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Globalisability of Universalisability? How to apply the Generality Principle and Constitutionalism internationally

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Globalisability of Universalisability?

How to apply the Generality Principle and Constitutionalism internationally

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1. Introduction

The growth of the extended order of international trade and the decline of centrally planned national economies have been major "Hayekian" events. The former demonstrates capitalism's ability to create spontaneous orders of mutually beneficial interactions of much greater complexity than could ever be produced by deliberate arrangement. The latter evidences socialism's *in*ability to provide institutions and incentives that allow for the social use of the local knowledge, personal skills, and individual talents of economic actors.

Following Hayek and classical liberals as ancient as Kant or Hume, abstract rules of just conduct form the institutional basis for spontaneous co-ordination in a free society. Such rules are abstract in the sense of being applicable to unknown and unspecified peoples and cases; and they are mostly proscriptive – thus "negatively" defining the liberty of using one's personal knowledge and skills in the pursuit of individually chosen aims. The rules of just behaviour being "purpose neutral" (Gray 1986: 67), their *applicability* is not confined to specific groups of peoples that share common specific purposes. Already for semantic reasons, but also due to the fact that universalisable rules know no demarcations of specific peoples, it seems only natural to assume universal applicability, i.e. globalisability of abstract rules of just conduct.

If social interactions now span the globe, the argument would go, if global interactions ought to be guided by rules, and if one wants such rules to reflect ideals of procedural justice and individual liberty, the issue of global "governance" should be a most natural concern for classical liberals. And a Hayekian answer to that challenge may at first sight seem straightforward. The "game of catallaxy" as a wealth-creating game of voluntary and mutually beneficent exchange is played according to common rules of the game.[1] With the removal of barriers to international trade and foreign direct investment, "catallaxy" has become the biggest game on our planet. Consequently it may seem, general rules of the game should also apply world-wide in order to create the beneficial effects of a global market economy.

[1] See Hayek (1966/67: 165): "liberalism presupposes the enforcement of rules of just conduct and expects a desirable spontaneous order to form itself only if appropriate rules of just conduct are in fact observed".

But things become ambivalent as one imagines law and legislation beyond the realm of established political communities such as nation states. Most of our laws still refer to given territorial entities (nation states); most legislation originates from national parliaments; most property rights and the liberties as legally defined and constitutionally safeguarded are rights and liberties of citizens (as members of a nation state). The largely unyielding congruence of the limits of laws and legislation with borders among (and within) nation states, however, is no deplorable heritage of nationalism or isolationism; it is a most natural consequence of constitutional and democratic liberalism. Only within nation states' (and, to a lesser degree, among some interstate federations') constitutions and political practice does one find fully developed combinations of legitimising procedures (representation, public debate), third party enforcement mechanisms (executive and police powers) and effective controlling devices (judicial review, public opinion, migration).

In order to create a harmonious triad of law, legislation and liberty, all these dimensions of collective action have to be balanced according to the political ideal of the rule of law. This ideal reflects the desire of a people to be under the same government and share the same rules of just behaviour which express common values of citizens as members of grown political communities based on common history, common language and some sense of empathy and mutual understanding. To be sure, not all nation states at all times trace back to a "demos" (e.g. Zürn 1998), or a "people" (Rawls 1999: 23ff) thus defined. But they certainly do so to a larger extent than most multi-national political bodies, or presumed representations of a "world community".

Still, one does finds organisations and institutions that provide rules and procedures for economic and political co-ordination and control on a trans-national scale. This observation can meet with two converse classical liberal or, say, Hayekian responses: (a) such rules are desirable – since (and as long as) they satisfy the need for an order of rules to create and channel a global order of actions; (b) such rules are of dubious legitimacy – since (and as long as) they cannot satisfy the need of adequate procedural and cultural conditions that reflect a grown understanding of common values, norms and opinions.

Our aim is to address some elementary aspects of this innate trade-off between both classical liberal requirements for an adequate order of rules: (a) effectiveness in the sense of the rules' congruence with a given order of (economic) actions and (b) legitimacy in the

sense of the rules' congruence with the given social-cultural conditions of (political) consent. In the following part 2, we review Hayek's own account of the requirements of a liberal international order of rules, finding several arguments that help to further illustrate the above-mentioned trade-off. But we will hardly find Hayek relate his legal and political philosophy of "universalisability" to assessments of international governance. Therefore, we have to go back to Hayek's accounts of universalisable rules of just conduct in part 3 in order to prepare our account of such rules' globalisability. In part 4 we address the generality norm as a constitutional principle for the governance structure of an international order. Both general, proscriptive rules and specific, prescriptive regulations of the international order are contrasted in part 5, as we find them today both on the level of WTO and of EU rules and regulations. Part 6 offers a summary conclusion of our empirical and normative-theoretical observations.

We cannot endeavour here to discuss all major elements of existing international law or of an ideal global "constitution of liberty". In fact, we will only occasionally be more explicit about material *contents* of the rules of the game. This is not only because such a task would be beyond the scope of a single paper. It is also because we like to focus our attention on formal principles that should, in our view, inform any (re-) construction of international governance.

2. Hayek on International Order

It has been observed, e.g. by Razeen Sally (2000: 97), that Hayek "wrote very little on questions of international order … his *oeuvre* was cast in a model of *national* political economy that rarely ventured 'beyond the border' to take account of international transactions. In the Hayekian scheme, economic order, the rules that underpin it, and the allotted role for the state and public policy all operate 'behind the border'". This is quite true for Hayek's work on law, legislation and liberty after the 1950s. But before that, one finds two writings in which Hayek explicitly addresses the problem of international (economic) order: A paper on "The Economic Conditions of Interstate Federalism" (1939) and chapter XV ("Prospects of International Order") in his "Road to Serfdom" (1944).[2]

[2] In Hayek's Constitution of Liberty, international aspects are virtually absent. The exception is one paragraph, where Hayek (1960: 47f) argues that even major inequalities among nations may be of great assistance to the progress of all with technological (and institutional) knowledge that took the West hundreds of years to achieve now presenting a free gift for underdeveloped countries. In his trilogy on Law, Legislation and Liberty Hayek only once addresses the issue of supra-national order and legislation. He

In his 1939 paper on interstate federalism, Hayek makes several points that are relevant for the following discussion:

- Interstate federalism faces the difficulty of subjecting numerous states characterised by diverse social and economic conditions and prospects to common rules. Compared to legislation within a single nation state, it is much less likely to command popular support for discriminatory rules and regulations that only benefit specific groups or determine specific social standards (Hayek 1939/80: 257ff). Hayek here implies that in a regime of voluntary interstate federalism the diversity of social conditions and of citizens' values and interests would favour agreement on (more) general abstract rules of conduct on the level of joint legislation.[3]

- Interstate federalism could also frustrate individual (member-) *states'* endeavour to enact interventionist legislation (ibid.: 258). With free movements of men and capital, discriminatory burdens placed on particular industries could "drive capital and labour elsewhere" (ibid.: 260). Competitive interstate federalism also means that national organisations such as trade-unions, cartels, or professional associations lose their monopoly power to control the supply of their services or products (ibid.: 261). Hayek here implies that interstate federalism, by inducing the "exit" of dissatisfied owners of mobile resources, would force governments at home to reconsider discriminatory regulations and resort to more "exit-resistant" general and abstract rules.

- In order to avoid disintegration of the federation, it would not be sufficient to only prohibit interstate tariffs or quota. Member states' administrative regulations often (are intended to) have the very same protectionist effects. In order to prevent non-tariff barriers from obstructing a common market, Hayek argues "that the

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names it as one instance to which his discussion of a model constitution could apply. Newly created supra-national authorities, Hayek argues, were "to be restricted to the establishment of general rules which merely prohibited certain actions of the member states or their citizens" (Hayek 1979: 108f). In his latest work, the "Fatal Conceit", Hayek (1988, ch. III) provides a conjectural history of the spontaneous (co-) evolution of trade and civilisation.

[3] The flip-side of this argument is, of course, that, with a constant level of (now centralised) interventionism, the amount of coercion or, in the terminology of Buchan/Tullock (1962) "external costs" increases with the size and heterogeneity of the political unit: "as the scale [of interventionist planning] increases, the amount of agreement on the order of ends decreases and the necessity to rely on force and compulsion grows" (Hayek 1944: 221f).

federation will have to possess the negative powers of preventing individual states from interfering with economic activity, although it may not have the positive power of acting in their stead" (ibid.: 267). Such negative rules of just government behaviour, Hayek argues, should also protect interstate competition in its ability to "form a salutary check …" on local governments' activities "… while leaving the door open for desirable experimentation" (ibid.: 268). Hayek here argues in favour of proscriptive rules of just conduct of member states, enforced by a central agency as "third party" – another claim in favour of internationalised universalisable rules of administrative behaviour.

In his "Road to Serfdom" Hayek (1944, ch. XV) discusses the "prospects of international order" in very much the same spirit, but with a somewhat broader perspective. And he is now more explicit about the role that an "international authority" would have to play in order to enforce the rules agreed upon by "a community of nations of free men" (ibid.: 236).

- Again, Hayek expects that interventionist planning can find support only within rather small nation states. But these states "will never submit to the direction which international economic planning involves … while they may agree on the rules of the game, they will never agree on the order of preference in which the rank of their own needs and the rate at which they are allowed to advance is fixed by majority vote" (ibid.: 230). And again Hayek expects that the powers of an international authority would be "mainly of a negative kind; it must, above all, be able to say 'No' to all sorts of restrictive measures" (ibid.: 232). Consequently, the rules of the game would have to be mostly proscriptive, defining only the kinds of actions that the players (above all: governments) may not undertake. To Hayek it seems at least plausible that governments can agree on a list of such measures as they do not want to see applied against themselves and which, therefore, they could commit themselves not to apply against others – provided that such prohibitions restrain the behaviour of every government that joins the international "disarmament club". Here, Hayek does implicitly apply his "test of universalisability" (see 3.2.) to the interaction among "nations", or rather, among political representatives of citizens of different states.

- On the specifics of the procedural rules defining the empowerment of a supervising authority, Hayek remains rather evasive. The major powers that must devolve on an international authority are "to preserve peaceful relationships, i.e., essentially the powers of the ultra-liberal 'laissez faire' state. And even more than in the national sphere, it is essential that these powers … should be strictly circumscribed by the Rule of Law" (ibid.: 232). The problem, not directly addressed by Hayek is however that, *even less than in the national sphere*, the necessary or at least favourable conditions for the Rule of Law to be effective are mostly absent in international relations: a common legal tradition and political culture, a grown legal practice, a habitual sense of justice, and the willingness to accept third party enforcement of the rules also in cases where defection or free-riding would be a dominant unilateral strategy.

- Instead of such "soft" or informal conditions, Hayek relies on international treaties in which "strictly defined powers are transferred to an international authority, while in all other respects the individual countries remain responsible for their internal affairs" (ibid.: 233). Later, Hayek alludes to a second condition for the stability and effectiveness of an international Rule of Law: not only should its tasks be limited to those that can be clearly defined and unanimously adopted; also its applicability and jurisdiction should be limited to those nations that are ready to co-operate under a common set of rules.[4] Hayek here seems to suggest that his ideal of a community of nations of free men is best organised as a "club": an association of nations that share elementary common values and are thus in a more credible position to commit themselves to adhering to a Rule of Law enforced by an international third party.[5]

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[4] Hayek (ibid.: 237) attributes the demise of the League of Nations to having been over-ambitious on both accounts: (a) "charged with all the tasks it seems desirable to place in the hands of an international organisation, they will not in fact be adequately performed" and (b) "in the (unsuccessful) attempt to make it world-wide it had to be made weak".

[5] The qualification that only states that already domestically subscribe to elementary principles of the rule of law can be accepted or expected to be members of an international community under the law of peoples is also prominent in Kant's "Eternal Peace" (1785/1991) and Rawls' "Law of Peoples" (1999). In Wohlgemuth (2004), I argue in favour of club solutions for the development of European integration as a way to combine flexible enlargement with increased legitimacy (voluntariness) and decreased decision making costs. See also Ahrens/Hoen (2002).

In sum, one finds in Hayek's early writings on international order both arguments that still today characterise discussions on globalisation and international political governance: (a) a need for rules of the game in order to preserve peace and facilitate international economic and political interaction; and (b) a need to limit the purpose of international rules and authorities to fields where true agreement can be reached. And, what is most relevant for our discussion, Hayek at least implicitly seems to suggest that it is above all the universalisable nature of international rules of the game that would serve *both* needs and should therefore also help to reduce innate tensions between them.

3. The reason of universalisable rules

3.1 The Kantian question

In appendix I to his "philosophical sketch" on "eternal peace" Kant (1795/1991: 121f), after distinguishing the "moral politician" ("who so chooses political principles that they are consistent with those of morality") from the "political moralist" ("who forges a morality in such a way that it conforms to the statesman's advantage") urges the practical philosopher

> "first, to decide the question: In problems of practical reason, must we being from its material principles, i.e., the end as the object of choice? Or should we begin from the formal principles of pure reason, i.e., from the principle which is concerned solely with freedom in outer relations and which reads, "So act that you can will that your maxim could become a universal law, regardless of the end"?

Not surprisingly, for Kant the latter has precedence – and for reasons that to a Hayekian sound very familiar. The first option would be that of Kant's "political moralist" who very much resembles Hayek's constructivist rationalist who holds that we "should so re-design society and its institutions that all our actions will be wholly guided by known purposes" (Hayek 1973: 9). The second option is chosen by Kant's "moral politician" who would assent to universal maxims of conduct and follow what Gray (1986: 7) describes as the main point in Hayek's procedural theory of justice: that "we discover the demands of justice by applying to the permanent conditions of human life a Kantian test of universalisability".

3.2 The "test of universalisability"

The "test of universalisability" (Hayek 1976: 27ff) is a procedural "test of the appropriateness of a rule" with the main criterion for appropriateness being whether we "can 'want' or 'will' that such a rule be generally applied" (ibid.: 28). Applying this Kantian test to the principles of a legal order, Hayek (1966/67:166) distinguishes 3 essential and interrelated aspects of rules of just conduct. Universalisability:

(1) Relates to individual conduct (not social states): "justice can be meaningfully attributed only to human action and not to a state of affairs without reference to the question whether it has been, or could have been, deliberately brought about by somebody".
(2) Leads mostly to rules that ban unjust behaviour (not prescribe specific actions): "the rules of justice have essentially the nature of prohibitions … the aim of rules of just conduct is to prevent unjust action".
(3) Creates protected domains of individual responsibility: "the injustice to be prevented is the infringement of the protected domain of one's fellow men, a domain which is to be ascertained by means of the rules of justice".

