to comment on the conformity procedures that

150 Id. These procedural protections are given to members only when the na-
tional standard deviates from a relevant international standard. This is not, how-
ever, a significant exception to participatory rights since it is contemplated and
required that "members shall play a full part, within the limits of their resources,
in the preparation by appropriate international standardizing bodies of inter-
national standards...." Id. art. 2.6. The obligation to give participatory rights to
foreign governments in standard-setting exercises is also qualified by the right of
members to omit those procedural rights where "urgent problems of safety, health,
environmental protection or national security arise or threaten to arise," in
which event the procedural rights must be given after the standard is adopted. Id.
art. 2.10.

151 Id. art. 2.5.

152 Id. art 4.1. Under this provision, each member must also take reasonable
measures to make sure that its local governments and non-government standard-
izing bodies also comply with the Code.

153 Id. art. 10.
are adopted.\textsuperscript{154} This comprehensive code of administrative procedure governing all standards-making is an application of the external, participatory vision.

This pattern of procedural requirements is a common feature of many WTO treaties.\textsuperscript{155} Moreover, in WTO adjudication, the Appel-

The most far-reaching guarantee of foreigners’ rights goes beyond even the right to participate in administrative proceedings and gives foreigners the right to enforce their rights in a neutral quasi-judicial forum. The treaty dealing with intellectual property, TRIPS,\footnote{TRIPS Agreement, supra note 19.} requires every WTO member (subject to a transition period for least developed countries) to have available an enforcement system in which intellectual property owners can enforce their property rights against alleged infringers.\footnote{Article 41 requires countries to “ensure that enforcement procedures . . . are available . . . so as to permit effective action against any act of infringement . . . .” TRIPS Agreement, supra note 19, art. 41, para. 1. Although that does not require “a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general,” the numerous obligations in this and succeeding articles of TRIPS require an independent decision-maker who takes evidence on the record and has enforcement and sanctioning power against alleged infringers. Id. art. 41, para. 5. Article 42 requires that members “make available to rights holders civil judicial procedures concerning the enforcement of intellectual property. . . .” Id. art. 42 (footnote omitted).} In the United States, where access to courts to vindicate rights is second nature and is available to all, it is often overlooked that access to an independent adjudicatory system is, in many countries, a novelty, and that an enforceable right of foreigners to sue to protect their rights within that territory is of enormous importance in knitting together

tions for foreigners. See, e.g., TRIMS Agreement, supra note 19, art. 6 (discussing transparency).
disparate national systems and fulfilling the external, participatory vision.

5.2.2. Procedural Guarantees as a General Requirement for Avoiding Unjustifiable or Arbitrary Discrimination

The protection of the participatory rights of foreigners is not limited to rights enumerated in the WTO agreements; participatory rights are deeply ingrained in the ethos of WTO norms and jurisprudence. Even beyond the provisions of WTO agreements that give foreigners specific procedural rights to participate meaningfully in a country’s policymaking machinery, the Appellate Body has interpreted the general non-discriminatory standards of the WTO treaties to require procedural attention to the views of foreign governments and, through them, to the views of foreign private interests.

Most notably, in the landmark Shrimp Turtles decision, the Appellate Body made the procedural rights of foreigners the touchstone for the application of the general exceptions of Article XX of GATT. There, the Appellate Body considered the legality of United States restrictions on the importation of shrimp from countries that were not adequately regulating their shrimp fishermen in a way that protected endangered sea turtles. Under the terms of the chapeau to Article XX, the United States could not maintain these restrictions if they constituted “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” The Appellate Body made the procedural rights of foreigners the centerpiece of its analysis of that language. According to the Appellate Body:

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161 Shrimp Turtles, supra note 159, at 15 (quoting the joint appellees’ request that the Appellate Body rule the embargo on shrimp to be inconsistent with the chapeau of Article XX).
Another aspect of the application of [the U.S. regulatory scheme] that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage [foreign-exporting countries] in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition.\footnote{Id. at 65.}

