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## Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Legal Order is Emerging

Bryan H. Druzin

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# Anarchy, Order, and Trade: A Structuralist Account of Why a Global Commercial Legal Order is Emerging

Bryan H. Druzin\*

## ABSTRACT

*While still fragmented, the world is witnessing the emergence of a global commercial legal order independent of any one national legal system. This process is unfolding both on the macrolevel of state actors as well as on the microlevel of private individuals and organizations. On the macrolevel, the sources of this legal order are complex international agreements; on the microlevel, private contracts employing commercial customary practices and arbitration are driving this process forward. Yet there is no comparable evolution occurring (in any substantial sense) in noncommercial areas of law such as criminal, tort, or family law. There is an overall asymmetry in the development of transnational legal order. But why is this occurring? This Article argues that the emergence of a global commercial legal order may be partially attributed to the unique structural nature of trade. The Article gives a structuralist account, positing that, unlike legal order of a non-commercial nature, commercial legal order has built-in mechanisms that make it particularly suited to evolve in a transnational context—that is, to evolve and sustain itself in the absence of a central legislative or coercive authority. The Article identifies and explores these built-in mechanisms. The Article concludes that, because commercial legal order is uniquely predisposed to emerge without the state, this asymmetry should not only continue but likely grow even more extreme.*

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\* Assistant Professor of Law, The Chinese University of Hong Kong. Special thanks to Jan Dalhuisen at UC Berkeley and King's College London for his guidance in formulating many of these concepts, and Bryan Mercurio and Julienne Chaisse at the Chinese University of Hong Kong for their comments on earlier drafts.

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## I. INTRODUCTION

There is something afoot in transnational law. It is becoming increasingly obvious that there is a general asymmetry in its development, with commercial legal structures converging at a faster

rate than law of a non-commercial nature. While still fragmented and exhibiting degrees of polycentrism, a global commercial legal order is coming into focus.<sup>1</sup> This emergence is unfolding both on the macrolevel of state actors as well as on the microlevel of private individuals and organizations. On the macrolevel, the sources of this legal order are complex international agreements; on the microlevel, private contracts employing customary law and arbitration are driving this process forward. This transnational legal order represents a rich and growing body of jurisprudence functioning under dispute settlement mechanisms that boast principles and rules that are no longer restricted to specific spheres of influence but actually entail elements of integration as trade law is being partly or fully harmonized.<sup>2</sup> Yet law of a noncommercial nature has no comparable evolution taking place (in any truly substantial sense) in areas such as criminal, tort, or family law.<sup>3</sup> The question thus arises,

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1. The Article uses the term *global commercial law* or *transnational commercial law* throughout. These are vague terms that need to be defined. They should be understood in the following expansive sense: the legal order that arises in relation to the formation of a contract between individual actors in a transnational setting. Radiating outward from this core starting point, this definition includes not only the contracts the parties themselves draw up but also legal structures such as the rules of international arbitration and even, in its more general sense, international trade law, such as the rules of multi-sovereign bodies. Thus, the term *global commercial legal order* as it is used here is inclusive of both the most simple and, at the same time, the most complex definitions of law dealing with transnational trade. It concerns both the actions of individual merchants and the actions of nation-states as well as the assortment of institutions that fall somewhere in between. For an excellent comprehensive treatment on this emergence, see generally JAN H. DALHUISEN, *DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW, INTRODUCTION—THE NEW LEX MERCATORIA AND ITS SOURCES* (5th ed. 2013) (advancing a theory that international commercial law emanates from a legal order of its own creation, rather than from states).

2. This legal order evolved for many decades in isolation and was not well-embedded in the body of general international law. However, it has now flowered into what may increasingly be called a global, commercial legal order comprised of customary commercial practices, international arbitration, international investment agreements, the rise of multisovereign bodies such as the World Trade Organization (WTO), the Organization for Economic Co-operation and Development (OECD), and regional economic integration such as the Association of Southeast Asian Nations (ASEAN) and NAFTA.

3. The global administrative law movement shows some nascent signs of a similar evolution; however, it is absolutely dwarfed by the transnational legal ordering that is arising in connection to commerce. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 15 (2005) (discussing the growth of a global system of administrative law and the historic constraints on greater consensus in global administrative law practice). But see Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 *N.Y.U. J. INT'L L. & POL.* 663, 694 (2005) (“[T]he large number of norms, the development of rules and principles, and the rise of courts all confirm the high degree of institutionalization . . . of the global administrative system.”).

what can account for this “edge” that commercial legal order seems to have over its noncommercial counterparts?

This Article argues that part of the reason is simply structural in nature. It is posited that the emergence of a global, commercial legal order may be at least partially attributed to the unique character of trade. Unlike legal order of a noncommercial nature, commercial legal order has built-in mechanisms that render it particularly well-suited to evolve in a transnational context.<sup>4</sup> As a result, commercial legal order has the ability—and, in fact, the tendency—to run ahead of the State and evolve, grow, and sustain itself quite robustly in a transregional context.<sup>5</sup> Of course, this evolution is multifaceted and complex; clearly, there are other factors that are contributing to this emergence. However, what theorists miss is the unique structural nature of trade that gives commercial legal ordering a fundamental edge over its noncommercial counterpart. The structuralist account offered here is not put forward as the sole and universal explanation for this emergence.<sup>6</sup> Indeed, national laws remain an imminent force that reinforce the emergence of markets and legal order—this is not denied here. Yet the built-in mechanisms of commerce need to be recognized as playing at least a contributory role in the emergence of a global commercial legal order. This Article identifies and discusses these mechanisms, focusing on three: the element of reciprocity, the practical requirements of the market, and the existence of network effects. These three elements are key; the market gives rise to similar legal practices, network effects standardize these practices, and reciprocity then helps sustain this legal order in the vacuum of centralized authority.<sup>7</sup>

In a nutshell, the Article’s thesis is this: commercial legal order is uniquely capable of evolving in a transnational context partially because it possesses built-in structural features that allow it to

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4. Clear examples of the tendency toward standardization at the macrolevel abound. Supranational codification efforts such as UNCITRAL, UNIDROIT, CISG, and the Lando-Principles are but formal reflections of this phenomenon. Indeed, modern international trade displays a strong tendency toward convergence and harmonization.

5. I have argued similarly elsewhere. See Bryan H. Druzin, *Law Without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order Within Commercial Systems*, 41 GEO. J. INT’L L. 559, 562, 586 (2010) (positing a theory of “high engagement” that attempts to account for the ability of commercial law to grow in a transnational context without resorting to a central legislative authority). Much of the present discussion builds upon, extends, and conceptually hones some of my earlier ideas regarding the nature of trade touched on in this paper.

6. Indeed on the macrolevel, public bodies like the WTO play a major role in driving this evolution forward. In fact, the WTO, more than any other multisovereign body, is spearheading the advance of international legal convergence and standardization.

7. A case could perhaps be made that these features also exist in noncommercial interaction. However, besides this being a rather tenuous position requiring some stretching of the terms *reciprocity* and *market*, these characteristics are far more salient in the case of commerce—there is no question on this point.

emerge, self-standardize, and sustain itself without a central authority, and it is this ability that helps explain the incongruous development of international legal order where in fact there is no such authority. As such, legal structures within the commercial sphere are able to advance at a swifter speed than other forms of legal order that lack these mechanisms. That is, commercial legal order is able to evolve within what is a state of technical anarchy.<sup>8</sup> The basic structure of trade drives toward convergence—a fact that may be discerned as much on the macrolevel of state actors as it is on the microlevel of private parties. For the structuralist account offered here, the distinction between private and state actors makes little conceptual difference. It does not matter the size of the trading entity; all that is required is that it act as a single, unified entity. When dealing with other states, national governments meet this definition.

The Article's argument is developed in four parts. Part I discusses the ability of reciprocity to sustain commercial legal order in the absence of a central coercive authority. Part II then discusses how market forces channel the emergence of a generally similar body of law. Part III argues that network effects then help standardize these legal practices. The discussion on network effects perhaps represents the Article's strongest contribution to the literature. Part IV then broadens the scope of the discussion and looks at other mechanisms of a structural nature that also potentially play a role in this process. Because of the primary importance of reciprocity, the market, and network effects in giving rise to stateless commercial legal order, the bulk of the Article is devoted to examining these three mechanisms; however, the discussion of other factors is also important. The Article concludes that, because commercial legal order is uniquely predisposed to emerge without the state, we should expect this asymmetrical emergence to not only continue but likely grow even more extreme. Indeed, a truly unified, largely stateless global commercial legal order is rapidly coming into focus. This is not the case for other forms of law. This Article attempts to shed some theoretical light on why this is occurring. At a time when the proliferation of international legal structures is accelerating, a closer look at the unique ability of commercial law to evolve in the absence of a centralized authority is, to say the least, highly relevant.

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8. *Anarchy* is understood here as the absence of a central legislative or coercive authority. See Peter T. Leeson & Edward P. Stringham, *Is Government Inevitable? Comment on Holcombe's Analysis*, 9 INDEP. REV. 543, 544–45 (2005) (evaluating the history of anarchical societies and the existence of anarchy on the international stage). However, some may take issue with this definition of anarchy. A conceptual alternative could be “decentralized order” in the Hayekian sense.

## II. MECHANISM ONE: RECIPROCITY

This Part explains how, as the result of reciprocity, commercial legal order can sustain itself without the enforcement power of a centralized authority—mechanism one. The Part that follows it then discusses how commercial legal order can, as the result of market forces, emerge in a fairly similar fashion—mechanism two. The third Part then discusses the crucial role of network effects in inducing standardization—mechanism three. Key to all of this, however, is the larger, underlying concept that legal order can arise as the child of the market.<sup>9</sup> In more precise terms, that legal order can arise and sustain itself without a centralized authority. Indeed, this idea forms the core underpinning of this discussion. As such, it needs to be outlined, if only briefly.

### A. A Vision of Governance as a Child of the Market

The idea that legal order can arise through the mechanics of the market has been the subject of a great deal of speculation and theory. Indeed, game theorists, libertarians, anarchists, and law-and-economics scholars all contend that law may evolve and sustain itself without the state.<sup>10</sup> Economists such as Friedrich Hayek offer a

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9. Phrased more precisely, the market and law develop simultaneously, working off each other. See B.L. Benson, *It Takes Two Invisible Hands to Make a Market: Lex Mercatoria (Law Merchant) Always Emerges to Facilitate Emerging Markets*, 3 *STUD. IN EMERGENT ORD.* 100, 100–01 (2010) (discussing the evolution of the law merchant throughout history and its re-emergence in modern global commerce).

10. See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 10 (1994) (providing an overview of the development of extralegal norms and describing the shortcomings of prior theories on the creation of law); 2 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY, THE MIRAGE OF SOCIAL JUSTICE* 107–09 (1973) (defining the commercial legal order as a “catallaxy,” the “special kind of spontaneous order produced by the market through people acting within the rules of the law of property, tort, and contract”); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. LEGAL STUD.* 115, 115–17 (1992) (concluding that “extralegal norms trump legal rules in a given market only where market participants find that keeping to the industry norms advances their own self-interest.”); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Norms, Rules, and Institutions*, 99 *MICH. L. REV.* 1724, 1724–25 (2001) (examining the cotton industry’s creation of a private industry legal system through the use of default contract rules and merchant tribunals); Karen B. Clay, *Trade Without Law: Private Order Institutions in Mexican California*, 13 *J.L. ECON. & ORG.* 202, 202 (1997) (discussing the facilitation of intermerchant trade by a private coalition, primarily through the use of a reputation mechanism); Robert Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 *INT’L REV. L. & ECON.* 215, 215–16 (1994) (focusing on custom as a method of enacting law and postulating that decentralized governance is key in maintaining an efficient economy); Robert C. Ellickson, *The Aim of Order Without Law*, 150 *J. INST’L & THEORETICAL ECON.* 97, 97–99 (1994) (theorizing that institutions and groups are capable of creating cost-minimizing, informal norms that may serve as an alternative

unique vision of how legal order may emerge.<sup>11</sup> They argue that, just like markets emerge, the rules of governance may evolve from the outcome of actors pursuing their individual interests.<sup>12</sup> Hayek contends there are two ways in which order can originate: “made” order and “grown” order.<sup>13</sup> Similar to Hayek’s description, Lon Fuller distinguishes between “horizontal forms of order” and “vertical order” imposed by the state.<sup>14</sup> Fuller sees law as something that mirrors the market order.<sup>15</sup> Many theorists speak about “market legal systems”—systems of “rules and enforcement procedures which arise from the processes of the market economy: competition, bargaining, legal decisions, and so forth; a legal system whose order is ‘spontaneous’ in the Hayekian sense.”<sup>16</sup> Indeed, the belief that a spontaneous order of

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to traditional forms of law); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857, 857 (1989) (focusing on the use of a reputation mechanism by a private coalition of eleventh century traders to overcome information asymmetry and limited contract enforcement); Rachel E. Kranton, *Reciprocal Exchange: A Self-Sustaining System*, 86 AM. ECON. REV. 830, 830 (1996) (discussing the persistence of reciprocal relationships in trade, even where a market transaction would be more efficient); Paul R. Milgrom, Douglas C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 1 ECON. & POL. 1, 1–4 (1990) (contrasting the effectiveness of the reputation mechanism versus formal institutions in facilitating trade in the context of the early middle ages).

