How International Institutions Evolve

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How International Institutions Evolve
Anu Bradford*

Abstract

Economic theory suggests that international institutions cannot simultaneously widen and deepen. There is an inevitable trade-off between the benefits of size and the costs of heterogeneity. Consequently, institutions ought to be either small and deep or, alternatively, large and shallow. Yet in reality, we observe that international institutions embrace new members while concurrently pursuing deeper cooperation. This Article seeks to explain how institutions evolve over time in light of this size/heterogeneity trade-off. It examines the strategic responses of members of institutions to heterogeneity costs and identifies two distinct yet related strategies that allow states to pursue gains from cooperation while suppressing heterogeneity costs: states seek to reduce the heterogeneity costs by either overriding the preferences of prospective or incumbent member states (consent tailoring) or, alternatively, by pursuing the strategy of accommodation through institutional adjustment (institutional tailoring). The chosen strategy is determined by the relative bargaining power of the members of the institution. Explaining the likely occurrence and expected sequence of these two strategies paves the way for a descriptive theory of institutional change. At the same time, this analytical framework explains how and why institutions have evolved to be both wider and deeper over time, contrary to the predictions of many economists.

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I. INTRODUCTION

The Economic Foundations of International Law by Eric Posner and Alan Sykes represents a significant contribution to an area of law that, for a long time, insulated itself from the insights of law and economics. While several other fields of law embraced economic analysis decades ago, the rational choice approach to international law has been slower to emerge. After the publication of this book, however, it is difficult for anyone to deny the analytical value that economics offers in enhancing our ability to understand how international law operates.

Among its many important contributions, the book offers an insightful and nuanced overview of the law and economics of international institutions. The authors discuss the conditions under which states delegate authority to international institutions and explain why such delegation is rare. Different values and interests across states make it challenging to settle on the goals and rules of an international institution. For the same reason, states are unable to agree on when and how to effectively discipline the institution. These high agency costs lead states to steer away from extensive delegation in most instances, explaining the weakness of many international institutions that currently exist.

Despite these challenges, international institutions have proliferated across different areas of international law. These institutions vary enormously in their size and scope. Most institutions are set up to produce and preserve public goods such as free trade, national security, or environmental sustainability. Increasing the number of participants in these institutions allows states to take advantage of economies of scale, hence expanding the availability and sharing the costs of these public goods. However, the pursuit of joint gains takes place within constraints, the most important of which are heterogeneity costs. States hold divergent views as to the precise sectors of the economy that ought to be liberalized, the gravity of various security threats, and the appropriate ways to respond to them, as well as the fair and efficient allocation of responsibilities for environmental protection. An increased membership thus contributes not only to greater gains but also to greater costs as the public goods can no longer be tailored to satisfy the individual preferences of the diverse membership. The optimal size of an institution is determined by this size/heterogeneity trade-off. Embracing a transaction-costs approach to international institutions, Posner and

2 See id. at 79–112.
Sykes acknowledge this trade-off and treat it as a central explanatory variable to the institutional variation we observe.

This Article builds on this key insight. It examines how international institutions respond to the growing preference heterogeneity across their membership that risks undermining the ability of these institutions to deliver public goods. Economic theory suggests that international institutions cannot simultaneously widen and deepen. There is an inevitable trade-off between the benefits of size and the costs of heterogeneity. Consequently, institutions ought to be either small and deep or, alternatively, large and shallow. Yet in reality, we observe that international institutions embrace new members while concurrently pursuing deeper cooperation.

This Article seeks to explain how institutions evolve over time in light of the size/heterogeneity trade-off. It examines the strategic responses of members of institutions to heterogeneity costs and identifies a number of bargaining techniques and institutional design mechanisms that follow from the presence of this trade-off. This inquiry paves the way for a descriptive theory of institutional change. At the same time, this analytical framework also enhances our understanding of how and why institutions have evolved to be both wider and deeper over time, contrary to the predictions of some economists.

Economic analysis of international institutions assumes that states seek to maximize gains from cooperation while minimizing the costs on their sovereignty. This Article identifies two distinct yet related strategies that allow states to pursue gains from cooperation while suppressing heterogeneity costs: consent tailoring and institutional tailoring. States seek to reduce the heterogeneity costs by either overriding the preferences of prospective or incumbent member states (consent tailoring) or, alternatively, by pursuing the strategy of accommodation through institutional adjustment (institutional tailoring). The chosen strategy is determined by the relative bargaining power of the members of the institution.

To simplify the analysis, we can distinguish between incumbent and prospective members in an international institution. We can further divide the states into proponents of more extensive institutional cooperation (cooperative members) and opponents thereof (uncooperative members). The cooperative members seek to deepen the existing level of cooperation among parties by increasing delegation. This may entail expanding the institution into new policy areas or assuming deeper substantive commitments within the existing policy areas. The uncooperative members seek to halt the evolution of the institution

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4 Id. By widening, we typically refer to the broadening of the membership to include new states. By deepening, we typically refer to expanding the substantive scope of the institution to embrace new areas of cooperation.
into new issue areas or towards deeper commitments. Thus, the description of states as “cooperative” or “uncooperative” members here only refers to their willingness to cooperate in matters that would further deepen the substantive scope of the institution, which is central to our understanding of how institutions evolve.

When cooperative members have leverage over uncooperative members, the former typically resort to consent tailoring. This strategy is most discernible at the stage when a prospective member state is proactively seeking admission to an institution and can therefore be subjected to various entry conditions. These accessions conditions ensure that new members subscribe to the policies favored by existing members. In other words, the new members' preferences can be overridden and their consent tailored to conform to the preferences of existing members. Cooperative states have less leverage over uncooperative incumbents as opposed to uncooperative prospective member states. Accordingly, cooperative members may be required to offer transfer payments in exchange for the existing uncooperative members’ consent and cooperation. This strategy may still allow cooperative members to extract the consent of the initially uncooperative members—but at a price. In addition to accession conditions and transfer payments, qualitative majority voting rules can also be seen as a mode of consent tailoring in that they force the minority to subscribe to the preferences of the majority. Finally, at times cooperative states are able to harness courts to suppress the preferences of the uncooperative members and thus enhance the degree of delegation to their preferred equilibrium.

Sometimes consent tailoring is not available. In such instances cooperative members resort to institutional tailoring to contain heterogeneity costs. Institutional tailoring can consist of accommodating uncooperative members by agreeing to differentiated obligations or, when necessary, allowing uncooperative member states to altogether opt out of additional cooperation in order to still be able to deepen delegation among a smaller group of cooperative member states. Here, the key difference to consent tailoring is that uncooperative members have the leverage—they make the cooperative members adjust as opposed to the other way around.

Often, consent tailoring and institutional tailoring take place in sequence. Institutions are conventionally first formed among a small group of like-minded states, focusing on issues where those states’ preferences are aligned. Thus, institutions often start off as more homogeneous without any discernible size/heterogeneity trade-off that would undermine cooperation. Divergences begin to emerge as states seek to deepen or widen the institution. Initial widening or deepening can often be accomplished through consent tailoring. States are screened and, if needed, homogenized at the accession stage. If necessary, states are also likely to be able to identify transfer payments and thereby successfully tailor their members’ consent, albeit at some cost. But as
heterogeneity further increases—either as a result of widening or deepening or, as often today, as a result of the simultaneous pursuit of both—states have to identify new ways to suppress heterogeneity and preserve the relevance and effectiveness of the institution.

After a certain threshold of diversity is reached within an institution, institutional tailoring becomes inevitable. An inquiry into evolving dynamics of some key institutions, such as the WTO, the EU, and NATO, reinforces the conclusion that after this threshold is met, consent tailoring alone is rarely feasible. At this point, universal obligations give way to differentiated responsibilities. It is no longer viable to expect all members of the institution to subscribe to all decisions taken within the institution. Given the depth of divergence in preferences, such a strategy would lead to lowest common denominator agreements that would erode the credibility and effectiveness of the institution. Ultimately, the only way to preserve the relevance of the institutions and capture optimal gains from cooperation is to allow for different groups within an institution to pursue deeper integration and hence allow “clubs within clubs” or “treaties within treaties” to emerge.

Examples of differentiated integration include the creation of the Eurozone among select members of the EU or the adoption of the Schengen Agreement that removes internal border controls within a subset of EU members along with some nonmember European states. The Agreement on Government Procurement in the WTO offers a further example of institutional tailoring where only some members of the WTO pursue deeper cooperation among themselves. NATO’s recent missions reveal a similar pattern: a small number of allies carry out military operations selectively without the involvement of the entire membership. These arrangements allow for “coalitions of the willing” to proceed with further integration and new commitments, preventing the uncooperative members from holding up efforts to deepen cooperation by exercising veto rights and engaging in other blocking tactics.

