The Least Restrictive Means

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it had not been applied to restaurants where 45 percent of all beef was sold. It was “not persuaded that Korea could not achieve its desired level of enforcement” by devoting “more resources” to conventional enforcement efforts in the beef sector. “Violations of laws and regulations like the Korean Unfair Competition Act can be expected to be routinely investigated and detected through selective, but well-targeted, controls of potential wrongdoers.” Finally, even though alternative enforcement measures “could well entail higher enforcement costs for the national budget,” the alternative Korea had chosen had “in effect shifted all, or the great bulk, of these potential costs . . . to imported goods and retailers of imported goods,” an “onerous shifting of enforcement costs which ordinarily are borne by the Member’s public purse.” Accordingly, the Appellate Body affirmed the finding that the dual retail system was not “necessary.”

2. EC—Asbestos.

The asbestos dispute arose when France enacted a ban on the sale of virtually all products containing asbestos in any form. Canadian firms had previously produced and exported to France various products for the construction industry, such as concrete forms reinforced with an asbestos-containing fiber. The French regulation put an end to these exports, and Canada complained that this policy violated WTO nondiscrimination obligations as well as obligations to eschew the use of quantitative restrictions on international trade. A dispute panel agreed with Canada that a violation of these obligations was present, but held that the Article XX(b) exception for measures necessary to protect human health was applicable to the ban so that no ultimate violation of WTO law arose.

On appeal, Canada challenged the panel’s reliance on Article XX(b), contending in particular that a total ban on asbestos-containing articles was not “necessary” to the protection of human

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23 See id at ¶ 168.
24 Id at ¶ 180.
25 Id.
26 Id at ¶ 181.
27 See id at ¶ 182.
28 WTO, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, ¶¶ 2, 193, WT/DS135/AB/R (Mar 12, 2001) (“Canada has not succeeded in establishing that the [asbestos] measure at issue is inconsistent with the obligations of the European Communities under the covered agreements.”).
29 See id at ¶ 2–3.
30 “[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.” Reprinted in Jackson, Davey, and Sykes, Document Supplement at 45 (cited in note 4).
31 See EC—Asbestos at ¶ 4(d) (cited in note 28).
health. In this regard it raised four arguments: (1) that the panel erred in finding that the asbestos-containing products created some health risk; (2) that the panel could not find that a measure was protected by Article XX(b) unless it had a quantitative estimate of the magnitude of the risk that it avoided; (3) that the panel inappropriately characterized the regulatory objective as being a complete halt to the spread of asbestos-related health risks, as it failed to take account of the fact that substitute products also created health risks; and (4) that the panel erred in finding that the “controlled use” of asbestos-containing products was not a reasonably available alternative.

The first two arguments are of little interest here and were dispensed with easily by the Appellate Body—the challenge to the finding of a health risk was a challenge to a basic factual finding that would not be disturbed on appeal, and the suggestion that the risk must be quantified finds no textual support in Article XX or in prior cases. The third and fourth arguments, by contrast, raise more fundamental issues and require somewhat greater attention.

Canada’s third argument was, in effect, that France had established a risk baseline that tolerated some health risk from construction products like those at issue. Hence, the panel should have asked whether some less restrictive policy could have achieved the same level of overall health risk as the situation that prevailed after the ban on asbestos-containing products. The panel, by contrast, had found that France’s goal was to achieve zero risk from asbestos, and that it was accordingly “necessary” to ban asbestos-containing goods altogether. The analysis suggested by Canada would have been challenging to be sure—it would have required a determination as to the overall health risk associated with substitute products with the ban in place, and an analysis of whether alternatives to a ban on asbestos-containing products could achieve a comparable risk level.

The Appellate Body’s response is somewhat opaque, but seemingly amounts to the proposition that in a case such as this one, least restrictive means analysis will not restate the regulatory goal pro-

32 See id at ¶ 165.
33 See id.
34 See id at ¶¶ 166–67.
35 The Appellate Body stated:

[It is undisputed that WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection... is a ‘halt’ to the spread of asbestos-related health risks... Our conclusion is not altered by the fact that [substitute] fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the [substitute] fibres is, in any case, less than the risk posed by... asbestos fibres.