11. See HAYEK, *supra* note 10, at 115–20 (arguing that, due to individual self-interest, the ideal societal order is that which individuals would choose if they were aware their initial position would be decided by chance); see also FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 225–43 (George Routledge & Sons 1944) (2002) (criticizing the proposition that an international centralized economic authority will lead to greater organization and harmony).

12. See Bruce L. Benson, *Economic Freedom and the Evolution of Law*, 18 CATO J. 209, 209 (1998) (“[M]any rules and institutions for governance evolve as the unintended outcomes of individuals separately pursuing their own goals (e.g., customs), just as markets do . . .”).

13. See 1 FRIEDRICH A. HAYEK, *RULES AND ORDER* 37 (1973) (“The grown order, on the other hand, which we have referred to as a self-generating or endogenous order, is in English most conveniently described as a *spontaneous order*.”).

14. See LON L. FULLER, *THE MORALITY OF LAW* 233 (rev. ed. 1969) (describing horizontal order as the bond of reciprocity between two coequal individuals and vertical order as the imposition of rules by the state and the state’s reciprocal commitment to abide by its own rules).

15. See Barry Macleod-Cullinane, *Lon L. Fuller and the Enterprise of Law*, *LIBERTARIAN ALLIANCE*, 1995, at 1–2 (noting Lon L. Fuller’s view that the law mirrors the market order).

16. See Roy A. Childs, Jr., *The Invisible Hand Strikes Back*, 1 J. LIBERTARIAN STUD. 23, 25 (1977) (contrasting “market legal systems” with “state legal systems”). This idea perhaps finds its fullest expression in the intriguing if not radical theories of anarcho-capitalism, a unique variant on anarchism. See MURRAY N. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* 266 (2d ed. 1977) (“[T]he free-market economy forms a kind of natural order, so that any interventionary disruption creates not only disorder but the necessity for repeal or for cumulative disorder in attempting to combat it.”); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* 199 (rev. ed. 1985) (“If central planning, then, thrusts the economy into hopeless calculational chaos, and into irrational allocations and production operations, the advance of government activities inexorably introduces ever greater islands of such chaos into the economy . . .”); see also DAVID FRIEDMAN, *THE MACHINERY OF FREEDOM*



cooperation can evolve from the market lies at the very heart of classical liberalism.<sup>17</sup>

The Article references these ideas here because, while many may have no intellectual sympathy for this vision of law, in its broad strokes, this is precisely what is happening in the case of law of a commercial nature in an interregional context: it arises largely spontaneously as the product of market forces and evolves in the vacuum of a centralized authority. Whatever one's views regarding the plausibility of such theories, it is difficult to deny that this position does appear to hold at least some merit in that this is what is occurring in the case of so much international commercial legal order.

### B. *Reciprocity Induces Compliance*

The foundational component of invisible-hand approaches that emphasize market-induced social order is the element of reciprocity. The claim is that the reciprocal gains from the recognition of the rules of property and contract (and the potential loss of them) stimulate voluntary compliance. The underlying dynamic of reciprocity implicit in trade—that mutual advantage can be achieved—helps sustain order. Actors will willingly commit themselves to a system of governance if they grasp that their self-interest is served by such a commitment. This holds true on the macrolevel as much as on the microlevel. Whether on the level of private parties, organizations, or state actors, reciprocity plays a powerful role in inducing compliance. Thomas Hobbes asserted that contracts “without the sword, are but Words, and of no strength to secure a man at all.”<sup>18</sup> This is an overstatement. In his focus on the “stick,” Hobbes neglected the “carrot”; parties under a contract observe their duties mainly because

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14 (1973) (describing the theory of anarcho-capitalism and countering the arguments against its feasibility). The theory calls for the complete elimination of the state, seeing free-market capitalism unrestrained by the coercive and subverting interference of government as the basis of a free society. Accordingly, this system necessitates a free market and complete voluntarism in all transactions. See Susan Love Brown, *The Free Market as Salvation from Government: The Anarcho-Capitalist View*, in MEANINGS OF THE MARKET: THE FREE MARKET IN WESTERN CULTURE 99, 99 (James G. Carrier ed., 1997) (defining anarcho-capitalism as a system which “minimises coercion and maximises individual liberty”). In the anarcho-capitalist vision of society, even law enforcement would be privately supplied through competing protection agencies. David Friedman, building on the ideas of Rothbard, has argued that a system of law can evolve reflexively from the functioning of the market, maintaining that legal structures could emerge as commercial services “produced for profit on the open market.” FRIEDMAN, *supra*, at 62.

17. See RAZEEN SALLY, CLASSICAL LIBERALISM AND INTERNATIONAL ECONOMIC ORDER: STUDIES IN THEORY AND INTELLECTUAL HISTORY 17 (1998) (“[T]he normative core of classical liberalism is the approbation of economic freedom or *laissez faire* . . . out of which spontaneously emerges a vast and intricate system of cooperation in exchanging goods and services and catering for a plentitude of wants.”).

18. THOMAS HOBBS, LEVIATHAN 115 (A. R. Waller ed., Cambridge Univ. Press 1904) (1651).

they are mutually advantageous.<sup>19</sup> Indeed, it is because the agreement offers reciprocal gain that the parties chose to enter into the contract in the first place. The *sword*, as Hobbes put it, only comes into play if the incentive structure changes midstream.<sup>20</sup>

### 1. The Force of Reciprocity on Both Micro- and Macrolevel

In fact, most business transactions between private parties do not involve formal contracts at all.<sup>21</sup> The strength of reciprocity is more than sufficient to sustain agreements. Where they can, however, parties like to include a bit of stick as well. In the case of private international parties, the participants will commit themselves to the force of specific domestic jurisdictions by including choice of forum clauses in their agreements. In this sense, their agreements piggyback on the authority of a particular jurisdiction. However, increasingly, international commercial actors rely upon transnational arbitration. Enforcement of international arbitration was bolstered by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which provides for court recognition and enforcement of foreign arbitration decisions.<sup>22</sup> The New York Convention is an example of how informal enforcement (reciprocity) can be greatly facilitated by

19. See ROBERT S. SUMMERS, *Lon L. Fuller*, in *JURISTS: PROFILES IN LEGAL THEORY* 81 (William Twining ed., 1984) (“[T]he overwhelming majority of contractual arrangements go forward without any resort to courts. This is mainly because they are mutually advantageous, not because of any threats of force.”). Indeed, “private mechanisms generate some degree of contract compliance . . .” JEFFREY A. MIRON, *LIBERTARIANISM FROM A TO Z* 70 (2010). For some early examinations of self-enforcing agreements, see L. G. Telser, *A Theory of Self-Enforcing Agreements*, 53 *J. BUS.* 27, 43–44 (1981); B. Klein & K.B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 *J. POL. ECON.* 615, 616 (1981) (examining the “non-governmental repeat-purchase” contract enforcement mechanism); see also Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 *S. ECON. J.* 644, 646 (1989) (“The authority which can most effectively back law is individual realization of reciprocal benefits arising from recognition of that law.”).

20. Or to avoid fear of such change, as in the prisoner’s dilemma.

21. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55, 62 (1963) (“One can conclude that while detailed planning and legal sanctions play a significant role in some exchanges between businesses, in many business exchanges their role is small.”); see also AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* 25 (2007); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 *J. LEGAL PLURALISM* 1, 1–2 (1981) (“Most business transactions . . . are conducted using various informal arrangements, such as handshakes and oral agreements, ongoing relationships, and custom and practice.”)

22. See United Nations Conference on International Commercial Arbitration, May 20–June 10, 1958, *Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. 1, U.N. Doc. E/CONF.26/8/Rev.1 (Vol. VI) (June 10, 1958) (detailing the application of the convention to the recognition and enforcement of arbitral awards in foreign states in Article D).

central enforcement.<sup>23</sup> It should be underscored that the assertion here is not that reciprocity is a perfect enforcement mechanism but merely that it is sufficient to sustain legal order where central enforcement mechanisms are lacking, which is largely the case in the international context.

On the macrolevel, however, it is a very different story. In the case of state actors, the source of enforcement is far less clear. With respect to the interaction of state actors, there is no clear coercive authority to which to appeal. There is often the option of arbitration or quasi-judicial settlement bodies through treaties and trade organizations, but the authority of such bodies is derived solely from the fact that these states simply acknowledge their authority in the first place. It is not comparable to the domestic authority of the state with its recourse to genuine force. In the absence of a central coercive authority, what ultimately holds enforcement regimes such as these together is the element of reciprocity. Reciprocities, as illustrated by treaties where a state agrees to various obligations in exchange for similar obligations accepted by another state, guide the macrolevel actions of state actors. Indeed, trade blocs arguably function like trade associations on the microlevel and are similarly bound together largely by the force of reciprocity, which compels trade bloc members to yield to its authority.

The importance of reciprocity is unmistakable in the case of the WTO. Indeed, the principle of reciprocity is woven into the very fabric from which the WTO is stitched.<sup>24</sup> Negotiations and agreements within the WTO framework are informed by the bedrock concept of reciprocity—(balance). The maintenance of balance is an overarching concern in provisions for adjustment, such as renegotiation and safeguard actions.<sup>25</sup> Reciprocity is an animating principle of agreements solidified within the WTO framework; it stands as a foundational norm of negotiation.<sup>26</sup>

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23. *But see* Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 497 (1995) (arguing, with substantial supporting evidence, that similar actions by governments to assert jurisdiction over arbitration enforcement actually raises the cost of arbitration).

24. *See* J. Michael Finger & L. Alan Winters, *Reciprocity in the WTO*, in DEVELOPMENT, TRADE, AND THE WTO 50, 50–51 (Bernard Hoekman, Aaditya Mattoo & Philip English eds., 2002) (noting that the Marrakesh Agreement, which established the WTO, refers to reciprocity in its preamble).

25. *See id.* at 52 (discussing the emphasis on reciprocity in the GATT articles on renegotiation and safeguard actions).

26. *But see* Kyle Bagwell, Robert W. Staiger & Alan O. Sykes, *Border Instruments*, in LEGAL AND ECONOMIC PRINCIPLES OF WORLD TRADE LAW 68, 158 (Henrik Horn & Petros C. Mavroidis eds., 2013) (“In practice, while the principle of reciprocity is a form of negotiation, WTO/GATT rules do not require that negotiations satisfy the reciprocity principle.”).

Reciprocity is a chief means of ensuring compliance on the supranational level. State actors are hesitant to not comply with their agreements because they will pay a price in loss of future commercial opportunities and reputational costs. In the case of trade, because of the supportive element of reciprocity, the self-enforcement ability of long-term commercial agreements is dramatically reinforced. In fact, the vast majority of commercial agreements, whether on the level of private parties or that of state actors, are fulfilled without having to go to dispute because they are mutually advantageous—not because of any threats of force.<sup>27</sup> In the case of private parties, empirical research has shown that the vast majority of business transactions are executed without even entering into formal contracts of any kind.<sup>28</sup> Reciprocity in this respect is of paramount importance. Mutual self-interest helps sustain cooperative relationships. This profoundly enhances the ability of commercial legal structures to emerge in a transnational context in the vacuum of a coercive authority. It should also be said that reciprocity not only sustains commercial legal structures; it actively encourages its emergence in that it energizes parties to come together and form commercial relationships, which call for a legal superstructure of some kind.