While the primary goal of this Article is to offer a rational explanation for institutional evolution, the discussion also has normative implications. Consent tailoring and institutional tailoring provide that the two core principles of international law—consent and universality—cannot be simultaneously


accomplished as institutions evolve. Consent tailoring compromises the former whereas institutional tailoring compromises the latter. The continuing adherence to both state consent and universality inevitably leads to weak institutions where a large number of states codify the lowest common denominator among them. Such institutions exist but rarely influence state behavior. To retain their effectiveness—and, consequently, their relevance—institutions must move away from one or the other. This descriptive observation leads to a normative conclusion, suggesting that effective international institutions increasingly rest on foundations that lack the support of one of the two core principles underlying conventional accounts of international law.

Finally, by arguing that institutional tailoring allows states to optimize between size and heterogeneity, this Article provides a normative defense for differentiated integration. The idea of differentiated integration is not new. The trend towards differentiated integration has been recognized in scholarly and political debates alike. However, conventionally, this development has been viewed as a suboptimal, interim, or second-best solution. Plurilateral agreements are expected to evolve into multilateral agreements and arrangements like the Eurozone to embrace new members over time. In contrast to these views, this Article suggests that all clubs within clubs should not necessarily evolve to ultimately comprise all members of the institution. Instead, if one takes the cost/heterogeneity trade-off seriously, differentiated integration can be a desirable end goal of international cooperation in that it allows states to optimize on this trade-off by maximizing the net gains from cooperation in all instances.

This Article proceeds as follows. Section II describes the international political environment within which international institutions operate today. Section III discusses how institutions evolve in this environment. It identifies the dual strategies of consent tailoring and institutional tailoring that states employ to manage the heterogeneity costs in their pursuit of gains from institutionalized cooperation and predicts their relative prevalence and expected sequence. Section IV touches on some limits of these strategies, and sketches some extensions to this analytical framework. The conclusion, found in Section V, highlights the key normative implications that follow from the discussion.

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8 For discussion, see generally Desmond Dinan, Fifty Years of European Community Law: A Remarkable Achievement, 31 FORDHAM INT’L L. J. 1118 (2008).
II. BETWEEN MULTILATERALISM AND UNILATERALISM

Pressing collective action problems—ranging from nuclear nonproliferation to climate change and from terrorism to new forms of protectionism—are increasingly complex and global today. Domestic economies are intertwined, requiring a coordinated response during economic downturns and times of financial crisis. Efforts to protect the environment, curtail protectionism, and fight terrorism similarly require sustained international cooperation to be effective. The nature of these challenges may be distinct, but they all share the common feature of being transnational and beyond any single state’s ability to solve alone.

At the same time, the distribution of power among states is more dispersed than ever. The number of influential states whose preferences shape outcomes has grown. The world lacks any single hegemon that could independently provide global public goods. The US, while still the most powerful nation, has seen its brief moment of hegemony following the collapse of the Soviet Union give way to a multipolar world. The problems underlying the Eurozone have made the EU turn inwards, compromising its efforts to exercise global leadership. China, together with other fast growing economies, has gained substantial global influence but has not yet assumed the role of a global hegemon, both for lack of capacity as well as ambition. Today, several states are powerful yet no state is powerful enough to get anything done alone. As a result, unilateralism seldom remains an option.

Yet, right at the time that unilateralism has met its limits, multilateralism is also becoming exceedingly difficult to accomplish. States’ preferences are increasingly diverse and, as a result, their priorities and policies difficult to reconcile. This growing heterogeneity stems from differences in key states’ incomes and regulatory capacities, as well as their varying political and economic ideologies. Some may argue that this has always been the case: states’ interests have always diverged across a number of important issues, undermining multilateral cooperation. However, the difference today lies in the number of states whose preferences matter. Powerful countries can no longer ignore the vast number of states whose relative influence on the world stage has grown. Fast-growing emerging markets account for an increasing share of the global economic output, giving these states a say in issues relevant to the world economy. One manifestation of this is the growing influence of China and India, and their subsequent tendency to exercise veto rights in institutions such as the

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WTO. This represents a palpable shift from the times when the US and the EU alone dictated the terms of WTO agreements and imposed their preferences on developing economies.\(^{10}\)

Multilateral cooperation is further complicated by the constantly shifting nature of alliances. Today, states form alliances on a case by case basis, depending on their interests in any given issue area.\(^{11}\) China and Germany are both creditors, whose interests in matters of international finance can more easily be aligned as a result. Yet the two disagree on most other global issues, ranging from combating climate change to advancing human rights. The international security environment is more complicated as the world is no longer neatly divided along the lines of the Cold War. Instead, idiosyncratic historical and regional ties and grievances define national security interests among traditional allies. Traditionally, the EU was viewed as a relatively homogeneous block of states sharing fundamental values and possessing high standards of living. However, today it is comprised of a membership featuring a diverse range of income levels and different economic and political histories. On some issues, the northern EU states have interests at odds with those of the southern states. But on others, intra-EU alliances and voting patterns shift depending on the individual member state’s trade balance, the share of agricultural production of the economy, energy infrastructure, socioeconomic challenges, the salience of organized labor, or the strength of environmental interests.

How are international institutions affected by mounting heterogeneity? Growing preference diversity within institutions raises the costs of cooperation. Contracting costs increase and delays become common. Negotiations end in deadlocks and any agreements, when reached, reflect watered down compromises. Lowest common denominator outcomes follow whenever the most reluctant member of the institution is able to set the pace and terms for cooperation. At worst, heterogeneity paralyzes the institution, bringing multilateralism to a halt.

Examples of states steering away from traditional multilateralism are numerous. Tired of deadlocks, delays, and costly compromises, some states are losing their faith in established institutions. Resurgent regionalism is replacing multilateral trade negotiations at the WTO: states have concluded over 200 bilateral and regional trade agreements since the WTO’s (thus far unsuccessful)
Doha Round was launched in 2001. The entire legal framework for regulating foreign direct investment relies on bilateral treaties and nobody is seriously discussing the revival of past attempts to negotiate a multilateral investment agreement.

Even when states continue to work within existing institutions, they commonly evade traditional multilateralism. There is an emerging awareness that NATO might be evolving towards a multitier alliance. Consensus on the proper role of the alliance is missing. The strategic rift among the allies is widening. The divergence of interests has been palpable in issues ranging from missile defense to enlargement and NATO's dealings with Russia, and from the 2008 crisis in Georgia to the alliance's continuing commitment in Afghanistan. At the same time, members need to exploit greater economies of scale to reconcile their unwillingness to spend more on defense and their awareness of continuing and new security threats. This pressing need to pool resources in the midst of dwindling defense budgets provides perhaps the most compelling rationale for the continuation of the alliance, which some have argued has outlived its usefulness. Yet in a more fragmented security environment, it is likely that countries will engage in NATO missions with increasing selectivity following the recent example of Libya. Going forward, NATO members are expected to continue to pick and choose the missions in which they participate.

The EU pursues deeper integration among some subsets of member states, the Eurozone and the Schengen Agreement being the most prominent examples of this trend. Instead of adhering to classic multilateralism, the prevailing tendency is for states to form ad hoc coalitions of the willing, which pursue joint gains tailored to their preferences, leaving behind the delays and dysfunctions associated with rigid institutions and costly multilateralism.

Another consequence of deadlocked political decisionmaking within institutions is a shift from the institutions' role in the political provision of public goods to the judicial maintenance of those goods. While some may argue that institutions have exhausted their ability to negotiate new gains, they nonetheless still matter in that they can preserve existing gains. When the pivotal
role of institutions changes from pursuing gains to preserving them, the role of courts and dispute settlement bodies grow at the expense of the political organs of institutions. The Dispute Settlement Mechanism ("DSM")\textsuperscript{16} at the WTO and the European Court of Justice ("ECJ")\textsuperscript{17} in the EU become key players in the era of gain maintenance. The ECJ’s role in promoting judicial integration within Europe at times when political integration in the EU comes to a halt is well understood.\textsuperscript{18} The international trade regime is experiencing a similar development. The DSM has become more active as states experience increasing difficulties in reaching political agreements. This development is consistent with President Obama’s recent announcement to devote more resources to trade enforcement at a time when the US government invests no meaningful political capital in concluding the WTO Doha Round negotiations.\textsuperscript{19}

Some observers of international relations have aptly described today’s political environment as an era of “messy multilateralism.”\textsuperscript{20} In this period, grand bargains and consensus are likely to be replaced by a more flexible and pragmatic concept of international institutions where multiple tiers of membership and differentiated speeds of integration become the norm. Strict adherence to genuine multilateralism is beyond what these institutions operating under current constraints of preference heterogeneity can deliver. At the same time, unilateralism is increasingly beyond the capacity of any single state, highlighting the need for collective action and continued burden sharing. States pursue “multilateralism à la carte” on a case by case basis with different combinations of allies that vary with states’ specific interests and alignments in each issue. In this new state of the world, traditional multilateralism and international institutions either become irrelevant or are forced to adjust to the less orderly reality. The next Section discusses how institutions are already responding, and must continue to respond, to a world where boundaries between sovereignty and solidarity are more elusive and where institutions are operating on a new terrain between unilateralism and multilateralism.