As Hayek never tired to insist, states of affairs that – such as the unplanned diffusion of incomes in a market economy – are unintended results of human interaction, but not of anyone's design or volition, can not be regarded "just" nor "unjust".[6] Justice is about individual conduct; it is about the choice of actions to achieve self-chosen ends. If justice is to be the maxim of rules that guide the social interaction of free man, these rules can not be predominantly prescriptive. If men are to be able to freely interact, using their own knowledge for self-chosen purposes, just behaviour cannot be enforced by means of rules which tell everyone what to do in any given circumstance. Rather, rules of just behaviour would in most cases[7] be negative proscriptions of certain kinds of behaviour that are generally deemed unjust (behaviour that no individual would want himself be the victim of). By prohibiting certain kinds of action, these rules negatively define and equally protect

[6] See (ibid.: 171): "Nobody distributes income in a market order (as would have to be done in an organization) and to speak, with respect to the former, of a just or unjust distribution is therefore simple nonsense".
[7] Hayek (1966/67: 167) acknowledges rare cases where positive duties to certain actions may be considered „just", such as a duty to come to the help of others whose life in imminent danger.

a private domain, a sphere of individual responsibility, or, in Lockeian terms: the rights to property, life and liberty.

This basic rationale of universalisability in the definition of unjust behaviour and the ensuing demarcation of protected domains *only* applies to the *extended* order of spontaneous co-ordination among large groups of unknown individuals who are and should be free to carry on self-chosen purposes. This point will be most relevant for our further discussion:

> "as rules which have originally been developed in small purpose-connected groups ('organizations') are progressively extended to larger and larger groups and finally universalized to apply to the relations between any members of an Open Society who have no concrete purposes in common and merely submit to the same abstract rules, they will in this process have to shed all references to particular purposes … [this] made it possible to extend these rules to ever wider circles of undetermined persons and eventually might make possible a universal peaceful order of the world." (Hayek 1966/67: 168)

Hence, Hayek (ibid.) argues that – given an ever extending order of interactions among unknown individuals – "only purpose-independent ('formal') rules pass this test" of universalisability. However, as Gray (1986: 60ff) points out, neither Kant nor Hayek aim at merely formal and purpose-free criteria of law and legislation. Rules of just behaviour are "purpose-free" in the sense that (in most cases) they do not prescribe or even refer to the pursuit of specific common purposes that individual action, in order to be legal or just, has to follow. But exactly because of their purpose-free formulation, they do support a "social" purpose in the sense of the extended order of successful voluntary co-ordination that the rules help create. This order "extends the possibility of peaceful co-existence of men for their mutual benefit beyond the small group whose members have concrete common purposes" (Hayek 1966/67: 163). And as this order of actions provides "the best chance for any member selected at random successfully to use his knowledge for his purpose" (ibid.) and at the same time the best available means for the use of knowledge and skills in society, abstract rules of a spontaneous market order finally increase "the chances of any member of society taken at random of having a high income" (ibid.: 173).[8]

There is only an apparent paradox in Hayek's claim that purpose-free rules serve the purpose of creating an abstract order, which supports the individuals' attainment of their

[8] In focussing on procedural criteria of justice and in taking the chances of a randomly chosen individual as point of comparison, Hayek's conception parallels the Theory of Justice of another modern Kantian: John Rawls (s.a. Gray 1986: 60; Hayek 1976: 100).

unknown, often diverse, particular purposes.[9] The point is that purpose-free (formulations of) rules, under conditions of lacking common (understandings of) specific purposes, are best at achieving the purpose of extending the order of voluntary interaction. And this order, exactly because of the purpose-neutrality of its basic rules and of its (market) co-ordination mechanism, leads to the best possible attainment of the purpose to maximise anyone's chances to pursue his self-chosen aims and have a high income.

3.3. The universal reach of abstract norms

The rationale of universalisable rules of just conduct applies with even greater force to the very extended order of global capitalism. The creation and preservation of an international market order within a "community of nations of free men" (Hayek 1944: 236) does not need "agreement on the concrete results it will produce in order to agree on the desirability of such an order" (Hayek 1966/67: 163). In fact, such an order based on universal rules of just conduct, "being independent of any particular purpose … can be used for, and will assist in the pursuit of, a great many different, divergent and even conflicting purposes" – as we should expect to find them the more the order extends to (groups of) individuals with different social values and cultural backgrounds. The three aspects of the test of universalisability can easily be translated into principles of international law, legislation and liberty:

(1) International justice refers to concrete individual (and political) behaviour, not to states of affairs that no one could intentionally have brought about.
(2) Internationally universalisable rules of just behaviour will in most cases be prohibitions aimed at the prevention of unjust action[10].
(3) Prohibition of non-generalisable, discriminatory acts creates protected domains also in international relations. It defines the equal sovereignty of citizens (and their political

[9] See Hayek (1976: 17): "Only if applied universally, without regard to particular effects, will [the abstract rules] serve the permanent preservation of the abstract order, a timeless purpose which will continue to assist the individuals in the pursuit of their temporary and still unknown aims". See also Buchanan/Congleton (1998: 9f): "The law, as such, is presumed to have as its primary purpose the facilitation of personal interaction. In this conception, there is no social purpose to the law. … the generality norm … is not drawn from some externally ordered list of social purposes (or external standards of fairness) – a list that is presumed to exit independently of the preferences of the players or participants in the game itself".

[10] The same is true for Kant's famous articles on perpetual peace. All, Kant observes, "are prohibitive laws" requiring the abolishment of the stated abuses, often even "being valid irrespective of differing circumstances and they require that the abuses they prohibit should be abolished immediately" (Kant 1795/1991: 97)

representatives) of all nations to pursue self-chosen ends by choosing among an open set of actions that are not prohibited.

Referring to the present discussion of "global governance", these aspects can yield some guidance. Concerning the first statement, it turns out to be rather pointless to discuss "global justice" in terms of the distribution of incomes among countries or regions, or with reference to "terms of trade" as long as they are the unintended results of spontaneous interactions among millions of individuals, which no one could ever have produced (or prevented) by deliberate action. Instead, one would have to look for concrete behaviour of economic or political actors that can be argued to be unjust, because it does not pass the test of universalisability, since no one (including those who carry out these acts) would want this kind of behaviour to be *generally* applied. Protectionism provides the perfect example. Tariffs, quota, as well as cases of deliberately erected non-tariffs barriers to trade will be ruled out by the generality test as prejudicial to the myopic interests of a few.[11]

The most important rules of just behaviour in an international community of free nations would have to bind *political* agents. They would above all consist of prohibitions of certain *political* actions that obstruct citizens' freedom to engage in mutually beneficial trade with foreigners. They would, thus, confer a protected domain of freedom to trade on individuals. To be sure, the removal of barriers to the free movement of goods, services, capital and persons across borders need not be the only task of an international economic order. But it is the foremost task, since without negative guarantees of free trade the market order is not going to develop into an extended abstract order that allows individuals across borders to pursue their self-chosen aims in a regime of mutually beneficial exchange. Other political rules that could facilitate international trade – such as the legal enforcement of

[11] See Buchanan/Congleton (1998: 78ff) and Vanberg (1992) illustrating the *domestic* prisoners' dilemma structure of protectionism. In fact, there is no prisoners' dilemma among states, since free trade enhances the welfare of a nation even if practised unilaterally (Sally 2000: 102ff). In a rational actor environment, protectionism can only be explained as "an intra-national prisoners' dilemma problem" (Vanberg 1992: 379) based on the rationale that seeking protection is the dominant strategy for any particular industry acting separately, although all would be better off if nobody were protected compared to the situation where all or most industries are protected. It could be argued that the constitutional choice of a purely formal generalisation norm would not prevent politicians to engage in protectionism, e.g. by imposing *uniform* tariffs on all imported goods. But, assuming a constant overall level of protection (say, of tariff receipts), this would already create a (Pareto-) improvement compared to a situation of discriminatory tariffs which create stronger distortions of resource allocation. However, even uniform tariffs would not pass the universalisability test since they would obviously discriminate against domestic consumers of imported producer goods or final goods (Buchanan/Congleton 1998: 80). Finally, with non-discriminatory tariffs, more industries would be affected in dual roles as producers and consumers. Hence even for current beneficiaries of discriminatory protection, no tariffs could be preferable to uniform tariffs (see Buchanan/Lee 1991).

border-crossing contracts, or the introduction of international standards and norms – are clearly secondary to the establishment of free trade. In addition, it is far from obvious that these elements of international private law would necessarily have to be laid down and fixed *once and for all* by an *international political* authority.

In fact, border-crossing transactions within the "international private law society" (Sally 2000: 111) do quite comfortably rely on "a web of private property rights and the enforcement of contracts according to private law *within a multitude of separate national jurisdictions*" (ibid.). International trade flourished well in the absence of unitary private law and of a central enforcer of international contracts. In addition to the choice of national formal private law and jurisdiction, also informal, privately established and enforced norms and conventions governing international transactions have for centuries spontaneously evolved and supported the extending order of capitalism. Obviously, this unplanned evolution of an order of rules establishing "stability of possession, of its transference by consent and of the performance of promises" (Hume 1739/1978: 126), originating in the mercantile community and spreading across borders of provinces and states by imitation rather than deliberate design is a major vindication of Hayek's trust in social self-organisation.[12]

Having thus established reasons for our emphasis on universalisable rules of just *government* behaviour aimed at protecting *private* spheres of freedom to engage in trans-national interactions, we will now take a closer look at the internationalisation and constitutionalisation of the relationship between "state" and "citizen" and ways to enforce universalisable rules of just behaviour on an international level.

4. Generality Principle and International Constitutionalism

Although we make ample use of ideas of classical liberalism, our guiding concept is not a material definition of minimal state action. Constitutional liberalism recognises the need of active legislation for the establishment of a legal framework that guides collective action on the sub-constitutional level of decision-making.[13] More specifically, the focus is on the

[12] See e.g. Hayek (1988: 94ff); Benson (1988); Milgrom/North/Weignast (1990); Curzon-Prize (1997).
[13] See about the Constitutional Political Economy approach Brennan/Hamlin (1998) and Vanberg (1998). See there also about the distinction between decisions carried out at the constitutional and the sub-constitutional level, and about the Principle of Constitutional Equivalence Sideras (2001).

relationship between citizens as the ultimate sovereigns of democracies, understood as "territorial enterprises" (Vanberg 2000) – with citizens' sovereignty providing the ultimate yardstick for politics to be carried out in their name.

The relationship between citizens and their rule-setting agents is fundamentally characterised by the extent to which citizens' personal freedom is protected against government encroachment. Arguably, on a national level, one key facet of this *individual safeguard* is the definition and enforcement of citizens' rights which critically depend upon the relative importance of proscriptive private versus prescriptive public (administrative) law within the legal system established by the respective constitution. Citizens are protected from discretionary government action to the extent that the rules composing the governing institutional fabric are general and proscriptive in nature, thus ensuring procedural justice and enforceable *private rights*. Individual freedom requires effective constitutional embedding. A constitution typically defines the locus of (domestic) political power. It is a formal or informal meta-level institution establishing and regulating subordinate institutions with specified competencies in the form of bundles of legal powers (Føllesdahl 2002). From a classical liberal perspective, the main task performed by a constitution is to define the limits of governmental powers vis-à-vis the individual constituent.[14]

A controversial issue is whether the concept of constitutionalism is of relevance for the international realm. Regarding constitutionalism and transnational governance, Joerges/Sand (2002) use a traditional and rather narrow concept of constitutionalism claiming that it presupposes a state and that, until very recently, the very idea of a "constitution without a state" sounded rather odd. Grimm (1997: 245), discussing the need of a constitution for Europe, points out that, although the Maastricht treaty does contain provisions of constitutional nature, "when it comes down to it constitutions are still something to do with states". The task that is attributed to constitutions by this approach solely refers to the formation of a legal basis for the state, to the creation of a legal meta-

[14] Hayek concedes that constitutions have served an important task in the United States in fending off discretionary governmental powers and securing independence. But he argues that constitutions as such are not necessarily the safest safeguard for constituents against arbitrary, coercive governmental powers. Rather, it is the rule of law that effectively constitutes a limitation on the powers of all government: "… the conception of the rule of law is sometimes confused with the requirement of mere legality in all government action. … The rule of law … is more than constitutionalism: it requires that all laws conform to certain principles." (Hayek 1960: 205).

level needed to set up a well functioning *democratic state* (Grimm 1997: 239, 250). Petersmann (1997, 1998, 2000), in turn, calls for a human rights approach to international law, arguing "that the universal recognition of 'inalienable' human rights as part of general international law calls into question the democratic legitimacy of the 'state-centred' approach of classical international law which has persistently failed to protect human rights and 'democratic peace' in international relations" (Petersmann 2000: 3). His conception of constitutionalism comprises different levels, national as well as international, of constitutional systems, thus extending Hayek's notion of a hierarchy of rules or laws (Hayek 1960: 176) beyond the boundaries of the nation state.

Our idea(l) of constitutionalism is less concerned with traditional notions of constitutionalism as a form to organise state activity. Instead, we regard all rules that govern fundamental aspects of relationships between individual constituents and political agents as constitutional. In principle, there seems no reason to conceptually separate the rules of the game of national politics from the rules of international political conduct. Just as national constitutional rules perform the task of containing the coercive capacities of governments, so do international rules which typically assume the form of mutual governmental self-restrictions: they limit the government's range of discretionary activities. This applies with even greater force to those areas of international relations where governments explicitly commit themselves to maintain freedom of, and non-discrimination in, legitimate international transactions of their citizens, thus warranting important additional protection of private property rights (Tumlir 1983: 83).[15] Thus Tumlir's (1983: 80) notion of the international economic order "as the second line of national constitutional entrenchment".

The generality principle is a rule of law that lays down basic requirements of constitutional and sub-constitutional legislation. As a constitutional principle that is to guide sub-constitutional decisions and acts of legislation, it demands the "limitation of the coercive powers of government to the enforcement of general rules of just conduct" (Hayek 1978: 138). This guiding principle is applicable not only to national governments and their constitutions. It can equally apply to coercive powers established among states, no matter if exercised in joint decision committees or by a centralised third party enforcer of

[15] On free trade as a private right, and as a matter of private law, see also Sally (2002: 31).

international rules of conduct. In the domestic sphere of politics, the state constitution establishing and regulating subordinate institutions is the relevant meta-level institution needed for the implementation of the generality principle. In the international political realm, however, it is not easy to identify a specific type of meta-institution essential for the operation of universalisable rules, such as the state constitution in the context of the nation state. Rather, one can discern a meta-institutional void in international affairs.

International political conduct takes place bilaterally or among small groups of nations, regionally, or multilaterally. And it concerns interactions among diverse groups of players such as individual constituents, enterprises or states. Accordingly, existing regimes governing international relations – for example world organisations such as the UN, WTO, the IMF or the World Bank, and other authorities such as the EU, the OECD or International Development Banks – differ significantly in the extent of their assigned tasks. The transformation of the GATT into the WTO, for example, involved a shift from an organisation exposed to power politics to an authority reliant more on law and due process. We argue that the international meta-institutional void needs to be filled with proscriptive, quasi-constitutional provisions, particularly if *individuals' rights* are at stake and need to be safeguarded against governments' discretionary interference. Particularly the WTO and the European Union show rudimentary traits of abstract rules, constitutionalism and the rule of law. In the following section we will hence look into the main characteristics of these two organisations focusing on the prospects of the realisation of an international economic order that is arranged according to the generality principle and that allows for just government behaviour protecting private spheres of freedom to trans-national interaction.

