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ENVISIONING A GLOBAL LEGAL CULTURE

“To truly know a man, you must walk a mile in his shoes.”

*Charles H. Koch, Jr.**

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INTRODUCTION

World cooperation has generated a variety of supranational organizations, with responsibilities ranging from trade to crimes against humanity.¹ These organizations often include judicial-like tribunals, and these tribunals have and will increasingly create law. Together, they are evolving a global legal culture.² This legal culture will initially derive from national legal cultures and yet, over time, will transform national legal cultures. The legal principles that will guide this emerging global legal culture must now be analyzed in order to gain some understanding of the future. This Article offers a *framework* for thinking about the future development of global legal systems.

The twin pillars of the immediate iteration of this global legal culture will be the civil law and the common law systems. This prediction is not mere transatlantic chauvinism. These legal systems have, for good and bad reasons, migrated around the world. At present, 33.8% of the world's jurisdictions, encompassing 55.6% of the world's population, are based upon the civil law model, or civil law systems mixed with others (indigenous or religious legal ideologies, for example). The common law model, along with systems mixed with it, include 28.24% of the jurisdictions, and 14.68% of the world's population. Hence, combined, civil and common law-based legal cultures cover over 70% of the world's population in over 62% of the jurisdictions.³ Moreover, the two currently dominant governments are the United States (U.S.) and the European Union

1. The term "supranational organization" is used for a particular type of international organization that is "empowered to exercise directly some of the functions otherwise reserved to states." Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 287 (1997).

2. "Legal culture" is used here to encompass the panoply of societal elements associated with a legal system. Lawrence Friedman, a United States legal sociologist, has focused on that concept. While he noted that other scholars have used the term differently, his use of the term "refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds." Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in *COMPARING LEGAL CULTURES* 34 (David Nelken ed., 1997). He intended that what falls within this term is "living law." *Id.* at 36. The term is criticized for lack of rigor and coherence: "The imprecision of these formulations makes it hard to see what exactly the concept covers and what the relationship is between the various elements said to be included within its scope." Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13, 15 (David Nelken ed., 1997). Cotterrell conceded that it is useful "for its emphasis on the sheer complexity and diversity of the social matrix in which contemporary state legal systems exist." *Id.* at 29. In this Article's discussion, breadth is much preferred to precision, and hence the term seems appropriate.

3. See University of Ottawa, World Legal Systems, at <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-systeme.html> (Oct. 1, 2003) (information about jurisdiction); see also World Legal Systems Website, at <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-tab1.html> (last visited Dec. 2, 2003) (information about population).

(E.U.).⁴ The U.S., with due respect to its country of origin, England, represents the common law system, albeit its own version. The E.U. has largely adopted civil law concepts, again with due respect to England and Ireland's common law presence in the E.U., and hence, will add strength to consideration of civil law principles. For these reasons, the first steps toward a global legal culture will be dominated by some blending of civil law and common law.

Of course, analysis based on the merger of these systems can only provide a plausible beginning in envisioning the global legal culture because, as recognized below, other customary and indigenous legal cultures, many of which have mixed with the two transatlantic systems, will certainly have increasing impact on the global legal culture. Any prediction of global culture in any regard faces claims of overwhelming diversity, but we have seen an unprecedented merging of cultures in recent times in the face of such cultural diversity. The development of supranational organizations such as the E.U. demonstrates the development of an integrated legal culture in the face of seemingly incompatible and even belligerent histories. In sum, it is plausible to conceive of a global legal culture, even in the face of great diversity, and to forecast that the early stages of that legal culture will borrow a good deal from civil law and common law experiences.

Careful consideration of this emerging legal culture has become an imperative. As a U.S. legal scholar, I feel a particular sense of urgency in that enterprise. Other legal regimes, both supranational and national, have increasing impact on U.S. legal practice and U.S. laws. Yet, few U.S.

4. The term "E.U. law" in this Article is a concession to popular usage. Technically, it is a misnomer. Hanlon provided one brief description of the correct nomenclature:

The TEU [Treaty of European Union or Maastricht Treaty] created the 'European Union'. It consists of three 'Pillars'. In the middle are three existing Communities, (*i.e.* ECSC [European Coal and Steel Community], Eurotom and the E.C. [European Community]). These three Communities will be known collectively as the European Communities. It will be noted that the TEU officially changed the name to E.C., dropping the "Economic" from the title. On either side of this central "Pillar" is the Common Foreign and Security Policy (CFSP) and Cooperation in Justice and Home Affairs (JHA). These three "Pillars" support the over-arching constitutional order of the Union. However, only the central Pillar, the E.C., is governed by Community law. The CFSP Pillar and the JHA Pillar are governed by intergovernmental cooperation. This means they are outside the jurisdiction of the Community institutions, particularly the Court of Justice. Neither will any of the Articles of the outside Pillars be enforceable, or challengeable, in National Courts. Thus, although the Union is wider than the European Community it has its roots in the Community.

JAMES HANLON, *EUROPEAN COMMUNITY LAW* 9 (2d ed. 2000). Another justification for an inclusive sense of "E.U. law" is that the future will almost surely see a body of law covering all three pillars, although many of the aspects of the two "outside" pillars will be ruled more by politics than law as in the U.S.

lawyers have more than mere superficial knowledge of other legal systems. While legal systems are generally local and nationalistic, the U.S. legal culture has remained even more isolated than most. On the other hand, lawyers from other legal systems have been studying the U.S. system, often from the inside (obtaining U.S. law degrees and participating in U.S. firms), for generations. To a large extent, the health of the U.S. legal culture and effectiveness of U.S. practitioners depend on how quickly its practitioners and scholars can catch up.

To encourage all, but particularly U.S., lawyers to think about transformation of the law, this Article will envision a global legal regime. The purpose is more reflective than predictive. Nominally, the Article has three parts. The first Part offers an overview description of the emerging supranational legal institutions and the major forces moving them. The next Part will outline civil law legal concepts and provide background for common law readers. To further the goal of this Article, it will do so as it suggests some issues that will arise as the civil law system is incorporated into the global legal system. The last Part will move to the Article's major goal of setting up a framework for contemplating the basis on which a global legal culture might evolve, to some extent, on the merger of this globalized version of civil law thinking with U.S. common law thinking. Some effort is made to suggest how other major legal cultures may impact on this system but with the recognition that thinking about the interaction of the two major transatlantic systems is sufficiently ambitious for one Article.

Actually, the analysis is a unit presented in three stages: institutions, civil law overview, and then the blending of the civil law and common law legal cultures. The first stage of the analysis looks to the experience and development of four centralizing regimes with global impact: the U.S., Europe, the United Nations (U.N.), and the World Trade Organization (WTO). Since the work is about legal culture the concentration is on the adjudicative institutions of these four organizations. Largely for background, the piece looks to the experience of the U.S. federal courts and the European trade and human rights regimes. The U.S. provides the prediction with 200 years of experience, and Europe provides it with about 50 years. The latter experience is more relevant because it is a recent uniting of a number of national legal cultures. Just as useful to this analysis is the fact that Europe has taken some steps in melding civil law and common law legal cultures. The U.N. engages in human rights creation, promotion and enforcement. Its International Court of Justice (ICJ) presents a plausible and, in fact, working global tribunal for those purposes. It will also provide some experience in unifying a legal culture. Like Europe, the global regime has a trade regime separate from its human

rights regime. The trade regime now has the WTO to promote and protect trade values. The WTO has its own court-like bodies. Again, the WTO adjudicative apparatus is presented more as a plausible vehicle for developing global law, but it also provides a centralizing experience. The European experience demonstrates that this putative trade regime will ultimately affect almost every aspect of national law, indeed society in general. Like Europe, both the U.N.'s rights tribunal and the WTO's trade tribunal have been and must continue to deal with the tension between civil law and common law ideologies. So, we have plausible nascent world tribunals and we can engage in at least some preliminary thoughts about evolution of a global legal culture recognizing that these tribunals might be the vehicles for carrying it forward.

Now we can begin the job of contemplating what this global legal culture will look like. As stated, about half the world's population is living under some form of civil law system. Thus, it is imperative that common law lawyers and scholars understand some of the basic tenets of a civil law legal system in order to engage in predictions about a global legal culture. Underneath this discussion, and continued into the next stage, is the observation that there are subtle but fundamental ideological differences between civil and common law legal thinking, despite some appearance of convergence between the two great transatlantic systems. Our task also requires sufficient understanding of the civil law model in order to form thoughts about the melding of that model with the common law approach. While these two legal systems have common cultural as well as legal sources, a person from a civil law system will have a different intuitive understanding of law than someone from a common law system. The task here is to gain enough understanding to contemplate how a civil law legal mind will think about an issue on the world stage. Thus, this Part also projects the civil law ideology into the global legal culture in order to move the analysis forward, as well as offer some common understanding of the civil law model.