Id at ¶ 168.
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pounded by a WTO member. If the stated goal is zero risk from asbestos, then WTO law merely inquires whether the measure in question is necessary to that goal, even if the overall level of health risk is not zero due to the risks from substitutes, and even if some less restrictive alternative policy arguably could achieve a comparable overall level of risk. The implicit constraint is merely that the regulatory policy in question cannot exacerbate the risk in relation to the alternatives—the substitutes cannot create more risk than the products they supplant.36 Regarding Canada's fourth argument about the "controlled use" of asbestos products as a less restrictive alternative, the Appellate Body again addressed the question left open by some of the earlier GATT decisions—what does it mean to say that an alternative is "reasonably available"? It referred briefly to an earlier panel finding that had not been appealed to the effect that "an alternative measure did not cease to be 'reasonably' available simply because the alternative measure involved administrative difficulties."37 It then quoted its opinion in the Korean beef case regarding the factors relevant to the "weighing and balancing process," and concluded that:

In this case, the objective pursued by the measure is the preservation of human life and health . . . . The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end.38

The last step was to point to scientific evidence in the record to the effect that "controlled use" (such as ensuring that the demolition of buildings with the asbestos-containing products are conducted by personnel wearing protection from airborne asbestos fibers) was not perfect.39 Some risks of asbestos exposure would always remain, and hence controlled use would not achieve the stated health objective.40

3. EC—Hormones.

In the 1980s, European regulators decided that the administration of growth hormones to beef cattle creates some human health risk (primarily a risk of cancer), even though scientific evidence of the risk from small residues was scant at best for most of the hormones in question. Europe prohibited the use of growth hormones on cattle for human consumption in Europe, and also prohibited the importation of beef from other nations that do not ban the use of growth hor-

36 See note 35.
37 Id at ¶ 169.
38 Id at ¶ 172.
39 See id at ¶ 174.
40 See id.
mones. As a result, a number of exporting nations, including the United States and Canada, were no longer able to sell their beef in Europe. (The option of certifying beef as hormone-free to the satisfaction of European regulators was evidently uneconomical.) The dispute simmered for many years, and was quickly brought to the WTO after its formation pursuant to the new Agreement on the Application of Sanitary and Phytosanitary Measures which, as noted earlier, requires Europe to ensure, inter alia, that its food safety regulations are not more trade restrictive than necessary to achieve its legitimate regulatory objectives.

I note the case not for what it says on this issue, but for what it does not say. Although Europe lost the case on other grounds, the parties to the case did not even raise the least restrictive means issue, despite obvious arguments that might have been made in that regard. Europe had characterized its regulation as a "zero residue" policy. But rather than understanding the goal as a zero residue objective, it could have been recharacterized as a zero risk objective. Evidence might then be adduced to establish that zero risk is achieved at low level residues (such as those permitted under hormone-residue standards promulgated by international standardization bodies), and a regulatory policy tolerating that level of residue might be deemed a less restrictive alternative. As another possibility, perhaps the regulatory objective could be restated as one of ensuring that consumers are protected against unwitting ingestion of hormone residues that they might prefer to avoid. Then, perhaps a labeling requirement for hormone-raised beef might be a less restrictive alternative. Yet, these strategies were not pursued at all. One must be cautious in drawing an inference about the law from the fact that litigants did not raise an argument, but the fact that attorneys for the United States opted not to pursue least restrictive means arguments surely suggests that they saw little hope for them on these facts.

B. GATT Decisions

Before discussing the implications of the WTO cases, it is useful to note briefly how the "necessity" issue was resolved in practice by pre-WTO GATT panels.

41 See WTO, EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, ¶¶ 1, 253, WT/DS/26 & 48/AB/R (Jan 16, 1998) (upholding "the Panel's finding that the EC measures at issue are inconsistent with the requirements of Article 5.1 of the SPS Agreement").
1. **United States—Section 337 of the Tariff Act of 1930.**

Section 337 of the U.S. Tariff Act of 1930 provides for actions before the International Trade Commission when the importation of articles involves unfair methods of competition.\(^{42}\) It has primarily been invoked in patent disputes.\(^{43}\) The European Community challenged a prior version of the law as a violation of the nondiscrimination obligations of GATT.\(^{44}\) The premise of the challenge was that domestic patent infringers could only be sued in U.S. courts, while the producers of imported goods that were alleged to infringe U.S. patents could either be sued in a court proceeding or subjected to an action under Section 337, which differed with regard to the time frame for the action, the procedures, and the remedies available.\(^{45}\) For example, the remedy in court was either damages or injunction, while the remedy under Section 337 included the possibility of an order directing the Customs Service to bar the offending goods from entering the United States.\(^{46}\)