5. The present international economic order

5.1 WTO: implementing the generality principle and direct effect - a mixed record

For the most part of the second half of the previous century, the world trading system was driven by the GATT regime (General Agreement on Tariffs and Trade). On the whole, GATT rules were built in order to promote market access according to Most Favoured Nation and National Treatment clauses that are of proscriptive and non-discriminatory

nature.[16] Following the Uruguay round, the WTO (World Trade Organisation) succeeded the GATT regime in 1994. With WTO, the political-institutional agenda was significantly broadened to include rules for market access in agriculture, textiles and clothing, services and intellectual property. TRIPS (the Agreement on Trade-Related Intellectual Property Rights), as opposed to the *proscriptive* Most Favoured Nation and National Treatment clauses of the GATT, is of *prescriptive* make-up. It consists of harmonised legal standards on the protection of patents, trademarks and copyrights to be applied across the WTO membership and takes the "WTO rules in a new direction – not farther in the direction of market access, but elsewhere, towards a complex, regulation-heavy standards harmonisation" (Sally 2002: 26). Thus, the exercise of the generality principle in the international realm, in spite of its longstanding use in the GATT agreements, cannot be taken for granted. Quite the opposite seems to be the case: at present, result-oriented rather than process-oriented politics seem to be the name of the game.

The WTO constitutes a community of nations aspiring to form a governance structure for foreign economic policy affairs through *law* (Petersmann 2000). The WTO, being a club of members with the mandate to warrant the gradual liberalisation of international trade, modified its agenda and corpus of law in consecutive negotiation rounds. With the considerable strengthening of the Dispute Settlement Mechanism, jurisprudence of the WTO has gained significance. The new Dispute Settlement Procedures are legalistic and quasi-automatic, as opposed to the much weaker modus operandi under the GATT regime that more heavily relied upon diplomacy and, as could frequently be observed, was repeatedly exposed to blunt power politics. The *constitutional function*[17] of free trade has gained importance. It reduces the politicised discrimination inherent in protectionist policies that favours powerful vested interests, and thereby helps to bring about greater transparency and equality of treatment before the law.

Yet, the observation that the WTO is a "contract organization" laying down and progressively extending its multinational commitments raises structural and procedural issues. The role of the Dispute Settlement Body, having the sole authority to establish

[16] The GATT had "a relatively clear mandate – to negotiate and enforce non-discriminatory rules on international trade" though "it is instructive to note that only 11 of the 25 founding articles of the GATT contain negative, proscriptive rules" (Sally 2002: 14, 18).
[17] On the constitutional function of the international economic order and of free trade, also understood as an additional line of constitutional entrenchment, see Tumlir (1983: 80), and Sally (2002: 16).

panels of experts to consider the case, and the Appellate Body is contentious. Some observers are concerned about a creeping legislation of the WTO that fills in gaps and ambiguities contained in many Uruguay Agreements, such as the General Agreement on Trade in Services (GATS), Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT) and Trade-Related Aspects of Intellectual Property Rights (TRIPS). This could create an "always-brittle political consensus" (Sally 2000: 27) within the large, diverse group of members trying to sustain "creative" judicial interpretations of legal texts, driven by litigation.

To be sure, a governance system consisting of a set of legal provisions to some degree requires, within its own confines, competency of judicial adjustments and interpretations. Legal-constitutional procedures must allow for legal interpretation in the light of changing circumstances. Just as contracts cannot possibly be complete, so do legal and constitutional systems. Leaders of government like to celebrate agreement committing themselves to certain policy principles only to subsequently exhaust themselves in endless bickering over phrasing the obligations in the most ambiguous and least compulsory manner. Therefore, a legal mechanism needs to be in place that is apt to detect and mend "structural fractures" of the legal system, prompting the relevant legal bodies to strive for consistency of legal interpretation over time and between contiguous areas of law (Tumlir 1983: 82).

The justified call for simple, transparent and negative rules does not principally discard the prospects of endowing the WTO with a quantity of competencies of judicial interpretation, first and foremost located at the Appellate Body. In view of the complicated relationship between the WTO Secretariat and the WTO members it may well be a sensible proposal to demand a reversal of the current trend of developing the WTO rules in contradictory directions, namely in the direction of *proscriptive* rules in the MFN and National Treatment fashion and simultaneously in the direction of *prescriptive* rules as seen in the case of TRIPS. The opportunity to revive the initial purpose of the GATT (to remove trade barriers by employing proscriptive, i.e. simple, transparent and non-discriminatory rules), may even be bolstered by strengthening the interpretative vigour of the relevant WTO bodies. After all, it was the GATT's "inability to provide an authoritative interpretation of its rules" (Tumlir 1983: 81) that can be regarded as its crucial weakness.

It was this structural flaw of the GATT, along with the insight that the GATT, for decades, had not been delivering the desired results of a truly open world trading system, that inspired Tumlir to offer a proposal that was intended to make the underlying principles of the GATT more effective: “One can imagine the international economic policy commitments of a government to be undertaken in the form of self-executing or directly effective treaty provisions, creating immediate private rights enforceable against one’s own government to the order established or contemplated by the treaty” (ibid.: 83). And he goes on suggesting that ”national courts, rather than diplomacy, can and should provide the necessary authoritative interpretation of the international commitments governments undertake in matters of economic policy” (ibid.).

The reading of international trade policy commitments, in the form of WTO rules, as private rights held by individual constituents principally allows national legislators to translate their international economic policy commitments into national law. It deploys national court systems to deal with cases brought in by individual constituents, now empowered to defend their private rights at home (Vanberg 1992). In the light of this reinforcement of the protection of property rights, the international economic order can, as mentioned above, be seen as the “second line of national constitutional entrenchment”. Directly effective agreement provisions would relieve WTO litigation bodies of the strain of the workload, thus turning the governance structure of international trade into a multi-level system serving the individual citizen. The resulting reduction of transaction costs of taking action against violations of international trade rules permits a broader enforcement and a more consequent implementation of the WTO rules. Consequently, directly effective provisions reinforce citizens’ sovereignty.

Another variant of the empowerment of individuals to guard their rights is conceivable and has partly already been put into effect. In principle, individuals could be given standing before WTO Dispute Panels, a possibility that is currently not put into practice. The North American Free Trade Agreement (NAFTA), however, has introduced this option for constituents of its member states to defend their rights against governments in front of a NAFTA Tribunal. A number of cases have been filed, for example *The Loewen Group, Inc. (Canada) v. The United States* or *Ethyl Corp. (United States) v. Canada*. The Loewen Group claimed that that the legal system of the United States, represented by the Mississippi State Court System, had violated its rights established under the “investor-to-

state" provisions of Chapter 11 of NAFTA and requested compensation from the U.S. government for the value of the settlement it had been forced into and for the subsequent plunge in the value of its stock and other business setbacks. The *Ethyl Corp. (United States) v. Canada* case was settled. Initially, Ethyl Corp. had challenged the Canadian government with a $251 million lawsuit, charging "regulatory takings" that effectively seized its Canadian assets. The Canadian government agreed to pay Ethyl $13 million in damages and to cover the company's legal costs rather than risk a politically embarrassing defeat in a NAFTA Tribunal.

These examples show that, even if no national court will ever rule on whether a case under consideration violated rights granted by specific NAFTA or WTO provisions, individuals or corporations can enforce their rights by employing quasi-legal procedures instead of diplomacy. The right to call upon an international conflict settlement panel or tribunal also reinforces citizens' sovereignty, just as directly effective international rules concerned with international policy conduct do. Additionally, both, the right to call upon an international conflict settlement panel or tribunal as well as directly effective international rules governing the international policy conduct de-politicise conflicts over economic policies and place the responsibility of the treatment of such cases in the hands of some international quasi-judiciary body, for example a WTO Settlement Panel, and the national judiciary respectively.

5.2 EU: universalisable "core" with expanding discretionary periphery

The European Union is more than an inter-governmental treaty constituting conditions of free-trade (such as the WTO). At the same time, it remains less than a federal state involving potential omni-competence or competence-competence on the federal level (such as the USA). The EU has sovereign rights conveyed to it by the member states that it exercises in place of them and with direct effect on the member states. So far, however, community institutions have no power to alter the law they are subject to; they are "given a constitution by third parties" (Grimm 1997: 248) – if the European treaties are regarded a "constitution" and member states' governments as represented in the European Council are regarded "third parties".[18]

[18] See Grimm (1997: 245ff) on the constitutional nature of the treaties. He argues that to the extent that constitutions are concerned with legalising political rule, the treaties leave nothing to be desired. Hence, from a legal scholar's perspective fundamental requirements of modern constitutionalism are met. However,

This ambivalent character of EU governance will remain largely unchanged even if national parliaments (and in some cases: populations via referenda) will ratify a "Treaty establishing a Constitution for Europe" as has been drafted by the European Convention in July 2003. The Convention was given an ambitious mandate: to consolidate the enormously complex body of European law separating primary from secondary rules and thus, making its basic structure of competencies, rights and procedures more transparent for the public and more binding for the contracting parties. In tidying up the complex network of treaties forming a three- column Union, the Convention somewhat succeeded. Bit still, it produced one of the most verbose constitutional texts to be found in history: some 263 pages text (depending on what language is used) filled with over 400 articles plus 37 pages protocols.[19] The American Constitution comprises 4,500 words, the proposed EU document some 70,000. The brevity, simplicity and transparency which ought to help EU citizens to know of and rely on lasting fundamentals of the polity and distinguish them from the lower-ranking details seemed impossible to achieve in a Convention of representatives of member states engaged in an ongoing log-rolling procedure.[20]

However, the basic universalisable provisions of the common market that already were established by the 1958 treaties creating the European Economic Community, should remain at the core of a new European constitution.[21] Here, we do find crucial elements of a universalisable order similar to Hayek's (1939/80) vision of interstate federalism. Artt. 3 (a), 3 (c), 3 (g)[22] provide the crucial rules governing the conduct of member state governments: the "prohibition" of tariff and non-tariff barriers to trade between member states and the "abolition of obstacles to freedom of movement for persons, services and

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Grimm also identifies serious deficiencies: "In so far as constitutions are concerned with the legitmation of rule by those subject to it, the treaties … fall short" since European public power "is not one that derives from the people, but one mediated through states" (ibid.: 249). Considering the absence of a "European people" in the sense of a political community speaking the same language, discussing the same issues in sufficiently overlapping communication networks and sharing similar values, it is above all the legitimacy basis that will for some longer time be lacking for a European Constitution that would have more weight and richness than the present treaties.

[19] See http://european-convention.eu.int for the full text.

[20] See, e.g. European Constitutional Group (2004) or Wohlgemuth (2003) for critical appraisals of the Convention's draft.

[21] For more comprehensive accounts of the development of EU constitutionalism with universalisability as a major reference point, see Streit/Mussler (1994); Mussler/Wohlgemuth (1995).

[22] We use the numbering according to the consolidated version of the Amsterdam Treaty of 1999. Within the draft treaty establishing a constitution for Europe, the core elements can be found as Artt. III-14ff.

capital". Prohibitions also include member states' granting of privileges in the form of aides, subsidies, discriminatory taxation and regulation (Artt. 87 ff.). In addition, private restraints to trade are "prohibited as incompatible with the common market" (Artt. 81 and 82). Hence, the freedom to act and to compete within the common market is protected by universalisable rules of just conduct against interference of national governments and of private actors. Thus, protected domains of individual freedom are created that underpin an extended order of voluntary interaction across (member) state borders. Finally, the rules have been "constitutionalised" with Art. 230 transforming member states' obligations to abstain from obstructing the basic liberties into subjective rights of EU citizens which are enforceable by court action (Streit/Mussler 1994: 332).

It is above all through setting non-discriminatory, universalisable rules of just conduct of member states and citizens of the European Union that economic integration is achieved "from below" with individual economic agents exploiting the extended order's enlarged opportunities which serve their individual purposes.[23] At the same time, individual member states, as long as their actions are not prohibited as incompatible with the common market, are free to develop institutional systems that reflect their own social and economic conditions, cultural traditions and public opinions. The freedom of citizens to choose between member states' institutional arrangements that involve different costs and benefits according to different needs, tastes and interests, together with the freedom of governments to change and differentiate their institutional supply, creates institutional competition among European member states. This inter-jurisdictional competition can in fact serve, as Hayek (1939/80: 268) expected, as a "salutary check" on the states' interventionist endeavours while still allowing or even stimulating "desirable experimentation" – thus also providing some equivalent to a Hayekian "discovery procedure" of such political preferences and problem solutions as, "without resort to it, would not be known to anyone, or at least would not be utilized."[24]

On the other side, European integration also clearly frustrates Hayek's expectation that interstate federalism would discourage discriminatory regulations and purpose-oriented

[23] See already Wilhelm Röpke (1959) for an account of a liberal international order that should grow from below instead of being imposed from above.
[24] The quote is taken from Hayek's (1968/78: 179) famous definition of (market) competition. Applications of this "Austrian" market process theory approach to the realm of political competition can be found in Wohlgemuth (1999; 2002) or Vanberg (2000).

legislation. Spectacular cases of discriminatory laws and policy prescriptions can be found right at the beginning of European integration – e.g. with the common agricultural policy or the European Coal and Steal Community. And they have grown ever since, e.g. with demanding a "high level of protection" in health, safety, environmental and consumer protection policies (Art. 95 (3)) or the establishment of various redistributive funds (Artt. 158ff) introduced by the Single European Act; with ambitious industrial policy targets (Art. 157) added by the Maastricht treaty; or with a verbose declaration of aims and purposes in the fields of "social policy, education, vocational training and youth" (Artt. 136 ff.) further amended by a charter of social rights with the Amsterdam treaty.

In the Amsterdam Treaty's 367 articles, rules stating that member states or European institutions "shall contribute to the achievements of the objectives referred to in article …", that they "shall work towards the development of a co-ordinated strategy for …", or "shall have as a task …" abound not only in rules dealing with procedural detail, but also in material law defining policies aimed at securing specific results for specific sectors or fixing specific standards favouring specific groups. In fact, the whole enterprise of European politics is put under a teleological constitutional obligation as expressed in the preambles to both treaties (on European Union and European Community): creating an "ever closer union" (see also Art. 1). Such a commitment of the Union and its members not only to specific actions following prescribed purposes, but also to a (meta-) purpose of never-ending political integration regardless of citizens' preferences would clearly contradict Hayek's understanding of a "community of nations of free men".[25]

The 2003 draft of a "European Constitution" would make this purpose-specific and programmatic character only more obvious. Although organisational provisions to strengthen a more effective respect of subsidiarity have been proposed, the collection of common purposes, goals and competencies has been extended even more. It reads much more like a party platform and statist wish-list granting licence and organising political activity than like a "Constitution of Liberty" that would above all have to define limits of

[25] Vibert (2001: 172) identifies an attitude of "Jurists' Europe" that triggers a "misleading chain of logic: European law is viewed as an instrument of integration all integration is good since all integration should be integration under the law, the more that law pervades all activities, the more the union's good is secured". Such reasoning, Vibert (ibid.) argues, "undermines the respect for the law since European law comes to be seen as serving a political agenda".

political power and grant individual citizens remedies against state interference (s.a. European Constitutional Group 2004).