Finally, we can blend in the common law. A separate discussion of the common law ideology does not seem necessary because I anticipate that most of the readers will come from a common law legal culture, more precisely the U.S. An understanding of the basic tenets of the common law model is presented in the discussion of the interaction of the two models. The primary goal of this stage of the analysis is to identify areas of tension between common law and civil law ideologies. Nonetheless, I suggest potential resolutions of those areas of tension. More ambitiously, I identify certain aspects of these models that might best be adapted to the global legal culture. These suggestions will be set up by the efforts in the second stage to suggest how a given aspect of the civil law system might

emerge in the global legal culture. Some much more cautious attempts are made to identify aspects of other legal cultures, e.g., Islamic or Asian, that might have impact on the current development of the global legal culture. I recognize that a variety of potential legal ideas may be adapted from other legal cultures, or develop from the creative energies of future generations, but contemplating those is simply too much at this point.

Hopefully, these three analytical stages come together in the readers mind to present a framework for analysis. Some effort is made to engage in divination. It is simply irresistible to do otherwise, but the real goal of this piece is to lay groundwork and encourage thinking about the dimensions of a global legal culture. Although I encourage U.S. lawyers and legal scholars especially to become engaged, all the citizens of the world must be active in the design of the global legal culture.

I. EMERGING GLOBAL INSTITUTIONS AND THE FORCES THAT WILL SHAPE THEIR LAWS

This Part examines the judicial-like tribunals that will contribute to the global legal culture. It focuses on the two major global adjudicative institutions, the World Trade Organization's (WTO) dispute settlement apparatus and the United Nation's (U.N.) human rights adjudications. In order to suggest the impact these tribunals may have, and how they may contribute to the evolution of a global legal regime, it looks at the evolution of the European legal regime and, to a lesser extent, the centralization of U.S. law over its history.

A. *Present and Future World Judicial Regimes*

Two parallel nascent global judicial regimes are evolving in a world-wide legal culture: the trade adjudicators and rights adjudicators. Trade adjudicators began to evolve when the WTO's "Dispute Settlement Bodies" (DSB) were created. An ultimate rights adjudicator machine has evolved from the U.N.'s International Court of Justice (ICJ) (sometimes referred to as the "World Court").⁵ Mostly, the assertion is that these two already important world tribunals will fill the adjudicative vacuum created by the globalization of society in general.

There are 18 international tribunals that are composed of permanent, independent judges with authority to issue binding decisions on cases

5. Helfer & Slaughter, *supra* note 1, at 285. In particular, they observe that the "Committee" is becoming increasingly court-like. *Id.* at 338, 344, 365. Even though Helfer and Slaughter assert that the United Nations Human Rights Committee (UNHRC) is a much more important human rights body than many recognized, the UNHRC is not likely to assume the role of adjudicator. *Id.* at 279.

between two or more parties.⁶ Some 96 bodies “in the international system that are charged by States with the job of interpreting international law” might also be seen as part of a global judicial regime.⁷ The U.S. participates in a large number of such adjudicative mechanisms.⁸ Most of these bodies are relatively new.⁹ Still, the WTO dispute settlement machinery and the ICJ seem most likely to gain some dominance among the world’s tribunals. Therefore, we can profitably reflect on a global legal system radiating from these two adjudicative regimes.

The Uruguay Round of the General Agreement on Tariffs and Trade (“GATT”) established the WTO, embodied in the Agreement Establishing the World Trade Organization [hereinafter, the “WTO Agreement”]. GATT began in 1947, and has since served as framework for several global free trade negotiations or “rounds.” In its current iteration, the WTO has considerable power. The WTO has already given evidence of its potential for reviewing a wide range of national laws and practices.¹⁰ McGinnis and Movsesian, for example, observed that, “The possibility of covert protectionism thus necessarily forces the WTO to address environmental, health, and safety issues.”¹¹ They offer two models for the future of WTO development: the anti-discrimination model and the regulatory model. The former is much less intrusive on national law than the latter. The latter results in the WTO making global social policy regulations to replace national regulations rejected as inconsistent with a world market. These two pro-free trade commentators warned that: “[I]n light of its academic and political support, the regulatory model will likely compete with the antidiscrimination model in shaping the WTO of the future.”¹² While both models presage significant shifts in sovereignty, the “regulatory model” suggests a more aggressive imposition of a global social policy on WTO member nations.

6. Shane Spelliscy, Note, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT’L L. 143, 147 (2001).

7. *Id.* at 146.

8. Although debatable, U.S. participation, and hence, delegation of “judicial power,” does not appear to violate the principals of the U.S. Constitution. Brian Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257 (2000) (arguing that supranational tribunals may, along with state courts and legislative courts, “share” in the exercise of the Constitution’s judicial power).

9. Spelliscy, *supra* note 6, at 148 (“Only two out of the eighteen have been in existence for over thirty years and only four for more than twenty years . . .”).

10. “One of the WTO’s more remarkable and controversial innovations is its mechanism for resolving trade disputes among member states.” Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review*, 20 MICH. J. INT’L L. 775, 777 (1999) (citing the massive literature that has already emerged).

11. John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 550 (2000).

12. *Id.* at 552.

The growth of economic activity covered by supranational government spurs corresponding growth in formal dispute resolution procedures.¹³ Originally, GATT made no provision for formal judicial dispute resolution, but the Uruguay Round resulted in an agreement on dispute settlement procedures.¹⁴ GATT provides that: "The WTO shall administer the Understanding of Rules and Procedures Governing the Settlement of Disputes . . . in Annex 2 to this Agreement."¹⁵ The WTO provides for the resolution of disputes among member states in the "Dispute Settlement Understanding" (DSU). DSU provides a panel of experts, but not necessarily legal experts, to hear complaints from nations and decide whether a member's laws violate GATT trade principles.¹⁶ The complaining party may seek compensation if the offending country fails to implement the final decision.¹⁷ The only sanction at present, however, authorizes the unsatisfied complaining country to retaliate against the offending party.

Parallel to trade, but moving more cautiously, is the global rights legal culture and the judicial regimes supporting it. Several specialized rights adjudicative bodies have developed over the years.¹⁸ The general human rights adjudicative institution, which has begun to evolve into a global right enforcing body, is the International Court of Justice. The ICJ's jurisdiction is very broad and it may be engaged to decide any types of "disputes" as defined by the treaty.¹⁹ Statehood is the only necessary qualification to be a party.²⁰ Although not necessarily confined to rights cases, the ICJ is the prime candidate to become a comprehensive global rights tribunal, and is most likely to evolve into a rights adjudicative

13. See Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63 (1998); and Alec Stone Sweet & Thomas L. Brunell, *The European Court and the National Courts: A Statistical Analysis of Preliminary Reference, 1961-1995*, 5 J. EUR. PUB. POL'Y 66 (1998).

14. MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 51-53 (2d ed. 1999).

15. One source of the WTO Agreement and related documents is the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994).

16. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 6, 8, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 1226 (1994).

17. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 126 (2d ed. 1997).

18. *E.g.*, The Inter-American Court of Human Rights. Helfer & Slaughter, *supra* note 1, at 376.

19. SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996* 519 (3d ed. 1997) ("[T]he classic definition of *dispute* is that given by the Permanent Court. . . : 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'").

20. *Id.* at 605.

regime.²¹ Clearly, it will and already has begun to develop a universal legal culture for rights.²²

The ICJ has had a much longer history than the WTO, and has over that time established principles supporting its judicial authority.²³ Franck identified the ICJ's early 90's decision in Libya's case against the U.S. and the U.K. to block extradition of those responsible for the Lockerbie airline bombing with *Marbury v. Madison*.²⁴ The U.S. Supreme Court in *Marbury v. Madison* laid claim to judicial review power in a manner that prevented its claim from being resisted.²⁵ Similarly, the ICJ established its authority in the Lockerbie case to review the U.N. Security Council, although it avoided direct confrontation with the U.N.'s political institutions.²⁶ Lockerbie, like *Marbury*, however, is noteworthy for its assertion of review authority, not its cleverness in avoiding direct institutional confrontation.²⁷

On December 21, 1988, a bomb planted on Pan Am flight 103 exploded over Lockerbie, Scotland. Two Libyan intelligence agents were accused. The U.S. and the U.K. indicted these agents and requested extradition. Libya refused. The UN Security Council adopted a resolution urging Libya to comply. Libya then instituted proceedings in the ICJ against the U.S. and U.K. asking the Court to rule that it had complied

21. For example, the U.S. has agreed to over 70 multilateral treaties and 30 bilateral treaties that contain special declarations of acceptance of ICJ jurisdiction without reserving the right to refuse consent in a specific case. Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DENV. J. INT'L L. & POL'Y 787, 789 (1998).

