

DOES TODAY'S INTERNATIONAL TRADE AGREEMENT BIND TOMORROW'S CITIZEN?

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INTRODUCTION

When, if ever, can the citizens of a democracy be morally bound by an agreement made by a previous generation of their fellow citizens? Although it is seldom faced squarely, this question usually arises in the context of assessing the legitimacy of an entrenched constitution,¹ particularly one with judicial review. Thomas Jefferson famously held that the answer is never.² His view was that no generation has the right to bind another;³ it can also be framed as the objection that no living generation should be bound by the “dead hand” of the past.⁴ Few people accept Jefferson's position.⁵ But it is not altogether clear what the moral, as opposed to the practical, grounds for rejecting it are.

I shall argue that an analogous difficulty arises with certain *international* agreements—specifically, with international agreements that are effectively *enforceable*. What these international agreements have in common with an entrenched domestic Bill of Rights is that, in each case, future generations in a given state are effectively disabled from certain exercises of their domestic legislative power. While I shall grant that such an arrangement may be plausibly defended against the dead hand objection in

* Canada Research Chair, Department of Philosophy, University of Toronto. An earlier version of this paper was presented to a workshop on the ethics of contracts, organized as part of the Twenty-second World Congress of Philosophy of Law and Social Philosophy held in Granada. I am grateful to Horacio Spector, the organizer, for including me in the workshop and to Alon Harel, Peter de Marneffe, Michael Otsuka, Henry Richardson, Don Ross, Fernando Tesón, and Alex Voorhoeve for helpful discussion. For very helpful correspondence, I am especially grateful to David Estlund.

1. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THOMAS JEFFERSON: WRITINGS 959–64 (Merrill D. Peterson ed., 1984).

2. *See id.*

3. *See id.* at 959, 963.

4. Peter de Marneffe, *Popular Sovereignty, Original Meaning, and Common Law Constitutionalism*, 23 L. & PHIL. 223, 224 (2004). Peter de Marneffe provides a list of scholars who endorse the objection in a somewhat different context, namely, as an objection to the principle of original meaning. *Id.* n.1.

5. Few, but not none. *See, e.g.*, MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY 132–50 (2003); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 5 (1989) (viewing democracy as a “unique process of making collective and binding decisions”).

the constitutional case, I shall argue that no analogous defense is plausible in the case of international *trade* agreements.

Indeed, I shall argue, furthermore, that insofar as they effectively disable future generations from exercising their domestic legislative power in the health or education sectors, international trade agreements are not morally binding. However, it is also true that among international agreements, trade agreements are the most likely to be effectively enforceable. Hence, we lack an answer to the dead hand objection in precisely that corner of the international legal arena where we need one most.

In Part I, I explain how both a domestic constitution and an international trade agreement effectively disable a majority of the people from deciding domestic legal questions, using as an example the General Agreement on Trade in Services (GATS). Part II investigates the presumption against disabling the majority, as well as various strategies by which this presumption may be defeated in the domestic constitutional case. In Part III, I conclude that these strategies for defeating the presumption are not generalizable to international trade agreements. In particular, the effective disabilities to deciding domestic legal questions concerning health or education that enforceable international trade agreements impose on later generations turn out to be substantively unjustified.

I. PART ONE

A. *A Domestic Constitution Effectively Disables a Majority of the People from Deciding Certain Domestic Legal Questions*

It will be helpful to begin with the situation that gives rise to the dead hand objection in the more familiar context of a democratic domestic constitution.⁶ The constitutional question is often specifically associated with an assessment of the democratic credentials of judicial review. But neither the specific focus on judicial review nor the restriction in the terms of assessment to those of democracy is analytically central, or even salutary. Rather, what is central is the status of certain limits on the legal power of a contemporary generation of citizens to decide certain legal questions concerning their own state. For simplicity, let me call these questions “domestic” legal questions; and for precision, let me follow Hohfeld in calling the limits on their legal power to decide, “disabilities.”⁷ Fundamentally, the

6. See Letter from Thomas Jefferson, *supra* note 1, at 963.

7. See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 60 (Walter Wheeler Cook ed., 1919).

dead hand objection concerns the status of a whole generation's legal disability to decide a given domestic legal question.

Consider an example—say, the question of whether individuals have a legal claim-right to due process of law.⁸ When this right not only exists, but is constitutionally entrenched, the legislature is disabled from rescinding it. That is to say, the legislature has no legal power to decide that individuals will no longer have the legal claim-right to due process of law.⁹ In Hohfeld's terms, this is equivalent to saying that individuals have an *immunity* against the legislature from having their claim-right rescinded.¹⁰ A *constitutional* right (e.g., to due process of law) is therefore the combination of a legal claim-right and a legal immunity from having that claim-right rescinded. This immunity is equivalent to the legislature's legal disability to decide a particular domestic legal question.

However, most constitutions provide for their own amendment.¹¹ Typically, the legislature acting alone is not entitled to amend the constitution. But there is usually some coordinated set of actors that is entitled to amend the constitution (e.g., a supermajority of the legislature acting in concert with other decision-making bodies).¹² Strictly speaking, then, even a constitutional right to due process of law does *not* provide an individual with a legal immunity *against these actors* from having her basic legal claim-right to due process rescinded. Unlike the legislature, the set of actors entitled to amend the constitution *does have the legal power* to rescind the claim-right to due process of law (or, for that matter, to rescind the legislature's disability to rescind that claim-right).

Nevertheless, procedures for amending the constitution are usually fairly cumbersome. Indeed, they are normally deliberately designed to make amending the constitution very difficult.¹³ Let us accommodate these various facts by saying that even the coordinated set of actors entitled to

8. See, e.g., U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 7–11, 24.

9. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (invalidating a state statute that infringed on the “fundamental right of parents to make child rearing decisions”); *Zablocki v. Redhail*, 434 U.S. 374, 386–88 (1978) (noting that “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests” and invalidating a state statute that impinged on the “fundamental . . . right to marry”).

10. See HOHFELD, *supra* note 7, at 60.

11. See, e.g., U.S. CONST. art. V; CAN. CONST. (Constitution Act, 1982) pt. V (Procedure for Amending Constitution of Canada), §§ 38–49.

12. See U.S. CONST. art. V. Article V of the U.S. Constitution requires two-thirds of both houses of Congress or two-thirds of the states to propose an amendment to the Constitution. The proposal must then be ratified by three-fourths of the state legislatures in order to become effective.

13. See *id.*

amend the constitution is *effectively disabled* from deciding certain domestic legal questions.¹⁴ For example, the coordinated set of actors entitled to amend the constitution is effectively disabled from rescinding existing constitutional rights because in practice it is almost never able to exercise the legal power (it strictly has) to rescind them.

Under what conditions is it justified (or legitimate) effectively to disable the majority of the people from deciding a certain domestic legal question? That is our core issue. I use the expression “majority of the people” advisedly here, so as to cover both the (strict) disability of the people’s primary representatives (i.e., the legislature) and the more fundamental, but also more wordy, (effective) disability of the coordinated set of actors entitled to amend the constitution.