There are many reasons that might explain the emergence and persistence of such rules as are clearly not universalisable and could even be obviously damaging the interests of large (but latent) groups within the EU.[26] European rules result from haggling over package-deals. Just as on a national level, discriminatory rules that benefit some and harm others can, particularly in combination with privileged access of special interest groups, be brought into a bargaining equilibrium via extensive log-rolling. European Union decision making procedures provide most favourable conditions for non-generalisable rent-seeking deals to be europeanised as "law". European legislation is often not visible to the public (and domestic parliaments) before decisions are taken; and conflicting positions are often "solved" (mostly in the Council of ministers) without identifying who was advocating what. Political deliberation often starts only at the very end of long technocratic drafting process; and political decisions often appear as *faits accomplis* after some days and nights of haggling behind closed doors. And perhaps worst of all, since there is no European public sphere or europeanised public opinion that could inform and control European politics, legislation cannot recur to an (informed) consent of a European people (Grimm 1997; Schlesinger 1999).

Overall, European integration at the same time asserts and disproves Hayek's ideas of interstate federalism based on universalisable rules of just conduct. With its common market based on fundamental liberties, the europeanisation of universalisable rules of just behaviour has produced an extended order of economic and inter-jurisdictional competition that should definitely have increased the chances of a European citizen taken at random of using his knowledge for his purposes and having a high income. However, with its growing periphery of interventionist and harmonised regulations stifling economic and inter-jurisdictional competition, Europe has also shown that policies that would definitely fail a universalisability test can just as easily be europeanised if adequately bundled and obscured.

[26] For a more comprehensive public choice account of European politics, see, e.g. Vaubel (1994; 2004).

6. Outlook: Towards a universalisable governance of globalisation

Was Hayek, writing at a time when the world was plagued by war and the breakdown of a fairly well established order of international trade[27], as Sally (2000) argues, naïve to expect an international economic order based on classical liberal principles to result from inter-governmental constitutionalisation? A careful reading of Hayek's early statements on this matter in the context of his later writings on universalisability, confronted with a preliminary evaluation of interstate federalism in the EU and of the WTO's trade regime partly vindicate, partly vitiate this claim.

In fact, the post-war international agreements preceding today's EU and WTO started out with basic rules proscribing certain kinds of government behaviour that were rightly identified as damaging mutual interests in an extended order of peace and prosperity. As Hayek (1939/80: 264) expected, central planning remained largely "limited to the extent to which agreement on … a common scale of values can be attained or enforced" and thus limited to small societies, homogenous populations or (federations of) states dominated by a totalitarian hegemon (the former USSR). The "free world" never looked like that and globalisation probably never will.

Constitutional democracies have learned to live with a "reasonable pluralism of comprehensive doctrines" (Rawls 1999: 40) at home and were thus well prepared to face even more diversity abroad.[28] And they have learned that the best way to cope with diversity is to rely on generality embodied in proscriptive rules instead of uniformity enforced by prescriptive rules. As a consequence, "negative integration" based on rules that remove barriers to citizens' interaction between states rightly took precedence over "positive integration" based on rules that decree the pursuit of specific (or unspecific)

[27] See Henderson (1992) who refers to empirical evidence that suggests that, viewed in historical perspective, closer economic integration is no dramatic novelty. As a well-established long-run tendency it was only interrupted by the Great War. In fact, "the world economy in May 1992 is further away from full integration than it was in May 1892" (ibid.: 646).

[28] What is already true for a constitutional democratic society: that "political and social unity does not require that is citizens be unified by one comprehensive doctrine" (Rawls 1999: 124) is all the more true in international relations. Rawls (ibid.: 40) argues very much like Hayek: "we may assume that there is an even greater diversity in the comprehensive doctrines affirmed among the members of the Society of Peoples with its many different cultures and traditions. Hence a classical, or average, utilitarian principle would not be accepted by peoples, since no people organized by its government is prepared to count, *as a first principle*, the benefits for other people as outweighing the hardships imposed on itself."

tasks.[29] However, as our short discussions of EU and WTO politics suggested, integration has not stopped there. Positive, purpose-lead integration "from above" with – sometimes reasonable, sometimes questionable – statements of common duties and purposes more and more shapes present agendas and intergovernmental bargaining rounds. Not only empirical, but also normative-theoretical reasons make us somewhat cautious when defending a claim of "globalisability of universalisability". The most important qualifications can be illustrated if we restate our claim with four qualifying parentheses: we argue in favour of the

(1) (near) globalisability of
(2) (elementary) universalisable rules of
(3) (un) just
(4) (government) behaviour.

We will conclude this (already sufficiently complex) paper by a short discussion of these four issues – partly summarising our argument so far, partly pointing at some additional complications of the matter of international governance that we started out to address with one simple constitutional principle: universalisability. For dramaturgic reasons we proceed in the order (3), (4), (2) and, finally, (1).

Our *third* qualification refers to the already sufficiently stressed reliance on predominantly proscriptive rules. This proposition is not unchallenged in the literature. Streit/Voigt (1993) also discuss "desirable rules for an international society of private law" (ibid.: 59) in Hayekian terms of universalisability, distinguishing three defining criteria: generality, openness and clarity. These elements are deemed adequate for a national private law society. But with application to international trade, Streit and Voigt argue, the property of "openness", i.e. the predominant reliance on proscriptive rules, would be "most undesirable in the case of a trade order" (ibid.: 60). It would amount to "an invitation to member states to invent practices which would allow the circumvention of these rules" (ibid.). We consider this a justified warning – well founded in experiences with, e.g., voluntary export restraints or regulatory non-tariff barriers. But we fail to see the workability of the alternative, namely "to opt for closure by declaring all actions forbidden which are not explicitly allowed" (ibid.). We lack the imagination to conceive of a definite and conclusive list of actions that governments would to be allowed or perhaps prescribed

[29] See Scharpf (1999) on the distinction between positive and negative integration. Streit/Mussler's (1994) concepts "integration from above" and "integration from below" create similar distinctions.

to take which would be conducive to the extension and protection of either an international spontaneous order of private trade or of inter-jurisdictional competition. Free markets, at home and internationally, depend on (a definite, but alterable list of) prohibitions rather than of governments' prerogatives.

The *fourth* reservation points at the peculiar structure of the international order: although "human individuals and not states or nations must be the ultimate concern even of international organizations" (Popper 1945/66: 288, note 7), it is state representatives that would have to convene and submit to constitutional self-restrictions on their behaviour, in order to create protected private spheres of the citizens represented. It is this reliance on inter-governmental self-restriction that turns the model of a constitutional contract among free citizens into a more indirect and demanding concept. There is one major reason why international governance (certainly in the EU, but also in the WTO) increasingly relies on purpose-lead declarations of the desirability of alleged common political aims instead of rules proscribing certain political actions: politicians. As soon as the most self-destructive government activities that most obviously threaten world peace and world trade are effectively banned, politicians following their common self-interest as a *classe politique* have other things in mind than further self-restrictions. For self-interested politicians it should be more rewarding in terms of demonstrated good intentions to sign declarations of common purposes referring to social (economic, environmental etc.) states of affairs that need to be changed. Also in terms of political power, international agreements providing mutual encouragement and authorisation to pursue activist agendas (at home or on the level of common policies far removed from domestic parliamentary or public control) must seem more attractive to politicians than a mutual abrogation of discriminatory policies.[30]

Our *second* qualification deserves some further clarification. Not all universalisable rules of just conduct can be and need be globalised. Globalisation does *not* afford the international legal order to become more and more "general" in the sense of plainly emulating the range of legislation as commonly performed in nation states. Nor does it afford delegation of the requisite authorities to enact and enhance such "generalised" law to a super-national authority. Globalisation, however, should profit from the international

[30] The observation of Vibert (2001: 22) not only relates to "constitution building" in the EU, but also to new agendas for WTO and IMF conferences: "When governments try to justify to public opinion what they have agreed in the treaties, the stress is always on the good policy outcomes they hope and promise to achieve – never on the underlying principles of political association".

availability of such rules as are more likely to be agreed upon by governments and citizens of those nation states willing to engage in the global game of catallaxy. Again, such rules would mostly be "general" in the sense of being independent of specific purposes, largely proscriptive towards governments and protective towards individual spheres of self-determination. Thus global governance should have at its core rules of conduct which are general in the sense of being universalisable across borders, not in the sense of being merely effectively enforced across borders.

One of our main arguments is that a territorially more universal applicability of such rules is greatly facilitated by their abstract nature of universalisability. The argument can also be formulated as a trade-off between rules' "reach" and their "richness" (see Vibert 2001: ch.4) with universalisability supporting reach – and richness reducing universalisability. General rules of just conduct have, as we argued throughout this paper, systematic advantages when one wants rules to reach out to ever larger groups and establish an extended order that allows peaceful interactions among individuals that need not have concrete purposes, value systems or interests in common.[31] Rules with more richness in material content and regulatory detail afford more agreement on concrete common purposes. They are best provided on lower levels of constitutional hierarchies (see part 4). For (near) global governance as well as for the division of powers within the European Union this means that those rules that are universalisable and provide the basic protected spheres of voluntary interactions among citizens should be at the heart of the respective constitution. Both WTO and EU (and their constitutional texts) should concentrate on their core activity of providing and enforcing general, proscriptive rules with reach. WTO trade rules should have the qualities of both governmental commitments, enforceable at the WTO level, and at the same time of private rights, enforceable at the level of national judicial level to discipline national governments. Authoritative judicial interpretation at WTO level may serve as an auxiliary to achieve consistency of legal interpretation over time and between contiguous areas of law. The same rationale applies, as argued above, to the "constitutionalisation" (Mestmäcker 1994: 6) of European citizens' basic freedoms to act on the European single market.

[31] Rawls, although his principles are "richer" in material content and even include (more or less) modest global redistribution duties, claims that his "Law of Peoples" has the advantage that its applicability "depends not on its time, place, or culture of origin … it asks of other societies only what they can reasonably grant without submitting to a position of inferiority or domination … This enabled that law to be universal in its reach. It is so because it asks of other societies only what they can reasonably endorse once they are prepared to stand in a relation of fair equality with all other societies." (ibid.: 121f).

With their tasks limited to the provision and enforcement of rules with reach, international agencies would be "a source of generally applicable rules that coexist alongside the rules of other regulatory regimes of the localities, regions, and states. What needs to be set up is a framework for coexisting regulatory regimes where rules with reach, provided by the union, coexist alongside rules with richness, provided by member states and their regions" (Vibert 2001: 99). As a consequence, people will not only, as consumers, have a choice between goods and services produced under different regulatory systems by competing businesses. They will, as "jurisdiction users"[32] also engage in choices between the regulatory systems themselves (as locations for direct investment, capital allocation or individual residence) – thus creating competition among jurisdictions. International agencies would still have an important role to play. We argue that their importance and strength not necessarily increases with the multitude and richness or their competencies. To the contrary, by trying too much, (European or near global) international authorities will only disappoint and disaffect. Hence, interstate federalism and the (near) global order of international trade is more stable and able to grow through enlargement if it relies on strong rules in limited areas. Violations of common rules of just conduct are easier to observe and compliance is easier to enforce, if the rules are mostly defined as proscriptions of certain kinds of conduct, rather than prescriptive rules commanding the pursuit of specific purposes.

International agencies would, therefore, find their most natural and strong role in the position of a neutral umpire, determining and sanctioning violations of common rules. With limited tasks and mostly negative formulations of the rules "significant room for the idea of a people's self-determination" (Rawls 1999: 111) would be preserved. At the same time, the central international authority would not be under unsupportable burdens on its (necessarily weak) direct democratic legitimacy. Hence a necessary condition of a workable international Rule of Law is the restriction of the international agency's competence to a final list of strictly defined competencies, serving a two-fold purpose: "The international Rule of Law must become a safeguard as much against the tyranny of

[32] See Vanberg (2000) on competition among jurisdictions and its capacity to create additional options for (immobile) citizens as well as for mobile "jurisdiction users" with the effect of enhancing "citizen sovereignty".

the state over the individual as against the tyranny of the new superstate over the national communities" (ibid.: 236).

This leads us, finally, to our *first* qualifying parenthesis. Although an international constitution's concentration on rules with "reach" should be applicable to societies based on quite different cultural norms, national traditions or political ideologies, some political agents and perhaps even their constituents may still find the limitations on their behaviour created by universal rules of just conduct "too rich". The opening of markets and societies to foreign goods, services, capital, ideas and people and the capitalistic spirit of competition that comes with it may be regarded threatening or even incompatible with (e.g. Buddhist or Hinduist) fundamental values. Hence, the international division of labour and knowledge under common universalisable rules is limited by the extent to which these rules are found compatible with a society's fundamental values. If even abstract rules of just conduct are found too burdensome and interfering with politicians' or citizens assumed sovereignty, they should neither be forced to join the international order of free nations, nor should they be given special status or the power to force other nations to adopt (even) weaker constraints. Although it can rightly be argued that network externalities exist to the effect that rules increase in value the greater the number of people who observe them, this scale advantage only holds if the rules' content does not change in the process. A softening of the rules or of their enforcement in order to reach the widest possible (European or global) agreement on a minimal common denominator should be resisted.[33]

Our ideal of a "globalisable" constitutional order based on universalisable rules of just conduct is old hat. In fact, it is as old as economics as a science, since all we offered here was a somewhat updated reformulation of Adam Smith's "obvious and simple system of natural liberty":

> "Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man or order of men. The sovereign is completely discharged from a duty, in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient." (The Wealth of Nations, vol. II, bk. IV, ch. 9., § 51)

[33] Instead, it seems preferable to give room for voluntary multi-speed (and multi-direction) integration. This means that those jurisdictions that want to pursue common purposes in specific areas of positive integration as well as those that favour stronger rules protecting their citizens' self-co-ordination through international trade in a model of negative integration should both be allowed to go ahead on their own responsibility. See Wohlgemuth (2004).

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Bruno S. Frey
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Direct Democracy for a Living Constitution

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April 5, 2004

Abstract: The development of the constitution must be based on the rule of law. Direct democratic rights allow citizens to participate in the amendment process. The direct democratic process of institutional change is theoretically and empirically analyzed. A number of counter arguments and issues for a gradual introduction are discussed.

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I Direct Democracy and the European Union

The planned constitution of the European Union represents a *unique chance to write a constitution for this century,* and for those to come.[1] It represents a rare window of opportunity for designing a constitution for one of the major political units of the world. It is very likely that few, if any, ground rules of such relevance can be written in the near future. The design of the European Constitution cannot start from scratch – no constitution ever can. In the case of the European Union, there are various previous treaties, such as those of Maastricht, Nice or Amsterdam, as well, of course, as the founding Treaty of Rome in 1956, which have to be taken into account.

This opportunity has so far been missed. The existing proposals must be considered an *exercise in compromise*. No new elements of democracy are considered. In particular, it has not been considered to give more direct democratic rights to the citizens. Granted, there is a difficult task to fulfill. The new EU Constitution has to meet with the agreement of all the member countries. This is no small task, considering the interests of the member nations differ in a great many respects. Most importantly, two fundamentally different interpretations of the European unification clash with each other. The *first* interpretation sees the European enterprise as essentially an *economic* one. The EU is to guarantee *free trade* in terms of the movement of goods, services, labor and capital. Political interventions should only serve to keep the borders open, to prevent trade distortions by subsidization, and other interferences distorting relative prices. The *second* interpretation sees the goal of the European enterprise as a *political* one. Europe is to move to "an ever closer union" (in the words of the former president of the Commission, Jacques Delors) and should end up similar to the "United States of Europe".