22. Criminal law is another area where an international legal culture may develop. For a discussion of how civil and common law legal cultures may clash in the International Criminal Court, see Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391 (2002). Christensen notes that elements of both civil and common-law procedures will be utilized in the ICC. *Id.* at 399.

23. Geoffrey R. Watson, *Constitutionalism, Judicial Review and the World Court*, 34 HARV. INT'L L.J. 1 (1993).

24. Thomas M. Franck, *The "Power of Appreciation:" Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992).

25. *Marbury v. Madison*, 5 U.S. 137 (1803). *Marbury* is well known to U.S. lawyers. William Marbury was appointed justice of the peace by outgoing President John Adams. He did not receive his commission before the new President, Thomas Jefferson, took office. At that point his commission was rescinded and he sued James Madison, the new Secretary of State. John Marshall, Chief Justice of the Supreme Court, ruled that the Court did not have original jurisdiction to provide the remedy requested, mandamus. In doing so, he asserted a very strong sense of judicial review but, since he did not order the issuance of the commission, this assertion could not be resisted. The foundation for strong judicial review was established but the actual extent of the exercise of that authority has ebbed and flowed over the Court's history.

26. Concerning the Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114.

27. Franck, *supra* note 24, at 520. ("The similarities of the Libyan case to *Marbury* extend beyond judicial tactics").

with the relevant international convention, that the U.S. and U.K. had violated that convention and to order the U.S. and U.K. to desist threats against Libya. Three days after the close of oral hearings, the Security Council adopted a resolution ordering members to take coercive action against Libya. The ICJ then ruled that Libya was not entitled to relief. While several judges felt that the Security Council resolution was controlling, others asserted the power to review such resolutions under certain circumstances.²⁸ Watson summarized the totality of the case: "The decision implies that the international community is moving toward a broader acceptance of judicial review than the framers of the U.N. Charter perhaps envisioned—that subsequent practice under the Charter may have altered its interpretation."²⁹

In addition to its constitutional significance, the Lockerbie case, like *Marbury*, resolved questions of private, individual rights. In *Marbury*, the plaintiff asserted his right to an office, whereas in *Libya*, the ICJ considered a right to protection from hostile criminal prosecution. The Lockerbie case had the added constitutional dimension of establishing judicial review of rights disputes among states. Clearly, the foundation for serious judicial review authority in the ICJ has been set. Whether it will be this adjudicative body, or some new one, it is inevitable that some human rights judicial regime will become prominent on the world stage.

In sum, it is easy to make the case that the DSB apparatus in trade and the ICJ in rights will continue to evolve into dominant supranational tribunals. It is equally likely that these two adjudicative systems will generate law increasingly affecting the world's population and impacting on national legal cultures. More mature examples of similar developments, however, are needed to conjure up a vision of the future of this global legal culture.

B. *The E.U. and U.S. Experiences as a Guide to the Future of a Global Judicial Regime*

To envision the evolution of a global legal culture, we turn to the European and U.S. experiences. Both have developed adjudicative bodies to further trade and human rights goals. U.S. courts have contributed to the constitutional goal to "form a more perfect union." Europeans seek "an ever-closer union," and have established adjudicative bodies that further that goal.³⁰ Both demonstrate how a cooperative enterprise can result

28. U.S. lawyers might relate this ruling to the "political question" limitations on judicial review. See Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1994).

29. Watson, *supra* note 23, at 27.

30. The E.U. has always been understood as a work in progress, and its members have agreed to "an ever closer union." TREATY ESTABLISHING THE EUROPEAN COMMUNITY, NOV. 10,

in unified trade and rights regimes.³¹ Both also demonstrate the symbiotic relationship between the central legal authority and their constituent states. The European and U.S. rights and trade adjudicative bodies then offer some basis for predictions about the evolution of global rights and trade regimes.

Like its European counterparts, the U.S. Supreme Court, along with the lower federal courts, exercise power over both federal and state governmental institutions. Article III vests "judicial power" in the Supreme Court and potential "inferior courts."³² Judicial power "shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties"³³ The U.S. Constitution unites judicial power over the various rights and commerce powers. Hence, U.S. central courts are different from European judicial bodies discussed below in that they combine both trade and rights enforcement.

Movsesian notes the similarities between the emerging WTO dispute settlement authority and the early years of the U.S. Supreme Court:

The history of Supreme Court review has interesting implications for today's debate on the WTO. While there are significant differences between the two institutions . . . the Court and the WTO are alike in one essential respect. Both are centralized tribunals that purport to decide whether constituents' laws conform to external standards. And, just as the antebellum Court had to establish its authority to determine whether state laws conformed to federal norms, the WTO must establish its authority to determine whether national laws conform to international norms. Indeed, . . . the arguments made in today's debate on the WTO greatly resemble those made earlier in the context of Supreme Court review.³⁴

The U.S. has experienced a continuous tension between federalism and nationalism, and between the courts and political institutions. Still, the power of the federal courts in both rights and trade have grown since

1997, O.J. (C 340) pmb. (1997). Recently, the German government proposed that the E.U. adopt a true federal government much like its own, but the other members are not ready for formalization of that degree of unification. The German state itself resulted from this type of progression. The several Germanic entities began to coalesce in 1833 with the establishment of the *Zollerein*, a German customs union. ANKE FRECKMANN & THOMAS WEGERICHT, *THE GERMAN LEGAL SYSTEM* 19 (1999).

31. Mark Tushnet, *Federalism and Liberalism*, 4 *CARDOZO J. INT'L & COMP. L.* 329 (1996) (observing a natural tendency toward centralization).

32. U.S. CONST. art. III, § 1.

33. *Id.* at art. III, § 2.

34. Movsesian, *supra* note 10, at 813 (citations omitted).

its founding and provide some justification for predicting similar tension and evolution in world government.

Although U.S. lawyers have some 200 years of historical experience, the recent E.U. experience might better serve to form an understanding of centralization generated by supranational government.³⁵ For some fifty years, the E.U. has sought a “single market” in Europe.³⁶ The European experience predicts that the WTO trade regime and, more to the point, its adjudicative institutions will only get stronger.³⁷ The nominal goal of the E.U. was economic cooperation, but the E.U. has become comprehensive.³⁸ The E.U.’s well-defined and aggressive legislative structure has played a crucial role in centralization.³⁹ But it is the role of judicial review

35. Thijmen Koopmans, *The Birth of European Law at the Crossroads of Legal Tradition*, 39 AM. J. COMP. L. 493, 505 (1991) (“Personally, I am tempted to think that the Court of Justice has become one of the major sources of legal innovation in Europe not only because of its position as the Community’s judicial institution, but also because of the intellectual strength of its comparative methods”).

36. The European Economic Community, known popularly as the “Common Market,” was established in 1957 by the Treaty of Rome. A second Treaty of Rome created the European Atomic Energy Community (Euratom), separated to accommodate the French. A previous treaty, the European Coal and Steel Community, created the first of three communities, and was in some senses the prototype. Together, these treaties created the three “communities” united in 1992 by the Treaty of European Union (Maastricht). This initial treaty has been amended on occasion to form a constitution or “basic law.” Each one of these iterations resulted in more centralization of authority, memorialized by the name change to the “European Union.” See generally TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter E.U. TREATY].

37. While member states such as Germany, Italy, and the United Kingdom originally felt resistant to give up a certain amount of sovereignty to the E.U., all now seem to have accepted the superiority of E.U. law. See, e.g., *Re: The Application of Wünsche Handelsgesellschaft*, Bundesverfassungsgericht [BVerfGE] [federal constitutional court] 73, 339, 3 C.M.L.R. 225 (1987) (F.R.G.); *Frontine v. Ministero delle Finanze*, Corte costituzionale [Corte cost.] [highest court for constitutional matters], 27 Dec. 1973, Foro It. 1974, I, 314, 2 C.M.L.R. 372 (1974) (Italy); *Regina v. Sec. of State for Transport ex parte Factortame Ltd.*, 1 Eng. Rep. 70 (H.L. 1990), 3 C.M.L.R. 375 (1990) (Eng.).

38. “Difficult as it may now be to believe, the founders of the Community appear to have expected the Community institutions to intervene only in very specific ways in the Member State economies.” George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 355 (1994). The evolutionary process from this narrow vision, now so “[d]ifficult . . . to believe,” to the E.U.’s robust and broad authority, provides valuable insight into the forces at work in a global trade regime.