The dispute panel found that impermissible discrimination was indeed present, and proceeded to consider whether the United States had a defense under Article XX(d), treating the patent laws generally as "laws . . . not inconsistent with [GATT]."\(^{47}\) By and large, the features of Section 337 that might disadvantage respondents relative to an action in U.S. court were held not to be "necessary" to the enforcement of the patent laws.\(^{48}\) The fact that Section 337 cases proceed much more quickly, for example, could not be justified as essential to the enforcement of the law—if speed was essential, why only when the infringing goods were imported?\(^{49}\)

The only feature of Section 337 that the panel felt might be "necessary" was the in rem remedy, and the opportunity for orders to be issued to the Customs Service to exclude offending goods.\(^{50}\) The panel reasoned that in personam remedies might be ignored or evaded by foreign producers who were not subject to arrest in the United States and might have no assets to be seized by U.S. authorities.\(^{51}\) The only viable option for preventing the sale of infringing goods, therefore, might be to exclude them from U.S. markets.\(^{52}\)

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\(^{42}\) See United States—Section 337 of the Tariff Act of 1930 at ¶ 2.2 (cited in note 6).

\(^{43}\) See id.

\(^{44}\) Id at ¶ 1.3.

\(^{45}\) See id at ¶ 2.8.

\(^{46}\) See id at ¶ 2.8(1).

\(^{47}\) Id at ¶ 5.22.

\(^{48}\) See id at ¶¶ 5.28-5.30.

\(^{49}\) See id.

\(^{50}\) See id at ¶¶ 5.31-5.33.

\(^{51}\) See id.

\(^{52}\) See id.
2. **Thailand—Cigarettes.**

Thailand engaged in a number of regulatory practices that disadvantaged foreign sellers of cigarettes. Most prominently, Thailand required import licenses to be issued before cigarettes could be imported, and allegedly had refused to issue any such licenses for a decade.  

Thailand defended its practices on two grounds. First, it argued that the government was concerned about the adverse health impact from the growing use of cigarettes by the Thai population. Second, it argued that imported cigarettes contained certain additional chemicals, such as those designed to lower tar and nicotine content, that might pose a health risk. Both arguments were claimed to afford a defense to the challenged practices under GATT Article XX(d).

The panel ruled that the discriminatory treatment of imported cigarettes could not possibly be “necessary” to the goal of curtailing smoking. It noted that a number of nondiscriminatory alternatives could be employed to that end—measures that raise the prices of all cigarettes uniformly, for example, or that restrict advertising uniformly. Regarding the argument that imported cigarettes contained potentially dangerous chemicals or additives, the panel also concluded that an outright ban on imports was not “necessary” to address the problem. It suggested that Thailand could simply ban cigarettes containing specific additives that were dangerous or unhealthy, and as to other additives it could employ nondiscriminatory labeling requirements that ensured disclosure to the consumer.

3. **United States—Marine Mammal Protection Act (Tuna-Dolphin).**

The *Tuna-Dolphin* case involved, among other things, a U.S. statute that prohibited the importation of tuna caught using certain fishing methods that kill dolphins. The statute applied to all tuna imports, even if the fish were caught in international waters or in the ter-

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53 See *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes* at ¶ 6 (cited in note 7).
54 See id at ¶ 21.
55 See id at ¶ 28.
56 See id at ¶¶ 21, 28.
57 See id at ¶ 81.
58 See id at ¶¶ 78–80.
59 See id at ¶ 77.
60 See id.
61 *United States—Restrictions on Imports of Tuna*, 39th Supp GATT BISD 155, ¶¶ 2.5, 7.1 (1993) (not adopted) (concluding that the “prohibition of imports of certain yellowfin tuna . . . and the provisions of the Marine Mammal Protection Act under which it is imposed are contrary to Article XI:1 and are not justified by Article XX(b) or Article XX(g)”).
ritorial waters of another nation. It was challenged as a violation of GATT nondiscrimination obligations, or alternatively as a violation of GATT commitments regarding quantitative restrictions.\(^\text{62}\) In a report that was never adopted in the GATT and that accordingly never became binding, the Panel found violations of GATT commitments and proceeded to consider whether the United States could invoke an Article XX exception.\(^\text{63}\)