III. HOW INSTITUTIONS EVOLVE

This Section explains how states can pursue deeper cooperation when their preferences become increasingly diverse. Subsection A discusses how international institutions have widened and deepened contrary to what economic models would predict. Subsection B considers alternative explanations for this development by revisiting the key assumptions under the relevant economic models. Subsection C identifies two strategies—consent tailoring and institutional tailoring—that states employ to accomplish deepening in the midst of widening. It argues that these strategies form states’ deliberate and rational responses to preference heterogeneity and seeks to explain their relative prevalence as well as expected sequence.

A. The Compatibility of Widening and Deepening: Theory versus Reality

The standard view argues that institutions must choose between widening and deepening.21 According to this view, the two goals are incompatible: the trade-off between gains from expanded membership and costs from increasing heterogeneity inevitably suggests that an institution with an expansive mandate will be favored by few states whereas an institution with a constrained mandate will attract a large number of states. Thus, we should observe an inverse relationship between widening and deepening in international institutions.22

Yet in reality, both the membership and the mandate of institutions tend to grow over time. The key institutions today are both wider and deeper than they were at their inception. The six-member European Coal and Steel Community, founded in 1952, has evolved into the twenty-eight-member EU today. The WTO has grown from twenty-three GATT members in 1947 to 159 WTO members to date. NATO had twelve members in 1949 and twenty-eight members today. And while new members continue to join these institutions, exits remain rare. No member state has ever withdrawn from the EU. Greenland, which holds semiautonomous status as part of Denmark, departed from the European Economic Community (the EU’s predecessor) in 1985. France withdrew from NATO’s integrated military command structures in 1966, only to resume its full membership in 2009. Similarly, Greece briefly withdrew

22 See Gilligan, supra note 21, at 459.
from NATO in 1974 but rejoined in 1980. No member has left the WTO to date.23

Alongside their growing memberships, the mandates of institutions have expanded. Institutions’ prerogatives are rarely removed while new issues and capacities are constantly added to their purview. The EU started off as an institution narrowly focused on integrating western European steel and coal industries before moving to establish a customs union and removing internal trade barriers soon thereafter. The competences of the EU have subsequently grown from comprising purely economic and trade matters to embracing issues ranging from environmental and consumer protection to social policy, transport, public health, and criminal justice. The WTO has similarly evolved from an institution established to dismantle tariffs on goods to an institution that regulates a wide range of nontariff barriers, dumping, subsidies, and a host of new issues such as intellectual property rights and trade in services. And after losing its traditional adversary with the collapse of the Soviet Union and the conclusion of the Warsaw Pact, NATO has been repurposed towards new enemies and vested with new responsibilities in conflict prevention—those conflicts entailing previously uncharted military, political, economic and ethnic dimensions.

B. Revisiting the Assumptions on Heterogeneity Costs and Gains from Cooperation

Before proceeding to explain the presumed incompatibility between widening and deepening, it is important to consider whether the assumptions underlying economic models that have led to this prediction are justified. One alternative explanation for simultaneous widening and deepening could be that growing membership does not, in fact, always lead to greater heterogeneity costs. Second, it might also be that the increase in the gains from cooperation exceeds the rate at which heterogeneity costs grow with new members. Both possibilities would explain why international institutions have managed to widen and deepen at the same time. Finally, the authors of these models themselves attribute this development to political forces that defy the economic logic underpinning their models. Alberto Alesina and Enrico Spolaore, for instance, point to bureaucratic capture in the EU context: EU institutions, as states’ agents, have managed to obtain powers from their principals to the extent that it has enabled them to

23 Conversely, exits are expected to be more likely outside the club goods. See discussion on the different dynamics characterizing club good versus public good institutions, infra Section III.B.2.
proceed with deeper cooperation regardless of the heterogeneity costs. These alternative explanations are discussed below in turn.

1. Heterogeneity costs.

Economic models that predict the formation of small and deep or, alternatively, large and shallow institutions assume that heterogeneity costs increase with the size of the institution. Accepting new members introduces new preferences and makes consensus harder to reach. This seems intuitively obvious. However, others may argue that increased interaction within institutions leads to a greater diffusion of ideas, which gradually aligns states’ interests. This tendency towards homogeneity can offset, or even exceed, any tendencies towards heterogeneity. Heterogeneity costs, according to this view, may thus on balance decline as opposed to increase over time, enabling states to pursue deeper integration despite the growing membership.

That state preferences are likely to gradually align following increased interaction is consistent with constructivist theories of international cooperation. But it could also be explained by rationalist arguments. Consider the EU. Over time, the EU has harmonized numerous laws and regulations. As a result, domestic policies have converged to a significant degree across the EU member states. These past harmonization measures should lower the adjustment costs associated with subsequent cooperation efforts given the greater proximity of domestic policies at that later moment. International trade serves as another example of how states’ interests may become aligned over time. Increased trade liberalization has made supply chains increasingly global. This has contributed to an increase in intraindustry trade, thereby aligning the interests of exporters and importers. When exporters predominantly rely on foreign inputs as sources of supply, protectionism becomes less viable: restriction of imports hurts domestic producers (including exporters) who use imports as components in their production, making protectionism a self-defeating strategy. As a result, states should be increasingly endorsing the same set of (pro-free trade) policies. This challenges the prediction that heterogeneity costs, on balance, would always be greater in Time 2 compared to Time 1 as long as the membership has grown between those two time periods.

However, while some characteristics of states become more homogeneous over time—for instance, participation in international trade increases all WTO members’ trade levels and, consequently, economic growth—other differences remain, failing to shift all states towards the institution’s “median voter” in a number of matters. For example, while China’s trade levels approximate those of

25 See generally id.
the US and the EU today, China insists that its GDP per capita shows that it remains a developing country in need of differential treatment. It also continues to adhere to some protectionist policies, including low levels of intellectual property protection and intervention in currency markets, despite more than a decade of interaction with its trading partners in the WTO.

Even shared characteristics among member states do not always ensure that these countries’ interests will be aligned and their heterogeneity costs contained. In other words, homogeneity in characteristics can still translate into heterogeneity in interests. Consider the following example. We expect existing members of an institution to support the inclusion of new members that share their particular preferences or characteristics. This should reinforce the bargaining power of their favored coalitions within an institution. However, whether to support the accession of a new member can entail a more complex calculation of how this accession will impact the interests of existing members. For instance, in an institution such as the EU that engages in redistributive policies, the existing beneficiaries of these policies may be expected to support the accession of other poorer countries that are likely to similarly favor the inclusion of strongly redistributive elements in all policy making. At the same time, these poorer countries are the expected cobeneficiaries of these policies, sharing the future gains from those policies with existing poor member states and thus potentially reducing the overall transfers that are available. Thus, admitting even seemingly homogeneous countries into the organization may still increase heterogeneity costs that impede the pursuit of joint gains.

Overall, it is doubtful that heterogeneity costs as a general matter have become less severe over time. Empirical evidence suggests that international cooperation is getting harder in large part because of the growing diversity in states’ preferences and positions. Heterogeneity costs in international institutions with universal membership have increased as the sheer number of states that exists has increased over the years. Every decision today must accommodate an even greater set of individual state preferences. WTO negotiations take longer to conclude when there are more members participating in negotiations. The deadlocks in the EU have become more common as heterogeneity costs have

26 Similarly, France, with its strong agricultural interests, was expected to support the accession of Poland and other heavily agricultural states that were likely to endorse the maintenance or even further extension of the EU's agricultural subsidies. At the same time, French farmers knew that the inclusion of these new agricultural producers was likely to reduce the subsidies available to the existing farmers, complicating their preference formation relating to the accession.

become more severe.\textsuperscript{28} Even the ICJ’s influence has arguably been compromised as heterogeneity among the states has mounted.\textsuperscript{29}

A further argument for the augmenting heterogeneity costs over the life of the institution is the plausibility of international institutions being first formed among like-minded states with largely similar income levels, economic policies, and political leanings. As these countries seek to expand gains from cooperation, they gradually begin to accept states that are less likely to share their preferences. Thus, the sequence of accepting new members often takes place from less to more heterogeneous states. Many international institutions reveal this pattern.\textsuperscript{30}

Another possibility is that while states’ preferences may in some important aspects become more similar with respect to issues that were subject to past cooperation, issues that are subject to later negotiations invite more disagreement. That is, increased heterogeneity is not driven by the sequence of the identity of participants that are admitted in the institution but by the sequence of issues subject to institutionalized cooperation. This assumes that states tend to first address issues that exhibit lower sovereignty costs, over time moving to cooperate on more controversial issues. Heterogeneity costs may thus become higher simply because the “low-hanging fruit”—referring to issues with unambiguous net benefits and little disagreement among states—has been picked and cooperation has moved on to difficult issues where states’ interests are further apart and consensus harder to reach.