39. Article 4 establishes five institutions: the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors. E.U. TREATY, *supra* note 36, art. 4. The first three are the political institutions. The allocation of authority among these three institutions may be startling to U.S. lawyers unfamiliar with the E.U.’s legislative process, whereas it may not seem extraordinary to those familiar with parliamentary governments. Some may be surprised by the European parliament’s passive role in the legislative process. The Commission, which also administers the laws, has sole authority to initiate legislation, and the Council has final enactment authority. These two institutions are constituted so as to represent the member states. The Parliament, which is directly elected by E.U. citizens, has various types of review and approval authority. In general, the Parliament has the power to stop, or at least make more

of national or "member state" actions that provides the relevant experience for predicting the impact of global tribunals.⁴⁰

The judicial authority of the E.U. is delegated to the European Court of Justice (ECJ). The ECJ has jurisdiction to enforce the basic law against both E.U. institutions and member states.⁴¹ E.U. Treaty Article 220 provides simply: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."⁴² The Court may void an act of an E.U. institution under Article 231.⁴³ More to the point here, under E.U. Treaty Article 228, the Court may review actions by the member states to determine if they have "failed to fulfil an obligation" under the treaty.⁴⁴ Both the treaties, as the basic laws, and the legislation and regulations implementing them, may be enforced through member

difficult, the enactment of legislation. The Council, with the advice of the Commission, has the final say. The latter two institutions may be comparable in a parliamentary system to the "government," the leadership of the dominant party or parties, which controls legislation as well as the executive, and hence Europeans may be more comfortable with this allocation of power. Still, each major treaty has given Parliament more power in response to claims of a "democracy deficit" and this trend is likely to continue.

40. For a description of the evolution of integration in the E.U., see Karen J. Alter, *The European Court's Political Power*, 19 W. EUR. POL. 458 (1996). "The ECJ has become an important and influential actor in Europe and courts have become political actors in all sorts of policy areas. Given that lower national judiciaries in Europe have historically played a much less significant role in policy-making than they have in the United States, this transition is especially significant." *Id.* at 481.

41. The basic law does not contain a supremacy clause, as does the U.S. Constitution. However, the E.U. Court, in an early display of its activism, recognized the supremacy of E.U. law within its area of interest. *Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, in 1964, firmly established that principle and has not been seriously challenged.

The transfer, by member-States, from their national order, in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail. As a consequence, Article 177 [reference from a national court to the E.U. Court] should be applied regardless of any national law in those cases where a question of interpretation of the Treaty arises.

Case 6/64, *Costa v. Ente Nazionale Per L'Energia Elettrica*, 1964 E.C.R. 585 [1964] 3 C.M.L.R. 425, 456 (1964). Currently, Article 10 (the former Article 5 as applied in *Costa*) provides that "[m]ember States shall take all appropriate measures . . . to ensure fulfilment of the obligations arising out of this Treaty and resulting from actions taken by the institutions of the Community." E.U. TREATY, *supra* note 36, art. 10. Further, its second paragraph states: "They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty." *Id.* Combined with the Court's enforcement jurisdiction, it becomes quite easy for an activist court to assert the supremacy of E.U. law, even without a supremacy clause as such.

42. *Id.* at art. 220.

43. *Id.* at art. 231.

44. Article 228 provides that a state must take necessary action to comply with the Court's judgment and, if it fails to do so, the Court may impose a "penalty payment." *Id.* at art. 228.

actions. However, E.U. laws may also have “direct effect,” giving them force in private litigation.⁴⁵

Like the U.S. Supreme Court, the ECJ has been extremely activist, and the law it created in the E.U.’s formative stage forms the bedrock of a strong central authority.⁴⁶ Bermann summarized its role: “The Court of Justice has thus taken virtually every opportunity that presented itself to enhance the normative supremacy and effectiveness of Community law in the national legal order.”⁴⁷ Even though it has recently been more cautious, as discussed below, legal doctrines it created are still a major centralizing force in Europe.⁴⁸ Alter found: “The European Union’s legal system has become the most effective international legal system in existence”⁴⁹

The “Solange” series of cases involving conflict between the German Constitutional Court and the ECJ demonstrates the natural movement toward acceptance of supranational judicial power.⁵⁰ The first case arose in the late 1960s from a grievance involving a license application by an import–export company, *Internationale Handelsgesellschaft*. The German administrative court referred the case to the ECJ on the question of

45. E.U. issues may be raised before national courts, and the national court may refer such questions to the E.U. Court. The E.U. founders took the alternative approach to a “federal” court system in contrast to the drafters of the U.S. Constitution. They created only one central court, and largely relied on national courts. Moreover, unlike the U.S. federal system, the E.U. Court may obtain a case directly from *any* national tribunal, from the highest national court to the lowest, even tribunals outside the judicial system. Article 234 authorizes “preliminary rulings” from “any court or tribunal of a member state” on treaty interpretations, validity of EU acts, and interpretation of “statutes of bodies established” by the Council. E.U. TREATY, *supra* note 36, art. 234.

46. Koopman, *supra* note 35, at 502 (“As the Court slowly started to act as the Community’s constitutional court, reviewing Community legislation and declaring national laws incomparable with Community law, the most obvious model was the federal constitutional court in Karlsruhe: France has no comparable tradition”); Tridimas & Tridimas, *supra* note 13, at 19 (“[Data] shows the range of discretionary power of the ECJ, that is, the set of *policy* outcomes that it can sanction without its rulings being overturned by new legislation”) (emphasis added). Because civil law nations in Europe have traditionally been opposed to judicial activism, some scholars might be surprised by the acceptance of the European Court of Justice. This acceptance may be explained by the Court’s essential role in European integration, a common goal of member–states. Mark C. Miller, *A Comparison of Two Evolving Courts: The Canadian Supreme Court and the European Court of Justice*, 5 U.C. DAVIS J. INT’L L. & POL’Y 27, 44 (1999). It has also been noted that national judges in Europe approve of the Court’s role because they see it as a way to increase their own power. *Id.* at 46.

47. Bermann, *supra* note 38, at 353.

48. Koopman, *supra* note 35, at 495 (“Experience of the last thirty years shows that legal integration is actually proceeding well, albeit at a slow pace.”).

49. KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* 1 (2001).

50. Mark Killian Brewer, Note, *The European Union and Legitimacy: Time for a European Constitution*, 34 CORNELL INT’L L.J. 555 (2001) (citing relevant cases and authorities).

whether the E.U. regulation violated German “basic law.”⁵¹ The ECJ responded: “[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.”⁵² It argued that even violations of fundamental human rights protected by a national constitution cannot stand against E.U. law.⁵³ The German Constitutional Court, however, ruled that E.U. law could not take precedence over fundamental rights guaranteed by Germany’s basic law.⁵⁴ In the second *Solange* case in 1974, the German Constitutional Court softened its insistence on German sovereignty in the face of E.U. law.⁵⁵ Still, the German Court made it clear that it retained the authority to determine whether E.U. law adequately protected rights guaranteed by its constitution.⁵⁶ In the third case, based on the new Treaty for European Union, the German Court adopted a new spirit of cooperation and moved closer to acceptance of a European legal order.⁵⁷

The European Court of Human Rights (ECHR) provides experience in the evolution of supranational tribunals dealing with rights.⁵⁸ The process begins by an individual alleging a violation of their human rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedom (Convention)⁵⁹ to a quasi-judicial tribunal, the European Commission on Human Rights. If negotiations fail, the Commission issues a decision determining whether the state party violated the Convention. The ECHR reviews the evidence and legal arguments *de novo*, and renders a final decision.⁶⁰ The ECHR acquires

51. Article 234 of the E.U. TREATY, *supra* note 15, (former Article 177) authorizes any “court or tribunal of a member state” to request that the ECJ “give preliminary rulings” on interpretations of E.U. law and on the validity of acts of E.U. institutions. Its purpose is to foster cooperation between the national courts and the ECJ. KOEN LENAERTS & KIRK ARTS, *PROCEDURAL LAW OF THE EUROPEAN UNION* 18–19 (Robert Bray ed., 1999). Indeed, it has made the national courts active partners in the European law regime.

52. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1135 (1970).

53. *Id.* at 1133–39.

54. BERNARD RUDDEN, *BASIC COMMUNITY CASES* 68 (1987).

55. See JULIANE KOKOTT, *REPORTING ON GERMANY, IN THE EUROPEAN COURTS AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* 89–90 (Anne-Marie Slaughter et al. eds., 1998).