Among other things, the United States argued that its policy was “necessary” to protect animal health under Article XX(b).\(^\text{64}\) Much of the discussion on this point centered on whether the United States could invoke Article XX(b) with respect to animals outside of its jurisdiction, but the report also contained some discussion of the “necessity” test.\(^\text{65}\) In particular, the panel noted that one important and highly trade-restrictive feature of U.S. law did not appear to be “necessary”:

> The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point in time, their policies conformed to the United States’s dolphin protection standards.\(^\text{66}\)

In addition, the panel held that the United States had not shown that it had exhausted other avenues for the protection of dolphins, “in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas.”\(^\text{67}\)

C. Implications

Although the number of cases over the history of the WTO/GATT system applying a least restrictive means test is small, the cases to date are consistent in my view with the proposition that the test is a crude form of cost-benefit balancing that is highly attentive to error costs and uncertainty. By “crude,” I mean that the WTO decisionmaker does not actually quantify the costs and benefits of alternative regulatory policies in dollars or some other metric. Rather, the decisionmaker proceeds more impressionistically and qualita-

\(^{62}\) Id at ¶ 3.1.

\(^{63}\) See id at ¶ 5.18, 5.23.

\(^{64}\) Id at ¶ 5.24.

\(^{65}\) See id at ¶ 5.25.

\(^{66}\) Id at ¶ 5.28.

\(^{67}\) Id.
tively to assess the effect of alternative policies on trade, the administrative difficulties and resource costs associated with alternative policies, and the regulatory efficacy of those policies. It then weighs these considerations in making a decision.

The attention to error costs and uncertainty is evident in the hesitancy of decisionmakers to hold that an alternative is less restrictive (or that the challenged policy is not “necessary”) if the alternative policy *may* be less efficacious and if the value of regulatory efficacy is great. Thus, for example, if the regulatory objective relates to some highly valued interest such as the protection of human life, then the challenged regulation will be upheld if there is any doubt as to the ability of the proposed alternative to achieve the same level of efficacy. This practice may be understood as a recognition of the fact that the costs of an erroneous decision—loss of life—would be extremely high, and that even a small probability of an erroneous decision counsels against condemning the measure under scrutiny.

By contrast, where the regulatory objective relates to some less important interest, and the proposed alternative is considerably less restrictive of trade, decisionmakers can condemn a challenged regulation even when the efficacy of the proposed alternative regulation may be less than the efficacy of the challenged regulation. Likewise, where an alternative regulation is clearly less restrictive of trade and there is no doubt as to its efficacy in achieving regulatory goals, the mere fact that it is somewhat more costly for regulators to implement will not prevent the decisionmaker from condemning the challenged regulation. These last observations make clear that the “narrow” conditions set forth in the introduction to this Essay need not hold before a less restrictive alternative may be found, and further indicate that an important degree of (crude) cost-benefit balancing is involved in the analysis.

Each of the adopted decisions to date fits nicely within this framework. In *Korea—Beef*, the dual retail system may well have made it easier for regulators to prevent the passing off of imported meat for domestic meat. Korea argued that before the system was put in place, fraud was difficult to police because once beef was unpacked it was largely impossible to determine its origin. Likewise, the alternative of trying to police fraud through spot inspections may have been more expensive. Nevertheless, in the face of evidence that the dual retail system had constrained the number of outlets for the imported product and significantly reduced its sales, the policing method that Korea employed to deal with other forms of consumer fraud was deemed less restrictive. The result may be explained by the fact that the cost of fraud to consumers—unwitting consumption of imported
rather than domestic beef—was clearly modest at best. Any reduction in the efficacy of regulation was thus of little moment.