In the GATT/WTO, states proceeded first to remove tariff barriers and various other border measures that were less controversial than subsequently negotiated “behind the border” measures, including domestic health and environmental regulations that often reflect deeply embedded and highly varied domestic preferences. Similarly, in the EU, cooperation has gradually moved to


\textsuperscript{29} ERIC A. POSNER, \textit{THE PERILS OF GLOBAL LEGALISM} 148 (2009).

\textsuperscript{30} However, at times, prospective gains are the greatest when cooperation is sought from countries that exhibit very different characteristics—such as a capital-exporting country concluding an investment treaty with a capital-importing country whose market has thus far been closed to foreign investment—or by the inclusion of a strategically important treaty partner, regardless of the high heterogeneity costs. Similarly, sometimes the participation of a single country can be crucial for the success of an international treaty. An international climate change treaty without China, for example, would hardly be effective. Similarly, the inclusion of “weak links” can be more crucial in any antiterrorism organization compared to any countries of lesser strategic importance.
more sensitive issues, like where states have legitimate disagreements on how to balance various domestic consumer or environmental protection measures with the need to guarantee unrestricted trade within the common market. Thus, part of the institutional evolution is the tendency to address issues in the order of lower to higher heterogeneity costs.

2. Gains from public goods.

The above discussion suggests the economic models are right to assume that heterogeneity costs typically increase as new members join the institution. Yet another explanation for wide and deep institutions comes from the possibility of greater-than-presumed net gains from a broad membership. To put it more precisely, under this view, broader membership increases the gains from the provision of public goods at a greater rate than the accompanying increase in heterogeneity costs. This would provide states with the rationale to accept new members despite some (more limited) increase in heterogeneity costs that a larger and more diverse membership entails. The possibility that marginal net gains from cooperation increase over time might be attributed to factors such as economies of scale and scope or the importance of network effects.

At the same time, it is also conceivable that net gains from cooperation diminish over time. States can be expected to cooperate first on issues where net gains are least contested. Only after the greatest net gains have been obtained do states move on to issues that offer lesser benefits as long as those benefits still exceed their costs of cooperation. Net gains can thus diminish over time if the most important benefits have already been pursued at the earlier stages of institutionalized cooperation. This sequence from greater to lesser net gains may explain the current stalemate at the WTO. Private interests are today less vocal in supporting the conclusion of the ongoing WTO Doha Round. This may be because businesses have already obtained the liberalization gains that were most salient for them, and will not invest their remaining political capital to pursue the lingering marginal gains.\(^31\)

The magnitude of gains may also vary depending on the particular relationship between the gains that are available from deepening versus the gains that are available from widening the institution. Deepening and widening can be viewed as strategic complements or strategic substitutes, and states forming an international institution can identify widening and deepening either as alternative or complementary paths for greater gains. If States A, B, and C initially formed a free trade area for goods, they could later expand their gains by inviting State D to join. This would constitute a strategy based on widening. Alternatively, States

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\(^31\) Similarly, the marginal benefit of adding one more member to the WTO may be less valuable at the point when incumbent members already have access to most of the world market.
A, B, and C could achieve further gains by deepening cooperation amongst themselves. They could, for instance, expand their free trade area to encompass services in addition to goods. Here, their chosen strategy would consist solely of deepening. However, often the greatest gains may be available from the pursuit of a dual strategy of widening and deepening. For instance, A, B, and C may derive the greatest benefit if they create a wider free trade area (including D’s market) while also expanding their institution to services.

If widening and deepening were *strategic substitutes* (in other words, where resorting to one strategy reduces the desirability of pursuing the other), we would expect only one or the other strategy to be chosen. A, B, and C may all benefit from access to D’s market for goods yet D’s involvement in the institution makes it less desirable to expand cooperation to services. This could be the case, for example, if D were a net exporter of services to A, B, and C, yet a net importer of goods from A, B, and C. However, if widening and deepening were *strategic complements* (in other words, where resorting to one strategy increases the desirability of pursuing the other), we would expect both strategies to be chosen. For example, the free trade area in services might require some institutional arrangements (including establishment of a DSM) that entail high fixed costs—too high to be justified for a trade area consisting of A, B, and C only. But if D were to share these fixed costs, the gains from expanding the cooperation to services could be justified. Here, widening and deepening would be seen as strategic complements.

It is therefore plausible that the observed pattern of simultaneous widening and deepening reflects the idea of strategic complementarity as opposed to strategic substitution. This complementarity could also suggest that at times gains from the provision of public goods, indeed, do increase at a greater rate than the costs introduced by greater heterogeneity. However, it also leaves open the possibility that while simultaneous widening and deepening can multiply gains, this dual strategy can also multiply heterogeneity costs.

While we may not be able to detect a general and uniform pattern of growing or diminishing gains from cooperation over time, we can be reasonably confident that gains from cooperation are likely to change across years. States’ trade flows fluctuate, changing the benefits of gaining access to new markets as well as the costs of the concessions given to any new trading partners. The nature and extent of military threats change as states build or rein in their military capacities and as adversarial governments rise to power or collapse. The optimal level of cooperation with allies and trading partners changes with these

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32 Under this hypothetical scenario, widening the institution to encompass D would hence make it less desirable for A, B, and C to expand their cooperation to services (as D would reap the main benefits from this strategy).
How International Institutions Evolve

internal and external events, leading at times to a need to broaden or deepen cooperation. In sum, there are several reasons for institutional expansion, only some of which might reflect the availability of greater net gains. The varied reasons for institutions' sprawling memberships and expansive mandates cannot, therefore, support the conclusion that broadening the institution to new members can in any systematic way be attributed to greater net gains (relative to the increase in heterogeneity costs) from large membership. This leaves the simultaneous institutional widening and deepening to beg for another explanation.

3. Politics and agency costs.

Another possibility is that the assumptions underlying the economic models predicting certain institutional patterns are not flawed as such. They may simply fail to capture the political reality that defies the logic of cost-benefit analysis. Institutionalized cooperation creates a bureaucracy that has a vested interest in growing the powers of the institution and thereby expanding its own influence. Institutions’ mandates may thus expand as part of the path dependence phenomenon where the delegation itself becomes self-reinforcing. Alesina and Spolaore argue that political forces created by institutions push towards greater delegation despite the growing preference heterogeneity among the members. The simultaneous deepening and widening of the EU, for instance, can be explained by bureaucratic capture and the demographic deficit that sustains this capture. This type of bureaucratic bias towards expanding the depth of cooperation is consistent with basic assumptions of public choice theory and our understanding of how international bureaucracies operate.

This explanation might be most compelling in the context of the EU, which has taken supranationalism and the delegation to international institutions further than any of its counterparts. It is true that the European integration has created a sizeable bureaucracy with a powerful Commission at its center. Yet it is hard to attribute the extensive widening and deepening of the EU only, or even primarily, to bureaucratic capture. The member states still retain control over the outcomes through their voting power in the Council, substantially constraining the acts by the Commission. It therefore seems more appropriate to provide an explanation where the EU member states remain at center stage. The following discussion argues that the EU as an institution has departed from the prediction of economic models because of systematic reliance on consent tailoring and institutional tailoring. Extensive accession concessions, together with a reliance on qualified majority voting ("QMV") and differentiated integration, have

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33 See ALESINA & SPOLAORE, supra note 3, at 207–8.
accommodated diversity and enabled broadening and widening even in the absence of any demographic deficit.