56. Brewer, *supra* note 50, at 572.

57. However, true federalization of Europe is still a work in progress: “*Solange III* again proved that the European Communities essentially remain an inter-governmental institution in which the Member States retain ultimate control over the European Court of Justice.” *Id.* at 574.

58. Helfer & Slaughter, *supra* note 1, at 294.

59. Nov. 4, 1950, 213 U.N.T.S. 222.

60. See P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 193–266 (3d ed. 1998).

jurisdiction if either the Commission or the defending state party appeals (an individual may not appeal).⁶¹ States undertake in the treaty to abide by the decision, but the legal effect they give the Court's judgment varies considerably. The rate of compliance by states is nonetheless extremely high.⁶²

The ECHR's road to effectiveness should guide a global rights tribunal.⁶³ The first factor that has increased its influence is the Court's willingness to find for individual litigants against their state and its ability to broadcast its performance in that regard. The second factor has been its ability to mobilize its users and consumers, individuals and their lawyers, voluntary associations and nongovernmental organizations.⁶⁴ A third crucial factor is demonstrable neutrality.⁶⁵

Nonetheless, the relationship between the ECHR and its member states has made it somewhat less of a force than the ECJ. In recognition of which, the ECJ has been required since the Amsterdam Treaty to apply human rights standards as set out in the Convention to the E.U. institutions and member states.⁶⁶ The ECJ has not found itself bound by ECHR decisions, but it refers to them in reaching its own rights-related judgments.⁶⁷ In addition to ECHR rulings, the ECJ looks to the constitutions and principles of the member states for human rights standards.⁶⁸ In short, the ECJ, despite its trade portfolio, has become an active rights enforcer.

Both the U.S. and the E.U. demonstrate the interaction between a centralizing legal regimes and that of their constituent parts. These experiences are instructive because the global judicial regime will force national legal cultures to deal with a complex matrix in which various existing national and global legal principles interact. The ECJ has served as a battleground for competing national laws of its member states. In *AM & S Europe v. Commission*, a British company refused to provide certain documents ordered by the Commission, citing legal privilege, an absolute privilege under English common law.⁶⁹ E.U. regulations involved in the

61. The Court notes, however, "that the Court should have knowledge of and, if need be, take into consideration, the Applicant's point of view." *Id.* at 229–30.

62. Helfer & Slaughter, *supra* note 1, at 296.

63. *Id.* at 311.

64. *Id.* at 312.

65. Helfer and Slaughter list several other factors that might contribute to empowering a global rights court. *Id.* at 314–28.

66. Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT'L L. 301, 306 (2001).

67. Case 2/94, Re: The Accession of the Community to the European Human Rights Convention, 1996 E.C.R. 1763, 2 C.M.L.R. 265 (1996).

68. Defeis, *supra* note 66, at 317.

69. Case 155/79, *AM & S Europe Limited v. Commission of the European Communities*, 1982 E.C.R. 1575, 1579.

Commission's order made no mention of legal professional privilege, but it did provide detailed provisions on investigation procedures. When the case came to the ECJ, British legal professionals gave support to the company, while the French government, which was not otherwise involved in the case, offered support to the Commission.⁷⁰ The French government argued that a member state's criminal law principle could not be extended into administrative law. After hearing multiple arguments, the ECJ ultimately decided to recognize the principle of protection of confidentiality. This is a clear example of the interaction of national laws in the formation of a broadly applicable law developed by supranational judicial bodies.

Slaughter observed both the "vertical" relations and "horizontal" relations among national and supranational courts.⁷¹ That is, supranational tribunals necessarily look to the law of its members, and whether the law that the supranational tribunals devised, ultimately affected the law of its members. The legal development moves "up" and "down" the supranational legal regime, as it has in both the U.S. and the E.U. In addition, however, the practical legal interaction required by participation in a supranational regime leads to borrowing and revision among national legal cultures. Even the U.S. Supreme Court, "regarded by many foreign judges and lawyers as resolutely parochial," has increasingly observed foreign principles.⁷² This supranational interaction introduces a new complexity into national law.

Against the U.S. and E.U. experiences as a basis for forming a future global legal culture is the undeniable fact that there is much greater diversity among the world players, even just the substantial players, than faced the U.S. goal of a "more perfect union" or the European goal of "an ever closer union." The WTO encompasses a plethora of trade related legal cultures. Perhaps even more daunting is the emotional and philosophical

70. Koopmans, *supra* note 35, at 498–99.

71. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112 (2000) (leading to an emerging "judicial comity").

72. *Id.* at 1118 (led by Justices Breyer, O'Connor, and Chief Justice Rehnquist). The acceptance of international law into U.S. domestic law is growing. Paust, *supra* note 21, at 791. The acceptance of E.U. review principles into the English, i.e. common law, legal culture might presage an increasing impact of globalization on U.S. national review law. The change in judicial attitude in England attributed to the duty to enforce E.U. law is considered dramatic. WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 15 (7th ed. 1994). Continental review principles themselves are also finding their way into English law. See ROBERT THOMAS, *LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW* (2000). "[The pressure to apply E.U. law] may create an osmotic or 'spill-over' effect of European law, whereby principles which need only be applied by the national court when it is concerned with Community law may nevertheless filter through into the court's elaboration of domestic law." *Id.* at 39. Whether borrowing is conscious or not, the general continental usage of the principle no doubt provides legitimacy to arguments for its adoption in England.

mélange of rights thinking that face a global rights judicial regime.⁷³ Remember, however, that Europeans came together within about a decade of having been killing each other in record numbers with the two of the major combatants forming the founding core. Nor are Europeans so homogeneous.⁷⁴ Religious and ethnic wars are a constant in European history. Its legal cultures are far from homogeneous.⁷⁵ The U.S. encompasses an even greater ethnic and cultural mix, although few of these can claim dominance over any geographic or political unit, and it found unification an advantage in both trade and rights over time.

On the other hand, considerable commonality exists in the world, at least, the legal world.⁷⁶ While the world offers more diversity than either the E.U. or the U.S., their experience predicts that unified judicial regimes will generate a common legal culture in trade and rights.⁷⁷ The experiences in the U.S. and Europe provide some confidence that a global judicial regime will be able to adjust in both trade and rights. A global legal culture in both areas is possible, and judicial body or bodies will be effective in confronting and evolving the necessary legal cultures. The key will be identifying foundational principles acceptable to most member nations and their citizens.

73. Helfer & Slaughter, *supra* note 1, at 363.

74. Mark Killian Brewer, *supra* note 50, at 563–64 (asserting that Europeans are not a cohesive group bound together by culture, language, or other factors).

75. Koopmans, *supra* note 35, at 493 (stating, while contrasting the relative cohesion of the U.S. with Europe, that, “In the European Community, the legal systems of the Member States are not only quite dissimilar, but some of them have even given origin to legal traditions which belong to the great legal traditions of the world”).

76. A global legal culture ultimately must fold in other legal cultures. At present, 1.2 billion Muslims seem particularly antagonistic to transatlantic culture in general. *ENCYCLOPEDIA BRITANNICA BOOK OF THE YEAR* (2003). They are covered by Islamic law, “Sharia,” in some form, and for many it is the dominant or sole legal system. This antagonism might seem an obvious counterexample to a commonality claim, but Bernard Lewis argued that the conflict between Islam and the transatlantic society is not due to lack of common understanding. He observed:

Islam and Christendom had a great shared inheritance, which drew on common sources: the science and philosophy of Greece, the law and government of Rome, the ethical monotheism of Judea, beyond all of them, the deeply rooted cultures of the ancient Middle East . . . True, they denounce each other as infidels, but in so doing, they reveal their essential similarity, even kinship.

BERNARD LEWIS, *CULTURES IN CONFLICT: CHRISTIANS, MUSLIMS, AND JEWS IN THE AGE OF DISCOVERY* 14–15 (1995). On the other hand, De Seif observed: “Great cultural differences exist among various areas inhabited by Muslims . . . The fact is that, despite this idealized concept [of solidarity], relations between Muslims differs little from relations between Christians, as shown by the internecine struggles . . .” RODOLPHE J.A. DE SEIF, *THE SHAR’IA: AN INTRODUCTION TO THE LAW OF ISLAM* 6 (1994).

77. See VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE* 31 (2001) (confirming convincingly that a culture might adopt the useful legal system of a historically antagonistic culture by the fact that Israel adopted German civil law).