Accepting the "necessity" of a compromise, the focus should already today lie on the development of the European Constitution in the future, i.e. on the question of *amending constitutions in the direction of more extensive direct democratic participation rights of the citizens*.

[1] The draft of the European Constitution is electronically available at http://european-convention.eu.int/, July 31, 2003.

II Direct Democratic Decision-Making and Its Diffusion

There are many different meanings, conceptions and also misunderstandings about what "direct democracy" is. The following two aspects of the way the term "direct democracy" is used here are crucial[2]:

1 Referendums and Initiatives as Additional Rights

Direct democracy (or, more precisely, semi-direct democracy) does not substitute for parliament, government, courts and all the other features known in representative democracies. Instead, it shifts the final rights in determining issues to the citizens. The extent of direct participation rights may vary, but they always include constitutional changes, normally by an obligatory referendum. Optional referendums and initiatives (allowing citizens to put issues on the political agenda) require a predetermined number of signatures by the citizens before they can take place.

From a historical perspective, three main stages of democracy may be distinguished:

- Classical democracy, first developed in Athens and other Greek city states. Participation rights were restricted to male citizens, thereby excluding a large number of the population, and extended only over a small area of a town. Yet the principles of democracy still revered and used today were developed there.
- The French Revolution extended democracy over a large area. The principle of representation made it possible to introduce indirect political participation to the nation state.
- Direct democracy combines these two earlier types of democracy by giving every citizen the right to decide on certain issues. The extreme (classical) form of having citizens decide on each and every issue is practiced nowhere today, but the number of issues on which citizens may vote varies widely between countries.

Over the period 1990 to 2000, no less than 405 popular referendums on the *national level* were recorded (see Gross and Kaufmann 2002, Butler and Ranney 1994). More than half took place in Europe, namely 248 (and again half of them in Switzerland); 78 in America, 37

[2] See e.g. Magleby (1984), Cronin (1989), Butler and Ranney (1994), Frey (1994), Dubois and Floyd (1998), Kirchgaessner, Feld and Savioz (1999), Frey, Kucher and Stutzer (2001).

in Africa, 26 in Asia and 16 in Oceania.[3] In the decade before (1980 to 1990), there were only 129 national referendums. Up until August 2002, issues of European integration led to no less than 30 national referendums.[4] There are a very large number of popular referendums at lower levels of government. In the German state of Bavaria there were as many as 500 since its adoption. In Switzerland, there are thousands of referendums at all three levels of government: local, cantonal and federal.

Most democracies do not allow the general electorate to participate in taking important decisions. Nowhere (except in Switzerland and Liechtenstein) are popular referendums used in a regular and systematic way at the national level. In the United States, despite its many local popular decisions, and its frequent use in some States, such as California and Oregon, there is no referendum at the national level. Many important decisions shaping a country's fate for decades to come are not subject to a popular referendum. A telling example is Germany. The citizens had no say either with respect to the conditions for the integration of the former GDR or the dumping of the Deutsche Mark and introducing the Euro. Directly democratic decisions are, in many cases, not taken seriously by the politicians in power. A revealing example is the Irish vote on the Nice Treaty of the European Union. The citizens rejected it in June 2001. Before the second vote on the issue, due to take place in August 2002, EU politicians made it clear that they would go ahead with the Treaty's program, irrespective of whether the Irish vote would be positive or negative (though unanimity within the EU is required).

2 Referendums and Other Forms of Consultation of Citizens

Referendums are a right given to the citizens by the constitution. Government and parliament are bound by these rights: they are not free to ask the opinion of the citizens only when it suits them. This distinguishes referendums from plebiscites undertaken by governments to ex post sanction a decision already taken by them. With plebiscites, the citizens are not asked to decide on an issue, but only to express their support of the government. Referendums also

[3] Some of these referendums certainly do not meet the requirement of leaving the (final) decision on an issue to the general electorate, but are rather plebiscites, i.e. votes where the government wants the support of the population for a decision already taken.

[4] An up-to-date account of the referendum experience around the world is provided by C2D - Research and Documentation Centre on Direct Democracy at the University of Geneva (http://c2d.unige.ch/, August 6, 2003). Additional information about direct legislation in the United States is collected by the Initiative and Referendum Institute in Washington (http://www.iandrinstitute.org/, August 6, 2003). Its partner organization in Europe (http://www.iri-europe.org/, August 6, 2003) provides information on the state of direct democracy in European countries (with a special focus on transition economies).

fundamentally differ from opinion surveys, which are on the spot views of people, without any consequences for the government: they can choose to act in accordance with the results or disregard them. In contrast, when citizens have taken a decision in a referendum, the constitution obliges the government to put the corresponding policy into practice.

III How the Direct Democratic Process Works

1 Direct Democracy Against Politicians' Cartel

Politicians against the voters

Persons acting within the confines of the political system have incentives to exploit it to their advantage. Politicians are not 'bad', or any worse than other persons, but they tend to be – as everyone else – self-regarding. They endeavor to further their own interests, which consist not only of material wealth, but also of recognition and prestige.

In a democracy, politicians can use three main ways of gaining benefits at the citizens' expense, or 'exploiting' the general population:

(a) Politicians may take decisions which they know to *deviate from the voters' preferences*. Political actors may do so because they have an ideology of their own, because they reap material and non-material advantages by so doing, or because they have insufficient information. For instance, politicians systematically prefer direct interventions in the economy to employing the price system, because regulations generally allow them to derive larger rents.

(b) Politicians secure themselves *excessive privileges* in the form of direct income for themselves or their parties, pensions and fringe benefits, such as cars and houses.

(c) Citizens' exploitation may take the form of *corruption*, i.e. direct payments for special services provided to payers, but not to others.

Politicians have a common interest to protect and extend these rents where possible. That means they have an incentive to form a *cartel* against the ordinary citizens. There is, however, a public good problem involved: an individual politician has an incentive to break out, if such action is positively sanctioned by the electorate. Such action can regularly be observed in democracies, but it is rarely of much consequence for the cartel. The politicians in many countries form a close-knit group of people clearly differentiated from the rest of the population. Their main contacts are within the group, so that the social disapproval of the few

who dare to break out of the cartel is acutely felt and carries a high cost. Moreover, the cartel is administered by the leaders of the parties so that, in most countries and time periods, only a small number are involved, and the break-out of a politician is quickly and effectively sanctioned by the other members of the cartel, for instance by restricting access to parliamentary positions (in particular membership of powerful commissions), or by reducing the monetary support provided by the state to the parties. An individual politician finds it equally hard not to be a part of the cartel, because the leaders of his party have many means at their disposal to control him or her, including enforced resignation.

Constitutional provisions against the politicians' cartel

All the actors involved, in particular the voters, are well aware that there are strong and ubiquitous incentives for the politicians to form a cartel and to exploit the voters. In response, one finds three quite different forms of institutions in democratic constitutions designed to check such action:

(a) *Rules* prohibiting the (excessive) appropriation of rents by the politicians, the most stringent ones being to prevent corruption. Obviously, such rules are only effective if they cannot easily be circumvented and if they are well enforced. Such provisions are completely useless against the first type of exploitation mentioned, namely the systematic deviation from citizens' preferences. As the privileges accorded by the politicians to themselves are of an extremely varied kind and are difficult to detect (especially with respect to pensions), experience shows that politicians' rent seeking can thereby scarcely be prevented. With respect to corruption, only the most blatant cases are found out. It must be concluded that, while such rules are of some use, they certainly are not able to prevent the exploitation of citizens to any significant extent.

(b) The establishment of special *courts*, with the task of preventing citizens' exploitation. All democratic countries know some institution of courts of accounts, but it may well be shown that they fulfill their role only to a limited extent. They are obviously the less effective, the more directly they depend on the politicians they are supposed to control. In this respect, it does not help much if the members of the court of accounts are elected and must answer to the parliament (instead of to the government), because the cartel includes politicians inside and outside the government. Even courts of accounts, formally independent of government and parliament, have little incentive and possibility of checking the exploitation of the citizens by the politicians. This applies particularly to

the deviation from citizens' preferences; it may indeed be shown that courts of accounts, which necessarily have to focus on the formal correctness of politicians' and administrators' behavior, in some respects tend to widen the gap between what politicians provide and what the people want.

(c) *Competition between parties* is the classical institution in representative democracies to prevent politicians from pursuing their own goals at the population's expense. Constitutions are familiar with various devices to further competition and make a coalition between the politicians more difficult. One is the division of power between the executive, legislative and jurisdictional branches. Another is the establishment of two houses of parliament. Because of the many types of interactions existing, and the well-defined gains to be expected, these devices are rather ineffective in checking the interests of the 'classe politique'.

An important constitutional device for stimulating the competition between parties is to guarantee, and to facilitate, the entry of new politicians and parties into the political system. While this certainly forces the established parties in a democracy to take better care of the people's wishes and to be more careful with regard to privileges and corruption, the effects tend to be short-lived. The previous outsiders quickly realize that many advantages are to be gained by tolerating the politicians' cartel, and even more by participating in it. The experience of many countries supports this theoretical proposition. An example are the 'Green' parties, who at first fought against the political establishment, but within a surprisingly short time learned to take advantage of the taxpayers' money for their own purposes.

On the basis of these arguments, it must be concluded that neither constitutional rules, nor courts, nor party competition are particularly successful in reducing the possible exploitation of the general population by the politicians. It is not argued, of course, that the constitutional features elaborated are useless, but that they do not provide a sufficient safeguard against politicians' rent-seeking. It is therefore desirable to search for, and to seriously consider, other constitutional means of fighting the politicians' cartel.

Referendums as a constitutional provision against the politicians' cartel

A referendum, in which all the citizens have the possibility of participating, meets the crucial requirement that it gives decision-making power to people *outside* the politicians' cartel. The individuals making the decision are not integrated into the 'classe politique' and they avoid

the control of politicians. In an *initiative*, the demands are explicitly directed against the political establishment represented in parliament and government. *Optional* and *obligatory* referendums serve more of a controlling function because, if successful, they overrule the decisions taken by the executive and the legislative bodies.

A popular referendum (in the widest sense of the word) can only serve its purpose if the 'classe politique' cannot block it. In many countries, the Supreme Court or, even worse, the parliament, has the power to decide whether a referendum is admissible. The criteria appear to be purely formal but, in fact, the members of the 'classe politique' have a considerable number of possibilities and incentives to forbid referendums threatening the position of the politicians' cartel. Often vague concepts, based on what *they* consider to be the 'raison d'état', are employed. In other countries, such as Switzerland, almost no such possibility exists, and therefore issues may be brought to the vote which are not desired, and are sometimes even strongly disliked, by the politicians.

Empirical evidence shows that referendums are indeed able to break the cartel among the politicians by getting through constitutional provisions and laws totally against the interests of the 'classe politique'. The following cases refer to Switzerland, the referendums' nation par excellence. The first two cases concern important historical episodes (Blankart 1992).

(a) During the 19th century, the house of representatives (Nationalrat) was elected according to the majority rule. The largest party greatly benefited from that; throughout seven decades, the Radical-Democratic Party secured a majority of the seats. When the idea was raised that the elections should follow proportional representation in order to allow small parties to enter parliament, the then 'classe politique' amongst the executives and jurisdiction strongly rejected this proposal for obvious reasons of self-interest. Nevertheless, in 1918, the corresponding referendum was accepted by the majority of the population and the cantons. In the subsequent elections, the Radical-Democratic Party lost no less than 40 percent of their seats.

(b) Up until the Second World War, Urgent Federal Laws (dringliche Bundesbeschluesse) were not subject to (optional) referendums. In order not to have to seek the people's approval, and in order to pursue policies in their own interests, the 'classe politique' in the government and parliament often declared federal laws to be 'urgent', even if that was not in fact the case. In 1946, an initiative was started with the objective of preventing this disregard for the interests of the population. Again, the executive and

legislative bodies urged the voters to reject the initiative, which was clearly one of self-interest. However, the initiative was accepted by the voters, and the politicians are now forced to take the citizens' interests into account when they decide on federal laws.

The history of Swiss voting provides many more examples of such clashes between the opinions of the leaders and the citizens. The politicians have to make great efforts to endorse as quickly as possible any movements originating from outside the cartel. Sometimes it is established parties (but usually at the fringes of the cartel), or associated interest groups, which initiate referendums. If this strategy is to be successful, the politicians have to at least partially take into account the population's preferences, and have to reduce the extent of their rent seeking. The *institution* of the referendum in this case leads indirectly to the desired outcome that the politicians' cartel has less leeway[5].

Politicians are well aware that the institution of popular referendum severely restricts their possibility of "exploiting" the citizens/taxpayers and they therefore oppose introducing elements of direct democracy.

2 Referendums as a Process

It would be mistaken to consider a referendum just to be a vote. Indeed, two important stages before and after the vote need to be considered.

The Pre-Referendum Process

The constitutional setting determines to a large extent which issues are put on the political *agenda,* and which are prevented from appearing. In representative democracies, politicians are often very skilled at not letting problems, which are to their disadvantage, be discussed in the democratically legitimized institutions. As has been shown, both theoretically and empirically, agenda setting power has a significant effect on voting outcomes.[6]

An important feature of referendums is the *discussion process* stimulated among the citizens, and between politicians and citizens.[7] Pre-referendum discussions may be interpreted as an

[5] Citizens' initiatives also allow an "unbundling" of issues, compared to the bundled issues typical for representative democracies. This induces policy outcomes that have a closer relationship with popular preferences (see Besley and Coate 2000).

[6] See Romer and Rosenthal (1978, 1982) for Oregon school budget referendums, and Weingast and Moran (1983) for congressional Committees. The two groups of researchers do not consider the *general* role of referendums in agenda setting, but concentrate on its effect on bureaucratic decisions. Our emphasis is on its role as a means to break the politicians' cartel.

[7] The essential role of discussion in direct democracy is more fully discussed in Frey and Kirchgaessner (1993), Bohnet and Frey (1994). For democracy in general, see Dryzek (1990).

exchange of arguments among equal persons taking place under well-defined rules. This institutionalized discussion meets various conditions of the "ideal discourse process", as envisaged by Habermas (1983). The relevance of discussion for politics induces citizens to participate, depending on how important the issue in question is considered to be. The experience of Switzerland shows indeed that some referendums motivate intense and far-reaching discussions (such as the referendums on whether to join the European Economic Space with a participation rate of almost 80 percent, compared to an average of roughly 40 percent). Other referendums considered to be of little importance by the voters engender little discussion and low participation rates (as low as 25 percent). This variability in the intensity of discussion and participation overrides the much studied "paradox of voting" (Tullock 1967, Riker and Ordeshook 1973).

The main function of the pre-referendum process is certainly to raise the level of information of the participants (for empirical evidence, see the next section). It may, moreover, be hypothesized that the exchange of arguments also forms the participants' preferences. What matters most is that this preference formation can be influenced by, but not controlled by, the 'classe politique'.