This core issue is often what is at stake in assessments of judicial review.¹⁵ But it is important to distinguish the disabilities suffered by the majority from the mechanism or institutional arrangement whereby these disabilities are implemented or enforced. *If* we suppose that the disabilities are themselves justified, there will be much less of an issue about how the mechanism for implementing the disabilities is justified. By contrast, if the disabilities suffered by the majority are *not* justified, then any mechanism for implementing them will be automatically unjustified. Since judicial review is, among other things, an institutional arrangement for *implementing* disabilities imposed on the majority of the people, assessments of judicial review depend upon a *prior* assessment of the disabilities it implements.¹⁶

B. *International Trade Agreements Similarly Disable the Majority*

Let me now explain how certain international agreements also function effectively to disable the majority of the people in a given signatory

14. With a strict disability, attempts by the agent to exercise the power she lacks are simply null and void; they have no valid effect. By contrast, with an *effective* disability, the agent strictly speaking has the power in question, so that if she were to succeed in exercising it, the normal effect would validly obtain. However, for various reasons, it is very difficult for the agent to exercise this power. In effect, then, practical realities prevent her from exercising the power.

15. See Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 36 (1992) (“Judicial review . . . constrains the range of decisions citizens can make in ordinary lawmaking procedures. (So it is held ‘antidemocratic.’)”).

16. For a modest but reasonable argument for judicial review that explicitly distinguishes between a justification for the limits on the power (i.e., the disabilities) of the legislature and a justification for judicial review as an institutional arrangement to implement these limits, see Horacio Spector, *Judicial Review, Rights, and Democracy*, 22 L. & PHIL. 285, 310–14 (2003). Spector’s argument for judicial review, which appeals to Coke’s dictum, *see id.* at 312–13, is modest precisely because it is *conditioned* on some antecedent justification for the legislature’s disabilities. It is not clear whether Spector takes himself to have discharged that antecedent elsewhere in the article.

state from deciding certain domestic legal questions. I shall first describe a specific example and then generalize the observation.¹⁷ My example comes from the GATS, which is one of the free trade agreements of the World Trade Organization (WTO).

For concreteness, let us focus on a particular provision of the GATS, article VIII on monopolies.¹⁸ This article prohibits the introduction of new service monopolies—as well as the expansion of old ones—in “scheduled” sectors, i.e., service sectors that signatory nations have explicitly committed to the full scope of the GATS. Commitments made under the GATS can be made in one of two modes, either bound or unbound. Bound commitments cannot be withdrawn unless the signatory nation either quits the GATS altogether or else compensates other GATS signatories whose trade would be adversely affected.¹⁹

To illustrate the operation of this provision, let health insurance serve as our example of a service sector. Over seventy-six WTO members, including the European Union and all of North America, have not only scheduled their health insurance (sub)sectors under the GATS, but have also bound this commitment.²⁰ Consider the consequences in Canada. Health insurance in Canada is available both publicly and privately, depending on whether the medical service to be insured is covered under the national health care system or not.²¹ Health insurance for medical services that are included within the national system is subject to a public insurance monopoly.²² But private health insurance is available, within a competitive market, for medical services excluded from (and so provided outside of)

17. I draw here on my previous work, Gopal Sreenivasan, *Does the GATS Undermine Democratic Control Over Health?*, 9 J. ETHICS 269, 269–81 (2005). The analogy between a domestic constitution and World Trade Organization agreements is also noted in Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167, 167–86 (2001).

18. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1B, General Agreement on Trade In Services art. VIII, Apr. 15, 1994, 33 I.L.M. 1167 (1994) [hereinafter GATS], available at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

19. See Sreenivasan, *supra* note 17, at 277. Note that “compensation” here is not paid to the adversely affected service provider (i.e., not to firms), but rather to other GATS signatories (i.e., to nations). Moreover, the compensation is not financial. Instead, it takes the form of equivalent opportunities for trade in services, which are negotiated in the first instance by the relevant nations, but subject to determination by the adversely affected nation(s) as a last resort. See *id.* n.21; GATS, *supra* note 18, art. XXI.

20. Sreenivasan, *supra* note 17, at 272–73.

21. For a brief overview, see Colleen M. Flood et al., *The Borders of Solidarity: How Countries Determine the Public/Private Mix in Spending and the Impact on Health Care*, 12 HEALTH MATRIX: J. L.-MED. 297, 300–05 (2002).

22. However, note that in a very recent case, the Supreme Court of Canada struck down part of the legal framework supporting the public health insurance monopoly, at least in the province of Quebec. *Chaoulli v. Quebec (Attorney General)*, 2005 S.C.C. 35, 29272, [2005] S.C.J. No. 33 QUICKLAW (June 9, 2005).

the national health care system.²³ For accidental historical reasons, pharmaceuticals are among the treatments largely provided outside of the national system.²⁴ Hence, at present, they are largely covered by private health insurance in a competitive market.

Yet various proposals have now been made to reform the health care system in Canada by bringing pharmaceuticals (*inter alia*) more fully inside the national health care system.²⁵ Institutionally, this reform would require that the public health insurance *monopoly be extended* to include (outpatient) pharmaceuticals. In other words, it would require extending an existing service monopoly to services that are presently supplied on a competitive basis—including by foreign insurance firms based in jurisdictions that have signed the GATS (e.g., the U.S. and the E.U.). On its face, this extension would appear to violate article VIII of the GATS. For the purposes of illustration, let us assume that it would violate article VIII.

In our terminology, the question of how pharmaceutical provision should be financed in Canada (e.g., whether insurance for it should be administered publicly or privately), like the question of whether the Canadian health care system should be reformed (e.g., to include pharmaceuticals more fully), is a domestic legal question. Strictly speaking, the majority of the people in Canada retains the legal power to decide this question, even in the example as described. To begin with, that is because imposing a legal obligation on an agent not to exercise one of her legal powers does not technically invalidate that legal power—it simply makes the agent liable to have the obligation enforced against her, should she exercise the power. In principle, moreover, Canada can still quit the GATS and thereby avoid the obligation (that is, the obligation not to extend its public insurance monopoly) altogether. As in the constitutional case, then, there is no strict disability here to decide a domestic legal question.²⁶

However, granted two further assumptions, Canadians (i.e., any majority of them) are nevertheless *effectively* disabled from deciding how the provision of pharmaceuticals should be financed in their own country. The first assumption is that the cost of simply quitting the GATS—of withdrawing from (or only participating on severely handicapped terms in) interna-

23. Flood et al., *supra* note 21, at 301, 305.

24. Pharmaceuticals provided within a hospital setting belong to the national health care system, and so are covered under the public insurance monopoly. For some historical background, see CAROLYN HUGHES TUOHY, ACCIDENTAL LOGICS: THE DYNAMICS OF CHANGE IN THE HEALTH CARE ARENA IN THE UNITED STATES, BRITAIN, AND CANADA (1999).

25. See, e.g., Allan S. Detsky & C. David Naylor, *Canada's Health Care System—Reform Delayed*, 349 NEW ENG. J. MED. 804, 808–09 (2003).

26. See *supra* notes 8–14 and accompanying text.

tional trade in services—is too high to make this a realistic or feasible option. In that case, Canada's GATS obligations are effectively compulsory, i.e., they cannot actually be avoided in practice. The second assumption is that the (prospective) cost of compensating other GATS signatories (or of having the obligation to do so enforced by the WTO) is sufficiently prohibitive that it is not worthwhile (e.g., it is irrational) for Canada to rescind its bound GATS commitment.²⁷ In that case, practical realities effectively prevent Canada from exercising its strict legal power to decide the domestic legal question of how pharmaceutical provision should be financed. But that is just to say that (any majority of the people in) Canada is effectively disabled from deciding this question—provided, at least, that the two further assumptions actually hold, a point to which we shall return presently.