*C. Major Aspects of the E.U.—U.S. Impact
on a Global Legal Culture*

As observed above, the global legal culture will be based on an amalgam of the world's legal and governmental cultures. For the foreseeable future, legal development will be dominated by U.S. concepts, representing the common law world and the presidential government model, and the E.U., representing the civil law tradition and the parliamentary government system. This foundation is predictable not only because these two transatlantic authorities, and the legal and governmental cultures they represent, will dominate at least this early stage, but because these cultures have migrated around the world, forming in some ways two fundamental models for legal and governmental institutions. Combined, civil law and common law-based legal cultures cover over 70% of the world's population in over 62% of the jurisdictions.⁷⁸ Similarly, most modern governments follow either the presidential or parliamentary models, or some hybrid, and as will be discussed, these governmental models will affect the emerging legal culture. In sum, global legal culture will reflect a merger of civil and common law principles as transmuted in these two legal and governmental cultures.

E.U. legal principles, despite U.K. membership, are founded on the civil law model.⁷⁹ As would be expected, it relied largely on the laws of France and Germany.⁸⁰ The precursor of German law was the Prussian civil code, the first civil code ever established.⁸¹ The original French code, however, is considered the model for civil law systems.⁸² In short, E.U. law is only one step removed from the bedrock of the civil law system and, hence, represents that system on the world stage.

The civil law model has spread throughout the world and now covers over half of the world's population.⁸³ Its reception by other cultures is well-documented. Generally, it has been a device, as it was in France, for breaking with traditional law and government.⁸⁴ However, it is not

78. University of Ottawa, *supra* note 3, at 3.

79. See MARTIN VRANKEN, *FUNDAMENTALS OF EUROPEAN CIVIL LAW AND IMPACT OF THE EUROPEAN COMMUNITY* 49 (1997).

80. See JURGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 3 (1992).

81. THOMAS GLYN WATKIN, *AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW* 132-33 (1999) (explaining that while the Prussian code, sponsored by Frederick the Great, is considered the first modern code, the code concept reaches back to Roman law); see also JEAN-LOUIS HALPERIN, *THE CIVIL CODE* 2 (1996).

82. WATKIN, *supra* note 81, at 146 ("The codification of Napoleon has . . . had the most widespread impact upon the world at large"). Watkin also noted the influence of Germanic codifications on the civil law tradition, as well. *Id.*

83. See also University of Ottawa, *supra* note 3. See generally KONRAD ZWIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 109 (Tony Wier trans., 3d ed. 1998).

84. ZWIGERT & KÖTZ, *supra* note 83, at 143.

inherently revolutionary, and the German adoption, as discussed below, actually sought to enshrine traditional laws.⁸⁵ Each system that has adopted the civil law model has added its own character.⁸⁶ Nonetheless, the French version serves as the prototypical model.⁸⁷ Its design had the most influence on the E.U. treaties.⁸⁸ For that reason, it is used here to explore the global ramifications of an extension of the civil law model.

The common law model has been adopted around the world, in over a quarter of the jurisdictions. This was less due to the result of a reform movement, and probably more because once “the sun never set on the British empire.”⁸⁹ As Glenn observed:

The common law expanded throughout much of the world as a result of the British empire The result . . . was a kind of embedding of common law thinking in a large number of diverse societies around the world What has happened, generally, is the marriage of the idea of a common law with that of multiple nation-states, and the marriage has been at times a difficult one.⁹⁰

Perhaps then, the formal adoption of the common law model significantly understates the impact of common law thinking.

The E.U. and U.S. experiences also differ in the allocation of judicial power over trade and rights. The two have followed divergent tracks consistent with the U.S. and Continental European judicial structures. The U.S. rights-enforcing judicial regime was combined with its trade-unification regime, vested in the U.S. Supreme Court and the lower federal courts. Europe has a separate rights-enforcing judicial regime, the ECHR, while the ECJ adjudicates trade issues.⁹¹ The unification of the trade and the rights judicial regimes within a single global tribunal is clearly possible, but the European experience, at present, suggests an opposite outcome. The informal coordination between the European trade adjudicator, the ECJ, and the European rights adjudicator, the ECHR, implies that the two global judicial regimes will increasingly work in tandem. At the very least, they will evolve an increasingly coordinated

85. *Id.*

86. *See id.* at 98–118.

87. However, in the particulars, the German version has been most often adopted because it attempts *detail*, whereas the French code aims only at *framework*. *Id.* at 144–45, 147, 154.

88. VRANKEN, *supra* note 79, at 49.

89. University of Ottawa, *supra* note 3.

90. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 228–29 (2000).

91. In 1989, the Court of First Instance was established to take on some of the workload. This Court has limited potential jurisdiction under Article 225, and even less actual jurisdiction as it is currently empowered. The ECJ has appellate authority over the Court of First Instance, and retains much of its original jurisdiction. E.U. TREATY, *supra* note 36, art. 225.

global legal culture with both fundamental components. On the other hand, U.S. lawyers are likely to at least instinctively favor unification, because they are accustomed to a single federal court system handling both. Our reflection does not require a clear commitment to either development.

These two models, and the entire supranational legal enterprise, assume a commitment to liberal democracy. Helfer and Slaughter argue that, "The European experience of supranational adjudication is the experience of two supranational tribunals [the ECJ and ECHR] operating within a community of liberal democracies with strong domestic commitments to the rule of law."⁹² They assert that a commitment to liberal democracy is necessary for the commitment to (peaceful) supranational adjudication. At this point, general global commitment to liberal democracy seems plausible. Hence, that condition ought to be fulfilled.

The political models that form the foundation of liberal democracy will also affect the development of a global judicial regime. Of course, the E.U. and U.S. also represent the two dominant types of democratic government: the parliamentary and presidential models. These two governmental models incorporate the courts in quite different ways. That difference will have to be "negotiated" in evolving a global judicial regime. The overarching difference, with the most impact on the courts, is the different sense of proper "separation of powers." The presidential model separates the two political functions, legislative and executive, with the judiciary acting as a coordinate branch. The parliamentary model separates the judiciary from the unified political functions. The U.S. government, of course, is presidential. The E.U. combines parliamentary governments, so that its instincts and its citizens' understanding of government begin with the parliamentary model and its vision of the courts.⁹³ The separation of the judiciary from social policy decisions in parliamentary government reinforces a similar civil law philosophy. As will be discussed, the judicial role in government in the presidential system, as opposed to the parliamentary system, will be a source of ideological more than structural tension in the global regime.

92. Helfer & Slaughter, *supra* note 1, at 331.

93. However, the E.U. may embody more of a presidential-model sense of separation of powers. Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451, 468-69 (1999) ("Methods of holding administration accountable in parliamentary systems offer little guidance for the Community. In Brussels, unlike national systems, the legislative principle is divided. . . . United States institutions can contribute to the Community administrative reform debate because in the United States *as well* a divided lawmaking principal must hold the administration accountable.") (emphasis added).

The E.U. and the U.S. are constantly dealing with the tension between nationalism and centralization. Alter summed up the evolution of the European shift in sovereignty:

The transformation of the European legal system is no longer seen as controversial. The incredible success of the ECJ makes it hard to imagine a European Union where European law is not supreme over national law. But . . . member states intended to create a limited legal system so as to protect national sovereignty.⁹⁴

Still, the E.U., despite pressure for an ever-closer union, has not been immune from the devolution movement. The E.U. has embodied its notion of this conflict in the doctrine of "subsidiarity." The doctrine of subsidiarity expresses a growing sense that the E.U. was detracting from members' authority beyond that intended or wished by its members and their citizens.⁹⁵ In short, it expresses a preference for social policy decision-making at the level closest to those who will be affected while still achieving the desired shared goal. Article 5 now expressly provides that:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore . . . be better achieved by the Community.⁹⁶

The E.U. "federalism" controversy is very familiar to U.S. lawyers. In U.S. constitutional law, the two sides in this debate are represented by the "nationalist," advocating a strong federal authority, and "federalist," supporting a considerable retention of authority by the states.⁹⁷ This con-

94. ALTER, *supra* note 49, at 183.

95. The doctrine began to emerge in the early 1980's from several different venues. The 1992 "Maastricht Treaty," formally the Treaty on European Union (TEU), incorporated the concept into basic law. For a discussion of the Amsterdam Treaty's treatment of subsidiarity and the experience with that principle between the TEU and the Amsterdam Treaty, see Christian Timmermans, *Subsidiarity and Transparency*, 22 *FORDHAM INT'L L.J.* 106, 127 (1999) (concluding that "Judge Pescatore . . . feared that subsidiarity would set us back into the dark times of anarchy of the nation states. I am happy to say now in 1998 that after five years of subsidiarity, the Community is still very much alive").