In *EC—Asbestos*, Canada argued forcefully that asbestos was of no danger unless airborne, and that carefully "controlled use" of its construction products with embedded asbestos fibers would protect against any hazard. The market should decide whether the extra costs of controlled use were worth incurring. But the European response that the absolute efficacy of controlled use had not been established in all settings, and that the products might fall into the hands of individuals who did not follow sound "controlled use" guidelines, carried the day. It was enough that the proposed alternative might not be as effective as a complete ban on the products, and that the health hazard was real. Likewise, neither the Panel nor the Appellate Body would accept Canada's attempt to recharacterize the regulatory objective as some (non-zero) overall level of health risk based on the risks that France would apparently tolerate from substitute products. To do so would have embroiled them in an error-fraught task of trying to determine whether the residual hazard with controlled use was less than or greater than the hazards from substitutes.

Given the decision in *EC—Asbestos*, it seems that attorneys for the United States in *EC—Hormones* were right to eschew least restrictive means arguments. They too would have rested on an attempt to recharacterize the regulatory objective in Europe as zero risk rather than zero residue, or perhaps as informed choice. Considering the health risk at stake, any serious possibility that positive hormone residues create a health hazard would almost certainly have prevented a finding that international residue standards or labeling requirements were a less restrictive alternative. The only realistic hope for the United States, therefore, was to show that the zero residue standard was completely unjustified from a scientific standpoint, and violated a different requirement in the Sanitary and Phytosanitary Measures Agreement—a requirement that measures be based on a scientific risk assessment. Success on that front would make the least restrictive means argument superfluous, while failure on that front would surely have doomed the least restrictive means analysis as well.

Although the old GATT cases are not legally "binding" in the WTO, at least the adopted panel reports from GATT have some persuasive authority. It is instructive to note that the results in these early...
cases comport with the approach of the WTO cases—indeed, they are for the most part extremely easy cases in which the existence of less restrictive alternatives could hardly be contested under any standard.

In *U.S.—Section 337*, it was impossible to explain why most of the rules that discriminated against foreign firms alleged to have infringed U.S. patents contributed to any legitimate regulatory objective. *A fortiori*, nondiscriminatory alternatives were less restrictive. The one exception—in rem remedies—had no plausible substitute in cases where the foreign infringer could not be reached personally due to the absence of any physical or financial presence in the United States. And it was difficult to imagine how an in rem measure at the border could be applied on a nondiscriminatory basis to domestic goods.

*Thailand—Cigarettes* is similar in important respects. The discriminatory treatment of imported goods was not plausibly needed if the goal was to reduce smoking. Indeed, measures that raised the price or restricted the quantity of imports but not domestic substitutes are plainly inferior to measures that raise price or restrict quantity across the board. As for the purported health concerns of the Thai government about the additives in foreign cigarettes, Thailand was free to enact a nondiscriminatory ban on cigarettes containing any additive that was thought to pose a health hazard, and to require disclosure of all additives. Even though health concerns were at issue, therefore, there seemed to be no uncertainty about the adequacy of trade neutral measures to take care of them.

*Tuna-Dolphin*, the one unadopted decision noted here, also involved a practice that had no plausible justification as an animal health measure—a regulation that conditioned the right to import on an incidental dolphin kill requirement that was only revealed after foreign fishermen had landed their catch. Whatever the permissible threat to dolphins, there was no reason why it could not be specified in advance. The one dimension of the case that is rather unusual is the suggestion that prior negotiation to achieve a cooperative solution was needed before the United States could unilaterally require other nations to comply with its dolphin protection policy as a condition of the right to export to the United States.\(^69\) Without more details on the

\(^69\) This idea resurfaced in a more recent WTO case, albeit not in the context of a least restrictive means analysis. See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, ¶¶ 172, 187, WT/DS58/AB/R (Nov 6, 1998) (stating that “the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved” rose to the level of “unjustifiable discrimination”; and concluding that the United States protective measure was “not justified under Article XX of the GATT 1994”). This case involved measures to protect sea turtles, prohibiting shrimp imports from nations that used shrimping methods deemed unsafe for the turtle population by the United States. The Panel and the Appellate Body found that the
contours of such a requirement—how long must negotiation be given to succeed, what if other nations do not give in to U.S. demands, and so on—it is difficult to know whether this requirement is onerous or trivial, and thus difficult to evaluate its relationship to the framework developed here.