C. Distinctions Between Domestic Constitutions and International Trade Agreements

In practice, therefore, both the GATS and an entrenched domestic Bill of Rights effectively prevent the majority in a given jurisdiction from exercising its legal power to decide certain domestic legal questions. Despite the basic analogy on this point, two differences between the cases are worth noting. First, different specific mechanisms are employed to hinder the majority from exercising the relevant legal power(s). In the case of a domestic Bill of Rights, the hindrance arises primarily from the extraordinary coordination required by the amending formula, whereas in the case of the GATS the hindrance arises primarily from considerations of cost. Still, the final effect the respective hindrances achieve is structurally the same, namely, a certain set of legal arrangements (a particular answer to some domestic legal question) is locked into place because the legal power to alter the existing arrangements (to change the answer) cannot, in practice, be exercised. Because our fundamental issue concerns the legitimacy of preventing the majority from deciding a domestic legal question—which includes *changing* the answer to the question—this difference does not disturb the basic analogy between the cases.

Second, there is also a difference in the *content* of the legal arrangements respectively locked into place by a domestic Bill of Rights and by the GATS. The effective disabilities imposed on the majority of Canadians by their domestic constitution serve to lock recognition of certain fundamental individual rights and liberties into place.²⁸ By contrast, the effective

27. For an explanation of the compensation process, see *supra* note 19.

28. See, e.g., CAN. CONST. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), §§ 7–11, 24.

disabilities imposed by the GATS serve to lock the existing degree of privatization in scheduled service sectors into place. For example, like citizens in at least seventy-five other jurisdictions that have signed the GATS, citizens of Canada are effectively prevented from having a health insurance sector with a *lesser* degree of privatization than exists in their country today. It remains to be seen whether this difference in content—i.e., in which domestic legal questions the majority is effectively disabled from deciding—affects the basic analogy between the GATS and a domestic Bill of Rights.

D. Distinctions Between International Trade Agreements and Other International Agreements

While the GATS is an international *trade* agreement, nothing in the basic analogy I have suggested depends on this more particular fact—at least, not in principle. Any international agreement has the potential to impose an effective disability to decide some domestic legal question on the majority of the people in a signatory state. This potential will exist whenever compliance with the obligations entailed by an international agreement dictates a specific answer to some domestic legal question. Whether this potential to impose effective disabilities is realized depends on whether the international agreement in question satisfies the two further assumptions described in Section B above: to wit, whether signatory states have a realistic option of simply quitting (or abrogating) the agreement, and whether the prospective cost of having the agreement's obligations enforced makes compliance with them the only worthwhile option for a signatory state.²⁹

For present purposes, what distinguishes international trade agreements from other international agreements is simply a practical fact: given the advent of the WTO and its sanctions regime, trade agreements (WTO trade agreements, at least) plausibly satisfy the two further assumptions, whereas other international agreements (e.g., the Universal Declaration of Human Rights) do not.³⁰ In the case of the GATS, I shall have to let the plausibility of the first assumption speak for itself. The plausibility of the second assumption has been spoken for on the WTO's own website:

29. *See supra* Part I.B. If the agreement will not be effectively enforced, then this prospective cost plainly becomes negligible.

30. *See* GATS, *supra* note 18, art. XXI; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR., 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>.

These clearly defined commitments are “bound”: like bound tariffs for trade in goods, they can only be modified after negotiations with affected countries. Because “unbinding” is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business.³¹

Notice, finally, that if doubts remain about whether the GATS (or any other WTO agreement) satisfies the two further assumptions, then the situation can always be redescribed as one in which the potential of the GATS effectively to disable the majority in a signatory jurisdiction (from deciding certain domestic legal questions) has not yet been fully realized. The difficulty that attends such effective disabilities should then be seen as one that is lurking in the wings, rather than being on our doorstep already.

II. PART TWO

A. *Naïve Majoritarianism: The Presumption Against Disabling the Majority*

Let us return to the underlying question: When is it justified effectively to disable the majority of the people from deciding certain domestic legal questions? Evidently, the question owes its charge or urgency to a presumption *against* so disabling the majority. To frame it constructively, the presumption favors the majority of the people’s having unlimited power to decide the law of the land. For example, it favors the majority of Canadians having the legal power—effectively, and not merely strictly speaking—to decide how pharmaceutical provision should be financed in their own country. Let us call this presumption “naïve majoritarianism”; it is, of course, highly controversial.³² But our fundamental question amounts to asking when this presumption is defeated and why.

It seems to me that naïve majoritarianism is recognizably a *democratic* principle, albeit an extremely crude one. This classification is itself controversial, since some will insist that majoritarianism has to be refined at least somewhat before it may be graced with the imprimatur of “democracy.”³³ But, as we shall see, this narrower controversy makes no significant difference to the basic question, which concerns *when* the naïve majoritarian

31. WORLD TRADE ORG., UNDERSTANDING THE WTO 35 (2003), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

32. See, e.g., RONALD DWORIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15–38 (1996).

33. See *id.*

presumption against a given disability is defeated.³⁴ I shall simply focus on the basic question.

Before we turn to consider various strategies for answering it, we should pause to deflect a different sort of objection to naïve majoritarianism, one that stands free of its need for refinement. The objection complains that (naïve) majoritarianism presupposes a discredited theory of legitimacy,³⁵ namely, the theory that legitimacy depends on consent. To illustrate the error in this objection, let us briefly review some key features of an alternative theory of legitimacy on which (naïve) majoritarianism is equally well motivated, namely, Philip Pettit's Republicanism.³⁶ According to Pettit, the legitimacy of a law is due to its consistency with freedom as nondomination, as distinct from the consent of those subject to it. Consistency with freedom as nondomination requires that a law not interfere arbitrarily in citizens' lives. But to establish that a given law meets this test requires, in turn, that the law be systematically exposed to the possibility of effective challenge by the citizenry—to what Pettit calls the citizens' power to "contest" the laws.³⁷

However, the citizens' power to contest a law manifestly presupposes that they (or their representatives) retain the power to change it. Alternatively, citizens have no power to contest a law that they are effectively disabled from rescinding. Hence, the *motivation* for institutionalizing the power to contest—that is, the imperative to shield citizens from powers to interfere arbitrarily in their lives—supports a presumption against disabling the majority of the people from deciding the law of the land.

I put the point in terms of motivation because Pettit's Republicanism also includes a "countermajoritarian" condition, which is explicitly designed to disable the majority of the people from deciding (and so, from contesting) certain domestic legal questions—roughly, the constitutional

34. Of somewhat greater importance is the question of whether, when naïve majoritarianism is defeated, the defeating considerations themselves have the character of "democratic" considerations, whatever exactly that may mean. For when the naïve majoritarian presumption against a given disability is defeated by specifically democratic considerations, then that particular disability is, on balance, not only justified, but also consistent with democracy.