## 2. The Importance of Both *Stick* and *Carrot*

It is important to note that reciprocity may work in two dimensions. It may unfold negatively as well as positively—there may be stick in addition to carrot.<sup>29</sup> The stick comes in the form of the loss of a benefit previously enjoyed—for instance, the loss of future gains to be had through commercial collaboration. In this case, actors will adhere to rules because noncompliance conflicts with their self-interest. The impact of a reciprocal stick can indeed be quite powerful. This is eminently clear in other contexts. Consider the law of war (*jus in bello*), where antagonists bent on the other's destruction, operating in the complete absence of an overarching authority, nevertheless coalesce around and generally respect a system of rules to govern their hostilities. Clearly, these are not parties that are aiming for cooperation. Nevertheless, robust cooperative structures emerge. This is the result of the reciprocal dynamic that undergirds the interaction of war. Both sides may view the situation asymmetrically in that they believe that their side may

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27. See Benson, *supra* note 19, at 5–6 (discussing the development of commercial law from the repeated interactions of self-interested merchants).

28. See Macaulay, *supra* note 21, at 58 (“Businessmen often prefer to rely on ‘a man’s word’ in a brief letter, a handshake, or ‘common honesty and decency’—even when the transaction involves exposure to serious risks.”).

29. Note that the colloquial understanding of reciprocity as merely a positive exchange is extended here, invoking the notion of reciprocity as it is employed in social psychology, which can be both negative and positive in nature.

be able to eventually prevail. Yet as they continue to fight, the assurance of reciprocated harm is enough to persuade the warring parties to voluntarily abide by a prescribed set of rules. Thus, we see the somewhat counterintuitive emergence of the rules of war upon the bloody and chaotic landscape of conflict. It is comparable to exhausted boxers holding each other for mutual support as they nonetheless continue to deliver their blows. This is quite a fascinating dynamic when one stops to really consider it: even while at war, the force of reciprocity induces high degrees of cooperation and compliance.<sup>30</sup> This is *negative reciprocity*—order sustaining itself through the negative consequences that would result from noncompliance, cooperation born of the stick as opposed to the carrot. In the case of commerce, this is the loss of future commercial opportunity. This can be contrasted with *positive reciprocity*, cooperation arising from a carrot. The dynamic of positive reciprocity is more obvious and does not require much explanation. Merchants collaborate because it is mutually beneficial. Trade is a “non-zero-sum game” where both parties may glean benefit.<sup>31</sup> Rule compliance is thus assured in a highly reliable way: not through the threat of external coercion by a government but by the force of self-interest. In either case—in both its positive and negative form—reciprocity induces rule-compliance.

### 3. Repetition and Reputation

All of this has been extensively studied by game theorists, where it is captured by the concept of conditional cooperation.<sup>32</sup> Game

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30. An extraordinary example of conditional cooperation through repetition is that of soldiers on the Western Front in World War I. Truces were quite common between Allied and German units that had been facing one another for long periods of time and fought repeated internecine battles over the same territory. In these conditions, complex “systems of communication developed to agree terms, apologize for accidental infractions and ensure relative peace—all without the knowledge of the high commands on each side . . . Raids and artillery barrages were used to punish the other side for defection . . .” MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* 65 (1996). This was an example of tit-for-tat, a basic but highly effective conditional cooperation strategy. *See id.* at 63–65 (“The principal condition required for Tit-for-tat to work is a stable, repetitive relationship.”). In order to quash the emergence of such truces, commanders would regularly shuffle units about so no regiment was opposite any other for long enough to build up a relationship of mutual cooperation. They would, in this way, stymie the cooperative-inducing effects of repeated interaction and reciprocity. *See id.* at 65 (“If two Tit-for-tat players meet each other and get off on the right foot, they cooperate indefinitely.”).

31. *See* SHANKER SINGHAM, *A GENERAL THEORY OF TRADE AND COMPETITION: TRADE LIBERALISATION AND COMPETITIVE MARKETS* 13 (2007) (outlining the driving factors underlying trade liberalization and competitive markets).

32. *See* STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* 63 (2004) (outlining the conditional cooperation strategy of tit-for-tat); *see also* Ernst Fehr & Urs Fischbacher, *Social Norms and Human Cooperation*, 8 *TRENDS IN COGNITIVE SCI.* 185, 186 (2004) (discussing the norm of conditional cooperation).

theorists contend that conditional cooperation can emerge spontaneously between players, given the element of reciprocity together with the possibility of repeated interaction.<sup>33</sup> The literature on conditional cooperation is substantial, and it need not be delved into extensively here. However, the basic thrust of it is this: “I will help you if you reciprocate; if you harm me, I will retaliate in kind.”<sup>34</sup> To this end, repetition is crucial, in that it smoothes out any short-term asymmetrical skewing of incentive structures that may tempt one party to violate the rules to get some short-term benefit at the other’s expense.<sup>35</sup> Or worse, the mere knowledge that this temptation exists drives actors otherwise willing to cooperate to mutual betrayal.<sup>36</sup> Repeated interaction helps ensure that reciprocity maintains order even if this balance may falter in specific short-term instances.<sup>37</sup> The “shadow of the future” will generally support a cooperative equilibrium.<sup>38</sup> However, it is important to note that, given

33. The literature in this area is extensive; however, for the foundational and probably most cited work, see Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCI. 1390, 1396 (1981) (advancing a biological approach to the development of conditional cooperation); see also Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306, 317 (1981) (“[Cooperation] cannot take place if it is tried only by scattered individuals who have no chance to interact with each other. But cooperation can emerge . . . as long as these individuals have even a small proportion of their interactions with each other.”). Indeed, the idea that frequent repetition encourages cooperation has become a virtual axiom among game theorists. See RIDLEY, *supra* note 30, at 61–62 (recounting the development of the principle of reciprocity in game theory). I have recently written on the role of reciprocity and signaling in sustaining legal order in the context of international treaties. See Bryan H. Druzin, *Opening the Machinery of Private Order: Public International Law as a Form of Private Ordering*, 58 ST. LOUIS U. L.J. 423, 465 (2013) (arguing that treaties that require positive actions, as opposed to merely the absence of action, induce compliance and treaty longevity, in that this allows for signaling).

34. This is a basic game strategy known as tit-for-tat. See Axelrod & Hamilton, *supra* note 33, at 1391 (detailing the basic theory of the prisoner’s dilemma).

35. Indeed, this is the famous solution to the dilemma in the well-known Prisoner’s Dilemma. See *id.* (“With two individuals destined never to meet again, the only strategy that can be called a solution to the game is to defect always despite the seemingly paradoxical outcome that both do worse than they could have had they cooperated.”).

36. This is the infamous Prisoner’s Dilemma.

37. See, e.g., OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 163–68 (1985) (making the case that repeated play and reputation are “private ordering” tools for enforcement). For a detailed breakdown of the basic structure of repeated games with perfect monitoring, see GEORGE J. MAILATH & LARRY SAMUELSON, REPEATED GAMES AND REPUTATIONS: LONG-RUN RELATIONSHIPS 15–24 (2006). Theorists also cite various other private mechanisms that can be employed to alter the cost-benefit structure for stronger agents that may be tempted to cheat. See Leeson & Stringham, *supra* note 8, at 546–47 (“If private mechanisms are devised that alter the cost-benefit structure of activities for stronger agents, the imposition of force need not be inevitable.”).

38. See Peter T. Leeson, *The Laws of Lawlessness*, 38 J. LEGAL STUD. 471, 480 (2009) (describing the *folk theorem*, which suggests that “when play is infinitely repeated and players are sufficiently patient, the shadow of the future can support the cooperative equilibrium.”).

sufficient communication, the same mechanisms that engender compliance and cooperation between two actors can emerge in the context of very large groups where parties do not repeatedly interact.<sup>39</sup> This may be achieved through the threat of reputational costs.<sup>40</sup> In this case, while an actor will suffer no retaliation at the hands of the party they cheat, other actors in the community will exact retaliation later down the road. Reputational costs are a powerful ex post enforcement mechanism that encourages rule compliance.<sup>41</sup> Indeed, the specter of future boycott and ostracism from the community is a powerful incentive to follow the rules.<sup>42</sup> Thus, a diamond trader will be hesitant to cheat a client even if the trader can do so with immediate impunity because doing so will harm the trader's commercial reputation at a far greater cost in the long run. In order to "maintain a reputation for dealing under recognized rules of behavior (i.e., for fair dealings or high moral standards), each player's dominant strategy is to behave as expected throughout each game that he plays, whether it is a repeated or a one shot game."<sup>43</sup> Thus, through reputational costs, a large community can achieve a substantial level of compliance based on what are essentially the same mechanisms that ensure compliance between just two actors—retaliation.

The upshot of this is that legal order can arise in a decentralized, spontaneous fashion even within large communities of merchants. And the community need not be hermetically sealed. It may be a myriad of partially overlapping communities bound together into a coherent whole that allows for a sufficient degree of communication—

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39. See Benson, *supra* note 12, at 218 (discussing the development of cooperative intergroup relationships).

40. See Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law*, 3 CONST. POL. ECON. 1, 1, 7 (1992) (arguing that repeated interaction with another individual does not create the same incentive to abide by set norms as does interaction with many different individuals and groups, as reputational costs for noncompliance are higher); Steven T. Schwartz, Richard A. Young & Kristina Zvinakis, *Reputation Without Repeated Interaction: A Role for Public Disclosures*, 5 REV. ACCT. STUD. 351, 351 (2000) ("While efficiency gains might be achievable through contracting or repeated interaction, there are many instances where contracting is costly or illegal and where transactions are not repeated among the same set of agents.").

41. Communication within a community can thus be extraordinarily powerful: "Essentially, investments in communication mechanisms substitute for investments in capacity for personal violence, and ostracism substitutes for self-help sanctions." Benson, *supra* note 12, at 214.

42. See *id.* ("Social ostracism . . . can be a very significant punishment. In fact, an individual's incentives to exact physical retribution or tit-for-tat punishment are weak when competitive alternatives exist and information is easily spread."). Indeed, "[r]eputations can make promises to perform credibly in small economies, and parties form trade associations partly to shrink the size of the relevant reputational group . . ." Alan Schwartz, *The Enforcement of Contracts and the Role of the State*, in LEGAL ORDERINGS AND ECONOMIC INSTITUTIONS 105, 107 (Fabrizio Cafaggi, Antonio Nicita & Ugo Pagano eds., 2007).

43. Benson, *supra* note 40, at 7.

a vast network of overlapping, loosely connected communities with commercial ties that bind huge numbers of actors into what can be described as a unified community within which a single set of customs, practices, and rules gain ascendancy. In many ways, communities of merchants are like small communities. It is well-acknowledged that reputational costs and repetition are sufficient in small groups to bring about stable social ordering.<sup>44</sup> If communities of merchants are analogous to small communities, the community of nations represents the tiniest of villages. Indeed, the effects of reciprocity are even more salient on the national level because the community of nations is relatively minuscule (there are presently only 193 states recognized in the United Nations<sup>45</sup>), and communication travels so freely that there is a virtual guarantee of reputational costs. Thus, not only do these mechanisms apply on the microlevel of private commercial actors and the communities they form, but they also apply just as powerfully—perhaps even more powerfully—on the macrolevel of nation-states engaging in trade.

Reciprocity creates both positive (successful trading) and negative (the loss of trading opportunity) incentives. This is not necessarily the case with other areas of human interaction. There is no immediate and clear reciprocity. In the case of trade, because the rules that evolve provide an element of mutual benefit, the need for a single external authority to promulgate and enforce a system of rules is not necessarily required. The force of reciprocity functions as a self-regulating legal mechanism; parties want to achieve consensus. Indeed, formal coercion is not as essential in a system structured around self-interest. The basic character of commerce, with its underlying principle of reciprocity, is itself an authority to which participants answer. This has given rise to a legal order that frequently supersedes the constraints of national boundaries. Owing to this organic evolution, a system of transnational commercial legal order has steadily evolved in the vacuum of a single coercive power. This has been facilitated by the element of reciprocity embedded in the very nature of commerce. The concept of reciprocity plays a critical role in the “spontaneous law” literature. Reciprocity is central because it is the primary means of inducing compliance in the absence of formal enforcement.<sup>46</sup> External coercion is replaced by the force of self-interest.