The reader may complain that I have given too little attention to competing hypotheses. The most obvious alternative might be the hypothesis that least restrictive means analysis in the WTO is political cover for motive review—that its real function is to identify policies motivated by protectionism rather than by some legitimate, non-protectionist objective. A similar suggestion has been advanced with reference to the cases decided under the dormant Commerce Clause of the U.S. Constitution. 70

Undeniably, at least some of the cases discussed above could be viewed as consistent with this hypothesis as well. But without going on at length, I reject it because the WTO has shown itself more than willing to condemn practices that have clear nonprotectionist origins (as in the EC—Hormones case71). There is little reason to think that least restrictive means analysis is more cabined in this respect than other inquiries under WTO law. Nevertheless, an ideal test case for discriminating among these hypotheses remains to be decided.

CONCLUSION

This Essay has argued that least restrictive means analysis in the WTO/GATT system to date is roughly co-extensive with (crude) cost-benefit analysis. The analysis gives great weight to the presence of uncertainty about the efficacy of regulatory alternatives when a vital interest like human health is genuinely at stake, but this feature too comports with the logic of cost-benefit analysis under uncertainty. It is an open question whether least restrictive means analysis works similarly in other legal contexts. One suspects that it does, but systematic exploration of that issue remains for future research.

United States had negotiated agreements regarding the protection of sea turtles with some nations but had made no attempt to negotiate them with others, and thus engaged in "unjustifiable discrimination" in violation of the chapeau to Article XX. See id at ¶¶ 166–72.

70 See Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich L Rev 1091, 1206–84 (1986) (arguing that the Supreme Court, in its dormant Commerce Clause jurisprudence, has been concerned exclusively with preventing state protectionism).

71 The regulations in question there were promulgated after well-publicized incidents in which the ingestion of beef from cattle treated with the hormone DES produced some nasty health issues. See Sykes, Product Standards at 16–17 (cited in note 2).
In the economic and political science literature on constitutional choice and constitutional design, David Hume is almost invariably associated with a master principle of design that is congenial to rational-actor approaches. I shall call this the knavery principle. As Hume put it, “in contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest.” The knavery principle is, however, untenable, as I shall subsequently discuss. So it might seem that Hume has nothing valuable to tell us about constitutional design.

My concern here is to dispel that impression, and by so doing to reevaluate and vindicate Hume’s contributions. I shall argue that Hume’s principal contribution is not the knavery principle. Indeed one of his major claims about the British constitutional order was that it violated the principle, and one of his major projects was to explain how the mixed British constitution could nonetheless retain its stability. Hume’s real contribution, rather, is to have pioneered the critical idea of second-best constitutionalism: the idea that multiple departures from the optimal or first-best constitutional arrangements might offset each other, producing compensating adjustments that ensure constitutional equilibrium. Hume’s characteristic mode of analysis, I shall suggest, is simultaneously to identify both a departure from optimal constitutional design and an offsetting institutional adjustment that compensates for the initial defect.

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The idea of second-best constitutionalism has important implications for American constitutional law. Many positions and arguments, in both structural constitutional law and the law of constitutional rights, appeal to the second-best idea of compensating adjustments; I shall canvass these arguments and indicate the principal lines of methodological criticism that can be advanced against them. Most importantly, the ubiquity of compensating adjustments does not entail that any particular constitutional actor should attempt to supply such adjustments, least of all judges deciding constitutional cases. I shall suggest that Hume's conception of second-best constitutionalism implies (or is at least compatible with) a modest conception of constitutional adjudication: Compensating adjustments should be welcomed where they exist, but judges ought not attempt to identify and promote them. If judicial attempts to engineer improvements to the constitutional structure often make things worse, not better, then a second-best account of constitutional adjudication itself entails that judges should ignore substantive second-best arguments in constitutional decisionmaking.

Two caveats are appropriate. First, the point of studying Hume's constitutionalism is presentist, not historical. I mean to plunder Hume for ideas with fertile applications, and I shall disregard historical fidelity if there is an opportunity to interpret or reconstruct Humean ideas in ways that enhance their present utility. Second, I shall focus on Hume's analysis of collective behavior and its institutional determinants, largely ignoring the extensive literature on Humean moral and political psychology at the level of individuals. Hume's psychology, with its distinctions among reason, passion, and interest, had great influence on the Framers, but I shall leave the originalist implications of Hume's ideas unexplored.