35. Academically discredited, that is, not popularly or politically or rhetorically discredited. For an early critique of the consent theory of legitimacy, see DAVID HUME, *Of the Original Contract*, in *ESSAYS, MORAL, POLITICAL, AND LITERARY* 465 (Eugene F. Miller ed., Liberty Classics 1987) (1777).

36. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997). For some recent discussions of democratic theory, and even specifically of judicial review, that appeal to a republican framework, see HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 8–17 (2002), and Spector, *supra* note 16, at 295–304. I draw here as well on Gopal Sreenivasan, *A Proliferation of Liberties*, 63 *PHIL. & PHENOMENOLOGICAL RES.* 229, 229–37 (2001).

37. PETTIT, *REPUBLICANISM*, *supra* note 36, at 183–85.

essentials.³⁸ The countermajoritarian condition is *also* motivated by the imperative to shield citizens from arbitrary power—only here the citizens being shielded are those in some minority and the potential source of arbitrary power is the will of the majority. We do not need to examine whether republicanism has a way consistently to shield some citizens from the unruly majorities of the present, while also shielding other citizens from the dead hand of the past. The point is only to illustrate that (naïve) majoritarianism is motivated under republican assumptions, even if resistance to it (at least, up to a point) is also motivated under the same assumptions. That is all we need to dismiss the objection.

B. Defeating the Presumption

I shall discuss two strategies for explaining when the presumption against disabling the majority is defeated. Both have been advanced in the context of assessing the legitimacy of an entrenched domestic constitution. However, given the analogy between a domestic Bill of Rights and enforceable international agreements, if either of these strategies succeeds the successful strategy may also be generalizable from one case to the other.

1. The First Strategy: The Presumption Is Defeated When the Disability is Self-Imposed

The first strategy is a non-starter, but it is an instructive one. It holds that disabilities suffered by the majority are justified whenever they are *self-imposed*.³⁹ On this view, the majority of the people is entitled to bind (and so, to disable) itself, and when it does, any presumption against disabilities imposed on the majority is defeated. For example, if the majority of the people *ratifies* a constitution (that establishes certain rights and disables the legislature from rescinding them), along with a typical amending formula (effectively disabling even those strictly entitled to amend the constitution from doing so), then the majority has simply disabled itself. Similarly, one might argue that the effective disabilities imposed by GATS on any signatory to the agreement are also self-imposed. After all, the obligation discussed in our previous example was triply voluntary: Canada signed the GATS, it committed its health insurance sector under the GATS, and it then bound its commitment.⁴⁰

38. *Id.* at 180–83.

39. See Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 L. & PHIL. 327, 353–54 (1990).

40. There is room to quarrel about whether the *majority of citizens* (as opposed to delegated bureaucrats) were sufficiently involved in this process of “self”-imposing obligations under the GATS.

The reason this strategy is a non-starter is that the legal force of a constitution, as well as that of an international agreement, is transgenerational. When everyone who actually ratified the constitution is long dead, for example, the constitution will still have legal force. As a result, later generations of citizens (including, plainly, any contemporary majority of them) will still be effectively disabled from deciding certain domestic legal questions. Since none of them actually ratified the constitution, their disability is clearly *not* self-imposed, at least not in any ordinary sense. It is rather imposed by the dead hand of the past.⁴¹ Likewise, majorities in future generations of Canadians (who did not even exist when the GATS was signed or health insurance scheduled) will remain effectively disabled from extending the public monopoly on health insurance to outpatient pharmaceuticals. This disability is not self-imposed either, but equally imposed by the dead hand of the past.

Whatever its merits in the case of the “founding” or “signing” generation, then, this justification for disabling the majority is inevitably short-lived. As we said at the outset, the fundamental problem concerns how one generation is justified in binding another generation. For (effective) disabilities that span different generations, the *self*-imposition strategy is therefore doomed because the “bound” self will always come apart from the “binding” self.

Two notable consequences follow from the failure of the self-imposition strategy. To begin, the “pre-commitment” model⁴² for justifying judicial review (or an entrenched constitution) also fails.⁴³ This follows because that model is simply an instance of the self-imposition strategy and so shares its defect: any given generation can only pre-commit itself. Furthermore, the underlying reason for the strategy’s failure makes a mystery, at least on the face of it, out of supermajoritarian ratification requirements. Normally, a bare majority vote—either in the legislature or in a referendum—is insufficient to ratify a constitution or constitutional amendment;

Arguably, a more immediate consequence of the analogy between domestic constitutions and enforceable international agreements is that the majority of citizens should be at least as directly involved in validating the latter undertakings as they are in ratifying (amendments to) the former. *See* Sreenivasan, *supra* note 17, at 279–80.

41. To translate this explicitly into republican terms, notice that any later majority—or, for that matter, minority—of citizens who disagree with (any part of) the inherited constitutional essentials they are effectively disabled from rescinding will now be subject to arbitrary interference in their lives. That is, they will be dominated.

42. *See, e.g.*, Freeman, *supra* note 39, at 353–56.

43. This is not to say that an *idealized* pre-commitment model fails (e.g., one that operates in a context of hypothetical consent). But in an idealized model, the specific notion of *pre*-commitment is otiose. For more extensive criticism of the pre-commitment model, on totally different grounds, see JEREMY WALDRON, *LAW AND DISAGREEMENT* 257–75 (1999).

ratification requires a supermajority, such as two-thirds or three-quarters.⁴⁴ However, since all of these votes take place in the present (or founding) generation, whereas the difficulty concerns later generations, the number of votes (i.e., the location of the threshold) appears to be completely irrelevant.

2. The Second Strategy: Qualifying the Presumption by Identifying Preconditions of the Presumption's Normative Standing

A second, more promising strategy aims to *qualify* naïve majoritarianism, by restricting the scope of its presumption against disabling the majority rather than defeating it outright. In general terms, the strategy is to identify *preconditions* of that presumption's having various kinds of normative standing—or, alternatively, to identify the preconditions of the normative standing of majority rule itself.⁴⁵ Because different kinds of normative standing are at issue, this turns out to define a family of strategies. What they have in common is (1) the idea that, unless a given condition is satisfied, the presumption against disabling the majority fails to have a particular normative standing; and (2) the claim that certain *limits* on the power of the majority (i.e., disabilities) to decide particular domestic legal questions are actually *constitutive* of the relevant precondition.

Let me mention four central examples. They proceed in decreasing order of the strength attached to the kind of normative standing at issue. The “limits” in question are limits on the legal power of the majority to decide domestic legal questions. For the moment, I will not say much about what content can be read into the various limits.

1. Some limits are *constitutive* of the procedure of majority rule⁴⁶ (or, further, constitutive of majority rule as “*democracy*”⁴⁷);
2. Other limits are *necessary* conditions on the *legitimacy* of majority rule;
3. Some limits are *necessary* conditions on majority rule's being part of an *acceptable* system of government;

44. See, e.g., U.S. CONST. art. V; CAN. CONST. (Constitution Act, 1982) pt. V (Procedure for Amending Constitution of Canada), §§ 38–49. For a proposal that Article V of the U.S. Constitution should be replaced by a more populist system in which the people vote directly on amendments proposed by the President, see BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS 410 (1998).

45. This is my own formulation based on sources I describe in greater detail *infra*. See *infra* notes 46–48 and accompanying text.

46. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980).