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44. See generally ELLICKSON, *supra* note 10 (detailing the informal norms governing the settlement of disputes among cattle farmers in Shasta County, California).

45. RUDOLPH C. RYSER, *INDIGENOUS NATIONS AND MODERN STATES* 219 (2012).

46. See Benson, *supra* note 12, at 211 (discussing the historical importance of mutual deterrence in preventing individuals from choosing violence over cooperation to increase their own wealth); see also Benson, *supra* note 19 (“[I]t becomes clear that reciprocal arrangements are the basic source of the recognition of duty to obey law (and of law enforcement when state coercion does not exist).”).



### C. Reciprocity as a Distinguishing Feature of Commerce

It is not an exaggeration to say that the element of reciprocity is an intrinsic feature of trade. Reciprocity is essentially built into commerce. It is crucial in allowing legal order to advance in the absence of a single overarching authority. Indeed, as Fuller asserts, "the concept of reciprocity assumes peculiar importance in a world where there is no external authority to enforce agreements. That is, in a world that exists in a Hobbesian state of nature."<sup>47</sup> Many libertarian theorists in fact carry this point further, arguing that, because the authority of customary law is based on a voluntary recognition that comes from the reciprocal gains of such recognition, it is in fact "much less likely to be violated than enacted law, imposed by a state and lacking reciprocity."<sup>48</sup> To be sure, the ability of trade to conduct itself in the absence of a centralized authority is remarkable and no doubt can be largely attributed to the fact that it is grounded upon reciprocal relationships.

The fundamental dilemma facing international law, both public and private, is that it exists largely in a Hobbesian state of nature with no authority possessing clear jurisdiction to enforce agreements.<sup>49</sup> Indeed, "while associations ranging from primitive tribes to modern nation-states are all governed internally by some form of law, their external relations with one another remain mainly anarchic."<sup>50</sup> Stepping beyond the boundaries of nation-states is essentially stepping into a state of impoverished anarchy.<sup>51</sup> Indeed, "the world as a whole has operated and continues to operate as international anarchy . . . . [T]he international sphere remains anarchic and shows few signs of coming under the rule of formal government soon."<sup>52</sup> Because it is grounded upon reciprocity, the exchange of property can achieve an astounding degree of self-ordering within this vast state of anarchy. A system of commercial legal order comprises a myriad of countless participants bound together by the common thread of reciprocity—the essence of trade. In this sense, the feature of reciprocity forms the underlying structure of all these numerous relationships; the potential to achieve some measure of gain through mutual cooperation and reciprocation

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47. Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 93–94 (2003).

48. Benson, *supra* note 19, at 660.

49. See Parisi & Ghei, *supra* note 47, at 94 ("International law . . . exists in a state of nature, because there is no overarching legal authority with compulsory jurisdiction to enforce agreements.").

50. Jack Hirshleifer, *Anarchy and Its Breakdown*, 103 J. POL. ECON. 26, 27 (1995).

51. See Alfred Cuzán, *Do We Ever Really Get Out of Anarchy?*, 3 J. LIBERTARIAN STUD. 151, 156 (1979) (explaining the landscape of authority among institutions outside of the nation-state framework).

52. Leeson & Stringham, *supra* note 8, at 544.

is the basis of commercial interaction. The potential to satisfy mutual self-interest is the engine that drives commercial trade. If this element is removed, a system of voluntary commercial relationships cannot survive.

Indeed, reciprocity serves as the organizing basis of commercial systems, both past and present: “[A]lthough the form of mercantile transactions has changed over time, the structural underpinnings of international commerce have remained the same throughout all eras. Reciprocity in trade, enforced in suppletive law in terms of the principles of consent, has continued to prevail as the basis of commerciality.”<sup>53</sup> Reciprocity is, in this way, the distinctive property of systems of decentralized commercial order.<sup>54</sup> Indeed, “[r]eciprocity, in the sense of mutual benefits and costs, is the very essence of trade.”<sup>55</sup> In contrast to other forms of law where reciprocity does not emerge with such vigor as its primary characteristic, commercial legal order can arise without the coercive hand of the state.

#### D. *Why Commercial Communities Are Primed to Produce Customary Law*

The work of Fuller may be of some broader conceptual help here. In *The Morality of Law*, Fuller looked closely at the emergence of customary law, suggesting it is predicated upon a basic sense of duty.<sup>56</sup> Fuller then asks: “Under what circumstances does a duty, legal or moral, become most understandable and most acceptable to those affected by it?”<sup>57</sup> His answer is an interesting one and highly relevant for the purposes of this Article: for Fuller, a sense of duty arises in relation to the element of reciprocity. He concludes that it is therefore in a society of “economic traders” that the necessary conditions for the arising of a sense of duty is most potent.<sup>58</sup> In the absence of third-party enforcement, “reciprocal arrangements are the basic source of the recognition of duty to obey law (and of law enforcement when state coercion does not exist).”<sup>59</sup>

Fuller argues that “we may discern three conditions for the optimum efficacy of the notion of duty. *First*, the relationship of reciprocity out of which the duty arises must result from a voluntary

53. LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 7 (1983).

54. See Benson, *supra* note 19, at 649 (discussing the components of a decentralized commercial order).

55. Benson, *supra* note 19, at 649.

56. See FULLER, *supra* note 14, at 19–23 (discussing the advent of customary law).

57. *Id.* at 22–23.

58. See *id.* at 23–24 (explaining the relationship between economic trading and duty).

59. Benson, *supra* note 19, at 646.

agreement between the parties affected; they themselves 'create' the duty.<sup>60</sup> *Second*, the reciprocal performances must in some sense be equal in value.<sup>61</sup> That is, no one should be perceived as getting "the better end of the deal." And *third*, "the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow—in other words, the relationship of duty must in theory and in practice be reversible . . ."<sup>62</sup> Fuller argues that these are "the three conditions for optimum realization of the notion of duty[,] the conditions that make a duty most understandable and most palatable to the man who owes it."<sup>63</sup> Fuller then goes on to ask, bearing these three principles in mind, in what kind of community would customary norms most easily emerge? He concludes that legal ordering of this kind most easily arises within a community of merchants engaging in commercial interaction. Fuller explains,

By definition the members of such a society enter direct and voluntary relationships of exchange. As for equality it is only with the aid of something like a free market that it is possible to develop anything like an exact measure for the value of disparate goods . . . . Finally, economic traders frequently change roles, now selling, now buying. The duties that arise out of their exchanges are therefore reversible, not only in theory but in practice. The reversibility of role that thus characterizes a trading society exists nowhere else in the same degree, as becomes apparent when we consider the duties running between parent and child, husband and wife, citizen and government.<sup>64</sup>

What exists, then, in a society of traders is a system centered on voluntary exchange that has at its disposal a common unit of comparison (money) and that involves relatively fluid relationships with individuals frequently changing roles (as buyers and sellers).<sup>65</sup> Indeed, because this concoction can cement a sense of duty in the minds of the participants, they are the perfect ingredients of stateless legal order. When these conditions are present, decentralized-yet-

60. See FULLER, *supra* note 14, at 23. A contractual relationship, we can assume, meets this criterion. An argument can be made that individuals sometimes are "forced" into business relationships out of economic necessity, a form of financial duress. In this sense, the truly voluntary nature of the relationship could be questioned. However, for Fuller's purposes, this would still qualify as a relationship of reciprocity resulting from a voluntary agreement as all that is required under Fuller's definition is a clear recognition of the benefit gleaned from the interaction. Thus, the choice can still be said to be voluntary insofar as that particular agreement goes. See generally FULLER, *supra* note 14.

61. FULLER, *supra* note 14, at 23.

62. *Id.* at 23–24.

63. *Id.*

64. *Id.* at 24.

65. See Macleod-Cullinane, *supra* note 15, at 6 ("Based upon voluntary trade, a common unit of comparison (money), and the changing roles of individuals (as buyers and sellers), the market order is that form of social organisation that best accords to the morality of duty.").

stable legal order can emerge where parties are willing to comply with the rules formulated to govern their relations. It is notable that the feature Fuller cites as so important is the relationship of reciprocity. His observations are relevant here because commercial relationships perfectly exhibit these three conditions. This is true as much on the microlevel of private parties as on the macrolevel of state actors. Fuller's analysis helps shed some light on why customary norms may emerge so easily within commercial communities, be they the norms of the international diamond trade or the norms of multisovereign bodies, such as the WTO or ASEAN. Fuller's conclusions apply as much to a community of trading nations as to a community of trading merchants—it is as true on the macrolevel of state actors as on the microlevel of private parties.

Before moving on to Part II, Part I concludes with a summary of the preceding discussion. Mutual benefit ensures a degree of willingness to come together and formulate a system of regulation to oversee this process. This aspect of mutual, immediate, and quantifiable benefit, while implicit in commerce, is less pronounced in other areas of law. Arguably, the most powerful force that can invigorate a system of law is an unshakable realization by all participants that subscribing to it is in their individual interests. It is this basic recognition that forms the very substratum of commercial legal order. Indeed, commercial legal order is unique in the degree to which the element of reciprocity underpins it. The reciprocal gains from the recognition of rules of property and contract—and the potential loss of them—thus serve as a self-enforcing mechanism, encouraging compliance. The need for an external authority to enforce this system of rules is thus not necessarily required. This creates a legal phenomenon that is far more amenable to a transregional evolution where a central coercive authority is not present. The element of reciprocity helps explain how, even in the absence of a central authority, legal order can be sustained—that is, how it can achieve high degrees of self-enforcement. However, this still leaves the question, without a central authority to create the rules, how can rules arise? Having discussed the crucial role of reciprocity in sustaining commercial order without the state, Part II will address the question of how complex legal practices and standards can arise without the state.

### III. MECHANISM TWO: MARKET PRESSURES

Perhaps an even more fundamental question than the issue of compliance is, how can these rules arise in the absence of a central legislating power in the first place, and moreover, possess a generally similar character? The answer is that legal practices need not be conceived of and imposed top down; they can grow bottom up in a

decentralized manner, guided by market forces. The fact that the rules are guided by market forces accounts for their general similarity. This Part deals with how market pressures give rise to generally similar legal structures, employing the medieval Law Merchant (an oft-cited example) to illustrate the process.

### A. *Commercial Law as an Instrument of the Market*

As much as a common medium of exchange is important to trade, so too is a coherent body of rules under which it can operate. Market pressures thus give rise to many common legal practices because these practices “grease the wheels” of trade.<sup>66</sup> Because they evolve from the practical necessities of trade, these legal practices tend to be fairly consistent across regions.<sup>67</sup> Because the basic requirements of trade are the same, the rules that arise to oversee trade often tend to be similar. Moreover, market pressures tend to create a degree of general uniformity in these practices because uniformity itself provides a benefit. As a result, in many aspects, commercial legal order demonstrates a general degree of similarity—all without the need for a centralized planner. The contracts of private actors reflect a general similarity in their use of business custom and the procedures of international arbitration,<sup>68</sup> and international trade agreements reflect a generally similar legal order among state actors. General standards emerge. In either case—the micro- or macrolevel—these commercial legal structures arise in response to the practical requirements of the market. The legal structures are, in a sense, instruments of the market. The result is that a complex body of commercial rules may arise without the need to be formulated by a central authority; the market formulates legal order spontaneously in a decentralized fashion out of sheer practical necessity. The outcome is a fairly consistent system of legal order followed by vast communities of merchants, institutions, and governments alike.

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66. See generally TRAKMAN, *supra* note 53.

67. See TRAKMAN, *supra* note 53, at 14 (comparing the legal practices of the Law Merchant from a regional perspective).

68. The pressing need for uniformity in the case of international arbitration is reflected in legislative efforts throughout the twentieth century, such as the Rules on Commercial Arbitration formulated by the International Law Association in 1950, a Uniform Law on Arbitration in Respect of Relations of Private Law developed by UNIDROIT in 1935 and amended by the Legal Committee of the Consultative Assembly of the Council of Europe in 1957, the European Convention on International Commercial Arbitration concluded in 1961, the ECE Rules for International Commercial Arbitration created by the United Nations Economic Commission for Europe in 1966, and UNCITRAL's rules for ad hoc arbitration. See generally Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy, in TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW?* 163–198 (Emmanuel Gaillard et al. eds., 2005) (exploring the emergence of a truly uniform international arbitration law).