A further important aspect of the referendum process is going beyond outcome considerations. Citizens may benefit from the process as such, as it is well established that people have a preference for participation in decision-making because it enhances individuals' perception of self-determination (e.g. Pateman 1970, for an extensive survey see Lane 2000, chapter 13). With regard to direct democracy, Cronin (1989), for example, notes, that "giving the citizen more of a role in governmental processes might lessen alienation and apathy" (p. 11). Moreover, the political discussion induced by initiatives and referendums generates a common understanding for different political opinions and positions. This strengthens the social contract based on consensus and motivates people to go beyond acting out of narrow self-interest. Participation possibilities are thus considered an important source of perceived procedural fairness, shaping individual behavior.

Post-Referendum Adjustments

In a referendum, a political decision is formally made, but this does not necessarily mean that the politicians and the public administration take the appropriate action to implement it. The more legitimate the constitution is taken to be in a political system, the higher are the costs of not following it. The politicians may also be induced to act in such a way by the threat of not

being reelected by the voters, but ultimately the extent of implementation depends on whether the constitutional rules are voluntarily obeyed by the persons in power.

The question of which side gets a majority in a referendum is not the only thing that matters. A referendum also clearly reveals how the population feels about the matter, and where and how large the minorities are. Groups dissenting from the majority are identified; their preferences become visible and become part of the political process (see Gerber 1997). This makes it more likely that particular parties start to champion their cause in order to win additional support, and for referendums to take place in particular regions.

Switzerland again provides a suitable example. In 1989, a popular initiative demanded that the Swiss Army be completely disbanded. Many Swiss considered this to be an attack on one of the almost "sacred" institutions of the country. The 'classe politique' was totally against the initiative, and the generals threatened that they would retire if the initiative was not overwhelmingly rejected (they spoke of a percentage of no-votes between 80 and 90 percent). The referendum outcome was a surprise to everybody, because one third of the voters (and a majority among the young voters eligible for military service) voted for the dissolution of the army. After a short period of shock, several parties suggested changes in the army which were implemented within a short time - changes which, before the referendum, were considered by everyone to be impossible to achieve.

3 Referendums and the Protection of Federalism

The institution of citizens directly deciding on an issue and the decentralization of decision making are closely connected. On the one hand, federalism is an *alternative* means for better fulfillment of the voters' preferences: individuals tend to turn away from unsatisfactory jurisdictions, while they are attracted to those caring for the people's preferences at low cost. The possibility to vote with one's feet (Tiebout 1956; see also Buchanan 1965, Hirschman 1970) tends to undermine regional cartels by politicians.

Federalism is, at the same time, a *prerequisite* for effective referendums rather than a substitute. In small communities, much of the knowledge needed for informed political decision-making is impacted in every-day life. The citizens are well aware of the benefits and costs of particular public programs. Moreover, as taxpayers, they have to carry the burden, provided there is a sufficient amount of fiscal equivalence (Olson 1969, 1986).

It is crucial for the beneficial functioning of federalism that the constitution explicitly assigns competence to spend money, *as well as* to levy taxes, to all the different levels of the state. However, this is not enough, because politicians oppose federal competition as it restricts them in following their own interests. Therefore, sub-central governments try to form tax and expenditure cartels that are protected by the central government. As a result, there is a tendency towards government centralization beyond the point where citizens benefit the most (e.g. Blankart 2000). The problem of over-centralization also exists for other reasons (see Eichenberger 1994, Vaubel 1994) and is difficult to control. Rather than protect the federal system in the United States, the Supreme Court allowed a broad interpretation of activities assigned to the federal level that led to substantial centralization (Niskanen 1992). A referendum system, in contrast, is the constitutional provision that is most likely to protect a decentralized government.[8]

IV Empirical Evidence on the Consequences of Direct Democracy

Direct democracy changes the political process in three important ways, compared to a purely representative democracy, as has been argued in the last section: (i) Due to a restriction of established politicians' power, an *outcome* of the political process can be expected that is closer to the citizens' preferences. (ii) The participatory character of direct democratic decision-making provides incentives to voters to inform themselves about political issues, and changes their relationship to authorities and fellow citizens. The referendum *process* might thus be a source of procedural utility. (iii) Direct democracy affects *institutional* change, and protects rules that favor the citizens; in particular, it is a safeguard against the risks of over-centralization.

In order to substantiate these hypotheses, systematic empirical analyses are necessary. A number of studies exist for both Switzerland and the United States (for surveys see, e.g., Bowler and Donovan 1998, Eichenberger 1999, Kirchgässner, Feld and Savioz 1999, Gerber and Hug 2001 or Matsusaka 2003). The two countries are particularly suited for comparative empirical analyses, because direct democratic rights are developed to a very different extent

[8] In their proposal for a "New Democratic Federalism for Europe", Frey and Eichenberger (1999) develop a model of federalism that is based on functional overlapping competing jurisdictions (FOCJ) that rely to a large extent on direct democracy.

at the level of Swiss cantons and US States respectively. While we briefly mention a wide range of results, some particularly important findings are presented in greater detail.

1 Effects on Policy Outcomes

In order to study whether direct democracy makes a difference to the outcomes of the political process, a natural starting point is to begin with public expenditures and revenues. Fiscal decisions are the central activities of most governments, and policy priorities are to a large extent formed in the budgeting process.

In a study covering the 26 Swiss cantons and the years between 1986 and 1997, Feld and Kirchgässner (2001) measure the effects of a mandatory fiscal referendum on aggregate expenditure and revenue. In 217 cases of the totally 312 annual observations, cantons adopt a mandatory referendum on new expenditure above a given threshold. It is found that expenditure and revenue in cantons with fiscal referendums are lower by about 7 percent and 11 percent respectively, compared to cantons that don't have this institutional provision.[9] In a sample of 132 large Swiss towns in 1990, the same authors replicate their test for the mandatory referendum on budget deficits. In cities where a budget deficit has to be approved by the citizenry, expenditure and revenue, on average, are lower by about 20 percent, while public debt is reduced by about 30 percent. With an extended panel data set from 1980 to 1998, the effect of the mandatory expenditure referendum is analyzed, taking the spending threshold into account (Feld and Matsusaka, in press). At the median threshold of 2.5 million Swiss francs (SFR), spending per capita is reduced by 1,314 SFR, i.e. by 18 percent for an average expenditure level of 7,232 SFR (compared to cantons that either have an optional financial referendum or no referendum on new public expenditure).[10] The difference in overall spending significantly varies between cantons, applying a low threshold of 0.5 million SFR (25^{th} percentile) and a high threshold of 15 million SFR (75^{th} percentile). For the former, expenditure is estimated to be lower by 1,389 SFR per capita, while for the latter the reduction is 845 SFR per capita. Moreover, it is found that the mandatory financial referendum has less effect when it is easier for citizens to launch an initiative for a new law or to change an existing law (measured by the signature requirement). Thus, there is a

[9] While these findings imply larger deficits and higher public debt in cantons with a fiscal referendum, ceteris paribus, the respective empirical results neither show statistically significant effects on the former measure nor on the latter one (Feld and Kirchgässner 2001, p. 354).

[10] In the regression equation, the following are controlled for: income level in the canton, federal aid, age structure of the population, population size, population density, unemployment rate, as well as whether people are German-speaking or not.

substitutive relationship between the two institutions with regard to their consequences on cantonal fiscal outcomes.

Very similar results are found for analyses across US States (Matsusaka 1995, 2003). In a panel from 1970 to 1999, including all states except Alaska, the effect of the initiative right is estimated on public expenditure, as well as on revenue. The institutional variable (a dummy variable) captures any type of initiative, whether it is statutory or for a constitutional amendment. After controlling for the average income in the state, federal aid, population size and growth, the percentage of metropolitan population and whether it is a southern or western state, initiative states, on average, have lower expenditure, as well as lower revenue, than non-initiative states. States with the initiative spend $ 137 less per capita than states that do not provide the initiative, ceteris paribus. They also raise less revenue, $ 117 per capita compared to non-initiative states. Both effects are about 4 percent, compared to average expenditure and revenue respectively. The effects are, however, significantly different when the signature requirements to launch an initiative are taken into consideration. States with a 2 percent requirement are estimated to levy $ 342 less taxes and fees per capita than non-initiative states (for the modal signature requirement of 5 percent, revenue is 6 percent lower and expenditure is 5 percent lower) (Matsusaka 2003, chapter 3). These effects reflect robust results that can be assigned to the referendum process and not, for example, to the ideology of a state's electorate. Controlling for roll call voting of state senators, as a proxy for voters' conservatism, does not change the results in a substantive manner; if anything, the effects for the institutional variable increase (Matsusaka 2003, chapter 3).

Often these kinds of results are interpreted as clear evidence that direct democracy produces favorable outcomes for the citizens. However, they mainly provide clear evidence against a simple median voter world, in which representatives implement the preferred expenditure and revenue levels of the median voter, and referendums and initiatives would have no effect.[11] It could well be that low expenditure and revenue levels mainly serve some well-organized interests (e.g. rich people) that rely less on public services. Therefore, the efficiency in the provision of public goods has to be analyzed.

[11] In contrast, Pommerehne (1978) provides strong evidence that the median voter model performs better in Swiss towns with extended direct democratic rights than in representative democratic cities. While, for the former category containing 48 of the 110 towns in the data set, a statistically significant demand elasticity for aggregate public expenditure with respect to income is estimated in 1970, this is not the case for representative democracies. Thus public expenditure seems to match median voter's preferences better in direct democratic jurisdictions.

The cost efficient use of public money under different institutional settings can be directly studied for single publicly provided goods. In a careful study on waste collection, Pommerehne (1983, 1990) finds that this service is provided at the lowest cost in Swiss towns that have extended direct democratic participation rights and choose a private contractor. If the services are provided by the town instead of a private company, costs are about 10 percent higher. Efficiency losses are about 20 percent in purely representative democratic towns (compared to direct democratic ones). The average cost of waste collection is the highest in towns that rely on representative democratic decision-making only, as well as on publicly organized collection (about 30 percent higher than in the most efficient case).

A hint on the efficiency of public services comes from a study that relates fiscal referendums to economic performance in Swiss cantons (Feld and Savioz 1997). For the years 1984 until 1993, a neoclassical production function is estimated that includes the number of employees in all sectors, cantonal government expenditure for education including grants, as well as a proxy for capital based on investments for building and construction. The production function is then extended by a dummy variable that identifies cantons with extended direct democratic participation rights in financial issues at the local level. Total productivity – as measured by the cantonal GDP per capita – is estimated to be 5 percent higher in cantons with extended direct democracy, compared to cantons where these instruments are not available.

Based on an aggregate growth equation, Blomberg et al. (in press) analyze to what extent public capital (utilities, roads, education, etc.) is productively provided and whether there is a difference between initiative and non-initiative states in the United States. Data on gross state product, private and public capital, employment and population are for 48 US states between 1969 and 1986. They find that non-initiative states are only about 82 percent as effective as states with the initiative right in providing productive capital services, i.e. approximately 20 percent more government expenditure is wasted where citizens have no possibility to launch initiatives, compared to states where this institution is installed.

Interesting indirect evidence for the efficiency of referendums and initiatives offers a comparative study of land prices in 91 municipalities in Connecticut (Santerre 1986). Property prices are significantly higher in municipalities that provide direct democratic rights, compared to municipalities that do not.

In section 3, we outlined a politico-economic process in which politicians form a cartel against citizens. Previous results could, however, also be explained by imperfect information

that lead benign representatives to implementing inferior policies, which happens less frequently in cantons, municipalities and states with direct democratic rights. While we do not reject the notion of well-intentioned representatives, differences in the level of efficiency are hypothesized to be due to differences in legislative shirking. Corresponding evidence is provided by a study on corruption in US states in 1998 (Alt and Lassen 2003). The misuse of public office for private gains is measured based on a survey of state house reporters' perception of public corruption. It is found that, in addition to a number of control variables, there is a statistically significant effect of voter initiatives on perceived corruption. In initiative states, corruption is lower than in non-initiative states, and this effect is the larger, the lower the signature requirement to launch an initiative. The result is further qualified, as there is only a negative effect on corruption for direct initiatives (but not for indirect initiatives, that have to be approved by the legislator).

Beyond the efficient provision of public goods and services, the consequences of direct political participation rights can be studied for citizens' happiness. Individuals not only have preferences for material affluence, but also with regard to freedom, equal opportunities, social justice or solidarity. Whether, overall, individuals' preferences are better served in direct democracies than in representative democracies can be conjectured, but not deduced, based on the extensive previous evidence. In contrast, the analysis of people's reported subjective well-being (for an introductory survey, see Frey and Stutzer 2002c) can offer important evidence on whether people in direct democracies are happier.

In a study for Switzerland in the early 90s, the effect of direct democratic participation rights on people's reported satisfaction with life is empirically analyzed (Frey and Stutzer 2000, 2002b). Survey answers are from more than 6,000 interviews. The proxy measure for individual utility is based on the following question: 'How satisfied are you with your life as a whole these days?' People answered on a scale from one (=completely dissatisfied) to ten (=completely satisfied). The institutionalized rights of individual political participation are measured at the cantonal level, where there is considerable variation. A broad index is used that measures the different barriers preventing citizens from entering the political process via initiatives and referenda across cantons.[12] The main result is a sizeable positive correlation

[12] The index is based on the four main legal instruments for directly influencing the political process in Swiss cantons: (i) the initiative to change a canton's constitution, (ii) the initiative to change a canton's laws, (iii) the compulsory or optional referendum to prevent new law or the changing of law and (iv) the compulsory or optional referendum to prevent new state expenditure. Obstacles are measured in terms of (i) the number of signatures necessary to launch an instrument (absolute and relative to the number of citizens with the right to vote), (ii) the legally allowed time span in which to collect the signatures and (iii) the level of new expenditure

between the extent of direct democratic rights and people's reported subjective well-being (after taking important socio-demographic and socio-economic variables into account). An increase in the index of direct democracy by one standard deviation raises the proportion of people indicating very high satisfaction with life by approximately 3.4 percentage points (or about 0.14 unit on the 10-point scale). This effect is more than a third as large as the difference in life satisfaction between the lowest income category and the one reporting the highest life satisfaction. As the improvement affects everybody, the institutional factor capturing direct democracy is important in an aggregate sense.

2 Effects on the Process of Political Decision-Making

Direct democracy fundamentally changes the *process* of political decision-making. It is not only that politicians are more restricted to follow citizens' preferences, but the direct involvement of the people changes their motivation when they act as voters, taxpayers or fellow citizens (Frey 1997). This can explain systematic differences as to how well aware of political issues people are, whether they can build up a relationship based on trust to public authorities, and whether they have a preference for, and gain procedural utility from, direct democratic participation rights as such.