This holding is noteworthy for two reasons. Although the Appellate Body did not support its interpretation of Article XX with citations to general principles of international law, it could have, for customary international law often calls for negotiations when domestic policy has external environmental effects.\footnote{See Lake Lanoux Arbitration (Fr. v. Spain), 12 R. I.A.A. 218 (1956), 24 I.L.R. 101 (Arbitral Trib. Nov. 16, 1957) (holding that France has an obligation to confer with Spain before planning a hydroelectric project in the Pyrenees that could adversely affect Spain); Case Concerning the Gabčíková-Nagymoros Project (Hung. v. Slovk.), 1997 I.C.J. 65, 78 (Sept. 25, 1997) (basing duty to negotiate in part on prior agreement between the parties, but citing precedent for customary duty to negotiate, including “North Sea Continental Shelf” Case, I.C.J. Reports 1969, para. 85, 93). Of course, treaties often impose a duty of prior consultation and negotiation when transborder policy is made. See, e.g., United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses, 36 I.L.M. 700 (1997).}

Moreover, the Appellate Body embraced this broad participatory principle even though it could have ruled on the narrower ground that the United States had discriminated by negotiating with some but not all of its trading partners.\footnote{The U.S. State Department, which enforced the shrimp embargo, at first interpreted its Congressional mandate to cover only the Western Hemisphere and negotiated the Inter-American Convention for the Protection of Sea Turtles with its trading partners in that area of the world. When the U.S. Court of International Trade interpreted the Congressional mandate to include endangered turtles anywhere in the world and fixed an early date for compliance with the mandate, the State Department threw together an embargo program without giving the countries of Southeast Asia the same procedural rights given to countries in the Western Hemisphere. This unintentional discriminatory treatment became an alternative holding for the Appellate Body. See Shrimp Turtles, supra note 159, para. 172. Robert Howse has mounted a strenuous argument against this reading of the Shrimp opinion, arguing that the Appellate Body did not articulate a general duty to negotiate, but only a duty to negotiate on a non-discriminatory basis when a state negotiates with at least one country. Howse, supra note 160, at 507-10. His argument, while plausible, has the appearance of wishful thinking from an environmental champion. Admittedly, the Appellate Body was less than clear, but the}
only one of the grounds for striking down the application of
the United States measure, the obligation to negotiate before taking
unilateral measures in order to avoid arbitrary or unjustifiable dis-


crimination is thus firmly rooted in evolving WTO norms.165

significant fact is that the Appellate Body announced the general duty to negotiate
before it talked about the duty not to discriminate against countries when negoti-
ating, which seems to indicate that the general duty to negotiate is independent of
the secondary duty not to discriminate while negotiating. Moreover, the Appel-
late Body recognized that the subject matter being regulated, the “protection and
conservation of highly migratory species of sea turtles ‘itself’ demands concerted
and cooperative efforts on the part of the many countries whose waters are trav-
ersed in the course of the recurrent sea turtle migrations.” Shrimp Turtles, supra
note 159, para. 168. This, too, supports the need for cooperative, not unilateral,
action, the very foundation of the external, participatory vision. See also Gránne
de Búrca & Joanne Scott, The Impact of the WTO on EU Decision-Making, in The EU
AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 1, 16-22 (Gránne de Búrca &
Joanne Scott eds., 2001); Howard F. Chang, Toward a Greener GATT: Environmental
Trade Measures and the Shrimp-Turtle Case, 74 S. CAL. L. REV. 31 (2000) (offering
support for cooperative action); Petros C. Mavroidis, Trade and Environment After
the Shrimp-Turtles Litigation, 34 J. WORLD TRADE 73 (2000). Moreover, the later
opinion of the Appellate Body in the same case that reviewed the duty to negoti-
ate in a challenge brought by Malaysia did not back away from the general duty
to negotiate. Naturally, when testing whether a country has negotiated in good
faith—the requirement imposed
by
the Appellate Body—the good faith can be
measured by comparing how the country negotiated with its various trading
partners, which is what the Appellate Body held. WTO Appellate Body Report on
United States—Import Prohibition of Certain Shrimp and Shrimp Products: Re-
course to Article 21.5 of the DSU by Malaysia [hereinafter Shrimp Turtles (21.5)],
http://docsonline.wto.org. But that opinion also pointed out that the holding
that a state may not negotiate discriminatorily was only “in part” the basis of the
ruling that the United States has engaged in unjustifiable discrimination. Id.
para. 119. The other part of the holding, presumably, was the general duty to negotiate,
which is implicitly endorsed by the reference to discriminatory negotiations as
only a “part” of the original opinion. Moreover, the Appellate Body repeated that
in view of the requirement in the United States legislation to negotiate and:

given the decided preference for multilateral approaches voiced by WTO
Members and others in the international community in various interna-
tional agreements for the protection and conservation of endangered sea
turtles that were cited in our previous Report, the United States, in our
view, would be expected to make good faith efforts to reach international
agreements that are comparable from one forum of negotiation to the
other.

Id. para. 122.

165 The obligation to negotiate was further discussed and amplified when the
Appellate Body reviewed later United States' efforts to negotiate with foreign
countries. See Shrimp-Turtles (21.5), supra note 164 (upholding the United States
actions as complying with the good faith standard).
Moreover, the procedural requirements of the *Shrimp Turtles* decision went beyond the general requirement to negotiate in good faith before imposing environmental embargoes. The Appellate Body found in the concept of "arbitrary discrimination" a requirement of transparent and predictable processes.\(^{166}\) Thus, when a country sets up a process for certifying countries that meet environmental standards it must provide the applicant country with an opportunity to be heard, to respond to the arguments made against it, and to receive a statement of reasons for the denial of the certificate.\(^{167}\) Again, the importance of the WTO as an international organization to enforce participatory rights is apparent.\(^{168}\) In short,

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\(^{166}\) "Article X:3 of the GATT Final Agreement establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations . . . ." *Shrimp Turtles*, supra note 159, para. 183.

Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.

*Id.* para. 182 (discussing Article X:3). In addition:

The non-transparent and ex parte nature of the internal governmental procedures applied by the . . . [United States] . . . throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.

*Id.* para. 183. Apparently this finding supported the conclusion of arbitrary discrimination under the chapeau of art. XX. *See id.* para. 184 ("We find . . . that the United States measure . . . amounts to . . . 'arbitrary discrimination' . . . ").

\(^{167}\) Interestingly, this requirement comes because of the inherent discrimination between those who are certified (even if no procedural rights are granted) and those who are denied an effective procedural opportunity to be certified. *See Shrimp Turtles*, supra note 159, para. 181 (demonstrating the impossibility of fair administration with different procedural rules).

\(^{168}\) The rights of participation that the Shrimp-Turtle (21.5) decision requires are an important part of the détente that the Appellate Body forged in that decision between the trade regime and the environmental regime. The Appellate Body was struggling with the claims of the trade regime—which wanted to restrict embargoes intended to protect the environment outside of a country—and the environmental regime—which wanted to enable countries to make trade rights dependent on countries meeting environmental standards. The Appellate Body forged a compromise by allowing trade to be enlisted to enforce extra-
the external, participatory model of the WTO is deeply embedded in the jurisprudence of the WTO.

6. THE INTERNAL, ECONOMIC VISION WEAKENS SUPPORT FOR THE WTO; THE EXTERNAL, PARTICIPATORY VISION ENHANCES IT

Not only is the internal, economic vision of WTO legitimacy founded on inaccurate constitutional analysis and misplaced notions of democratic policymaking, the vision cannot sustain support for the WTO among a broad range of civil society. The internal, economic vision emphasizes the economic benefits of trade, and the values promoted by efficiency, a view tailor-made for (and by) economists and trade specialists. But it does not advance a vision for the WTO that is acceptable to those for whom economic and efficiency values are not paramount. The vision presents too narrow a focus—and an unnecessarily narrow focus—to garner widespread support for the legitimacy of the WTO.