Consider the basic principles of contract. The principles of formation, consent, misrepresentation, mistake, and duress all arose incrementally from the customary rules of merchants, not through the complex mechanics of formal legislation.<sup>69</sup> These principles arose because they facilitated the practice of trade.<sup>70</sup> B.L. Benson, building on the ideas of both Fuller and Hayek, has written persuasively on the notion that commercial legal order tends to evolve naturally in line with the needs of commerce.<sup>71</sup> In Benson's view, if left to its own devices, commercial legal structures will evolve primarily because they facilitate commercial activity, making it more efficient.<sup>72</sup> He contends that rules and governmental institutions may evolve as the unintended outcomes of individuals separately pursuing their own goals in the same way commercial structures develop.<sup>73</sup> This unfolds in an evolutionary-like process: complex legal structures develop through a process of trial and error because "the actions they are intended to coordinate are performed more effectively under one institutional arrangement or process than under another. The more effective institutions and practices replace the less effective."<sup>74</sup> Consequently, basic commercial legal structures tend to be similar. They are similar because they reinforce business; the requirements of the market, which are more or less universal, channel the evolution of legal structures in similar directions.

The state is thus not indispensable in the project of commercially oriented law. This is borne out by the historical Law Merchant as well as its modern equivalent. Indeed, the medieval Law Merchant is a perfect example of the capability of commerce to produce a relatively uniform body of legal order in the absence of a centralized authority. As such, the remainder of Part II will explore the Law Merchant example in detail.

### *B. An Example Drawn from History: The Medieval Law Merchant*

For anyone wanting a concrete example of the ideas discussed above, they need not look any further than the system of commercial legal order that arose in Western Europe during the medieval age. Indeed, the medieval Law Merchant powerfully illustrates the self-

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69. See Cooter, *supra* note 10, at 2 ("[J]udges dictated conformity to merchant practices, not the practices to which merchants should conform. By this process, the Law Merchant was allegedly absorbed into English common law.").

70. See Benson, *supra* note 19, at 644, 647 (discussing the basic principles of contract law).

71. See, e.g., Benson, *supra* note 19, at 650 (discussing the evolution of the commercial legal order).

72. See generally Benson, *supra* note 12 (describing how commercial legal order can be established).

73. See *id.* (discussing the natural evolution of commercial institutions over time).

74. Benson, *supra* note 19, at 644.

generative capacity of commercial customary norms.<sup>75</sup> The reader should note that while Part II focuses on the medieval Law Merchant, it is but one historical example of private legal ordering: American fish wholesalers, eleventh-century Maghribi traders, and many other merchant communities are all equally good examples of systems of decentralized commercial legal order.<sup>76</sup> The elaborate system of law that evolved in medieval Iceland in the complete absence of a coercive state, relying wholly on market mechanisms and private institutions, is another good example.<sup>77</sup> However, for clarity, this Article will limit its focus to the medieval Law Merchant. In the tenth, eleventh, and twelfth centuries, merchants created an international system of law to regulate the expanding networks of European trade and beyond.<sup>78</sup> During this period, “the basic concepts and institutions of modern Western mercantile law—*lex mercatoria* (the Law Merchant)—were formed, and, even more importantly, it was then that mercantile law in the west first came to be viewed as an integrated, developing system, a body of law.”<sup>79</sup> The Law Merchant was, as Fuller would say, a form of “horizontal law”<sup>80</sup>—law formulated bottom-up by merchants in a spontaneous fashion rather than imposed from on high through the legislative will of a state. It reflected the needs of day-to-day commerce; it was, in many respects, a creation of the market.

In the absence of a centralized authority, merchant courts emerged along trade routes and trading centers to resolve the legal disputes that would invariably arise between merchants. Parties to a

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75. See PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* (2009); JOHN UMBECK, *A THEORY OF PROPERTY RIGHTS WITH APPLICATIONS TO THE CALIFORNIAN GOLD RUSH* (1989); Terry L. Anderson & Peter Hill, *American Experiment in Anarcho-Capitalism: The Not so Wild, Wild West*, 3 J. Liberation Stud. 9 (1979); David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399 (1979); Greif, *supra* note 10, at 857; Leeson, *supra* note 38, at 482; Peter T. Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, 115 J. POL. ECON. 1049 (2007) for other historical analysis of systems of customary law. These systems include the Maghribi Traders, medieval Iceland, mining camps in the American West, the *Leges Marchiarum* (the Law of the Marshes), an intricate system of criminal law related to cross-border banditry (“reviving”) that emerged in the Anglo-Scottish borderlands from the thirteenth to sixteenth century, and the ordering system between pirates.

76. For some discussion of these, see John McMillan & Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH. L. REV. 2421, 2433–36 (2000).

77. See Friedman, *supra* note 75, at 399–400 (explaining how a complex legal system developed in Iceland, albeit with peculiar characteristics); see also Carrie B. Kerekes & Claudia R. Williamson, *Discovering Law: Hayekian Competition in Medieval Iceland*, 21 GRIFFITH L. REV. 432, 432 (2012) (discussing the system of law in medieval Iceland).

78. TRAKMAN, *supra* note 53, at 8–12.

79. HAROLD J. BERMAN, *LAW AND REVOLUTION, THE FORMATION OF THE WESTERN LEGAL TRADITION* 333 (1983).

80. See FULLER, *supra* note 14, at 233 (discussing the legal framework of the Law Merchant).

legal claim would accept the court's decisions largely out of fear of commercial ostracism, a common penalty for those who refused to accept the ruling of the court.<sup>81</sup> "The threat of boycott of all future trade 'proved, if anything more effective than physical coercion.'"<sup>82</sup> The element of reciprocity and "the threat of business sanctions compelled performance."<sup>83</sup> This illustrates the point made above regarding the ability of reciprocity, both negative and positive, to induce compliance even in the absence of a centralized coercive authority. While the literature on the Law Merchant is not without its detractors,<sup>84</sup> *lex mercatoria* arguably shows that the "reciprocal gains from the recognition of rules of property and contract provided sufficient incentives for merchants to establish their own stateless enterprise of law."<sup>85</sup>

The medieval Law Merchant was absorbed by the common law during the rise of the modern state. Yet the Law Merchant has re-emerged as a primary force in current international commercial trade, where it continues to evolve in the absence of a centralized authority.<sup>86</sup> Arguably, the evolutionary process of the medieval Law Merchant could not have been achieved through intentional design.<sup>87</sup> It needed to emerge in a decentralized manner. Indeed, that the Law Merchant arose within the social chaos of the medieval period flies in the face of the conventional wisdom that legal order needs the guiding hand of the state. However, it should not be surprising that a viable system of customary legal order was able to emerge. "Custom, not law, has been the fulcrum of commerce since the origins of exchange."<sup>88</sup> What gave force to this system of customary law were the needs of the market. The Law Merchant was shaped by market forces, which guided its development.

81. See Benson, *supra* note 19, at 650 (explaining the reasons why parties in dispute accepted merchant court decisions).

82. *Id.* at 649.

83. TRAKMAN, *supra* note 53, at 10.

84. Indeed, critics of this literature contend that this account of the law merchant has primarily been produced by antigovernment ideologues who have distorted the facts (and perhaps fabricated them) in an effort to show that the state is not necessary for legal order. See, e.g., Christopher R. Drahozal, *Busting Arbitration Myths*, 56 KAN. L. REV. 663 (2008); Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortions of the Medieval Law Merchant*, 21 AM. U. INT'L L. REV. 685 (2006); Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427 (1999).

85. Benson, *supra* note 19, at 646.

86. See generally Benson, *supra* note 19, at 660 ("Customary law continues to 'govern' most commercial interaction today.")

87. See *id.* ("The market process could not develop and evolve without a coterminously evolving, clearly defined and enforceable set of rules of property and contract of course.")

88. TRAKMAN, *supra* note 53, at 7.



### C. The Law Merchant Reinforced Business

The Law Merchant was a tool of unified commercial discourse that transcended the hotchpotch of different local systems of law that traders would encounter, such as ecclesiastical, manorial, and civil.<sup>89</sup> The Law Merchant provided a measure of standardization. This universality was a requirement of the evolving system of exchange. The Law Merchant created a largely transregional law of trade, itself representing an essential advancement in commerce. “[The] uniformity and universality of the resulting customary rules facilitated transnational trade in a world of parochial local jurisdictions hostile to foreign merchants and lacking unifying states.”<sup>90</sup> The emergence of a standardized system of law thus proved invaluable to the enterprise of trade: “As international trade developed, the benefits from a uniform rules and uniform application of those rules superseded the benefits of discriminatory rules and rulings that might favor a few local individuals.”<sup>91</sup>

Consistency in the rules overseeing trade was absolutely vital in allowing a system of transregional exchange to develop. The Law Merchant represented what Fuller calls a “language of interaction”<sup>92</sup>—an instrument of communication among a community of merchants from disparate cultural and political settings with a limited degree of mutual trust. The growing commercial needs of merchants traveling between these various regions demanded a uniform and commonly recognized system of law to facilitate the common objectives of commerce. Merchants from all across medieval Europe would travel vast distances to exchange goods in fairs and village markets with parties they knew little about and with whom they shared no common cultural bond.<sup>93</sup> In this setting, localized and contradictory legal customs were a significant impediment to the free flow of commerce. Thus, a clear system of rules to oversee trade was a necessity. As these traders engaged in commercial interaction, business customs became increasingly better-defined and less arbitrary. A coherent legal order emerged, much like a common trading language. The Law Merchant grew out of repeated dealings between traders because it facilitated the ability of these merchants to engage in the act of trade. The law that arose was, in a very real sense, in response to the requirements of the market—an instrument

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89. Macleod-Cullinane, *supra* note 15, at 5.

90. Kadens, *supra* note 84, at 1155. But see this same paper arguing that the uniformly and universally adopted Law Merchant facilitated international trade in Europe.

91. Benson, *supra* note 19, at 648.

92. LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 213 (Kenneth I. Winston ed., 1981).

93. See Benson, *supra* note 19, at 649.

of the market. Legal practices arose to assist the endeavor of commerce.

The emergence of credit is a good example. Benson points out that, by the twelfth century, "the main forms of credit extended by sellers to buyers were promissory notes and bills of exchange."<sup>94</sup> Prior to this period, the practice of negotiability of credit instruments did not exist.<sup>95</sup> Negotiability of credit was a critical innovation that allowed trade to flourish. It "was 'invented' by Western merchants because of the need for improved means of exchange as commerce developed."<sup>96</sup> This was largely because "the rise of the Law Merchant generated sufficient confidence in the commercial system so that a reservoir of commercial credit could be established."<sup>97</sup> Legal practices evolved during this period as a response to the needs of the market. Every "procedural or substantive legal rule in the Law Merchant thus had a practical genesis."<sup>98</sup> Another good example of this was the recognition of a document lacking notarial execution as valid so long as it was signed by the relevant parties, as this greatly aided in the speed of transactions and reduced costs.<sup>99</sup> Likewise, rules regarding the passing of property without actual physical delivery evolved in order to address problems associated with the geographical impediments traders typically encountered.<sup>100</sup> The overall body of law that emerged was a response to the practical requirements of the market.

Over time, merchant business practices were increasingly put into writing in the form of written commercial instruments and contracts.<sup>101</sup> Thus, the Law Merchant arose from the pages of contracts voluntarily agreed to by private merchants. These contracts were not law in the sense of codified commercial legislation drafted by the disinterested minds of government but rather predicated upon the specific agreements drawn up by traders themselves. Invariably, the Law Merchant would gradually incorporate these contractual usages. In every aspect of the Law Merchant, the contract itself was the focal point of all legal issues; the agreement between traders was of absolute dominance in these matters. All other questions were

94. *Id.* at 650–51.

95. *See id.* (discussing the emergence of credit instruments as mechanisms for trade).

96. *Id.* at 651.

97. *Id.*

98. TRAKMAN, *supra* note 53, at 14.

99. *See id.* at 14–15 (explaining tactics used in the Law Merchant to increase efficiency).

100. *See id.* at 15 ("The rule permitting a passing of ownership without physical delivery overcame the difficulties associated with the geographic distances between transactors.").

101. Benson, *supra* note 19, at 649 ("Furthermore, as the norms of commercial law became more precisely specified they were increasingly recorded in writing.").