The bureaucratic explanation model is even less helpful in describing the broader trend; agency capture cannot explain developments in other international organizations, which are even more strictly within the control of their member states. The member states themselves, for instance, have retained control and determine the fate of NATO and the WTO. With this observation in mind, the below discussion emphasizes the role of states as principals in full control over outcomes. It contends that deepening and widening take place not just as a result of a bureaucratic coup or forces of path dependence. Members of international institutions are not passive and powerless in the face of international bureaucratic expansion. Instead, the size/heterogeneity trade-off exists and states are keenly aware of it. As a result, member states seek to actively preserve the gains from cooperation while minimizing heterogeneity costs. To do this, they engage in a conscious strategy of consent tailoring and institutional tailoring in an effort to pursue institutionalized cooperation, mindful of the trade-off. This dual strategy that straddles the ability to homogenize and the need to accommodate offers an alternative—and, I would argue, a more accurate—explanation for how institutions evolve, and why they continue to deepen and widen at the same time.

C. Consent Tailoring and Institutional Tailoring

This Subsection argues that states employ two strategies that allow institutions to simultaneously deepen and widen. First, states deliberately suppress heterogeneity costs by homogenizing uncooperative members through consent tailoring. Second, when forced to adjust, states accommodate uncooperative members through the strategy of institutional tailoring. The choice between the two strategies depends on the relative bargaining power of cooperative and uncooperative members of the institution.

1. Consent tailoring.

The below discussion identifies four forms of consent tailoring: accession conditions, transfer payments, majority voting rules, and delegation to courts. These strategies can be harnessed, together or in isolation, to curtail heterogeneity costs. What they have in common is that they compromise the pure form of consent by suppressing the preferences of uncooperative members. Their use is therefore expected to positively correlate with the

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34 Note that these are not the exclusive strategies for suppressing consent. Threats, sanctions, rewards, and variations of such are also employed to influence behavior and outcomes.
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amount of power held by cooperative members in any given bargaining situation.

Consent tailoring is most common and often most successful at the stage when a prospective member state seeks access to an existing institution that provides so-called "club goods." For instance, the WTO, the EU, and NATO all generate benefits that extend to their members exclusively. New members clamoring to get into the club have diminished bargaining leverage due to the existing members' ability to exclude them from the benefits that the institution provides. Each time a new member seeks admission, the incumbent members have significant leverage against the prospective entrant, extracting extensive concessions before the entrant is admitted to the institution. Consequently, admission criteria are some of the most viable and visible ways to preempt heterogeneity costs. Numerous institutions screen their members and maintain a high price for entry by subjecting new member states to tough accession conditions. These conditions homogenize the preferences of a new member and thereby mitigate, ex ante, subsequent cooperation problems.

The length of accession negotiations at the WTO or the EU, together with the extensive conditions under which the eventual accessions takes place, provide evidence that states use the admission process as an important bargaining tool. This pre-entry homogenization is seen as an effective way to prevent problems stemming from high heterogeneity costs once the member is admitted and the institution thereby expanded. Obviously, the new member is expected to subscribe to the existing policies of the institution. But heterogeneity costs are also likely to be reduced with respect to new policies. Economic or political reforms that a prospective member must undertake frequently change the constellation of domestic interests and build regulatory capacity more generally. These reforms suppress political resistance and alleviate economic adjustment costs that would otherwise hinder policy measures proposed in the

future. Admission-stage homogenization is therefore often the most effective way to ensure that a new member’s conduct will conform to the preferences of the median voter within the institution, and thereby not obstruct the existing members’ efforts to pursue future gains.

However, it may not be sufficient to simply obtain a promise from the candidate country that it will subscribe to certain policies. Greece was made subject to the Eurozone’s stability rules when joining the common currency. Later, it became obvious that Greece had breached those rules, highlighting the need for an effective monitoring and enforcement apparatus to hold states to their commitments. Romania and Bulgaria were required to carry out significant reforms to promote the rule of law and undertake institutional and political reforms before gaining access to the EU. Yet their adherence to rule of law as well as ability and willingness to guarantee the independence of the judiciary has been repeatedly questioned since. The commitment to fundamental elements of democracy in Hungary is similarly eroding. And the EU is not alone in struggling to prevent its members from backsliding. Russia and China’s records of compliance with the WTO rules have been mixed despite the extensive commitments both undertook as part of their accession processes. Thus, monitoring, enforcement, and the prospect of sanctions may

38 See, for example, Commission Opinion of 22 February 2005 on the applications for accession to the European Union by the Republic of Bulgaria and Romania, June 21, 2005, 2005 O.J. (L 157) 3.
be needed to ensure that new members are homogenized and heterogeneity costs are contained in practice as well.

The ability to homogenize preferences becomes more difficult once these new members are admitted into the institution. The new members now have a vote and hence an enhanced ability to resist policies that contradict their preferences. Here, cooperative members may still be able to engage in consent tailoring but such tailoring takes place under new constraints. Cooperative members are more likely to have to offer various transfer payments to "buy" the preference alignment of uncooperative members. A well-known example of this kind of institutionalized transfer payment is the conclusion of the TRIPS Agreement within the WTO.\(^4\) There, developed countries offered to liberalize trade in textiles and agriculture in return for developing countries agreeing to protect intellectual property rights. Without such linkage, developing countries would not have agreed to undertake IP commitments, which were expected to bring few gains and impose significant costs on them.\(^4\)

Similarly, costless consent tailoring is rarely available, even at the accession stage, outside the club good context where incumbent members hold significant sway. The EU, the WTO, or NATO all provide "excludable" goods; that is, the member states of these institutions can exclude the nonmembers from the benefits associated with the membership. The ability of these institutions to reserve the benefits they create for the members of the club only increases the attractiveness of the accession to the institution. In contrast, in the case of public goods, which are "nonexcludable," incumbent members seek to persuade a recalcitrant member state to join the institution in an effort to have them share the costs of the provision of such goods. This task is challenging, as the outsiders are often better off remaining outside the institution and free riding on the other states' efforts. Consider, for instance, a new institution established to tackle climate change that seeks to persuade China to join its mission to reduce greenhouse gas emissions. China gains nothing by joining the institution: by staying outside, it remains free to continue to emit, yet is able to enjoy any improvement in the climate thanks to other states' efforts.\(^4\) Here, cooperative members have none of the bargaining leverage akin to what they held when China was actively seeking to join the WTO. They are left with the option to

\(^4\) Id.
\(^4\) It is, however, true that at times states seek to join an institution that imposes some costs or obligations on them (be they related to protection of human rights or environmental interest or some other policies not innately supported by the country assuming the obligations). One motivation to do so relates to their desire to enhance their reputation and signal to other states their commitment to certain laudable principles and policies.
offer transfer payments sufficiently large to change China’s incentives to join the public goods institution. Thus, in situations where an uncooperative member’s bargaining power is enhanced—be it due to the possibility of free riding or due to leverage gained after accession—consent tailoring is likely to be accomplished only at a price.45

Transfer payments, while common, are not always available to accomplish homogenization.46 Such transfers can be too economically costly or too politically contentious to implement. If transfer payments consist of concessions in some other issue area, a new set of vested interests are brought in, triggering political resistance and complicating the dynamics of the bargaining. Another plausible homogenization strategy that states may have, then, is the ability to override uncooperative states’ preferences with majority voting rules as long as those states constitute a minority within an institution. Some institutions, most notably the EU, have moved away from the requirement of unanimity towards qualified majority voting rules in many issue areas.47 Growing heterogeneity and subsequent holdouts have gridlocked EU decisionmaking, leading members to give up consensus voting. However, as QMV entails that states can be bound to decisions against their will, QMV rules have not been extended to most sovereignty-sensitive areas, such as taxation, common foreign and security policy, and the revision of EU treaties.48 QMV has the upside that it keeps international institutions functional. The downside is that it binds the unwilling. In this sense, any majority voting represents a departure from the fundamental principle of consent in international law.49 It is therefore not surprising that the EU—which is unique in its extent of supranational powers—is a rare example of an institution that has gradually moved towards QMV and thus embraced the idea of homogenization by way of an explicit override of states’ preferences.

Imposing extensive accession conditions, buying consent through transfer payments, and overriding uncooperative states’ preferences via majority voting

45 But note that the leverage to extract concessions in the case of club goods can sometimes be used to make up for the lack of similar leverage in these other areas. For instance, trade agreements can be used to entice a country to sign onto a (non-club good) international organization.
47 *See, for example, Joseph H.H. Weiler, The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration, 93, 94 (1999); Consolidated Version of the Treaty on European Union art. 16(3), 2010 O.J. (C 83) 24.
49 *See Vienna Convention on the Law of Treaties, supra note 7, arts. 24, 40.*
rules all have the downside that they may reduce reluctant member states’ incentives to eventually comply. A state is more inclined to defect from the commitments that it has undertaken unwillingly. In these instances, homogenization may still occur but it may require cooperative members to spend resources devoted to monitoring and enforcement. Ultimately, institutions with enforcement capacities can attempt to force homogenization through international courts and dispute settlement bodies. For instance, if an EU member state refuses to comply with a directive that emerged when its preferences were overridden in a QMV process, the Commission or another member state can initiate proceedings before the ECJ, which has the ability to impose sanctions for noncompliance. Similarly, if China violates the TRIPS Agreement, infringing the interests of US companies, the US can challenge the violation before the WTO’s dispute settlement mechanism. The WTO’s Dispute Settlement Body can then order China to comply, ultimately by authorizing retaliation.50 In this way, courts can be harnessed to enforce the bargains states have made to curtail heterogeneity costs.