The problem with the internal, economic vision is not with faulty economic analysis. The economic case for free trade is clear. The problem with the internal, economic vision is that for many people, the economic or efficiency values on which the vision is based are only a subset of the values that make social arrangements valuable. For a good part of the non-trade community social policy must be based on a wider array of values, including meas-

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169 Robert Howse makes a similar point when he writes:

As persons with the bent of managers and technical specialists, they tended to understand the trade system in terms of the policy science of economics, not a grand normative political vision. A sense of pride developed that an international regime was being evolved that stood above the “madhouse” of politics (if one can borrow Pascal’s image), a regime grounded in the insights of economic “science,” and not vulnerable to the open-ended normative controversies and conflicts that plagued most international institutions and regimes, most notably, for instance, the United Nations.


170 See, e.g., Raustiala, supra note 12, at 403 (“I can only imagine what Seattle would have been like if [McGinnis] ideas had been widely circulated among protesters.”) (referring to the version of the internal, economic vision appearing in John O. McGinnis, The Political Economy of Global Multilateralism, 1 Chi. J. Int’l L. 381 (2000)).

https://scholarship.law.upenn.edu/jil/vol24/iss1/1
ures of welfare that are not precisely captured by arguments about efficient markets. To them, enhancing efficiency without also paying attention to values of equity and community is a mistake.

Indeed, the internal, economic vision confirms the worst fears that members of civil society have about the WTO and the world trading system. That vision espouses the very caricature of the WTO that the WTO critics find so objectionable—the idea that the function of the WTO is to freeze public policy into efficiency values, and to retard public policy that would be based on non-efficiency values. In addition, because what is frozen in place is a view of efficiency made by trade specialists at a time when the relationships between free trade values and other social values were only dimly understood, the vision gives rise to the justifiable fear that a particularly narrow brand of efficiency analysis is being "constitutionalized" through the WTO. The defenders of the WTO who espouse this vision are challenging the WTO’s critics to accept the free trade paradigm; that will not happen. They should be working to fit the free trade paradigm into a broader vision of the role of democratic values in making economic and social policy in an era of interconnected globalization.

The irony is that the external, participatory vision of the WTO is fully consistent with the efficiency values that are so important to trade specialists and economists. The external, participatory vision emphasizes the freedom given by markets and the importance of transnational legal participation as a mechanism to enhance that freedom. It fully supports the goals of those who would build wealth by building freedom, but without pushing a model of unilateral tariff reduction that history and experience have shown to be unrealistic.

Not only is the external, participatory vision of the WTO fully consistent with values of efficiency, it is attractive for other reasons. Because the vision is grounded in fundamental and widely shared values associated with democracy, federalism, and constitutionalism, and because it accurately encompasses the values that actually animate the WTO system, the external, participatory vision is—for those reasons—attractive to the WTO’s critics and to a wide spectrum of civil society. The heart of the external, participatory vision is the need to foster participatory decision-making when decisions in one country potentially affect people who live in other countries. This value underlies the international agenda of virtually every group that might otherwise be a critic of the WTO.
To see why the external, participatory vision is attractive, consider the following passage in which David Held discusses the essential democratic dilemma in an interconnected world:

To take some topical examples: a decision to increase interest rates in an attempt to stem inflation or exchange rate instability is most often taken as a ‘national’ decision, although it may well stimulate economic changes in other countries. A decision to permit the ‘harvesting’ of the rainforests may contribute to ecological damage far beyond the borders, which formally limits the responsibility of a formal set of political decision-makers. A decision to build a nuclear power plant near the frontiers of a neighboring country is a decision likely to be taken without consulting those in the nearby country (or countries), despite the many risks and ramifications for them. A decision by a government to save resources by suspending food aid to a nation may stimulate the sudden escalation of food prices in that nation and contribute directly to an outbreak of famine among the urban and rural poor. These decisions, along with policies on issues as diverse as investment, arms procurement and AIDS, are typically regarded as falling within the typical domain of authority of a sovereign nation-state. Yet, in a world of regional and global interconnectedness, there are major questions to be put about the coherence, viability, and accountability of national decision-making entities themselves.¹⁷¹

Held’s analysis makes it clear that a democratic deficit similar to that addressed by the WTO cuts across subject matter. Policy that adversely affects the welfare of those living in other countries is a common feature of the modern world. Accordingly, we need to find institutional structures to enhance democracy by giving those adversely affected by policy the opportunity to play a role in shaping that policy, not only for economic policy issues (like interest rate levels), but in every other social issue in which one country, through its policy decisions, has the power to affect the lives of people in other countries.