“subservient to its dominating function as a regulator of behavior.”<sup>102</sup> The agreement formed the cornerstone of the Law Merchant precisely because this law arose to serve the requirements of trade; before all else, this was its overriding objective. The Law Merchant sprang from the business customs prevalent at the time, which evolved because they assisted the undertaking of trade. A fundamental respect for the merchant practice as a primary source of regulation reverberated throughout the evolution of the *lex mercatoria*.<sup>103</sup> The law “reinforced rather than superseded the cycle of business practice. It commanded merchants to do that which they themselves had promised to do. Moreover, it generally avoided complex legal forms and mandatory controls over business that had not already been sanctioned either in custom or in commercial habit.”<sup>104</sup> As the Law Merchant emerged in response to the needs of merchants, above all it was functional rather than ideological.<sup>105</sup> It was formulated to govern the dealings of traders, and was itself an administrative reflection of the requirements of these dealings.

It is, however, debatable as to whether the medieval Law Merchant truly could be considered a unified single market. Local governments did at times attempt to exert influence over the law governing trade in their region to gain some relative commercial advantage for local traders.<sup>106</sup> The Merchants of Antwerp, for instance, “refused to submit to the law of London, on the ground that the law of London discriminated against them.”<sup>107</sup> Local merchant courts were not always impartial, often favoring local merchants over foreign traders.<sup>108</sup> However, it is astonishing that, in absence of a central authority, a relatively uniform system of commercial legal order nevertheless emerged in medieval Europe, despite these attempts at rent-seeking by local authorities. It speaks to the degree to which market forces that required (and still require) a uniform body of law helped create the commercial law of the period. Despite this tendency toward local favoritism, the Law Merchant developed by the hands of merchants with disparate profit incentives, mutual distrust, and little in common. This fact is a stark testament to the

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102. TRAKMAN, *supra* note 53, at 10.

103. See Marlene Wethmar-Lemmer, *The Development of the Modern Lex Mercatoria: A Historical Perspective*, 11 *FUNDAMINA: A JOURNAL OF LEGAL HISTORY* 183, 189 (2005) (“[T]he *lex mercatoria* embodied a respect for merchant practice as a primary source of regulation and the ‘law’ as a secondary control over commerce.”).

104. TRAKMAN, *supra* note 53, at 18.

105. See Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 *U. TORONTO L.J.* 265, 274 (2003) (“[T]hese developments were functional more than ideological.”).

106. See Trakman, *supra* note 53, at 19–20 (providing several jurisdictions that enacted ordinances to favor local merchants).

107. *Id.* at 20.

108. See *id.* at 19 (“In addition, local merchant courts were not always impartial in their treatment of foreigners.”).

power that market forces exert over the formation of commercial legal order.<sup>109</sup> Indeed, on a fundamental level, market forces created the Law Merchant—and they continue to do so today.

#### D. *The Modern Law Merchant*

As already mentioned, the Law Merchant arguably did not disappear. The Law Merchant simply transformed as it was co-opted and codified by state law.<sup>110</sup> It was subsumed by the emergence of national commercial law codes. The Law Merchant remained the primary source of commercial law in both the common law and civil law systems,<sup>111</sup> and has now re-emerged in the present age. A coherent legal order is a practical requirement of international trade, which cannot wait around for state law to play catch-up. The demands of a global market, much as with the medieval Law Merchant, have given rise to relatively standardized legal structures within the vacuum of a central authority. Thus, there is the ascension of a new Law Merchant. The modern Law Merchant, while fragmented by the fissures of national law, still exists.<sup>112</sup> Indeed, “[i]nternational commercial law is still largely independent of nationalized legal systems, retaining many of the basic (though) modernized institutional characteristics of the medieval Law Merchant.”<sup>113</sup> Like the Law Merchant of old, the modern Law Merchant is above all a response to the needs of the community of merchants from which it has evolved. Its guiding spirit is efficiency and pragmatism because this is what the market requires the world over. The growing use of dispute resolution speaks to the ability and need of merchants (as well as state actors) to adjudicate their own legal matters. The practices and procedures of international commercial arbitration are remarkably similar, not unlike its medieval predecessor.<sup>114</sup> Like the medieval Law Merchant, modern commercial arbitration is “surrounded by a *ius commune*, a law common to merchants . . . . This *ius commune* is evident in the codification of mercantile arbitration rules both within bi- and

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109. In fact, even after the absorption of Law Merchant into State law, elements of the Law Merchant still levied a considerable influence upon the courts.

110. See TRAKMAN, *supra* note 53, at 23 (“[The Law Merchant] was transformed in character during the sixteenth and seventeenth centuries to blend with local influences.”).

111. See *id.* (“[T]he foundations of the Law Merchant . . . remained intact in both civil and common law systems.”).

112. See Trakman, *supra* note 103, at 283 (citing the emergence of nation-states as fracturing, but not eliminating, the Law Merchant).

113. Benson, *supra* note 40, at 1.

114. See Trakman, *supra* note 103, at 282 (explaining that the conventions of international commercial arbitration may be inherently similar to the Law Merchant court because of reliance on trade usage).

multilateral conventions, as well as in the rules of international commercial arbitration associations.”<sup>115</sup>

In large measure, international commercial law—the body of law that has arisen within a transregional context on the back of increasing commercial trade between private as well as state actors—is simply a product of ubiquitous market forces that usher it into being, channeling its evolution, just as with the Law Merchant of old. As such, it should not be surprising that such legal order exhibits a high degree of standardization. Because these legal structures emerge in line with the needs of the market, and because these needs tend to be the same everywhere, a degree of general uniformity results.

#### IV. MECHANISM THREE: NETWORK EFFECTS

##### A. *The Limits of Market-Induced Uniformity*

Yet this uniformity is not perfect. It is important to not overstate the case, as much of the literature has in fact done.<sup>116</sup> This uniformity is merely a general similarity of common practices requisite to trade. Many practices and usages often vary considerably across commercial communities. A recent expanding literature in fact questions the true sweep of market-induced uniformity in the Law Merchant, arguing that customary commercial law often shows signs of “polycentrism.”<sup>117</sup> More recently, Benson has defined the Law Merchant as “a distinct, but not independent, system of polycentric customary law evolving spontaneously from the bottom up through the interactions of merchants.”<sup>118</sup> Yet from this web of polycentric systems of legal practices, commonly held rules do emerge.<sup>119</sup> Some of this may be explained by rule-emulation. Indeed, Benson makes this argument: “Many intra-group rules will be commonly held . . . and emulation also will occur where differences initially exist but individuals perceive superior arrangements among other groups, so many common customs can exist in an extensive polycentric web of communities.”<sup>120</sup> Part III discusses the concept of emulation below in

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115. *Id.*

116. Trakman, Benson, and other writers have certainly fallen victim to this, although subsequent publications by Benson step back from the argument. *See generally, e.g.,* B.L. Benson, *The Law Merchant Story: How Romantic is it?*, in *LAW, ECONOMICS, AND EVOLUTIONARY THEORY* 68 (Peer Zumbansen & Graif-Peter Calliess eds., 2011).

117. *See id.*

118. *Id.* at 72.

119. *See id.* (“Also note that many of these legal systems were polycentric. Different royal law, manorial law, and local custom applied in different areas although they often had similar rules.”).

120. *Id.* at 71.

more detail.<sup>121</sup> However, it is argued here that the primary mechanism that induces this commonality is network effects. The propensity of trade to extend its reach across regions tends to extinguish polycentrism because this generates network effects. Much like regional dialects, with higher levels of interaction comes the need for standardization and a common tongue.<sup>122</sup> Thus, even in situations of polycentrism, high degrees of uniformity arise as network effects push the market for legal rules toward ever-higher levels of standardization. The higher the intensity of interconnectivity, the more standardization will occur as a result.

Where market-induced uniformity falters, network effects pick up the slack. This causes customary law to self-standardize; network effects help consummate the job initiated by market pressures. Demands of the market are similar across regions, and therefore the basic legal structures they engender tend to be similar. However, where differences remain, increased interregional interaction generates network effects that induce uniformity. Remaining regional differences thus tend to get ironed out under the increasing pressure of network effects. Given the structural composition of trade, network effects are not only possible, but a strong case could be made that they are inevitable (provided there is a sufficient interaction between merchants or state actors). This drives toward an obvious conclusion: as interaction increases, standardization will increase. Following this logic, while polycentrism will stubbornly remain in places, the accelerating volume of global trade should lead to increasing levels of overall standardization.

### B. *What are Network Effects?*

So what exactly are network effects? A network effect is essentially the idea that the implicit value of a product increases as the number of other agents using the same product grows, which in turn draws more users.<sup>123</sup> It is commonly seen in relation to goods that require a standard platform to operate, such as telephones and fax machines.<sup>124</sup> Network externalities arise from the need for

121. See *infra* Part III.C.

122. See discussion of the interregional character of trade in greater detail *infra* Part IV.A.

123. See S.J. Liebowitz & Stephen E. Margolis, *Network Externalities*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 671, 671 (Peter Newman ed., 1998) (illustrating the benefit derived from a product when the number of people using the same product increases).

124. For a very good overview of other network effect examples in a wide range of contexts, see Joseph Farrell & Paul Klemperer, *Coordination and Lock-In: Competition With Switching Costs and Network Effects*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1967, 2012–20 (M. Armstrong & R. Porter eds., 2007).

compatibility between products.<sup>125</sup> This is because an item's inherent utility hinges upon its ability to facilitate interaction between agents: "[T]he utility that a given user derives from the good depends upon the number of other users who are in the same 'network' . . . ."<sup>126</sup> As more users begin to use the product and its utility grows, even more consumers will choose to use the product, and on it goes, creating a kind of snowball effect as more and more users flock to the product or standard. This kind of positive feedback lies at the heart of a network effect; the dynamic can reinforce burgeoning patterns, causing these patterns to become progressively more entrenched over time. When a market has settled upon a single standard and all competing standards have left, the market "is said to have tipped."<sup>127</sup>

Networked markets exhibiting multiple standards are considered extremely "tippy."<sup>128</sup> Indeed, "[w]hen two or more firms compete for a market where there is strong positive feedback, only one may emerge as the winner."<sup>129</sup> A clear single standard will eventually come to dominate. As this Article argues elsewhere, the market for legal standards and practices can tip precisely in this fashion, inducing high levels of standardization.<sup>130</sup> Migrating from the domain of economic theory, the concept of network effects has been presented as a way to explain the ascendancy of particular products over others in the market.<sup>131</sup> It is a useful concept drawn from the field of economics that accounts for how certain commercial products proliferate in a path-dependent manner. Oft-cited examples include VHS's dominance over Beta and the standardization of the

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125. Note that I am referring here to what are known as direct (as opposed to indirect) network externalities.

126. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

127. William H. Page & John E. Lopatka, *Network Externalities*, in ENCYCLOPEDIA OF LAW AND ECONOMICS 952, 960 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000). See also Thomas C. Schelling, MICROMOTIVES AND MACROBEHAVIOR 92-94, 98-99 (rev. ed. 2006) (influencing the decision to "tip-in" or "tip-out" is the amount of people already participating in the activity).

128. See TIM WEITZEL, ECONOMICS OF STANDARDS IN INFORMATION NETWORKS 24 (2004) (regarding a market with multiple standards as one that will likely lean toward one standard while eliminating the others); Rudi Bekkers, MOBILE TELECOMMUNICATIONS STANDARDS: GSM, UMTS, TETRA, AND ERMES 196 (2001) ("Some economists call such a market 'tippy' or 'tipping,' and they believe that it is unlikely that all firms or designs will survive [7, 16, 17].").

129. CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO NETWORK ECONOMY 176 (1998).

130. See Bryan H. Druzin, *Buying Commercial Law: Choice of law, Choice of Forum, and Network Effect*, 18 TUL. J. INT'L & COMP. L. 131, 149-56 (2009) (arguing that network effects induce standardization in choice of law and choice of forum clauses in transnational commercial contracts).

131. For the early foundational work in this field, see Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 BELL J. ECON. & MGMT. SCI. 16 (1974). See discussion *supra* Part III.C (likening the ascendancy of certain consumer products due to network effect to the ascendancy of certain jurisdictions).

QWERTY keyboard layout.<sup>132</sup> Yet network effects may apply with equal vigor to any networked system where participants are free to select the standard they wish to use and will benefit from increased standardization.<sup>133</sup> The interconnectivity of trade creates highly networked systems.