Part I explains the important failings of the knavery principle. Part II examines Hume's characteristic analytic style, with its appeals to offsetting violations of ideal institutional design. Part III turns from British to American constitutionalism, fleshing out the Humean idea of second-best constitutionalism and examining its implications for contemporary constitutional interpretation and adjudication. A brief conclusion follows.

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See, for example, Morton White, *Philosophy, The Federalist, and the Constitution* 13–22 (Oxford 1987); Douglass Adair, "That Politics May Be Reduced to a Science": *David Hume, James, Madison, and the Tenth Federalist*, 20 Huntington Library Q 343, 348–57 (1957) (describing the influence of Hume on Madison's writings on factions).
I. KNAVES AND KNIGHTS

The initial puzzle is why anyone might endorse the knavery principle as a master principle of constitutional design. As Hume puts it, "[I]t appears somewhat strange, that a maxim should be true in politics, which is false in fact." It is not true that public officials, or for that matter people generally, always pursue rational self-interest, except in the tautological sense that reduces altruistic behavior and morally-motivated behavior to interdependent utility functions and a "taste for fairness," respectively. In Hamilton’s words, the "assumption of universal venality in human nature is little less an error in political reasoning, than the supposition of universal rectitude." But the empirical question turns out to be a distraction. The standard defense of the principle, stemming from work in the economics of constitutional choice, casts it as a methodological commitment rather than an empirical claim. The knavery principle is factually erroneous, yet (on this view) represents the best postulate by which to assess constitutional-design proposals.

The methodological defense of the principle rests on four claims. First is a claim from symmetry or parsimony: If people are best modeled as rational maximizers of self-interest in explicit markets, the same model should be applied to implicit political markets. By itself the appeal to symmetry does not, of course, tell us whether rational self-interest is the correct uniform assumption to use, but the implicit claim is that explicit markets can’t sensibly be modeled on any other assumption. Second is a kind of maximin argument, or more loosely an argument based on avoiding the worst-case scenario: If the harms from self-interested official behavior are greater than the benefits of public-spirited official behavior—if knaves do more harm than knights do good—then constitutional rules should be designed on pessimistic assumptions to minimize the worst possible outcomes rather than to maximize the best possible outcomes. Third is a selection claim: Just as non-profit-maximizing behavior is driven out of explicit markets by the bankruptcy of non-profit-maximizing firms, so too public-regarding behavior will be driven out of political markets be-

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7 These claims are advanced in Geoffrey Brennan and James M. Buchanan, *The Reason of Rules: Constitutional Political Economy* 46–66 (Cambridge 1985), and qualified or repudiated in Geoffrey Brennan and Alan Hamlin, *Democratic Devices and Desires* 17–33 (Cambridge 2000).
cause public-regarding officials will lose out to officials who strictly maximize success in elections and other competitive selection processes. Fourth is an analogy to Gresham’s law: Self-interested behavior will drive out public-spirited behavior, not by selection processes, but by forcing public-spirited actors to behave as though they were self-interested, simply to protect themselves from the depredations of their self-interested competitors.

All of these claims are questionable. Methodologically, symmetry or parsimony is always at best a weak and defeasible commitment; it counsels the theorist to reject unnecessary complexity, adopting like assumptions to model like settings, but the opposite counsel is that the theorist should reject excessive simplicity, and should tailor his assumptions to capture relevant differences in different settings.\(^8\) To treat explicit markets and politics under identical assumptions if the two domains are governed by fundamentally different forces is just as much a mistake as it is to treat them under different assumptions if the two domains are fundamentally similar. The appeal to symmetry, then, is parasitic on a suppressed judgment, or guess, that the same motivations do in fact dominate both political and economic institutions.

Substantively, the knavery principle is excessively static. It ignores critical dynamic effects, by virtue of which the best maxim for constitutional design may be to assume that public actors are at least heterogeneous in their motivations, rather than uniformly self-interested. To design institutions on pessimistic assumptions about the motivations of public actors may simply create a self-fulfilling expectation, one that itself causes public actors to hold the self-interested motivations that the knavery principle attributes to them. Two mechanisms produce this self-fulfilling expectation: the endogeneity of official motivations and the selection effects of institutional design.\(^9\)

First, the self-interest assumption may crowd out public-spirited motivations.\(^10\) Providing material rewards for altruistic behavior may reduce the incidence of the desired behavior if actors are altruistically motivated.\(^11\) The reward reduces the cost of the behavior, but the offsetting effect is that the provision of the reward reduces the utility that public-spirited actors derive from performing it, if the reward suggests that the behavior is motivated by venality rather than altru-

\(^8\) See Albert O. Hirschman, Against Parsimony: Three Easy Ways of Complicating Some Categories of Economic Discourse, 1 Econ & Phil 7, 8–9, 20 (1985).