96. E.U. TREATY, *supra* note 36, art. 5.

97. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *VA. L. REV.* 1141 (1988).

flict has raged since the Constitutional Convention.⁹⁸ As in the E.U., unification and localism ebb and flow.⁹⁹

U.S. federalism and E.U. subsidiarity contrast in interesting ways that might shape any predictions about the future of shared authority between the global regime and its national members. Bermann distinguished the two concepts in this way: "U.S. federalism places greater emphasis on the presence of an overall balance of power between the federal government and the states than on respect for any single rule for allocating competences among the different levels of government."¹⁰⁰ U.S. federalism principles may look to an array of justifications for centralized decision-making in a particular area of public policy. The federal government may decide that a solution should be sought at the national level without having to formally justify that choice. Subsidiarity focuses only on "the relative capacities of federal and state government to deal effectively or adequately with the problem or policy at hand."¹⁰¹ Subsidiarity is a formal restraint in which the central government may take action only if it can demonstrate that it is the best actor; otherwise, the solution to a perceived problem must be left to the local authority. Therefore, E.U. subsidiarity places the burden on the E.U. institutions, including the E.U. Court, to demonstrate that centralization is superior, whereas U.S. federalism allows the political institutions to make the choice. E.U. subsidiarity then both empowers a reviewing court to restrain central authority and restrains the central adjudicative bodies from themselves asserting power. U.S. federalism inhibits judicial interference in centralization of a solution, but only if it attempts to circumvent legitimate political judgments.

All of these E.U.–U.S. governmental experiences assist in developing a framework for envisioning the future of a global legal culture. They show the process toward some degree of centralization, and the legal relationships between central authorities and their sovereign units. They show the role likely played by the adjudicating tribunals of the central authority, and the tensions that role creates. These sources help us envision similar evolution in global government and the role of global tribunals. We move then to laying the foundation for contemplating that future.

98. See generally JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* (2002).

99. Recently, the U.S. Supreme Court has tipped the law towards regionalism. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

100. Bermann, *supra* note 38, at 450.

101. *Id.* at 451.

II. CIVIL LAW THINKING IN A GLOBAL PERSPECTIVE

This Part has two interrelated goals. First, I expect that most of the readers of this work will have only limited knowledge of basic civil law principles. Thus, this section tries to provide an overview of civil law thinking. Second, in order to do so in a way that moves the inquiry forward, it also attempts to identify some major issues that might arise as those concepts are incorporate into a global legal culture. These observations anticipate the discussion in Part III, in which the civil law meets common law thinking on the world's legal stage. While a common law scholar might seem a curious person to attempt these objectives, I might claim both an advantage in explaining civil law concepts to common law readers and in anticipating outsiders' reaction to those concepts as they might be brought forward into the global arena.

A. *The Concept of a "Code"*

It is well recognized that the keystone of the civil law system is "the code." The concept of the code, however, is much more ideological than common lawyers recognize. In approaching the civil law, common lawyers must dismiss the popular distinction that civil law is statutory law as opposed to judge-made common law. As Merryman in his famous guide to the civil law for U.S. lawyers wrote:

The distinction between legislative and judicial production of law can be misleading. There is probably at least as much legislation in force in a typical American state as there is in a typical European or Latin American nation The authority of legislation [in the U.S.] is superior to that of judicial decisions; statutes supersede contrary judicial decisions (constitutional questions aside), but not vice versa If, however, one thinks of codification not as a form but as the expression of an ideology, and if one tries to understand that ideology and why it achieves expression in code form, then one can see how it makes sense to talk about codes¹⁰²

The first step, then, is to explore the ideology expressed by the code oriented strategy.

The need for this understanding is particularly acute because supranational legal principles will necessarily evolve from multinational agreements. Civil lawyers will approach both the drafting and interpretation of those basic agreements as they might a code.¹⁰³ The E.U. treaties

102. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 26-27 (2d ed. 1985).

103. There may also be added pressure for more code-like legislation in the common law Member States of organizations such as the E.U. For example, there has been a great deal of debate over the possibility of criminal and commercial codes in England, though many English legal scholars are opposed to such ideas. See Lord Goff of Chieveley, *The Future of the Com-*

support this conclusion.¹⁰⁴ Vranken notes that, “Similarities exist between the 1957 Treaty of Rome . . . and the 19th century codes, in particular the French *Code Civil*. The Treaty is a framework treaty (*traité cadre*): it lays down a grand design only. Yet somehow the treaty can make the same claim to comprehensiveness as a civil code.”¹⁰⁵ This similarity is far from a surprise because civil law drafters instinctively conceived of their mission as creating a European code. More to the point, one can expect civil lawyers to seek to fashion global agreements with the same instincts, and they will view the final product as if it were a code. What does this mean?

1. Objective in Resort to a Code System

The civil law ideology grew out of an experience that taught that courts might be the most dangerous branch, and certainly not inherently the least dangerous.¹⁰⁶ This principle belief began with the French *ancien regime*, in which the “*Parlements*,” or regional courts, were oppressive and corrupt instruments of bourgeois authority, and frequently served as an instrument for royal repression.¹⁰⁷ Constraining judicial abuses was the goal of the code, and that goal pervades through civil law thinking. It is *how* the courts are constrained, however, that is the key to understanding the civil law ideology.

Because of this experience, the separation of powers between majoritarian government, the legislative process, and the judicial function is a fundamental objective of the code.¹⁰⁸ While recognizing three functions, law making, law implementing, and law interpreting, it strives to insulate the legislative (law making) function from the judicial.¹⁰⁹ This governmental objective conforms to the parliamentary model in which civil law systems reside. That model combines the executive and legislative in that

mon Law, 46 INT’L & COMP. L.Q. 745, 750 (1997) (“Since English commercial law seems to be so widely used and English commercial lawyers seem to be so widely consulted, why worry about a commercial code?”).

104. The current iteration of the E.U. treaties is at least as much constitutional in nature. Indeed, the E.U. treaties are now generally considered a *de facto* constitution. Brewer, *supra* note 50, at 559 n.21. Also, E.U. members are committed to developing an actual constitution in the near future. The Laeken European Council, Laeken Declaration—The Future of the European Union, Dec. 15, 2001, available at <http://europa.eu.int/futurum/documents/offtext/doc151201-en.htm>. Still, they retain a code-like nature as well.

105. VRANKEN, *supra* note 79, at 49.

106. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 431 (1968).

107. ANDREW WEST ET. AL., *THE FRENCH LEGAL SYSTEM* 142 (2d ed. 1998) (“The Republic has traditionally been wary of the power of the judiciary. This distrust is rooted in the way the *Parlements* of the *Ancien Régime* abused their position and interfered in politics.”).

108. Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 TUL. L. REV. 1010, 1012 (1974) (“The courts, however, may not make law. This prohibition stems from the doctrine of separation of powers . . .”).

109. RAYMOND YOUNGS, *ENGLISH, FRENCH & GERMAN COMPARATIVE LAW* 8 (1998).

the legislative branch forms the executive leadership and is ultimately controlled by it. Thus, both the civil law model and the parliamentary model seek protection of democratic law making and implementing functions from an elite judiciary.

In their seminal comparative law explanation, David and Brierley attribute this division in some degree to all the systems in the entire "Romano-Germanic family." The tendency is both traditional and natural:

Given the present unflinching tendency of jurists in all countries to look for support in a text of law, the creative role of judicial decisions is always, or nearly always, hidden behind the screen of an 'interpretation' of legislation. It is exceptional for jurists to abandon this habit or for judges to admit frankly that they have the power of creating rules. They persist in their attitude of obedience to enacted law, even when the legislature itself has recognized that they may be gaps in the legislation

. . . .

Whatever the contribution of the courts to the evolution of the law, it certainly differs, therefore, from that of the legislators in countries of the Romano-Germanic family. Legislators, who nowadays are called upon to establish the framework of the legal order, do so by formulating commands and creating rules of law. Very rarely are courts authorised to use this method save a few possible exceptions which, while undoubtedly interesting, leave the principle intact nevertheless.¹¹⁰

Thus, the civil law actors adhere to this separation of functions, but the impact on the legal culture is subtle.

This parliamentary, civil law vision of separation of powers is likely to guide the global judiciary. First, civil law nations dominate the global arena, and civil law public law principles do not seem to give way to common law principles.¹¹¹ Second, most nations have some form of parliamentary system with a strong legislative concept. Third, and perhaps more important, the global participants will not trust an activist and free wheeling judiciary.