At times, courts can go further than to enforce bargains embedded in constitutive treaties of their organizations. They can occasionally be viewed as independent actors with activist agendas that serve to suppress heterogeneity costs and deepen the mandates of the institutions. The European Court of Human Rights, for instance, interprets the European Convention of Human Rights (ECHR) in light of the principle of “European consensus.”51 This principle permits the Court to rely on the member states’ subsequent human rights practices as an interpretive technique for the “living” Convention. However, the notion of consensus can rest on the subsequent practices of the majority, as opposed to all, of the ECHR members. Thus, respondent countries whose practices deviate from that of the majority are homogenized by way of the ECHR imposing the European consensus on them.52 The ECJ and the WTO’s DSM have similarly been praised or accused—depending on one’s perspective—of stepping in with activist rulings, particularly when political decisionmaking has been deadlocked. The deepening of the EU and the WTO’s agendas and powers may thus at least at times reflect the integrationist (and thus homogenizing) rulings of the courts, which are largely detached from the decree

50 However, even then, China has the option of engaging in “efficient breach,” enduring retaliation instead of complying with the specific obligations. Thus, courts—with the possible exception of the ECJ—can hence be seen imperfect in their ability to engage in consent tailoring.


of heterogeneity costs that impede effective political decisionmaking. This way, courts can also be viewed as engaging in consent tailoring that lead to deeper institutions notwithstanding the preferences of (part of their) membership.

2. Institutional tailoring.

The previous discussion acknowledged that consent tailoring is not absolute even at the accession stage. The leverage that incumbent members have over prospective members depends on the extent to which the former versus the latter benefit from accession. If the gains from the accession accrue primarily to existing members, the prospective member may not agree to extensive conditions. Reservation prices differ from one prospective member to another. While the EU may be able to impose tough conditions on Romania or Macedonia, it may not be able to extract the same conditions from, say, wealthy and self-reliant Norway. Thus, even at the accession stage, incumbent states may occasionally need to accommodate the newcomer. Similarly, consent tailoring may not be available against existing member states. Issue linkages are not always available, feasible, or acceptable. For most sensitive issues, voting rules are likely to continue to call for unanimity. In such instances, every member state retains a veto and uncooperative states’ preferences cannot be overridden by a QMV. Finally, courts can advance the institution’s goals with activist rulings, but are aware of potential political backlash from doing so, and exercise self-restraint as a result.

In these situations, one possible outcome is that an institution comes to a halt, forcing states to forgo further benefits from cooperation. However, this is likely to lead to underprovision of public goods, which is costly and thus normatively undesirable. In these instances, the most reluctant member state gets to set the pace for cooperation and determine the boundaries of the institution. It may therefore be preferable to accommodate the uncooperative member in the absence of the ability to homogenize its preferences. Thus, an institution is forced to adjust by accommodating the preferences of an uncooperative member state as opposed to the other way around.

Institutional tailoring presents the opportunity to accommodate uncooperative members in the absence of the power to dominate them. The key to institutional tailoring is that it moves the institution away from equal and universal obligations. This can be accomplished by allowing members to assume common but differentiated responsibilities (“CDRs”)54 or, alternatively, by

53 See Richard Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraint, 98 Am. J. Int'l. L. 247, 251 (2004); see also DEHOUSSE supra note 18, at 84–90, 115–16.

pursuing differentiated integration through opt-outs. Allowing for coalitions of the willing that negotiate treaties within treaties or form clubs within clubs also constitutes a strategy of institutional tailoring. These instances typically reflect the cooperative members’ reduced bargaining leverage yet also an acknowledgement that net benefits of even this type of more limited cooperation still exist.

Differentiated obligations are a well-accepted feature of international law. CDRs are commonly extended to developing countries that have a diminished capacity to assume full obligations under WTO trade agreements. CDRs are also prevalent in international environmental law where countries’ obligations are adjusted to take into account their capacity to comply with costly commitments. The key idea underlying CDRs is that all member states participate in the institution, but on different terms. Generally CDRs are explained by distributional concerns and justified by a notion of fairness. Rationalist arguments, however, also support their employment. Differential obligations enable for a more optimal equilibrium to be reached: it is preferable to allow a subset of countries to assume a lower level of obligations as opposed to lowering every state’s obligations to the level that is acceptable by the least cooperative member state. Institutional tailoring as a tool for optimizing the size/heterogeneity trade-off thereby offers an efficiency justification for CDRs. Michael Gilligan, who has argued that no trade-off between size and heterogeneity exists as long as states participating in institutionalized cooperation can set their policies at different levels, indirectly supports this view. Large membership can therefore be consistent with deep obligations as long as the institution forgoes the idea of identical obligations that are universally applied to all of its members.

A more far-reaching technique of institutional accommodation is the decision to allow for suspension of uncooperative member's obligations or complete opt-out from treaties. Reservations are a common feature of

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57 While differentiated obligations are more commonly discussed, differentiated rights are also commonly found within the international system. Examples of this include the voting system of the UN Security Council and the different rights afforded to parties to the nuclear non-proliferation treaty.

58 See, for example, Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 10(c), Dec. 11, 1997, 2303 U.N.T.S. 148.

international law and international organizations typically accommodate a range of opt-outs. The commitments under the WTO treaties can be suspended by invoking the GATT's escape clause, allowing a member to pursue safeguards measures that put aside their original commitments. The EU's Charter of Fundamental Rights accommodated opt-outs for the UK and Poland. Similarly, the Schengen Agreement proceeded despite the resistance of the UK and Ireland, ultimately allowing them to stay outside of the zone abolishing internal border controls.

The above examples reflect forms of institutional tailoring where the default norm is for all members of the institution to participate in cooperation while allowing for some uncooperative members to not assume these same obligations (and, as a corollary, often to not enjoy these same rights). A more far-reaching form of institutional tailoring is the situation where the default norm is, at least initially, the reverse. For example, the WTO's Government Procurement Agreement initially brought together only a limited number of WTO members pursuing deeper cooperation with respect to certain issue areas while the great majority of the WTO membership remained outside of the agreement.

A common defense for the existence of opt-outs and differentiated integration is their ability to mitigate political conflict—that they are better than not pursuing cooperation at all. But these arrangements may also reflect first-best arrangements in that they maximize the net gains from cooperation. A compelling normative defense for opt-outs and differentiated integration is their ability to facilitate optimization of the size/heterogeneity trade-off. These strategies allow for a higher level of cooperation to take place where the uncooperative members do not get to set the boundaries of the institution and water down the entire cooperative enterprise.

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62 Also notable is the EU's enhanced cooperation mechanism, introduced by the Amsterdam treaty, which provides the legal basis for such cooperation. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 11, 1997, 1997 O.J. (C 340) 1.
3. The choice between consent tailoring and institutional tailoring.

When faced with a deadlock where some member states are seeking to deepen cooperation while others are resisting, the key question is whether the cooperative members should tailor the preferences of the uncooperative members to conform to the goals of the institution—consent tailoring—or whether they should tailor the institution and its policies to the diverse preferences of its members—institutional tailoring.

When do cooperative members choose homogenization over accommodation? The likely answer is “whenever they can.” Institutional tailoring reduces gains from cooperation relative to full cooperation. States are therefore likely to favor consent tailoring over institutional tailoring each time this strategy is available for them. When cooperative members have full leverage over uncooperative members, the size/heterogeneity trade-off fails to materialize. Bargaining power dictates outcomes and uncooperative members are not able to obstruct the deepening of cooperation. Under this scenario, cooperative members can always homogenize uncooperative members. Further, they can do so without incurring any costs; they can freely expand gains from cooperation without the need to adjust the point of cooperation to the preferences of other members. But as discussed, homogenization is not always available. At times, cooperative members are forced to yield, accommodating the preferences of uncooperative members by agreeing to differentiated obligations or allowing for the reduction of gains through opt-outs. Whether homogenization or accommodation takes place depends on the relative bargaining power of the cooperative and uncooperative states at any given time on any given issue.