47. See DWORKIN, *supra* note 32, at 15–19.

4. Other limits are *necessary* conditions on majority rule's instantiating a certain fundamental value—e.g., liberty, individual self-rule, equality, community, nondomination, or deliberation.⁴⁸

To illustrate the general strategy, consider (1) briefly. Before the “majority of the people” can decide *anything*, certain procedures have to be in place defining, for example, who can vote, how votes are to be cast and counted, how questions or candidacies are to be presented, whether there will be prior discussion and under what conditions, and so on. A certain minimum apparatus is thus presupposed by the very existence of “the people” as an actual decision-making body, and so by the ability of any majority of them to arrive at a decision. It is simply incoherent for the majority to dispense with any part of this minimum apparatus. For example, it is incoherent for the majority to decide not to count *all* of the votes validly cast on a given question—incoherent, that is, not to count all the votes and then to represent the outcome as the “decision of the majority.” It follows not only that the majority is disabled from deciding not to count all of the valid votes, but that there can be *no (majoritarian) presumption* against *this* disability. Similarly, there is no such presumption against any other disability that falls within the scope of (1). Without a majoritarian objection to these disabilities, there is nothing in need of counterbalancing in order to yield their justification, all things considered.⁴⁹

The difference between (1) and (2) concerns the distinction between what is required simply to constitute majority rule as a functioning decision procedure and what is required for decisions made by the majority to possess *minimal* legitimacy. “Minimal” legitimacy is meant to mark the point at which there begins to be a presumption in favor of the majority's power to decide. There is *no* presumption in favor of majoritarian decisions that are not even minimally legitimate. But minimal legitimacy remains distinct from legitimacy, all things considered. Achievement of that more conclusive status depends on the weight of the considerations telling against the minimally legitimate decision. I am taking for granted that majority rule is not minimally legitimate by definition. Consider universal suffrage, for example. It is hard to deny that majority rule employed in a context without female suffrage is still “majority rule.” Hence, universal suffrage falls *out-*

48. For liberty, individual self-rule, equality, and community, see *id.* at 21–35; and for individual self-rule, equality, nondomination, and deliberation, see Spector, *supra* note 16, at 314–34. I have discussed the necessary conditions on individual self-rule, partially in criticism of Dworkin, in Gopal Sreenivasan, *Judicial Review and Individual Self-Rule*, 2 REVISTA ARGENTINA DE TEORÍA JURÍDICA 1, 1–8 (2001) (Arg.), <http://www.utdt.edu/departamentos/derecho/publicaciones/rtj1/pdf/Sreenivasan-F.PDF>.

49. Even the most naïve majoritarianism, then, has to accept *some* limits on the legal power of the majority to decide domestic legal questions.

side the scope of the main clause in (1).⁵⁰ However, it is not hard to argue that “male only” majority rule is not even minimally legitimate. Disabling the majority from deciding to restrict suffrage to men is therefore a necessary condition of majority rule’s being minimally legitimate. As with any disability within the scope of (2), there is not even a presumption against it.

The difference between (2) and (3) concerns the distinction between what is required for there to be *some* presumption in favor of the majority’s power to decide and what is required for that presumption to be *normally decisive*. Here I take it that when majority rule is embedded within a straightforwardly acceptable system of government, the presumption in favor of letting the majority decide will normally be decisive, even if exceptions cannot be ruled out altogether. A possible test case for the distinction between (2) and (3) is freedom of speech or freedom of the press. Are these necessary conditions of majority rule’s being *minimally* legitimate? It strikes me as certainly coherent, and perhaps even plausible, to deny this. That is, there is plausibly *some* presumption in favor of the majority’s power to decide, even when the decision is taken in the absence of free speech or a free press. Naturally, this may be debated. However, it is also plausible to deny that a system of government lacking free speech or a free press is straightforwardly acceptable. So the presumption in favor of a majority’s power to deny free speech or a free press would fall (well) short of being normally decisive; and, on balance, it is hard to avoid the conclusion that this presumption would, in fact, be defeated by the considerations favoring freedom of speech and of the press. Since these freedoms fall at least within the scope of (3), disabling the majority from rescinding them will still be justified on balance.

Finally, (4) connects the operation of majority rule with various fundamental values. Trivially, majority rule will not instantiate nondomination or equality, for example, if the majority decides to flout the minimum requirements of nondomination or equality. From the standpoint of these particular values, then, there is always something to be said for disabling the majority from making such decisions. But this leaves open the substantive philosophical question of how these values are related either to the minimal legitimacy or to the straightforward acceptability of a system of government.⁵¹

50. Arguably, however, it remains within the extended scope of majority rule constituted “as democracy,” at least if this is read to mean “full democracy.”

51. There is also the issue that preoccupies many contributors to the debate about judicial review, namely, whether the concept of democracy itself entails either minimal legitimacy or straightforward acceptability. See, e.g., DWORKIN, *supra* note 32, at 15–38; WALDRON, *supra* note 43, at 278, 282–312. That is to ask, are the limits in (2) or (3) actually within the extended scope of majority rule constituted

Where in the progression from (1) to (3) should we classify the immunities that protect fundamental rights of the kind commonly entrenched in a constitutional Bill of Rights? I assume that few of them actually fall within the scope of the main clause in (1). However, even if they “only” fall within the scope of (2), there will still be no objection to answer, and so their justification will automatically be secure. If they fall within the scope of (3), there will be some presumption against them, but this presumption can be rather plausibly regarded as defeated. Thus, the correlative disabilities will remain justified on balance.

I take it that different classifications will be in order for different constitutional rights.⁵² But it does not matter here just which classification is in order for each case. For present purposes, I grant that any standard constitutional right is at least a necessary part of a straightforwardly acceptable system of government; and hence, that its correlative disability is justified on balance. I am happy to grant this because my official concern is not with the disabilities that entrench constitutional rights, but rather with the disabilities imposed by effectively enforceable international trade agreements, such as the GATS.

III. PART THREE

Does today’s international trade agreement bind tomorrow’s citizen? No, it does not. More precisely, insofar as international trade agreements effectively disable later generations in signatory jurisdictions from deciding domestic legal questions concerning the signatory jurisdictions’ *health* or *education* sectors, the agreements are not morally binding on later generations. To see why not, let us consider what might be said to defend the effective disabilities that enforceable international trade agreements impose on later generations.

A. *Do the Benefits of Free Trade Justify Entrenched Free Trade?*

In general terms, the point of the effective disabilities imposed by the GATS is to *entrench* the existing degree of openness to trade in scheduled service sectors,⁵³ i.e., to lock this degree of openness into place. Because

“as democracy” in (1)? If so, then all of the relevant disabilities imposed on the majority count not only as justified, all things considered, but also as consistent with democracy. This seems to be Dworkin’s position.

52. Indeed, I am inclined to believe that certain standard constitutional rights do not even fall within the scope of (3). But much of this depends on which constitutional rights count as “standard.”

53. The existing degree of privatization (e.g., of competitive provision) in a service sector is entrenched as a side effect of entrenching its degree of openness to trade.

the GATS also aims progressively to liberalize international trade in services, its ultimate goal is to entrench an international system of free trade in services. Other international trade agreements aim to entrench free international trade in other tradeables, such as goods.⁵⁴

The common argument for entrenching a system of free international trade is that entrenchment is necessary to stabilize a system of free trade, and thereby to make it predictable. Stability and predictability are necessary, in turn, for maximizing the economic benefits of free trade.⁵⁵

We can summarize this argument in the following simplified terms:

(a) entrenchment is a necessary condition of maximizing the economic benefits of free trade;

(b) in country X, the maximum *domestic* economic benefits from free trade are a *net* positive.