\(^9\) See Kornhauser, 3 Theor Inq in L at 18–19 (cited in note 1).


ism. Conversely, on the punishment side, attaching material sanctions to self-interested behavior may increase the incidence of the undesired behavior. Punishment increases the relative cost of the behavior, but there are potential offsetting effects here as well: The implicit announcement that "a fine is a price" may undermine moral or social norms that otherwise inhibit the behavior, and may signal that violations of the rule are widespread, thus implying that only chumps or suckers voluntarily comply. In both cases, material sanctions premised on the assumption of self-interested behavior can inhibit the internalization of public-spirited motivations. Designing institutions for knaves may itself beget knaves.

These crowding-out effects suppose that the identity of public officials is held constant, but that the motivations of officials are endogenous. Public-spirited motivations are driven out by institutional structures even though the officeholders would have held public-spirited motivations under alternative structures. A second class of dynamic models reverses these assumptions, holding motivations constant while treating the identity or selection of officials as endogenous. Even if actors' motivations are exogenously fixed, the knavery principle may effect its self-fulfilling prophecy through the selection of selfishly motivated actors from a heterogeneous pool of selfish and unselfish candidates. Altruistic actors experience a differential cost from operating in an environment that supposes all actors to be selfish; imagine a public-spirited official whose opportunities to serve the public interest are frustrated by the elaborate monitoring devices put in place to check selfishly motivated officials. Altruistic actors who anticipate this differential cost of officeholding will invest less in seeking public office, all else equal, and will thus tend to leave the field to selfishly-motivated actors who experience no such costs. This reverses the selection argument for the knavery principle: Designing institutions for knaves creates a system in which knaves operate comfortably, while knights decline to take public office.

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12 Uri Gneezy and Aldo Rustichini, *A Fine is a Price*, 29 J Legal Stud 1, 14 (2000) (finding that the number of late parents at day care increased after a fine for lateness was implemented, and concluding that "[n]o guilt or shame ... can be attached to the act of buying a commodity at will").


II. Hume on British Constitutionalism

If the knavery principle is untenable, at least in any simple form, what can we learn from Hume about constitutional political economy? A great deal, I argue, even though Hume provides no overarching master principle of constitutional design. In this Part, I shall identify what I take to be the characteristic structure of Humean constitutional argument: Given an irreversible departure from, or violation of, ideal constitutional design, the best response is not to approximate the ideal as closely as possible by adopting its remaining components. Rather, the best response is to violate the ideal along some other margin, in order to produce an offsetting condition or compensating adjustment. In Part II.A, I illustrate the argument in the setting of institutional competition between Commons and monarchy, while in Part II.B, I do the same in other settings.

A. Commons and Monarchy

As an exegetical matter, the casual attribution of the knavery principle to Hume is misleading. Although Hume endorses the principle as a "just political maxim" established by "[p]olitical writers," his interest in the principle is complex and ambivalent." Hume elaborates it to mean that constitutional arrangements must, "by the skilful division of power," ensure that no one institution of government may accrete so much power as to allow it to exercise unchecked sway over the whole. The critical puzzle for Hume is that the British constitution of his day violated the knavery principle, yet maintained itself as an ongoing arrangement. Here I shall examine both the violation that Hume discerned and the compensating condition that stabilized the mixed constitutional order.

In Hume's view, a major source of the instability of constitutions generally is an imbalance between formal or legal power and the de facto power conferred by property. Social actors lacking legal power who accrue great wealth can eventually leverage their wealth to destabilize or even overturn nominal constitutional arrangements. Hume's view is nuanced; he concedes that if the original constitution of the state allots no power to groups that subsequently become differentially wealthy, then "[a] Government may endure for several ages, though the balance of power, and the balance of property do not coincide," because property holders will lack any pretext for seizing nominal authority. Yet where the original constitution grants "any

16 Id.