In short, the external, participatory vision of the WTO places the WTO firmly in the forefront of international institutions that are addressing the central issue of global governance—how policy that affects the lives of foreigners is made when those foreigners have no formal voice in shaping that policy. This is an issue that is at the core of the interest of groups of various political persuasions, across numerous subject matter areas. Environmentalists, labor rights activists, and human rights activists, on the one hand, and those interested in transnational issues or economic freedom, on the other, are at the most fundamental level concerned with the effects of policy made in one country or the people of other countries, and are therefore interested in advancing new forms of transnational policymaking. Once they understand the true nature of the WTO, they will stop questioning the legitimacy of the WTO and begin the earnest task of integrating the values of the WTO with other values that are important to people.

7. CONCLUSION

The WTO needs to be rescued from its friends. The WTO is one of the most important international institutions, but not for the reasons that trade specialists and economists believe, and not for the reasons that global skeptics fear. True, the WTO has had significant success as a trade organization and has been instrumental in improving the welfare of many people around the world in all types of countries. But the legitimacy and importance of the WTO lies not in its role in opening markets or in helping countries suppress “special interest” legislation. Its importance lies in the success that it has had in moving globalization toward new forms of transnational participation and thus new forms of global democracy.

The friends of the WTO—those trade enthusiasts and economists that have guided the fortunes of the WTO—have put together a defense of the WTO that accentuates the efficiency values that the WTO promotes and the welfare that is promoted by efficiency values. I do not doubt those values or question the welfare effectiveness of the WTO. But efficiency is not the only value that

172 The external, participatory vision will therefore be attractive to advocates of Immanuel Kant’s notion of cosmopolitan democracy that can lead to perpetual peace. See, e.g., PERPETUAL PEACE (James Bohman & Matthias Lutz-Bachmann eds., 1997) (discussing, through different pieces, Kant’s cosmopolitan ideal of perpetual peace).
drives public policy, and the critics of the WTO are justified in questioning the legitimacy of any organization that emphasizes efficiency values at the expense of other values. As long as the legitimacy of the WTO is understood and projected in terms of efficiency values, and as long as the WTO is understood only as a trade organization, the WTO will fail to receive the respect that it deserves and the acceptance that will enable it to play a more central role in providing public policy solutions to the challenges of globalization.

As we have seen, democracy is a difficult concept to advance in an era of globalization. In an interconnected world, the concept of territorial democracy is an historical artifact rather a workable program. Democracy assumes that those who will be affected by policy will have an opportunity to participate in some form in the making of that policy. Because that is not possible when the policy made in one country adversely affects people in other countries, much contemporary policymaking violates fundamental notions of democracy. State-centered democracy in an interconnected world has only the patina of legitimacy rather than the content of legitimacy. As long as the policies made in one country affect the welfare of people in other countries, support for individual autonomy and self-determination—the essence of democracy—compels us to search for new forms of representation across borders. The WTO is one such form of transnational representation and participation.

The WTO allows each member country, in the representation of its people, to try to persuade other countries to change policies that are inimical to the interests of its people when those people would otherwise be adversely affected by the policy without representation. A country proposing to increase a tariff or subsidy, or to regulate its affairs in a way that reduces access to its market unnecessarily, must appear in a forum that allows those adversely affected by the policy to argue against the policy. Because this forum fosters participatory policymaking, it is consistent with, and reinforces, global federalism that increases, rather than decreases global democracy and effective national sovereignty.

The WTO supports important participatory and democratic principles in an era of globalization; this role is one that even the critics of particular policies of the WTO must acknowledge to be legitimate. This role is precisely the role that the critics of the WTO find to be necessary to deal with other areas in which policy made in one nation adversely affects people in other nations—issues of environmental spillover and international crime for example. Ac-
cordingly, critics and friends alike can appreciate the WTO as an institution of participatory policymaking.