It is widely believed that well-informed citizens are an essential prerequisite for a well functioning and stable democracy. If citizens do not have sufficient information about the policies or candidates they vote for, they may be disappointed by the actual consequences of their decisions, which in turn can undermine the acceptance and legitimacy of democracy as a political system. However, collecting information in order to make an informed decision at the poll is a public good that citizens are only willing to make to a limited extent. On the one hand, it can be debated whether a direct democratic decision on a particular issue demands more or less information than the choice of a candidate, given the institutions that lower citizens' information costs.[13] On the other hand, it can be asked whether the level of voter information itself is dependent on the political system in which citizens live. We have theoretically argued in the last section that a political system which gives citizens more

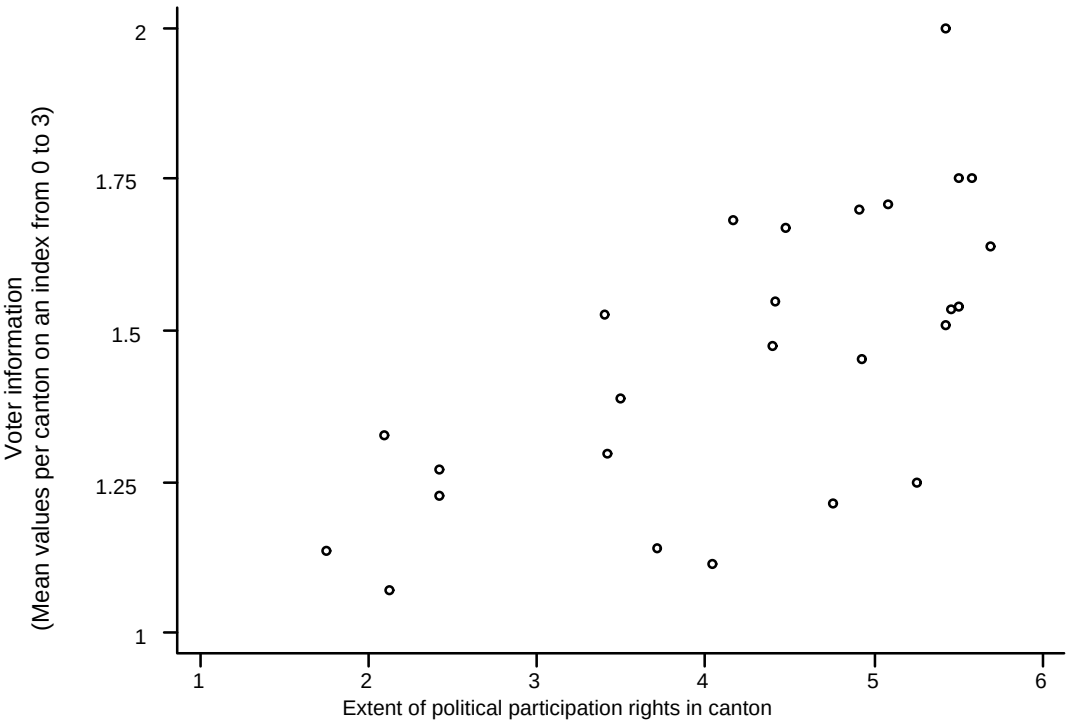
per head allowing a financial referendum. Each of these restrictions is evaluated on a six point scale: 'one' indicates a high obstacle, 'six' a low one (compulsory referenda are treated like referenda with the lowest possible obstacle). Average non-weighted ratings represent the measure used for direct democratic rights in Swiss cantons.

[13] Voters can use party ideologies to proxy for the consequences of their vote. They also pay attention to the previous performance of a government; they judge the reputation of candidates (Lupia and McCubbins 1998); they evaluate voting recommendations by interest groups (Schneider 1985, Lupia 1994); or they collect political information as a by-product of mass media consumption.

political participation possibilities will change the demand for political information, as well as the supply of it. An illustrative example is the introduction of the Maastricht Treaty in various European countries. In the countries where citizens had the right to vote on it (e.g. Denmark), politicians had to engage much more in explaining the Treaty to the citizens than in countries where no referendum took place (e.g. Germany). For the citizens the incentives to be informed were greater, as the intense discussions before the referendum partly transformed 'having a reasoned opinion' into a private good. Casual observation suggests that, as a consequence, information levels on the content of the Treaty were high among Danish citizens. While this example offers suggestive evidence that voters are better informed when they have a larger say in the political process, Benz and Stutzer (in press) provide more systematic evidence.

They study voter information in two different contexts. First, survey data from the Eurobarometer series is used to systematically investigate how referenda in several European countries affected citizens' information on the European Union (EU). The results indicate that people in countries with a referendum are in fact "objectively" better informed (according to 10 questions about the EU in the 1996 Eurobarometer), as well as feeling "subjectively" better informed about the EU after a referendum (Eurobarometer 1992 – 1997).

Second, they look at voter information in Switzerland. As a proxy measure for citizens' awareness of political issues, the number of correct answers to the following three questions is used: (i) "How many parties are in the Federal Council?" (ii) "Who was the president of the Federal Council in 1995?" And (iii) "How many signatures are required for an initiative?" Data is obtained from a large survey conducted among the Swiss electorate in 1996. Differences across cantons are explained by a measure for the extent of citizens' participation rights, as well as a number of socio-demographic control variables. In this study, the same broad index is used as in the work on direct democracy and life satisfaction in Switzerland (described in the last subsection). A raw correlation is presented in figure 1.



Source: Benz and Stutzer (in press) based on Selects 1996.

Figure 1: Correlation between Voter Information and Political Participation Rights in Swiss Cantons, 1995.

It shows that, on average, citizens living in more direct democratic jurisdictions are objectively better informed about politics. The result holds in a multiple regression framework and indicates that the effect is sizeable. For the full range of the institutional variable, an effect is estimated that is comparable to an increase in education from mere compulsory education to having attended a college providing a diploma at the end.

The study by Benz and Stutzer (in press) also indicates that political participation possibilities raise discussion intensity which, in the literature, is seen as an important transmission channel that leads to higher voter information.

People's satisfaction with the provision of public services in direct democracies is likely to influence their behavior as voters collecting information or as taxpayers. However, the process of decision-making may also change people's trust in authorities (this can be seen as a psychological contract, Feld and Frey 2002) and their motivation to obey the law. It has, for example, been shown that, with more extensive democratic participation rights, people have higher tax morale and evade taxes less. Based on survey data from the World Values Study,

Torgler (2003) finds that, in more direct democratic Swiss cantons, citizens are more likely to agree with the statement that "cheating on taxes if you have a chance" is never justifiable. Pommerehne and Weck-Hannemann (1996) directly study tax evasion in Swiss cantons and find that it is substantially lower where citizens have a direct impact on budgetary policy.

Citizens' experience with direct democracy has further been found to form positive attitudes about their abilities to influence what government does (Bowler and Donovan 2002). Thus, direct democracy strengthens citizens' feelings of political efficacy.

The evidence mentioned in this subsection leads to the hypothesis that citizens might benefit from the process of direct democracy, beyond its political outcomes.[14] Frey and Stutzer (2002a) extend the study mentioned above on direct democracy and life satisfaction to address this hypothesis. In order to disentangle outcome effects and procedural effects that make for the positive correlation between participation rights and reported subjective well-being, foreigners are used as a control group. Foreigners benefit from favorable outcomes, but are excluded from procedural benefits. In fact, it is found that the positive effect of direct democratic participation rights is about three times as large for citizens as it is for foreigners.

3 Effects on Government Centralization

The relation between direct democracy and federalism is not restricted to the common goal of a better fulfillment of citizens' preferences. Rather, the two institutions are mutually dependent. In particular, the citizens are interested in a working federal competition between jurisdictions. In order for the citizens to defend themselves against politicians' interests in the case of centralization, they need strong political rights. Blankart (2000) explains the stronger centralization in Germany, compared to Switzerland, after World War II by the missing direct democratic instruments at the federal level in Germany. He documents the centralization process by comparing Germany's Basic Law in 1949 with the one in 1999. With regard to taxation, for example, tax bases in 1949 were allocated exclusively to each of the three levels of government. In 1999, almost all the relevant taxes are under federal legislation, and separation of taxes is replaced by revenue sharing. This is reflected in a percentage of centralized taxes of 93.0 percent in 1995 compared to 61.2 percent in 1950. While, in Switzerland, a parliamentary system with two chambers exists that is similar to the one in Germany, there is a significant difference in the process of constitutional change. In the case

[14] For a general account on procedural utility, see Frey, Benz and Stutzer (in press).

of tax issues, for example, “since 1917, the citizens have been called no less than 23 times to vote on federal income and turnover taxes. Forty percent of the proposals have been declined in the first round” (Blankart 2000, p. 32). Accordingly, centralized taxes account for 47.4 percent in Switzerland in 1995, i.e. a much smaller proportion than in Germany (although both countries had similar levels in 1950: 60.1 percent in Switzerland and 61.2 percent in Germany).

The effect of direct democracy on government decentralization is also empirically documented for the lower levels of government. In an extension of the work on spending across US states from 1970-1999, Matsusaka (2003, chapter 4) studies how the initiative changes the division between state and local expenditure. While initiative states, on average, spend 13 percent less per capita at the state level than non-initiative states, they spend 4 percent more at the local level. The result is more decentralized spending patterns in states that adopt the initiative. Similar results are obtained for Swiss cantons in a panel over the period 1980 to 1998 (Schaltegger and Feld 2001). Rather than expenditure per capita, the proportion of cantonal expenditure in percent of total state and local spending is related to the development of the financial referendum. It is found that cantons with fewer obstacles to launching a budget referendum are less centralized with regard to expenditure, as well as revenue. The effect on expenditure is to a large extent due to more decentralized spending on education in more direct democratic cantons.

Direct democracy is not only affecting the process of fiscal centralization, but also spatial centralization. Martin and Wagner (1978) find that there are fewer municipal incorporations in US states, where direct democratic processes involve residents in incorporation decisions.

V Arguments against and Counter-Arguments for Referendums

Systematic evidence has been accumulated that direct democracy is a process and provides outcomes that are more in line with citizens’ preferences than are a purely representative democratic process and its outcomes. Nevertheless, referendums can hardly be considered a popular institution in democracies, not to speak of authoritarian systems. Not surprisingly, the members of the ‘classe politique’ are quick to raise many objections, because they realize that referendums constitute a threat to their position, by limiting their rent seeking potential. Many intellectuals – even those who do not share in the spoils of the politicians’ cartel, and those opposing the political establishment – also reject referendums, with a variety of arguments. The basic reason is that they consider themselves to be better judges of what is

good for the people than the citizens themselves. They tend to see themselves in the role of 'philosopher-king', determining what 'social welfare' is. Consequently, they prefer decision-making systems where they have a larger say. Thus, they oppose referendums for the same reasons as they oppose the market.

The following 10 arguments are often raised against the institution of the referendum. In addition to the empirical evidence in the last section, we respond to these claims with additional arguments.

1 Citizens Fail to Understand the Complex Issues

It is argued that the average voter is not well informed nor well educated, so that he or she cannot reasonably be allowed to determine political issues; this is the task of a specialized group, the politicians, who represent the voters.

This view can be refuted for various reasons:

First of all, it is inconsistent to trust citizens to be able to choose between parties and politicians in elections, but not between issues in referendums. If anything, the former choice is more difficult, as one must form expectations on how politicians will decide on future issues.

Secondly, the voters need not have any detailed knowledge about the issues at stake. Rather, they only need to grasp the main questions involved. These main questions are not of a technical nature, but involve decisions of principle, which a voter is as qualified to make as a politician.

Thirdly, the general intelligence and qualifications of politicians should not be overrated. They can hardly be considered to be consistently superior to other people. Moreover, the average Member of Parliament has little choice; he or she is normally forced to vote according to what the party superiors and a few specialists have decided in advance.

Fourthly, a number of institutions have emerged in direct democracies, helping citizens to reach reasoned decisions. The parties and interest groups give their recommendations concerning decision-making, which the citizens may take into consideration. Even more importantly, the discourse in the pre-referendum stage brings out the main aspects and puts them in perspective.

Finally, as shown in the last section, citizens' information on political issues has to be taken endogenously. Direct democracy provides incentives for the citizens to privately collect information, and for the political actors and the media to provide it.

2 Citizens Have Little Interest in Participating

Participation in initiatives and referendums is often quite low. Sometimes only a few eligible voters go to the polls. It can be concluded from that that citizens are not interested in the issues to be decided on.

This is, however, a wrong conclusion for three reasons:

Firstly, the voting participation is not always so low. When the citizens feel that the issue is important, the voting participation rises considerably. Switzerland provides a good example of this variability: while average participation for all issues at the federal level is around 45 percent, it can be as low as 25 percent. But sometimes it goes up to 80 percent and more, as was the case in 1992, when the Swiss citizens had to decide whether they wanted to join the European Economic Area or not.

Secondly, high voting participation is not necessarily a good thing. Citizens are perfectly rational not to participate when they find the issues unimportant or when they are undecided. It could even be argued that it is socially beneficial that citizens do not participate under these conditions, but rather leave the decision to those for whom the issue really matters. Voting participation then reflects citizens' preference intensities, which makes the vote socially more valuable.

Thirdly, it would be naive to think that *freely chosen* voting participation in parliaments is very different from how citizens behave with respect to popular referendums. Today's Members of Parliament are highly specialized and seriously consider the pros and cons of only a few issues. In the case of all other issues, they (have to) follow the dictate of the party leadership, i.e. they do not cast a voluntary vote. This is reflected in the often extremely low participation in a parliamentary session. The Members of Parliament have to be herded together from the lobby or their offices to cast the dictated vote.

3 Citizens Are Easy to Manipulate

Financially strong parties and pressure groups are better able to start initiatives and to engage in referendum propaganda than are financially poor and non-organized interests. This cannot

be denied. However, the perspective is wrong because it takes an absolute stance: it is *always* true that the rich and well-organized groups wield more power. The crucial question is whether they have *more* or *less* power in a direct than in a representative democracy. It is well known that well-organized and financed pressure groups exert considerable power over the politicians sitting in parliament and in government. It may even be argued that it is cheaper to influence the small number of legislators and government politicians than the total electorate.

4 Citizens Are Prone to Decide Emotionally

Voters are often supposed to be unduly influenced by emotional considerations. Again, this charge must be considered in a comparative perspective. There is little reason to believe that politicians are less subject to emotions. After all, parliaments are known to have highly emotional debates, sometimes even erupting into fist fighting. For that reason, many parliaments have formal procedures to debate a proposal two or even three times, with considerable time elapsing in between. The same holds for popular referendums. Before taking the vote, there must be time for intensive discussion, which allows the various sides of a question to be brought up. This strongly increases the chances of a decision dominated by rational aspects.[15]

5 There Are too Many Referendums Confusing the Voters

When the citizens have to simultaneously decide on a great many issues (in California, for instance, the voters often have to deal with 20 or even more propositions), they focus on a few clear issues. The decisions on all other issues are then haphazard and lack rationality.

This is indeed a situation to be avoided. However, the number of referendums put to the vote can be steered by the number of weekends with ballots over the year and by the number of signatures required for an initiative or optional referendum. If the number of issues to be decided on gets too large, the number of signatures required can be raised. Such a decision

[15] In July 2002, the German Bundestag debated (and rejected) a proposal to introduce elements of direct democracy at the federal level. For fear of emotional decisions, the introduction of the death penalty was excluded right from the very beginning as a subject for a referendum. This overlooks that an extensive discussion among the citizens, and with experts and politicians, brings to the fore all sides of the issue. A purely emotional decision is unlikely to occur. Moreover, many countries using the death penalty follow the representative principle (the United States being an example), while the country with most extensive direct democracy (Switzerland) prohibits the death sentence.

should be taken by a constitutional referendum to prevent the 'classe politique' from fixing such a high number of signatures that referendums become improbable.