### C. Network Effects and the Standardization of Legal Practices

A great deal of uniformity is already ensured by the fact that the requirements of trade tend to be generally the same across regions, and that uniformity itself is such a requirement. However, network effects reinforce this uniformity. They provide an explanation of how legal practices are able to self-standardize in the absence of a centralized legislative authority. As more traders—including state actors—embrace a specific legal practice or standard, this draws others to do likewise. There is an implicit benefit in adopting the dominant practice in that it facilitates a merchant's ability to do business with a greater number of traders. Familiarity with specific, widely recognized business practices can deliver returns in terms of efficiency through the ability to work with these practices, including anticipating their use and cost-savings in the course of conducting trade. Indeed, if merchants needed to learn how to employ a new commercial-legal practice each and every time they engaged in commercial dealings, it would be enormously challenging—similar to learning a new language with each and every person one encounters.<sup>134</sup> All things being equal, it is more efficient to simply adopt the prevailing legal practice. Indeed, this process is clear in the case of actual languages. Trading languages emerge along commercial routes to facilitate communication between merchants. The emergence of “vehicular languages” such as pidgin is often seen along trade routes. Swahili is an example of a trade language. Trade languages are a linguistic expression of the need for standardization between traders, but they are just one manifestation.

This Article argues elsewhere that the impact of network effects may be discerned with respect to the standardization of choice of law and choice of forum clauses in transnational contracts.<sup>135</sup> This is a

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132. For an argument disputing the veracity of the VHS and QWERTY example, see S.J. Liebowitz & Stephen E. Margolis, *Should Technology Choice Be a Concern of Antitrust Policy?*, 9 HARV. J.L. & TECH. 283, 312–16 (1996).

133. For information on how the concept of network effect has been applied in the literature of path dependence, see generally W. Brian Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON J. 116 (1989); W. Brian Arthur, *Positive Feedbacks in the Economy*, 262 SCI. AM. 92 (1990); S. J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In and History*, 11 J.L. ECON. & ORG. 205 (1995).

134. See, e.g., Farrell & Klemperer, *supra* note 124, at 1972 (describing how this process is called “switching costs” in the network effect literature).

135. See *supra* Part III.B.



good illustration of the point in question on the microlevel of private parties—the number of “consumers” who select a specific choice of law or choice of forum provision is analogous to the number of consumers who use a certain product.<sup>136</sup> As the number of consumers increases, so too does the inherent value of using that jurisdiction, which induces even more people to “purchase” that jurisdiction’s law.<sup>137</sup> This Article argues that the nature of commerce renders transnational commercial law ideally calibrated to produce network effects. The twin ingredients of fluid interaction and frequent choice present in commercial dealings invariably trigger network effects. Interaction demands synchronization, and frequent opportunities to select law in each new commercial relationship induce a general drift toward a standard jurisdiction. This same logic applies to legal practices writ large. Choice of forum and choice of law clauses are but two examples of this phenomenon. Network effects are arguably responsible—at least in part—for the general spread of legal norms, the emergence of standard terms of contract, the rules of arbitration, and even recognized geographical centers of arbitration for certain industries.<sup>138</sup> This is also true for the macrolevel of state actors adopting the provisions that structure treaty arrangements. Given sufficient interaction, network effects will cause a general drift toward a single standard. Provided that there is no strong incentive to keep the existing standard, there is every reason to adopt the prevailing standard as one plugs into a new network of legal norms.

The benefit implicit in converging upon a specific standard is thus sufficient to generate powerful network effects in the market for legal standards, inducing unprompted standardization. Network effects will not, however, manifest in noncommercial areas of law. The reason is structural: unlike private parties engaging in contracts or state actors entering treaty relationships, participants do not actively choose the legal standards they wish to employ to regulate their relationships. This is a feature unique to commercial relationships. Commercial association is therefore structurally primed to produce network effects; this is not the case for noncommercial relationships.

#### D. *Polycentrism and Market Insulation*

However, if network effects lead to standardization, what then may account for the persistence of polycentrism? Why is there not a

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136. See Druzin, *supra* note 130, at 134 (claiming choice of forum decisions fall under similar network effects as consumer product decisions).

137. *Id.* at 135.

138. See *id.* at 137–38 (“[A]ll the elements of the modern law merchant . . . may be attributed to the effects of network externalities.”).

single, perfectly unified system of commercial legal order? Why are there islands of polycentrism? Again, the answer is structural: it is a result of market insulation. As areas of trade become more interconnected, network effects will produce more standardization; if interconnectivity is low, network effects will not manifest as powerfully. The impact of a network effect ends precisely where the need for compatibility ends. Put simply, if one never leaves the small town in which one lives then one only needs to learn the language of that small town.

### 1. The Concept of Network Insulation

To understand what is meant here by of “insulation,” it may be useful to simply think of networks of actors linked together by trade—whether on the microlevel of private parties or the macrolevel of states—simply as “trading networks.” For example, the global shipping industry or oil industry is a trading network. Yet these are hardly hermetically sealed, discrete networks. Rather, upon closer inspection, the image of a single, unified commercial community dissolves into a loose amalgam of separate but overlapping nested networks of commercial association. The coal industry, for example, spills out into and is interconnected with a dizzying array of other trading networks. What defines the coal industry is merely a concentration of trading connections (interconnectivity) between commercial entities centered loosely around the production and/or trade of coal. As a trading network, the coal industry sits somewhere upon a continuum of interconnectivity, varying profoundly depending upon which section of the industry is being inspected. In truth, it is an amalgam of countless overlapping, nested, and interconnected subnetworks with differing degrees of connectivity. Indeed, to properly understand network effects, the standard notion of a discrete “market” must be replaced with a more fluid concept, one based upon the intensity of trading links. While economists may speak in terms of various markets, on a more abstract, conceptual level, the entire global economy may be said to be a single market in that it is interconnected. It is a single market marked by clusters of intense interconnection based around certain products or services (also shaped by geographical and national boundaries, protectionist walls, tariffs, etc.). The extent to which it is possible to speak of separate markets depends only upon the degree that parts of this single market suffer from low interconnectivity. Thus, for a trading network to be insulated, it is not necessary that it is totally disconnected from all other trading networks (indeed, markets do not exist in this

manner) just that it possesses relatively less overlap with other trading networks.<sup>139</sup>

## 2. Localized Network Effects

It is not normally useful to speak of markets in this highly structuralist manner. So why do so here? This conceptualization is important because the degree of interconnectivity between trading networks, and thus the need for compatible standards arising in relation to this, will determine the comprehensiveness of standardization. The less interconnected a trading network is with other trading networks, the more it is insulated, and thus the less susceptible it is to the impact of large-scale network effects and standardization. A sufficiently insulated trading network will generate its own network effect, much like the dialect of an isolated community.<sup>140</sup> Within insulated trading networks, the standardization of certain legal structures will remain localized while a greater standardization of more general practices will result.<sup>141</sup> This results in localized network effects, which account for polycentrism in relation to legal standards. It is important to clarify what is meant here by *markets*, as in the housing market, credit market, and so on. While network effects may be highly discrete, the concept of a market is not. Given sufficient interconnection, standardization will occur across markets. The relative insulation of a trading network will determine its susceptibility to network effects and its tendency to maintain localized standards. Therefore, as long as some trading networks enjoy relatively robust insulation,

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139. It is possible that a market could be completely insulated. Yet, one would be hard-pressed to find many examples of perfectly isolated markets in human history. Certainly, an example would be virtually impossible to find in the modern age. For example, even the most isolated farming community in North Korea, the hermit kingdom, enjoys some degree of connectivity: that is, to the larger North Korean economy, which itself, although insulated, is nevertheless connected to the world economy. And so the story goes for virtually every commercial community across the globe. The embrace of the market now reaches across the planet. Perhaps a good analogy is that of an ecosystem: while ostensibly discrete and largely insulated, it is merely embedded into the larger environment.

140. It is not a coincidence, for example, that while there is a single worldwide standard for fax machines and modems where compatibility between regions is its express purpose, multiple formats persist for digital televisions, for which compatibility across regions is not a key element. See Carl Shapiro & Hal R. Varian, *The Art of Standards War*, 41 CAL. MGMT. REV. 8, 13 (1999) (arguing that where compatibility across regions is not a necessity, such as in the digital television market, multiple formats can coexist, unlike the standard needed across things such as fax machines).

141. See *id.* at 9–10 (illustrating the difficulties encountered when developing intercontinental railroads because of different track gauges, which worked in localized areas but necessarily yielded to a standard when travel was no longer isolated to local areas).

polycentrism will persist on certain levels. Polycentrism is in fact localized network effects.

The medieval Law Merchant once more illustrates the point: while regional differences between various Law Merchant courts remained, there emerged a relatively consistent body of law across vast stretches of Europe created by trade links.<sup>142</sup> Although regions had their "own variety of the Law Merchant . . . , all were but varieties of the same species. Everywhere the leading principles and the most important rules were the same, or tended to become the same."<sup>143</sup> This is rather astonishing considering the impoverished level of communication and regionalized character of the age. Network effects help explain how the Law Merchant displayed this degree of uniformity in the face of polycentrism; the interaction of traveling traders generated network effects that caused merchants across vast regions to converge on specific legal standards in an entirely uncoordinated fashion. This legal standardization was something comparable to the standardization of railway track gauges in the nineteenth century—it provided a standard upon which the enterprise could flourish.<sup>144</sup> More importantly, network effects continue to exert a similar influence over the emergence of the modern Law Merchant. This is a powerful idea: it strongly predicts that a global commercial legal order is a virtual inevitability (albeit with pockets of polycentrism). The only obstacles now to global standardization are (1) national laws that serve as *de facto* barriers to legal standards and (2) the natural insulation of certain trading networks.

The application of network effects to legal standardization brings up several very interesting implications that are beyond the scope of this Article—concepts such as switching costs, lock-in, and potential inefficiencies, which may offer considerable explanatory power regarding how international legal structures are evolving, and will continue to evolve.<sup>145</sup> Moreover, the idea that network effects may

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142. See W. MITCHELL, AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT 7, 9 (1904) (concluding the differences across regional trade laws were still based upon the same broad foundation).

143. *Id.*

144. For more on the spontaneous emergence of standards as the result of network effects, specifically in relation to choice of law and choice of forum clauses in transnational contracts, see Druzin, *supra* note 130, at 170–72. See also Douglas J. Puffert, *Path Dependence in Spatial Networks: The Standardization of Railway Track Gauge*, 39 EXPLORATIONS IN ECON. HIST. 282, 283 (2002) (illustrating how the standardization of track gauges led to greater profits for railways due to increased ability to exchange traffic).

145. For the foundational literature on how a user can become "locked-in" to a product because the costs associated with switching are too high, see Stan Liebowitz & Stephen E. Margolis, *Policy and Path Dependence: From QWERTY to Windows 95*, 3 CATO REV. BUS. & GOV'T 33, 33 (1995); W. Brian Arthur, *Competing Technologies*, *supra* note 133, at 119 (depicting how multiple choices to continue using inferior

induce the autonomous standardization of legal structures may be a substantial contribution to the literature on bottom-up legal ordering.<sup>146</sup> In any case, for the purposes of this Article, the importance of network effects is clear: once a degree of legal standardization takes root, the phenomenon can swiftly reinforce itself as network externalities amplify the effects. As customary methods of conducting business become more deeply entrenched and widely followed, the system becomes progressively easier to maintain and the process more difficult to reverse. In simple terms, the emergence of standardization only encourages further standardization.

## V. OTHER MECHANISMS

Thus far, the discussion has concentrated on three primary mechanisms that help drive the emergence of a global commercial legal order: reciprocity, market pressures, and network effects. Reciprocity encourages compliance in the absence of a centralized authority, market demands produce a generally similar body of law, and network effects tend to iron out polycentrism and generate standardization in that body of law. In short, the market creates legal order, network effects standardize it, and reciprocity sustains it. However, there are other mechanisms worth noting that, arguably, also play a role in inducing the decentralized emergence of commercial legal order. The final Part of this Article summarizes the more significant of these. What follows is a laundry list of sorts—a selection of various features of trade that contribute to the emergence of a relatively standardized, global commercial legal order. Many of these mechanisms are deserving of a far richer discussion than is provided here. Further examination along these lines is invited, particularly where this may be of an empirical nature.