Consent tailoring and institutional tailoring are likely to take place in succession as institutions evolve. Institutions are often initially formed among a small group of like-minded states. In the beginning, these states cooperate on issues where their preferences are closely aligned. Thus, institutions often start out without any discernible size/heterogeneity trade-off that would undermine their ability to facilitate cooperation. Differences only begin to surface as states gradually seek to deepen or widen the institution. Consent tailoring is often enough to accomplish widening or deepening in the early days of the institution. New members are homogenized at the accession stage to the extent possible. When needed, transfer payments are employed to buy the new or existing members’ consent. But as heterogeneity further increases, states are forced to look for new ways to suppress preference heterogeneity. They may do this by changing voting rules to relinquish unanimity. With respect to some issues or some members, however, giving up the veto right is not acceptable. Sovereignty costs are simply too high in comparison to the benefits of institutionalized cooperation. Here, states are more protective of their own ability to veto
cooperation when needed when compared to the expected costs of the other states’ exercise of their veto power on other issues.

Eventually, in this sequence of strategies, consent tailoring meets its limits and institutional tailoring is triggered. There is a point at which heterogeneity costs become so palpable that the preferences of the minority can no longer be tailored to those of the majority. As a result, cooperative states move to institutional tailoring. Of course, in an institution that embraces multiple issues, cooperative states may be able to continue to homogenize uncooperative members in some areas while being forced to accommodate them in other areas, depending on the relative bargaining power of the two groups in each issue area. But as a general trend, often institutions are forced to move from homogenization to accommodation over time.

Ultimately, once a certain threshold of preference diversity is reached and the strategy of consent tailoring is exhausted, CDRs, opt-outs, and cooperation by coalitions become the norm. Clubs within clubs begin to emerge. These new cooperative coalitions are likely to be initiated by powerful states that have the ability to “go it alone,” and hence benefit from the creation of a new club even if the others failed to join them. Gradually, as the importance of that club grows, other states may seek access to it in order to avoid incurring the costs of exclusion from the club. This happened in the case of the Government Procurement Agreement in the WTO as well as the Schengen Agreement and the Eurozone in Europe.

Such a club is also likely to gradually gain more bargaining power vis-à-vis the initially excluded members (or those that are initially unwilling or unable to join) and thus regain the ability to homogenize outsiders that seek to join that coalition at a later date. The Schengen Agreement, for instance, changed the incentive structure for outsiders once it was established by creating a single focal point for cooperation. Outsiders were suddenly limited to two options: joining the Schengen or rejecting passport-free travel within Europe altogether. The Schengen Agreement also created new costs for those remaining outside by imposing more stringent border controls for travel from outside of Schengen. Thus, the number of members in the initially small coalition is likely to grow through consent tailoring over time. This strategy is likely to be employed until the club widens and cooperation deepens to a point where institutional tailoring is once again prompted. Thus, we may observe another cycle during which an

institution evolves through a sequence of consent tailoring and institutional tailoring as small clubs develop into larger clubs over time.

The recognition of this dynamic does not, however, entail that it is always optimal for an institution to continue to widen and/or deepen. An optimal point of cooperation may be reached where it is not worth adding new members or where the equilibrium depth of cooperation has been reached. The above discussion has merely suggested that simultaneous deepening and widening, if desirable, can be feasible. It has also offered an analytical framework to understand how states can optimize the size/heterogeneity trade-off over time through the dual strategy of consent tailoring and institutional tailoring and unpacked the conditions under which one strategy is likely to prevail over the other.

IV. LIMITATIONS AND EXTENSIONS

The above discussion invites several qualifications and extensions, only some of which can be addressed here. To start with qualifications, consent tailoring and institutional tailoring are common yet imperfect strategies for optimization. Thus, they do not guarantee that an optimal size of an institution is reached or maintained. Consider consent tailoring first. At the accession stage, cooperative states may push consent tailoring too far. They can miscalculate what can be accomplished with this strategy. Ultimately, they can alienate prospective members altogether, reducing the gains from cooperation. They might also undermine their own leverage for (future) consent tailoring if they “cheapen” the accession standard by occasionally letting in states too early, or by failing to enforce some of the agreed upon accession conditions against defecting member states post-accession. Both instances send signals about the credibility of the admission standards, potentially compromising the future use of the accession criteria as a tool for consent tailoring. Consent tailoring via transfer payments also carries the risk of suboptimal outcomes. For example, states may have the incentive to falsely portray themselves as uncooperative to extract a higher price in return for their cooperation.

Institutional tailoring is similarly complex and subject to errors. Allowing clubs within clubs to emerge may seem optimal for a certain policy area but at times fails to remain such when linkages to other policy areas become better understood. The formation of the Eurozone, for instance, did not turn out to be

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an optimal currency area in no small part because it was not accompanied by a similar decree of delegation of authority in fiscal matters. The case of the Euro illustrates that the optimization of size/heterogeneity trade-off calls for more intricate calculations given the potential linkages across policy domains. Thus, the above discussion should not be read to suggest that the current make up of institutions would reflect successful optimization of the size/heterogeneity trade-off.

Related complexities arise from the difficulty to calculate the expected net benefits from institutionalized cooperation due to elusive linkages between different policy domains. Calculating the net benefits of admitting China into the WTO, for instance, was complicated by existing disagreements on the extent and magnitude of expected positive externalities associated with China's membership. China's entry was known to establish a larger free trade area with unambiguous benefits for all members. But China's membership also carried more tenuous (but potentially substantial) benefits if China's commitment to economic opening were to pave way for political reforms as well.67 Informational asymmetries hence also stand in the way of perfect optimization.

The idea of "flexible design" is inherent in the theory of optimal size of institutions. Aware of the trade-off, rational states are expected to adjust the membership of the institution to optimize the net gains from cooperation. But this flexibility is limited because, in practice, the flexible design only allows movement to one direction: towards more members and deeper cooperation. Institutions, once established, tend to be sticky. States rarely leave institutions—in particular institutions that produce club goods—as the experiences of the EU, the WTO or NATO suggest.68 Competencies of these institutions are also rarely rolled back. The adjustment of the depth and width is hence often a one-way street and decisions are difficult to reverse ex post. Evolution of an institution can typically just halt or go forward. If there is a backlash, we rarely see states dismantle or leave institutions. Given the inherent stickiness of membership, the impending vote in the UK on whether to leave the EU can be seen as all the more monumental and as an important test case for the sustainability of the two-way flexibility.


68 However, outside of club goods, institutions' membership can be less sticky. The US withdrew from UNESCO in 1984, from ILO in 1975 (only to return in 1980); the Statute of the International Court of Justice allows states parties to opt into recognizing certain types of decisions as ipso facto compulsory. Statute of the International Court of Justice art. 36(2), June 26, 1945, 59 Stat 1055, 3 Bevans 1153; see also Konstantinos D. Magliveras, Exclusion from Participation in International Organizations 65, 194–201 (1999).
When states come to realize that the international institution has clearly exceeded its optimal size and become dysfunctional, states cannot easily adjust the size of the institution by way of exit or expulsion. Instead, in such situations members typically leave the institution intact but move their cooperative activity outside the institution. This raises an additional question of when states choose to form a new institution outside the existing one as opposed to pursue differentiated integration within an existing cooperative framework. For instance, a group of WTO members are currently negotiating an International Services Agreement ("ISA") outside of the WTO, departing from the model of GPA and other plurilateral agreements that the WTO has traditionally accommodated. One way to understand an agreement like the ISA is to view its negotiation outside of the WTO as a way to restart the process of consent tailoring and restore the optimal size of an institution given the costs and benefits associated with such an agreement. Yet it is unclear why cooperative states adopted a view that they could not accomplish the same within the existing institutional framework. This question whether clubs are formed outside or inside exiting institutions is closely related, but is beyond the focus of this short intervention. It is, however, an issue where a transaction-costs approach to international organizations can potentially advance the analysis.

This Article has focused on the dual strategy of consent tailoring and institutional tailoring. In doing so, it has focused on the choice as well as the sequence of strategies that states employ to maximize net gains from cooperation while being constrained by heterogeneity costs. However, this inquiry of optimal sequencing of consent tailoring and institutional tailoring is different from the question of optimal sequencing of widening and deepening of an institution. A few remarks regarding the latter here can help spur that discussion, though a more careful analysis falls outside the scope of this short Article. Because of the leverage incumbent members enjoy at the accession stage, they are likely to have an incentive to deepen the institution in anticipation of enlargement. If the institution contemplates accepting new members and expanding cooperation to new areas, cooperative members may strategically sequence deepening just before widening to facilitate the process of deepening. This way, they may rely on consent tailoring and avoid having to extend transfer payments in return for new members' cooperation later on or, more

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69 See Regional Trade Agreements: Facts and Figures, supra note 12 (depicting the increase in RTAs since the creation of GATT/WTO).

problematically, agree to more costly institutional adjustment that leaves them
with fewer gains from cooperation.