Let us call this the “case for entrenched free trade” in country X.⁵⁶

If this case holds, then inhabitants of country X, including each later generation there, have *some* interest in being effectively disabled from revising (the various provisions that constitute) country X’s commitment to free trade. This follows from the fact that each living generation in country X has an interest in net economic gains, together with the hypothesized fact that there is some net economic gain that it can realize *only if* it is effectively disabled from revising country X’s commitment to free trade. How large a given generation’s interest is in being disabled in this way depends on the size and importance of the net economic gain in question.

It is important to distinguish here between free trade and entrenched free trade. Economic orthodoxy holds that, at least in the long run, free trade provides positive net economic benefits for all the trading partners. However, free trade does not have to be entrenched.⁵⁷ Trade can be free even when majorities in the respective trading jurisdictions are not effectively disabled from revising the regulatory framework that governs their trade. Consequently, for the purpose of identifying the benefits generated

54. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

55. See, for example, the WTO’s explanation: “Governments are always free to liberalize unilaterally without making commitments in the GATS. However, GATS commitments have real value in providing secure and predictable conditions of access to markets, which benefits traders, investors, and, ultimately, all of us as consumers.” WORLD TRADE ORG., GATS—FACT AND FICTION 13 (2001), www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf.

56. There are various ways in which this case can be formulated. What is crucial is simply that there be some positive level of net domestic economic benefit for which entrenchment is a *necessary* condition. The reference to “maximizing” in (a) serves to make the claim of necessity as plausible as possible.

57. See WORLD TRADE ORG., *supra* note 55, at 13.

specifically by the entrenchment of free trade, we should discount the net economic benefits realized by ordinary, *nonentrenched* free trade, since entrenchment is obviously not a necessary condition of realizing *these* benefits. We are only interested in the net economic benefits that entrenched free trade realizes *over and above* those realized by ordinary free trade. Let us call these benefits the “differential” net economic benefits of entrenched free trade.

So, to reprise, each living generation in country X has some interest in suffering the effective disabilities required to entrench free trade, and the size and importance of this interest depends on the differential net economic benefits of entrenched free trade in country X. But, of course, each living generation in country X *also* has some interest in *not* suffering the relevant disabilities. This follows immediately from the fact that each living generation has an interest in deciding domestic legal questions for itself. Each generation therefore has contradictory interests in the effective disabilities imposed by enforceable international trade agreements. Accordingly, the justifiability of these disabilities depends, in the first instance, on which of the contradictory interests has greater weight.

Notice that the case for entrenched free trade does not answer this basic question. It says only that the differential net economic benefits from entrenched free trade are positive. This is consistent with any or every generation’s interest in these benefits being outweighed by its interest in deciding the relevant domestic legal questions for itself, in which case the corresponding disabilities would not be justified. Hence, as stated, the case for entrenched free trade fails to justify entrenching free trade.

B. The Preemptive Strategy for Justifying Effective Disabilities Cannot Be Generalized to the Case of International Trade Agreements

The most direct way to remedy the case for entrenched free trade would be (somehow) to generate the result that every generation’s interest in the differential benefits of entrenched free trade is greater than its interest in deciding the relevant domestic legal questions for itself. However, an alternative to this direct comparison is suggested by the preemptive strategy for justifying effective disabilities that we examined in the constitutional case.⁵⁸ It is worth considering whether the preemptive strategy can be generalized to the case of enforceable international trade agreements.

58. *See supra* Part II.B.2.

Let us begin with an analogue of proposition (2), which invoked a normative standing of intermediate strength:⁵⁹

(2') The disabilities required to entrench free trade are *necessary conditions of the legitimacy* of majority rule.

To defend (2'), one would have to argue that majority rule employed in a context without entrenched free trade is not even minimally legitimate. I shall take for granted that this is simply absurd.

Let us therefore pass to an analogue of the weaker proposition (3).⁶⁰ The straightforward analogue would be:

(3') The disabilities required to entrench free trade are *necessary conditions* of majority rule's being *part of an acceptable system of government*.

Is it plausible to claim that a system of government that did not entrench its participation in free international trade is, *ipso facto*, unacceptable? This position also seems very difficult to sustain. It implies, for example, that prior to the advent of the WTO there were never any acceptable governments in the world. Yet, on the contrary, it seems much more plausible to hold that a system of government—for example, a run-of-the-mill modern constitutional democracy—that does not even participate in free trade, let alone entrenched free trade, *can still* count as “acceptable.” At worst, the position is suboptimal or short-sighted.

However, it may also be that the notion of an “acceptable system of government” is not robust enough to allow a clear evaluation of (3'). In discussing the constitutional case, we associated this notion with the conditions under which the presumption in favor of majority rule is normally decisive. For example, I claimed that freedom of speech was a necessary condition of an acceptable system of government, and hence that the presumption in favor of the majority's power to deny free speech fell short of being normally decisive.⁶¹ But a different way to understand the eminent plausibility of this conclusion is to see it as overdetermined by the intuitive conviction that we can reach all the way to the all-things-considered conclusion that a population's interest in free speech simply defeats the presumption in favor of the majority's power to deny free speech. In other words, it defeats the majority's interest in deciding this particular domestic legal question for itself.

What underwrites this intuitive conviction in the case of free speech? In brief, it is that freedom of speech, like other fundamental rights and lib-

59. *See supra* Part II.B.2.

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61. *See supra* Part II.B.2.

erties, belongs to the fundamental common interests of a population. This observation encompasses various points that need to be distinguished. To begin with, the “fundamental” character of the interest in free speech marks its special weight. Furthermore, its character as a “common” interest is meant to be read fairly objectively, and this in two dimensions. On the one hand, the interest in free speech is presumed to be common *across individuals* in a nation’s present generation of citizens; and, on the other hand, it is also presumed to be common *across the generations* in that nation. Finally, it is critical to add that the instrumental connection here between the intrinsic interest (i.e., in free speech) and the protective institutional arrangement (i.e., the legal right to free speech) is essentially invariant.

This final point serves to transfer the interpersonal and intergenerational stability of the intrinsic interest in free speech to the instrumental efficacy of the legal right to free speech, i.e., to the institutional arrangement entrenched by the relevant effective disabilities. As a result, not only will later generations have the same fundamental interest in free speech as earlier ones, but the best protection for their interest will be conferred by the same institutional arrangement that earlier generations adopted to protect theirs. In that case, *any* living majority has at best a limited interest in revisiting that arrangement. Depending on the details of one’s preferred philosophical framework, the interest is either insignificant or inoperative.⁶² Either way, there is a clear path to the conclusion that the presumption in favor of any living majority’s power to deny free speech is defeated by its generation’s fundamental interest in free speech.