6 Political Leadership Is Impossible

Politicians are sometimes supposed to make unpopular decisions. An example would be a restrictive fiscal policy, when the budget deficit is getting too high or when inflation soars. Such policy pays off only over the medium or even long term. It is argued that such unpopular policies would be impossible in a direct democracy.

This conclusion however does not necessarily hold. In a direct democracy, the politicians are forced to explain their policies to the citizens. If they can give good reasons why they propose to undertake such a seemingly unpopular policy, the citizens will not oppose it. There are many examples in Switzerland where the citizens are prepared to support policies burdening them, provided the politicians make an effort to explain why the sacrifice is necessary to improve the situation long term. Empirical evidence presented in the last section, for example, shows that fiscal stability is higher in Swiss cantons and US states with more extensive direct democratic participation rights.

7 Referendums Are Inadequate for Major Issues

As the voters are taken to be poorly educated and ill informed, subject to manipulation and to emotional decisions, it is often argued that referendums should only be used for small and unimportant issues. In contrast, issues of great consequence – such as changes in the constitution – should be left to the professional politicians.

The opposite makes more sense. Major issues can be reduced to the essential content. Evaluation is then not a matter of (scientific) expertise but of value judgments. Following methodological individualism, only the citizens may be the final judges when it comes to preferences, and a substitution by representatives is, at most, a second best solution. As the politicians have a systematic incentive to deviate from the voters' preferences, a substitution leads to biased outcomes.

8 Referendums Hinder Progress

Asking the population to make a decision is often rejected because it is argued that the 'ordinary citizens' do not like changes, and that they prevent the adoption of 'bold, new ideas'.

It may well be true that many new propositions are rejected in referendums, but this does not mean that this constitutes a disadvantage. The fact that proposals contain new ideas is no proof of their quality. Indeed, the citizens are right in rejecting them when they are in favor of the 'classe politique'. The concept of 'bold, new' solutions is not rarely the result of technocratic thinking and of a planning mentality. They strengthen the politicians' and bureaucrats' position, but need not necessarily be in the voters' interests.

Referendums are a well-proven procedure to break deadlocks in societal decision-making and, in this sense, are progressive. There are cases in which an issue is difficult to resolve in parliament and government, and where a referendum helps to clear the issue. An example is the demands by regions for more independence. These demands are often accompanied by considerable violence and bloodshed. The Basque country is just one of many cases. In a direct democracy, such heated issues may be brought to a resolution acceptable to a large majority. In Switzerland, for instance, the secession of the Jura from the canton Bern was achieved by undertaking a number of referendums. While some minor violence took place, the issue was settled with much less strife and bloodshed than normally occurs in representative democracies, let alone autocratic systems.

9 Referendums Destroy Civil Rights

One of the fundamental problems of democracy is the "tyranny of the majority". This danger is seen to be particularly acute in the case of referendums, where the will of the majority is unrestricted. As a result, civil rights may be thwarted. But this is not necessarily the case. Most importantly, if there are economic, social and political cross cleavages, no group of citizens is *always* in the majority, and therefore will be careful not to antagonize other social groups. Empirically, some evidence for the suppression of civil rights has been found in local and state ballots in the United States (Gamble 1997), but there is also contrary evidence for the USA and Switzerland (Cronin 1989, Frey and Goette 1998). In a study on 51 California ballot propositions, the notion of cross cleavages is supported. Hajnal et al. (2002) find that black, Latino and Asian American voters are only about one percent less likely than white voters to be in the winning majority of the vote.

10 Referendums Are Expensive

The last argument against referendums is the alleged high cost of undertaking them from an administrative point of view. It is argued that parliamentary decisions are much less expensive and should therefore be favored.

There are two reasons why this reasoning is fallacious:

Firstly, referendums are not expensive compared to the large cost of running a professional parliament with its accompanying party system (see e.g. von Arnim 1988 for Germany). As in a direct democracy, the final say is with the citizens, and less money needs to be spent on parliament and the parties. Moreover, the administrative costs of referendums are not high, because several propositions can be dealt with in one weekend, and citizens can be asked to actively participate in organizing the vote and counting the votes. While the citizens drafted suffer some opportunity cost, such a participation has the advantage of getting them more directly involved in governing their state, which tends to raise their sense for citizens' duties.

Secondly, the administrative cost of running referendums is immaterial compared to their major advantage, namely to significantly reduce the deviation of political decisions from individual preferences.

VI Introducing Direct Democratic Elements

The development of a constitution must be based on the *rule of law.* This means that a crucial part of a constitution is making provision for how to change it. The procedures must not be left to whatever body is trying to capture them. Rather, the procedures for changing the constitution must give the *citizens well-defined rights to participate in that process.* In the case of the European Union, a straightforward way would be to require a double simple majority, both among all the voters in the European Union *and* among the member states[16]. It is, of course, also possible to require qualified majorities, either among the voters or member states, or both. An essential requirement is that the citizens' participation is fully guaranteed

[16] This corresponds to the rules in the Swiss Constitution requiring that constitutional changes must be approved by the simple majority of the Swiss voters and the Swiss cantons. This has resulted in a great number of constitutional changes over the course of time and has contributed to ground rules adapting to evolving requirements. The many changes are partly due to the fact that, at the federal level, popular initiatives are possible only for changes in the constitution but not for changes in laws. Therefore the constitution became overburdened with issues of lesser importance better suited for the level of laws. Recently, this provision has been changed and it is now possible to undertake general popular initiatives that leave the decision to the legislator whether the initiative is formulated as a constitutional amendment or as federal law.

and, in particular, that they (and not the federal government) have the power to assign legislative competence to bodies and state levels, the so-called competence competence. This includes the right to start constitutional changes via popular initiatives, with the courts and parliament having only minor, and clearly delineated, possibilities of intervention with respect to the issues proposed. The right must also extend to accepting or rejecting constitutional changes suggested by the parliament.[17]

1 Precondition in Society

There are many politico-economic obstacles to introducing political institutions that restrict the competence and influence of established interests. However, in societal crisis, or after a revolution (like in the former communist countries in Europe), there is a window of opportunity for institutional change and new basic rules for society. In order to successfully introduce direct democracy during these periods of time, a civic culture is necessary that facilitates the use of referendums and initiatives. It is impossible to successfully run directly democratic institutions where there is no adequate basis in society. One condition under which direct democracy[18] works well is when there are strong cross-cutting cleavages (e.g. with respect to per capita income, religion, and culture or language). This guarantees that it is not always the same group of persons that finds itself in the minority and therefore feels exploited. As has also been emphasized, the citizens must have sufficient trust in the politicians that they actualize the referendum decision, and the politicians must trust that the citizens take reasonable decisions when voting on issues. This trust must develop over time and cannot simply be instilled from outside. Therefore, the "grand" solution of jumping from a representative democracy straight into a fully developed direct democracy is both unrealistic and undesirable. Rather, direct participation rights for the citizens should be gradually introduced[19], so that a *learning process* can take place between the citizens, parliament and government. The use of initiatives and referendums by the citizens is, however, also a major factor in raising civic culture, especially in the form of the trust

[17] We are, of course, not the only ones who are proposing elements of direct democracy for the new European Constitution. See most recently e.g. Feld and Kirchgässner (2003), Mueller (2002, 2003) or Hug (2002, chapter 7) for a survey on previous proposals.

[18] This condition is not only specific to direct democracies, but also holds for all types of democracy.

[19] To gradually introduce direct democratic elements in a political system dominated by the government may, however, induce the risk that the government on purpose undermines its functioning in order to "demonstrate" to the citizens that it cannot work.

citizens have in their government. Direct democracy thus helps to create the necessary conditions for its own smooth functioning, provided the learning effect indeed takes place.

2 Gradual Introduction

There are several ways in which directly democratic rights can be gradually introduced. Most of them restrict the application of direct democratic decision-making and constitute a considerable danger for direct democracy. Most importantly, the restrictions introduced may stay for good. In the case of several of the restrictions, this would amount to destroying the whole idea of citizens' participation in political decision-making. The institutions of direct democracy cannot develop their strengths. The outcome of politics would not correspond more closely to citizens' preferences than under a traditional representative system. Moreover, the citizens are unable to learn the special features of direct democracy properly. Five approaches for a gradual introduction are briefly discussed.

Size of majority

Passing a proposal in a popular vote may require a *super majority*, for instance two thirds of the participants. Alternatively, one may require a simple majority of the *whole* electorate, including those abstaining. Such quorums exist in Italy and many Transition Economies. In several of them, referendums received a majority of the votse cast, but not of the electorate. In Italy, these quorums led to the perverse situation that opponents of a referendum called people to abstain from voting and were thus undermining the institution of direct democracy as such.

A strong restriction on popular initiatives and optional referendums is the number of signatures required. A balance between requiring a low number (and therefore having many referendums) and a high number (and therewith excluding citizens) is needed.

Issue domain

Some questions can be excluded from direct voting or can be protected with the use of qualified majorities, for fear of "irresponsible" or "uncontrollable" outcomes. One could restrict the domain in the following way:

- Basic parts of the *constitution,* such as those referring to human, political and civil rights, can be excluded.[20]
- Supposedly *sensitive* issues may be removed from citizens' voting. This may refer to problems relating to particular minorities, ethnic or religious groups, but also, for example, to the death penalty (as in Germany).
- Issues that are thought to be beyond the *competence* of the citizens. This may, for instance, be assumed to hold for economic problems, such as taxation. (In Germany, the recent proposal to introduce national referendums excluded tax issues from the very beginning).

These restrictions are probably most dangerous for a successful application of direct democratic decision-making, as they undermine the institution from the beginning. If only very unimportant issues are put to the vote, or if the number of signatures required for an initiative or optional referendum is far too high, the citizens cannot experience the advantages of direct democracy. On the other hand, the politicians can always claim that they gave direct democracy a chance, but that it did not work. In the case of tight restrictions, a vicious circle may develop. The way popular participation is introduced leads to unsatisfactory results and experiences, providing the opponents of direct democracy (in particular the politicians in power) with a good reason to introduce even more severe restrictions. Of course, under these circumstances, direct democracy cannot work.

Decision level

Direct democratic elements can be restricted by initially granting them only on a particular level of the state.

One possibility is to start at the *local level*, giving citizens the right to launch initiatives and vote in referendums in political communes. This allows the citizens to benefit from everyday or impacted information in order to form a reasoned opinion. Moreover, the issues are often of immediate relevance to the population. But this procedure only makes sense if the political communes have a sufficient amount of autonomy. Preferably, they should be able to decide both on taxes and public expenditures. Recently, in the case of EU member states, there have

[20] Such restriction may make sense, also in fully developed direct democracies, but it should be noted that this is not the case in Switzerland. It should immediately be added that the Swiss voters have had no inclination to cheat where such basic rights are concerned.

been introduced quite extensive referendum rights in some of the German Laender (in particular in Bavaria and the New Laender, see e.g. Luthardt und Waschkuhn 1997).[21]

Another possibility is to start at the *national level*, when major issues are at stake. This has indeed happened in several European countries, where the decisions of whether to join the European Union or to join one of the several treaties have been relegated to the citizens as a whole. As these decisions are of crucial importance, the citizens are well aware of their relevance and will certainly be inclined to participate in the vote.

The limitations on the levels at which elements of direct democracy are to be introduced make most sense. The rights for initiatives and referendums should first be introduced at the local level, and at the same time at the national level, and perhaps only later at the regional level. At the local level, the citizens tend to be well informed about the issues in question, while at the national level the decisions to be taken are of obvious importance. These are indeed the levels where direct democratic elements have been introduced in several transition economies, though only to a limited extent (Gross and Kaufmann 2002).

Time

The referendum process may be shaped by requiring a sufficient amount of time to pass between the start of an initiative or referendum process, the actual vote and the resulting decision becoming effective. This is a move towards the constitutional idea (e.g. Mueller 1996) of putting people behind the veil of uncertainty, and therefore inducing them to take a more "objective" position.

A more innovative idea is to proceed, as (many) parliaments do, namely to have a first, second and sometimes even a third reading of a law. In a direct democracy, one could first have an *informative* vote, and after sufficient time has elapsed to allow for a discussion of the outcome, a *decisive* vote could be cast.

Co-determination

The citizens' decision may only become effective if it is supported by a corresponding vote in the parliament (and perhaps even in the two houses). This would, however, reduce referendums to a plebiscite. Another possibility would be to accord a veto right either to the citizens or to the parliament. One may also consider a double majority in the form of the popular vote and votes in the regions (cantons or states). This latter requirement applies, for

[21] The referendum experience in other European countries is described in Gallagher and Uleri (1996).

instance, in Switzerland, where both the majority of all the Swiss voters, and the majority of the cantons, must approve a constitutional referendum.

VII Conclusions

The crucial question is *who governs* the step by step introduction of directly democratic instruments. Ideally, it would be a constitutional assembly. Its members are not directly involved in current politics, so they take a more objective stance. They do not have to fear a reduction in their own power if direct democracy is introduced in the future. In reality, however, a considerable number of the members are likely to belong to the "classe politique". They either served in political decision making in the past, currently do so, or hope to do so in the future. In all cases, they tend to oppose popular participation in political decision-making.

For these reasons the active involvement of the citizens in amending the constitution, as well as in more general political decision making, cannot be substituted by resorting to representation. Giving citizens rights to directly participate in political decision making can be based on two different types of reasoning. The first takes such political rights as a *value as such*, which must not be legitimized any further. Direct democracy is then taken as the next logical major step from the introduction of democracy in the classical Athenian city-state and its broadening over whole nations in the wake of the French revolution.

The second type of reasoning considers the favorable consequences of giving the citizens the right to directly participate in political decision making. This paper identifies two sources of benefits:

(a) *Procedural Utility.* Direct participation rights raises citizens' utility, quite independent of the outcomes reached. Empirical evidence suggests that citizens' subjective reported well-being (ceteris paribus) is the higher, the more extensive their participation rights are.

(b) *Outcome Utility.* When the citizens are allowed to directly participate in political decisions, the policies undertaken yield more favorable results for them. Extensive empirical evidence for Switzerland and the United States (the leaders in direct democracy) suggests that more extensive participation rights via popular initiatives and referenda lead to a lower tax burden and lower public expenditures; to higher

efficiency and productivity in the provision of public goods and services; and to higher overall satisfaction (happiness) of the population.

The following arguments are often raised against direct democratic institutions: the citizens fail to understand the complex issues; they have little interest in participating; they are easy to manipulate; they tend to decide emotionally; the large number of referenda lead to confusion; leadership is made impossible; direct democracy is inadequate for major issues, hinders progress, destroys civil rights and is very expensive. This paper argues that these arguments should be rejected, in particular if a comparative stance is taken, i.e. if decision making in direct democracy is contrasted with that in representative democracy.

Elements of direct democracy can be introduced gradually and there are many possibilities for varying the required majority, the issue domain, the time, and the extent of codetermination of citizens and parliament, as well as whether to start at the local, national or supra-national level.

The paper concludes that increasing the direct democratic political participation rights of the citizens is an important step for a future democracy. It is, in particular, a crucial requirement for a future European Constitution committed to democracy.

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