However, the sequencing may be reversed in instances where
uncooperative members hold greater bargaining power. The UK, for instance,
may well support the EU’s enlargement precisely because it seeks to obstruct
future deepening. Knowing that deepening is less likely (or, as has been argued
here, possible, but more costly) in the presence of larger membership and higher
heterogeneity costs, the UK may have the incentive to endorse widening before
any efforts to deepen cooperation within the EU. Thus the choice of optimal
sequencing between widening and depending can depend on whether the
cooperative or uncooperative members hold the leverage over the decision on
whether to pursue one or the other first.

V. CONCLUSION

After World War II, states responded to increasing global integration by
forming international institutions. Institutions were meant to solve various
cooperation and coordination problems. Since their inception, membership in
these institutions has grown and agendas have become more complex. Growing
heterogeneity within institutions has led to increasing deadlocks, which have
undermined multilateral cooperation and the effectiveness of institutions. This
Article has offered an analytical framework to understand how states cooperate,
and how institutions evolve in the face of this growing preference heterogeneity
within their membership. The economic logic underlying the formation of
institutions suggests that simultaneous widening and deepening of institutions
is unattainable because of the trade-off between increased size and growing
heterogeneity within institutions. Yet, all around us, we have observed
institutions embrace new members and expand their mandate over time. The
goal of this Article has been to explain why and how.

This Article has argued that states have successfully widened and deepened
institutions by systematically employing two strategies: consent tailoring and
institutional tailoring. Both strategies are aimed at suppressing heterogeneity
costs. Whether states choose to homogenize uncooperative member states
through consent tailoring or accommodate them through institutional tailoring is
determined by the relative bargaining power of the cooperative and
uncooperative members of the institution on a given issue at a given time.
However, as preference heterogeneity within an institution grows over time,
institutional tailoring is likely to dominate consent tailoring. Ultimately,
differentiated integration—an element of institutional tailoring—becomes a
prevailing feature of multilateral cooperation. Framed this way, the
size/heterogeneity trade-off can offer a dynamic explanation for how
institutions evolve as opposed to a merely static theory of an optimal size of
states or institutions. In other words, this trade-off not only determines the optimal size of an institution but also sets off a series of the adjustment strategies and determines their sequence and, consequently, progression of the institution.

The discussion has implications across areas of international law. It raises some new questions but also allows us to revisit old debates with a new analytical framework. For instance, one of the long-standing debates in international trade law this past decade has been whether bilateral and regional preferential trade agreements ("PTAs") are welfare-enhancing. Traditionally, the inquiry has focused on the degree to which such agreements lead to trade creation versus trade diversion. But as PTAs today are increasingly deep in terms of their substantive coverage, a better way to analyze their desirability might be to assess them in light of the size/heterogeneity trade-off. Their scope may not indicate that they are "second best" agreements. We may also not want to see them expand to embrace a great number of states. Such expansion would likely come at the cost of the depth of the commitments. In the end, whether any particular PTA reflects an optimal size requires a detailed understanding of the benefits available under any given size, heterogeneity costs that limit the parties ability to obtain those benefits under any given size, and strategies available for the parties to manage and overcome those heterogeneity costs via consent tailoring and institutional tailoring—both initially as well as over time as the institution evolves.

The above discussion also contributes to our understanding of the relationship between international law and state power. The interplay between consent tailoring and institutional tailoring explains how powerful states seek to maintain their leverage in international institutions even when the balance of power becomes more dispersed. While at first glance, today's international cooperation seems to mark the decline of powerful states' bargaining leverage, another way to think about institutional tailoring is that it merely reinstates powerful states' control over institutions. As power becomes more dispersed and consent tailoring less successful, powerful states simply abandon traditional multilateralism and proceed to cooperate in the form of coalitions of the willing. The idea of building "institutions within institutions" can have the effect of restarting the process of institutional change, restoring the ability of powerful states to override the consent of uncooperative members and thus move the institution towards a new equilibrium between the benefits of size and costs of heterogeneity. Thus, the primary beneficiaries of differentiated integration are often the large and powerful countries who simply have found another way to reinstate their control of institutions and outcomes.

This Article has offered a descriptive analysis on institutional change. Yet the discussion has several normative implications, two of which stand out. First, differentiated integration is conventionally thought of as being a suboptimal or
the “second best” solution to institutional cooperation. Opt-outs and escape clauses are claimed to weaken the institution. Clubs within clubs are seen desirable only to the extent that they pave the possibility for a more inclusive cooperation in the future. Genuine multilateralism thus often remains the ultimate goal. However, if one takes the size/heterogeneity trade-off seriously, no single optimal size or scope for an institution exists. Instead, different issues within an institution call for a different number of participating states depending on the relative magnitude of gains and heterogeneity costs. Consent tailoring and institutional tailoring allow countries to optimally tradeoff between economies of scale and preference heterogeneity in each area of cooperation. Differentiated integration hence makes institutions more effective by eliminating holdout problems, while leaving them at the same time more legitimate by preserving sovereignty. While critics may claim that differentiated integration makes institutions less inclusive, the converse may also be true as states are permitted to join institutions even if they are not capable or willing to assume all or identical obligations. Thus, differentiated integration can be normatively defended as a desirable end goal of international cooperation.

At the same time, institutional tailoring and differentiated integration carry distinct risks. Today, the question of multitier governance is particularly acute for Europe. The severe problems underlying the Eurozone show that a large membership is not necessarily optimal. Admitting fiscally weak members has increased the heterogeneity costs of the currency union, deeply dividing the interests of the debtor and creditor countries. These divisions have not been matched with transaction costs savings that broader membership should deliver. Going forward, while there continues to be a core set of EU policies and principles that all countries will likely share, in a large number of policy areas the EU must either retreat and slow the pace of integration or allow for varying clubs within the club to emerge. The biggest test yet to come is the ability (or desirability) of the EU’s Eurozone members to move towards greater fiscal integration—as some predict to be inevitable—while leaving the institutional structure of the broader EU intact.

Second, an enhanced understanding of how institutions evolve invites us to rethink some of the fundamental principles on which international law and the legitimacy of international institutions are conventionally thought to rest. This Article has suggested that when international institutions evolve, they cannot accomplish the two fundamental principles of international law—state consent and universality—at the same time. After a certain threshold of preference

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71 Other scholars have acknowledged that consent in international law is becoming more attenuated. Universality of international law and uniform obligations across states have similarly been called into question. But when examined with the help of the transactions costs approach to
diversity within an institution has been reached, either the need for genuine consent or universality needs to give. Consent tailoring compromises the principle of consent whereas institutional tailoring compromises uniformity and thereby the idea of universal rights and obligations. Only if institutions are large and shallow can consent and universality coexist. But institutions that seek to both widen and deepen can only do so by either moving away from one or the other.

This observation invites us to rethink the international institutions as presenting a design choice among three principal variables: consensus, universality, and effectiveness. In this triangle, two principles can coexist yet never all three. The three variables are all interrelated, making it impossible to optimize on all three at the same time. In the presence of this “triple constraint” or the “international law triangle,” one principle must always give, presenting members with a crucial choice pertaining to the institutional design.\(^72\) Universal institutions operating based on the principle of consensus cannot remain effective—yet regaining effectiveness would require relaxing the principle consensus or, alternatively, forgoing universal obligations. Consensus-based institutions seeking to effectively constrain state behavior cannot do so while continuing to strive for universal membership—limiting the size of the institution becomes inevitable every time consensus and effectiveness are prioritized. Yet if the universal membership remains a foundational value for the institution, decisionmaking must move away from consensus, else forgo effective decisionmaking and become capable of only generating inconsequential decisions reflecting the preferences of the most resistant voter.

A potential new avenue for international law and economics scholarship—both theoretical and empirical—would be to enhance our understanding of the rational design of international institutions with this triangle of consensus, universality, and effectiveness in mind. This research would allow us to better explain and predict the various institutional patterns as a function of the distinct (yet inevitably varying) hierarchy across these three principles. It could also help us unpack the economic and political conditions under which each principle is sacrificed—as an inevitable consequence of embracing the other two—providing an opportunity to re-examine the very foundations on which international law is conventionally thought to rest.

\(^72\) This argument mirrors and directly borrows from the concept known as “project management triangle,” a model that identifies three variables central to any project: fast, good, and cheap. Any project can accomplish any two—but always at the cost of forgoing the third one.