Notice that, on this reconstruction, the argument retains a preemptive structure. We reach the conclusion that it is justified, all things considered, to disable the majority from deciding a certain domestic legal question (legal right to free speech or not?) without having to appeal to anyone’s specific interest in *entrenching* an answer to that question. We reach this conclusion in advance, as it were, of weighing the additional protection that a constitutional right confers over and above an ordinary legal right. Rather, the justification is secured by a warrant to discount any living majority’s interest in the particular answer excluded by the disability at issue (the *absence* of a legal right to free speech); and this warrant is supplied by the intergenerational stability of the instrumental interest in the opposing answer (the presence of a legal right), which this same disability locks into

62. The details concern how the justificatory force of fundamental common interests is spelled out—whether in terms of a simple appeal to objective interests or of an appeal to some kind of idealized consent. We need not choose between these versions here; it is also possible to combine them in some fashion.

place. Weighed against any generation's consequently fundamental interest in a legal right to free speech, its discounted interest in deciding otherwise simply gives way.

Instead of trying to evaluate (3'), then, we might consider whether an analogous preemptive argument can be made to remedy the case for entrenched free trade. Here the institutional arrangement entrenched by the relevant disabilities is ordinary free trade, while the underlying intrinsic interest is presumably human *welfare*.⁶³ Let us grant (what is no doubt true) that human welfare is a fundamental common interest of any population, in just the sense specified earlier. Still, in order for the analogy to stand up, it must also be true that the instrumental connection between human welfare and free trade is itself stable across the generations. Indeed, this instrumental connection must be sufficiently stable across the generations to warrant the conclusion that *any* living majority in a given jurisdiction has at best a limited interest in revisiting the policy of free trade.

To deny its stability across the generations, it suffices to observe that the instrumental connection between welfare and free trade is an *empirical* connection. In this crucial respect, it differs sharply from the instrumental connection between free speech and a legal right to free speech. Moreover, the intergenerational *instability* of the instrumental interest in free trade, as a means to welfare, or even to net economic benefits, is entirely consistent with the economic orthodoxy about free trade: economic theory does not guarantee that the net economic benefits of free trade in a given jurisdiction will be positive under any and every combination of real-world circumstances (internal and external), let alone guarantee it within the interval of a living generation. How could it?

It is therefore implausible to discount any living majority's interest in revisiting the various provisions that constitute its jurisdiction's commitment to free trade—in revisiting policy choices, for example, about specific degrees of liberalization in trade or specific degrees of privatization (mixes of private and public provision) in various of its service sectors. But discounting this interest is the *sine qua non* of the preemptive strategy. Hence, whatever its merits in the constitutional case, I conclude that the preemptive strategy for justifying effective disabilities imposed on later generations cannot be generalized to the case of enforceable international trade agreements.

63. See WORLD TRADE ORG., *supra* note 55, at 2 (“The ultimate aim of Government is to promote human welfare in the broadest sense, and trade policy is only one of many instruments Governments use in pursuing this goal.”).

C. *Are the Benefits of Entrenched Free Trade Greater Than Every Generation's Interest in Deciding the Law of the Land?*

There remains the direct strategy of arguing that every generation's interest in the differential net economic benefits of entrenched free trade is greater than its interest in deciding the relevant domestic legal questions for itself. I shall neither endorse this option nor attempt to foreclose it altogether, but it is worth registering two notes of scepticism.

To begin, we should observe an important consequence of the failure to assimilate the justification of entrenched free trade to that of an entrenched domestic Bill of Rights. In its weakest version, the preemptive strategy offered to justify the effective disabilities is necessary to make the presumption in favor of the majority's power to decide domestic legal questions normally decisive. However, the effect of implementing these disabilities is precisely to strengthen the presumption favoring the majority's power to decide the *remaining* domestic legal questions. Let us call a system of government in which majority rule has been constrained by all of the effective disabilities justified by the preemptive strategy a "constitutional democracy." In the context of a constitutional democracy so defined, the presumption in favor of the majority's remaining power to decide the law of the land is normally decisive.

Now, given the failure to generalize the preemptive strategy to the case at hand, its scope obviously excludes the domestic legal question of whether trade should be free. But then it follows that, at least in a "constitutional democracy," the presumption favoring the majority's power to decide *this* question is normally decisive. In other words, not only can we not discount a living majority's interest in the power to revisit a policy of free trade, but a constitutionally democratic majority's interest in this power is normally a decisive interest. This raises the bar for the direct strategy.

Of course, a "normally decisive" interest can still be defeated. So it remains possible that the differential net economic benefits of entrenched free trade are weighty enough to override even this strengthened interest in deciding the relevant domestic legal question(s). I am in no position to exclude this possibility. However, we need to be more careful than we have been so far about *which* questions count as the "relevant" domestic legal questions in this context. To simplify matters, and idealizing greatly, let us pretend that we can delimit the "economic" domain. The legal provisions that serve to entrench free trade—for example, the various commitments that nations can bind under the GATS—effectively disable the majority in signatory jurisdictions from deciding domestic legal questions both *inside and* outside the economic domain. The possibility I shall simply leave open

is that the differential net economic benefits of entrenched free trade are weighty enough to override a living majority's normally decisive interest in deciding domestic legal questions *inside* the economic domain.

My second (and stronger) note of scepticism concerns the power to decide domestic legal questions *outside* the economic domain. For present purposes, what places a domestic legal question outside the economic domain is that the primary basis on which alternative answers to it ultimately ought to be evaluated is both a fundamental common interest and clearly distinguishable from (the interest proximately served by) net economic benefits.⁶⁴ More specifically, I take it that a wide range of policy issues concerning *health or education* will count as domestic legal questions "outside" the economic domain in this sense.⁶⁵ An alternative way to fill this category, then, is to assume that there are "health" or "education" interests and that they:

(i) can be clearly distinguished from net economic benefits;

(ii) are a fundamental common interest; and

(iii) provide the primary basis on which domestic health [or education] policy ought to be evaluated.

Recall the question we discussed earlier of whether Canada's national health care system should include outpatient pharmaceuticals.⁶⁶ It can serve additionally as a plausible example of a domestic legal question "outside" the economic domain. Notice that placing it there is neither to deny that including outpatient pharmaceuticals will have different consequences for the production of net economic benefits in Canada from not including them, nor to deny that these consequences can be relevant to evaluating the alternatives. It is simply to recognize that their relevance is at best secondary to an evaluation based on the "health interests" of Canadians.

I claim that the differential net economic benefits of entrenched free trade *cannot* justify effectively disabling a majority from deciding domestic legal questions outside the economic domain. In particular, a constitutionally democratic majority cannot be thereby disabled from deciding domestic legal questions concerning health or education. As against the weight of differential net economic benefits, this majority's normally decisive interest in having the power to decide these questions is simply decisive.

64. I avoid the language of "human welfare" here, as it can be read to encompass net economic benefits as well as interests importantly different from them.

65. For that matter, domestic legal questions concerning fundamental rights and liberties *also* count as "outside" the economic domain. But our discussion is now focused on questions that are not covered by standard constitutional rights.

66. *See supra* Part I.B.