### A. *Transregional Nature*

Foremost among these features is the simple fact that commerce has an inherent tendency toward interregionalization. Indeed, it is the very nature of commerce to encourage and foster links between regions of people to anticipate convergence. Law of a noncommercial

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technology can make it too expensive to switch and will lock users in to the inferior technology); Liebowitz & Margolis, *supra* note 123.

146. This is something I hope to unpack more fully in future research. For more on what I have written on the idea of bottom-up legal ordering, see Bryan H. Druzin, *Planting Seeds of Order: How the State Can Create, Shape, and Use Customary Law*, 27 *BYU J. PUB. L.* 373 (2014) (forthcoming) (arguing that policymakers can harness the energy of customary ordering to trigger legal order); Druzin, *supra* note 33 (arguing that treaties may be intentionally designed to capture the dynamic that gives rise to cooperative order).

nature has no need for harmonization, as there is no inherent collision between these bodies of law. This is not the case with law of commercial nature. Commercial activity is the forging of ties between people, an evolving process of interaction and reciprocity—with its rise comes the need for relatively standardized legal regulation. As commerce flows across regional divides, commercial legal order flows with it; it is the extension of an evolving system of transregional connections, pushing law across geographical and cultural boundaries.

This is not true for other forms of law. To pick but one example, family law is not inherently interregional. It is quite content to be entirely regionalized. Commerce is not. As merchants engage in trade across political, cultural, and geographic divides, they transport trade practices and the law that supports it. As commercial activity from disparate regions commingles, standardization is entrenched by a sort of natural “ripple” effect between regions, creating a degree of legal uniformity. This ripple effect may be particularly powerful for the commercial law of an economically dominant region relative to less commercially significant regions. Less commercially vibrant regions are more likely to be more inclined to adopt the commercial practices of the more dominant regions. This is generally comparable to the linguistic dominance of the English language as a common tongue (indeed, English has now become the undisputed language of international business).<sup>147</sup> The upshot of all this is an overall standardization in commercial practices and the law that goes with it.

### B. A Commercial Veil of Ignorance

There are other features that likely also play an important role in the global emergence of a transnational commercial legal order. Commercial relationships are generally fluid, with traders frequently changing roles as sellers and buyers, reversing the duties that arise

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147. This is intimately related to the idea of network effects and economies of scale, discussed below. See Mark Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 494 (1998) (“Language, for example, is the fundamental medium of communication and could be said to have both negligible inherent value to the first speaker and increasing value over the range of additional speakers.”); S.J. Liebowitz & Stephen E. Margolis, *Network Externality: Uncommon Tragedy*, 8 J. ECON. PERSP. 133, 136 (1994) (citing the proliferation of English speakers as creating a network of relationships, even where there may be no physical interaction); Amitai Aviram, *A Network Effects Analysis of Private Ordering* 15 (Berkeley Program L. & Econ. Working Paper Series No. 46, 2003), available at <http://www.escholarship.org/uc/item/0n7132w5#page-1> (“Language is characterized by network effects—the benefit derived from communicating in a language increases significantly as more people are familiar with it.”). For a more in-depth analysis of the network effects of language, see generally Jeffrey Church & Ian King, *Bilingualism and Network Externalities*, 26 CAN. J. ECON. 337 (1993).

out of these commercial exchanges.<sup>148</sup> This has a direct effect upon compliance. This fluidity, so characteristic of commercial intercourse, creates a "Rawlsian veil of ignorance"<sup>149</sup> in which actors are more willing to observe the collectively agreed-upon set of rules because it is in their self-interest to do so. This is because their position in relation to these sets of rules is subject to change. Indeed, this was the case "during the formative period of the medieval Law Merchant . . . when traveling merchants acted in the dual capacity of buyer and seller. If they articulated a rule of law which was favorable to them as sellers, it could have the opposite effect when they acted as buyers, and vice versa."<sup>150</sup>

This is equally true on the macrolevel of the state. States engage in trade as both importer and exporter, as both buyer and seller. Moreover, state economies typically span diverse sectors that experience different periods of growth and decline. The uncertainty of future economic conditions in relation to the various sectors of their economy, and the duality of their role as both importer and exporter, places governments behind a similar "veil of ignorance." Entire national economies experience a shifting relationship with the rules of commercial law. In some instances, governments may be advantaged by a rule that in fact works to their detriment in other sectors—or when they assume the role of importer instead of exporter. States are highly reluctant to engage in noncompliance where a trade war may result (negative reciprocity), yet they are equally hesitant to violate rules of trade that may benefit them in other circumstances (positive reciprocity). This undoubtedly plays a role in voluntary compliance with international commercial agreements in the absence of truly efficacious enforcement mechanisms.

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148. This was already touched on in relation to Fuller's notion of duty. For a detailed discussion of the role of stochastic symmetry and role reversibility in inducing spontaneous systems of order, see Francesco Parisi, *Spontaneous Emergence of Law: Customary Law*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 603, 607-08 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

149. Rawls claims that rational people will choose to follow principles of justice, which are innately fair, if their reasoning is conducted from a position of uncertainty regarding how the selected principles will affect their own personal situation. Rawls refers to this process of reasoning without personal biases as "the Veil of Ignorance." In his seminal work, *A Theory of Justice*, Rawls states, "I assume the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general consideration." JOHN RAWLS, *A THEORY OF JUSTICE* 118 (rev. ed., 1999).

150. Parisi, *supra* note 148, at 608.

### C. *Universal Nature*

Another contributing characteristic of trade is the universal and (mostly) culturally neutral nature of trade. Commercial legal order is generally less rooted to specific political and cultural traditions, displaying a more universal character. This greatly facilitates standardization across regions. Such is not the case with noncommercial areas of law. With areas of noncommercial law—such as family law, constitutional law, administrative law, the rules of civil procedure, human rights, and criminal law—the influence of particular cultural and religious values looms larger and impedes interregional standardization. Thus, commercial legal order—being relatively apolitical, non-normative, and less influenced by the winds of cultural subjectivity—tends to display a more homogeneous appearance than many other forms of law. As commercial forces tend to be universal, so too are their legal expression, and this is conducive to the global expansion of these legal structures. People are far more inclined to adopt new, foreign commercial legal practices than they are noncommercial legal principles that are tied up with more normatively loaded arenas such as criminal law, tort law, and family law. Indeed, as has been discussed previously in the literature, a rational choice model applies more readily to merchant communities.<sup>151</sup> Commercial arrangements are markedly non-normative. “[I]n commercial interactions, parties are far more likely to be calculating their actions according to parameters of self-interest, and are therefore less likely to be guided by emotional considerations . . . .”<sup>152</sup> The clarity that arises from commercial relationships thus allows for an easier adoption of new legal practices, which facilitates standardization.

### D. *Ease of Consensus and Immediate Legitimacy*

Another point is the ease of consensus surrounding law of a commercial nature. The tangible nature of commercial activity, where loss and gain is more immediate and quantifiable, facilitates legal standardization to a greater degree than other forms of law. This is because it is easier to achieve agreement between states regarding commercial regulation—where costs and benefits can be more easily anticipated—than to reach consensus regarding abstract issues such as constitutional freedoms and human rights. Due to this built-in characteristic, commercial legal order lends itself more readily to transnational emergence. The emergence of EU law, from what was

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151. For a more detailed exposition of this point, see Druzin, *supra* note 5, at 570.

152. *Id.*



in its nascent stages no more than a succession of commercial agreements, is perhaps a perfect illustration of this point.

Related to the ease of consensus is the issue of legitimacy. Burgeoning transregional commercial legal order is substantially legitimized by the usefulness and efficiency of concrete, issue-specific commercial cooperation and its outcomes. Of course, this is not a seamless evolution. Consider the WTO. In the context of the WTO, consensus is often extremely difficult to achieve. Likewise, the legitimacy of the WTO remains constantly under challenge.<sup>153</sup> Nevertheless, economic goals tightly bound in well-established commercial regulation provide a sense of legitimacy that is hard to achieve as rapidly (if at all) in other areas of law. Regarding law of a noncommercial nature, the acceptance of the primacy of noncommercial law over preexisting regional law is far more challenging, as noncommercial law does not enjoy the advantage of an almost-instant overarching sense of common purpose (i.e., economic benefit). This is a profoundly powerful legitimizing force. While such recognition can take considerable periods of time—as well as significant historical and political events—to become well-established, the uniting force of common commercial interests can achieve this remarkably quickly. The sense of legitimacy to commercial law is arguably significant to its evolution on an interstate level, reinforcing and fostering its continued emergence.

#### E. *Modeling and the Element of Competition*

There is a final feature implicit to trade that should be considered. In fact, this is the foundational paradigm to trade: competition. Commercial legal order arises from a system (commerce) wholly predicated upon competition. This is not the case for other forms of law, such as criminal law. As a result, successful commercial practices tend to self-replicate across regions as players model their own commercial enterprises on prior successful ones—if only to remain competitive. Precisely because they facilitate commerce, successful legal structures will frequently be adopted across regions much in the same way.<sup>154</sup> In order to remain competitive, merchants are often forced to implement commercial practices that have proven most functionally efficient. This basic element of competition thus encourages “modeling,” which further induces standardization. Once these legal structures emerge, competition ensures continued

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153. See Amrita Narlikar, *Law and Legitimacy: The World Trade Organization*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 294–97 (David Armstrong ed., 2009) (detailing the most popular arguments against the legitimacy of the WTO).

154. See TRAKMAN, *supra* note 53, at 71 (concluding only those legal structures that prevailed in trade practice will be implemented over those created by common law judges because of the former’s proven success).

adherence to the rules that develop. The force of competition will lock them into place. Thus, the same dynamic that initially gives rise to legal standardization also sustains it; no party will risk abandoning commercial legal practices that have proven efficient. This dynamic is absent in the realm of noncommercial legal order, where competition simply does not apply.

While there is an implicit tendency for commercial legal order to follow a pattern of spontaneous standardization, this is simply not the case for most noncommercial legal order. Areas of law such as administrative law, constitutional law, and criminal law do not have comparative mechanisms that drive standardization and compliance to a comparable degree. This is why, arguably, the structures of commercial legal order have advanced more swiftly in a transnational context than law of a noncommercial nature. And this is as true for the medieval Law Merchant as it is for the modern Law Merchant. It is the nature of commercial regulation to induce standardization, which is not the case for noncommercial areas of legal order. Again, the European Union provides a good example. Indeed, the enormous difficulty and repeated setbacks beleaguering EU legal integration as it seeks to establish an extensive legal framework beyond the scope of mere commerce is testament to the complexity involved in this more ambitious form of legal integration. Achieving this level of transnational standardization is difficult precisely because these areas of noncommercial legal order lack the mechanisms implicit in commerce discussed in this Article. These mechanisms naturally encourage standardization and facilitate convergence. A tremendous act of political and cultural will is therefore required to push past this barrier and scale the towering cliffs of total legal integration.

## VI. CONCLUSION

This Article argued that the emergence of a global commercial legal order may be partially attributed to the unique structural nature of trade—it put forth a structuralist account of this emergence. Unlike legal order of a noncommercial nature, commercial legal order has built-in mechanisms that make it well-suited to evolve in a transnational context. The Article mapped out the principal mechanisms that support and drive this process forward: reciprocity, the market, and network effects. The role of network effects in decentralized legal ordering in particular offers a wide breadth of theoretical potential. The Article also noted other features implicit in trade that arguably also play a role in the emergence of a global commercial law. Commercial legal order is a wholly unique form of law in that its mechanics are intertwined with a basic activity that undergirds and flows throughout the development of human civilization—trade. As such, it possesses intrinsic features not found

in any other quarters of law. The ever-widening gulf between global commercial and non-commercial law is testament to the ability of these features to propel the transnational emergence of a commercial legal order. The implications of this are far-reaching: it suggests that, because commercial legal order is uniquely predisposed to evolve without the state, there is every reason to believe that this asymmetrical emergence will not only continue, but likely grow even more extreme as time passes and global trade increases. The world may very soon see a virtually unified system of global commercial legal order, while legal order of a non-commercial nature remains languishing in the deep mud of entrenched regionalism. It may be that, absent a central authority with real legislative and enforcement power, legal order of a noncommercial nature simply lacks the structural ability to ever achieve global unity. As the volume of international trade continues to increase swiftly and unabated—now including in its expansive sweep virtually every corner of the globe—this possibility is a reality for which the international community would be well-advised to prepare.