In support of this claim, I shall argue by cases. (For convenience, I frame the discussion in terms of health policy, but the argument is easily generalized to education policy.) Either the health policy question at hand has a (quasi-objectively) fixed answer or it does not. The most interesting case is where it has *no* such fixed answer. That is to say, no particular institutional arrangement best satisfies the population's health interests on this question with sufficient intergenerational stability to discount any living majority's interest in choosing the best institutional arrangement for itself.⁶⁷

Under this assumption, it follows that there is no preemptive justification based on health interests for *entrenching* any particular answer to the health policy question at hand. For example, there is no such health-based justification for entrenching either the exclusion or the inclusion of outpatient pharmaceuticals from Canada's health care system. Likewise, there is no such health-based justification for entrenching a public insurance system to finance health care, nor for entrenching a private one. But then there is no justification for entrenching answers to these questions *on any other basis*.⁶⁸ To entrench an answer on some basis other than the population's health interests would prevent the health policy question from being answered on the primary evaluative basis on which it ought to be answered. Since that basis also has the weight of a fundamental interest, constitutionally democratic majorities ought not to be prevented from using it to decide domestic health policy questions. That is, they ought to retain the power to do so.

Of course, there is also the remaining case in which the health policy question at hand *does* have a (quasi-objectively) fixed answer. This case divides into the subcase where the fixed health policy answer is *inconsistent* with entrenched free trade (in some domain), and the subcase where it is consistent. Both subcases can be illustrated in relation to the question of whether a jurisdiction's health care financing system should be organized as a public insurance system (i.e., noncompetitively), as a private insurance system (i.e., competitively), or as a mixed system. I take it that a private health insurance system is consistent with free trade in (health) insurance

67. In this respect, health policy questions then resemble the question of free trade more closely than they resemble the question of free speech. Because the instrumental connection between health interests and the institutional arrangements that promote them is also an empirical connection, the case where a health policy question has no fixed answer is arguably the most plausible case. But I need not insist on this claim.

68. *A fortiori*, there is no justification for *entrenching*, for example, the exclusion of outpatient pharmaceuticals *as a side effect* of another policy that is justified on the basis of its net economic benefits, such as entrenched free trade in insurance services.

services, whereas a public health insurance system is not. For simplicity, I ignore mixed systems.

Now if a population's health interests justify *entrenching a public* health insurance system, the example fits the first subcase. But here, entrenched free trade in health insurance services is excluded by a fundamental common interest, so an appeal to its differential net economic benefits will not suffice to reverse this conclusion. On the other hand, if a population's health interests justify entrenching a *private* health insurance system, the example fits the second subcase instead. Here, entrenched free trade in health insurance services remains an option. However, *ex hypothesi*, the majority is *already* justifiably disabled from deciding not to have a competitive health insurance system. Thus, no appeal to differential net economic benefits is necessary to justify the majority's disability. In neither subcase, then, is there room for the differential net economic benefits of entrenched free trade (in health insurance services) to justify effectively disabling the majority from deciding the health policy question at hand.

My criticism of the "direct strategy" therefore finds its mark whether or not the health policy question at hand has a fixed answer. The direct strategy for justifying the effective disabilities required to entrench free trade is based on the differential net economic benefits produced by the entrenchment. But the force of this justification turns out to be sensitive to whether the questions the majority is thereby disabled from deciding are inside the economic domain or outside. It can only succeed, so I have argued, when it is restricted to domestic legal questions *inside* the economic domain.

In actual practice, unfortunately, the effective disabilities imposed by enforceable international trade agreements are not sensitive to this restriction (or at least, not always). For example, as we saw earlier, article VIII of the GATS effectively disables the majority of Canadians from deciding to include outpatient pharmaceuticals in their national health care system.⁶⁹

69. See *supra* Part I.B. It may be objected that the GATS respects an equivalent restriction, as it excludes services supplied "in the exercise of governmental authority" from the scope of the GATS. See GATS, *supra* note 18, art. I § 3. But this objection may be rejected on two grounds. First, it is controversial how much protection from the GATS this exemption actually affords public services because it is quite unclear how its provisions are to be interpreted. For further discussion, see MARKUS KRAJEWSKI, CTR. FOR INT'L ENVTL. LAW, PUBLIC SERVICES AND THE SCOPE OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) (2001), <http://www.ciel.org/Publications/PublicServicesScope.pdf>. Second, the two restrictions are not equivalent. Among other differences, a restriction protecting a living majority's power to decide domestic legal questions concerning health or education has to be a *dynamic* restriction—it must protect health and education in later generations independently of what earlier generations have decided. By contrast, the governmental authority restriction is a *static* restriction—it only applies to service sectors that satisfy its definition when a jurisdiction signs the GATS (and only so long as the sector continuously

However, insofar as the effective disabilities imposed on later generations by international trade agreements extend to the domestic health or education sectors, they are unjustified, all things considered. In these respects, such agreements are not morally binding on later generations.

CONCLUSION

I close by distinguishing my position from a weaker conclusion in the neighborhood. I began by describing an important analogy between entrenched domestic Bills of Rights and enforceable international trade agreements—namely, they both effectively disable (the majority in) later generations from deciding certain domestic legal questions. Readers persuaded of this analogy may naturally infer that enforceable international trade agreements should be subject to a supermajoritarian ratification requirement. They may conclude, in other words, that since such agreements function like an entrenched domestic constitution, similar procedural requirements should be imposed as conditions of their validity.

While I do not dispute this conclusion,⁷⁰ there is an important sense in which it understates what the present argument at least purports to show. Recall that if we reject the self-imposition strategy for justifying disabilities, supermajoritarian ratification requirements actually appear somewhat mysterious. If today's votes are morally powerless to bind tomorrow's citizen, why does it matter *how many* of today's votes are required?

One reasonable answer is that supermajoritarian ratification requirements affect the probability that different kinds of content will be enacted. In particular, it is plausible that they make it more difficult to enact laws that are not in the common interest (as compared to laws that are). The higher the voting threshold, the less likely that laws that fail to promote the common interest will be enacted. If that is correct, then supermajoritarian ratification requirements can be instrumentally justified—as a means, for example, to help ensure that only laws that promote the common interest can be entrenched.

However, insofar as a procedure is instrumentally justified by its contribution to a certain substantive result, adherence to the procedure fails to justify the outcome *when* it is independently known that the substantive result was not actually produced. Let us assume that ratification of enforceable international agreements by a domestic supermajority is required to

satisfies the definition). That is why, for example, Article 1 § 3 of the GATS does not shield an *extension* of Canada's public health insurance monopoly to outpatient pharmaceuticals from the obligations of Article VIII.

70. Indeed, I have drawn the conclusion myself. See Sreenivasan, *supra* note 17, at 280.

guard against the entrenchment of provisions that do not promote the domestic common interest. But now suppose we know that the common interest of later generations is not promoted by imposing certain disabilities on them. Nothing a supermajority decides today can change this fact. Hence, even if the relevant disabilities were ratified by a domestic supermajority, they would still fail to be justified. To put it a better way, the ratification would fail to confer any instrumental justification on them.

I should therefore state my conclusion more precisely: the effective disabilities to decide domestic legal questions concerning health or education that enforceable international trade agreements impose on later generations are *substantively unjustified*. It is not enough to say that these disabilities are justified only if they are ratified by a supermajority. The truth is that they are not justified *even if* ratified by a supermajority. No majority, not even a supermajority, should have the power to ratify an international trade agreement that effectively disables later generations from deciding domestic legal questions concerning health or education.⁷¹ Attempts by the present generation to exercise *that* power should simply be regarded as morally null and void.

71. In other words, the present generation should be strictly disabled from imposing certain disabilities on later generations; and these include effective disabilities imposed by international trade agreements in the domestic health or education sector.