Interestingly, despite the fact that most E.U. members have a civil law legal culture, and all have a parliamentary form of government (although some have a "hybrid"), the ECJ has been quite activist. Yet, it is unlikely

110. RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF THE LAW 123 (2d ed. 1978).

111. In hybrid systems, public law is where the mix happens. PALMER, *supra* note 77, at 9-10 ("One searches in vain for a system where continental law predominates in the public sphere while Anglo-American law dominates the private.").

that such activism will be acceptable on the global stage. The WTO Appellate Body's decision in *EC—Measures Affecting Livestock and Meat Products (Hormones)*,¹¹² illustrates this concern. In *EC—Hormones*, the Appellate Body admonished the Panel for imposing procedures on the parties that did not have a foundation in the treaty's text. It was very concerned over the Panel's lack of respect for an agreement that WTO Members consented to as a framework for guidance. Thus, the tradition of civil law coupled with the tendency of global institutions to reject judicial activism indicates the separation of legislative and judicial functions will likely persist into any global legal system.

2. Natural Law

The place of natural law is historically significant, and hence is important in understanding the instincts of civil law philosophy. Zweigert and Kötz explained it as such:

As a matter of intellectual history it is clear that the Code as whole would never have existed but for the idea of codification which comes from natural law. Furthermore the [French] Code Civil is based on the tenet of natural law that there are autonomous principles of nature, quite independent of religious belief, from which one can infer a system of legal rules which, if given intelligible form according to a plan, can act as the basis for an orderly, reasonable, and moral life in society.¹¹³

Thus, civil law is founded on what is called "secular natural law."¹¹⁴

Understanding the civil law ideology requires the recognition that somewhere in at least the subconscious of the civil law is the ghost of natural law. Yet, modern jurisprudence worldwide has much less respect for the concept of natural law, even as a legitimate evolutionary root. Even civilians have questioned the propriety of founding a legal system in the notion of natural law, although perhaps they cannot totally distance themselves from some visceral imperative.¹¹⁵ Nonetheless, whatever they now believe about universal principles, civil law is imbued with natural law reasoning.

The civil law's natural law orientation will affect its impact on the global stage, where other cultures will cling to their own set of universal

112. WTO Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R, DSR 1998:1 135, ¶ 181 (Feb. 13, 1998).

113. ZWIGERT & KÖTZ, *supra* note 83, at 88.

114. MERRYMAN, *supra* note 102, at 18–19.

115. See WATKIN, *supra* note 81, at 139.

principles.¹¹⁶ It will be hard to negotiate these differences in global tribunals because they are based on cultural experience and tradition. Thus, the more civilians seem attached to a natural law the more controversy will revolve around fundamental principles. It is well accepted that negotiation is most likely to breakdown when fundamental principles are at stake. In short, disagreement over the very existence of natural law can be expected to be one source of tension if the civil law model is adopted on a global level.

Indeed, even the notion of legal secularism will be questioned in many legal cultures. What is known as the *jus commune*, the sources of civil law, includes canon, i.e. catholic, law along with Roman and local law.¹¹⁷ Although to a large extent the code approach was intended to free the legal culture from religious principles, the resulting code was imbued with them. It will be important for participants to recognize the potential religious undertones of any disagreements between applying the principles of civil law and other legal cultures.

3. Rationalizing the Law

The philosophical context from which the civil code emerges justified a scientific approach to law making and development. Indeed, Merryman observed that, “[Civil law scholars] deliberately and conscientiously sought to emulate natural scientists.”¹¹⁸ The codes are the product of the “Age of Reason.” “The civil codes are premised on the belief that life is not full of random events, but rather that there is order.”¹¹⁹ Therefore, the civil law instinctively perceives the law as a subject of scientific study and formulation.¹²⁰ Starting with that conception of the law, it seemed quite reasonable that a small body of experts, called “jurists,” should lay the foundation of the legal culture.¹²¹

A substantial difference exists, however, between the French approach and the German approach.¹²² The French code was revolutionary in that it sought to wipe away prior law and establish a new legal order; in contrast, the German code sought to adopt fundamental principles by scientific study of the historical context of existing German law. The French code writers thus set out to discover, through science, a set of ‘best princi-

116. Indeed, U.S. law incorporates natural law principles, such as the rights of man, as much as we would like to deny it. MERRYMAN, *supra* note 102, at 16–17.

117. *Id.* at 11–12.

118. *Id.* at 62.

119. VRANKEN, *supra* note 79, at 35.

120. F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 76 (1955).

121. “Jurist” means an “academic lawyer.” VRANKEN, *supra* note 79, at 44 (“Both the French and German civil codes were the product of a small team of people.”).

122. See MERRYMAN, *supra* note 102, at 28–33.

ples,' whereas the German "historical school" opposed a code devised by reasoning due to philosophical principles. Nonetheless, the two civil law models share a desire for rationality and a scientific approach to the law.

Just as it is not fruitful today to assert universal principles of law, the world may also be skeptical of a neutral, scientific approach to its legal system.¹²³ First, agreement on best principles is extremely difficult. While the search might be for some sort of principled consensus, that consensus will result from a "negotiation" of legal traditions, rather than a scientific distillation of immutable axioms. Second, much of the science in the civil law system was historical, the derivation of law from ancient "wise" cultures. History and social traditions are not universal, and other, non-transatlantic societies will look to their own "wise" cultures. Moreover, the "wise" cultures have lost much of their gloss, particularly the ones upon which the code is founded.

Still, the objective rationality of civil law may find acceptance in the global legal culture. Legal consensus cannot be developed from a "town meeting," even of representatives of legal cultures. Rather, the global "legislation" will necessarily be the work of a body of persons charged with developing its framework. Many of these individuals will be jurists, instinctively trying to find and incorporate the "best" ideas. The structured adaptation and creativity of the civil law system may be compatible with the evolution of the law in the global arena.

4. A Code is a Framework

Whatever its philosophical roots may be, the overarching strategy of any code is to create a framework for society. The framework seeks the smallest possible number of elements; it seeks what the civil law jurist Jhering called an "economy of juristic concepts."¹²⁴ The degree to which this strategy is adhered to varies among codes. Nonetheless, the object of any code is to provide this foundational framework for the legal culture.¹²⁵ It is a launching pad from which judicial decisions and legislation spring. It seeks at once to be concise, straightforward, and universal.¹²⁶

Given the philosophical difference, it is not surprising that the French and German code differ in this respect. The French code was to be so

123. For an English perspective, see Goff, *supra* note 103, at 760 ("Let us therefore continue to worship at the shrine of the working hypothesis, and continue too to contemplate the great idea with all the caution bred of common sense and our long experience.").

124. LAWSON, *supra* note 120, at 67.

125. For a common law perspective, see Goff, *supra* note 103, at 753 ("Continental lawyers love to proclaim some great principle, and then knock it into shape afterwards. Instead the boring British want to find out first whether and, if so, how these great ideas are going to work in practice.").

126. See LAWSON, *supra* note 118, at 79; see also VRANKEN, *supra* note 79, at 58.

simple and straightforward that lawyers would be unnecessary. In contrast, its precursor, the Prussian *Ladrecht* of 1794, attempted to be so detailed as to govern every possible situation. Even after the failure of this attempt, the drafters of the German code sought a much more detailed and technical document. Its code strategy incorporated a role for legal professionals. Still, the two code models aim at a framework around which the total legal system could be built.

5. Symbol of Change and Unity

Despite their different philosophies, the German and French models share fundamental code-related goals that have popularized them around the world.¹²⁷ They incorporate a sharp separation of powers doctrine in which the legislature makes the law and judges are prevented from doing so. Thus, codes represent an affirmation of majoritarian government. Also, since they are necessarily the product of nationalism, creating one law for an entire nation, codes performed (and continue to perform) a unifying function. It may be these characteristics that recommend the civil model to emerging states around the world. For these people, the code offers tangible commitment to democratic government, rather than government run by elites, and the expression of nationhood.

These characteristics make civil law ideology particularly attractive to the global legal culture. Globalization will instinctively drive toward unification, and a code is an effective technique for centralization. The code-like use of the treaties forming the E.U. demonstrates this unifying nature.¹²⁸ Multinational agreements resembling a generalized, or French-style, code, will no doubt play the role of the "code" in a more global context.¹²⁹

6. Anticipated Interpretative Method as a Guide to Drafting

The civil law system has developed sophisticated interpretative methods, and the anticipation of application of these techniques will affect the drafting instincts of civil law system participants. For one thing, the civilian approach to language is consistent with the general international law commitment to text.¹³⁰ The WTO Appellate Body decision in

127. See MERRYMAN, *supra* note 102, at 32.

128. The E.U. treaties' ambiguous nature has generated a call for the creation of an actual European code. Ugo Mattei, *Hard Code Now!*, 2 GLOBAL JURIST FRONTIERS 1 (2002).

129. The founding treaties of supranational organizations naturally take on the characteristics of a code. Undeniably, these agreements also have constitutional aspects. See Movsesian, *supra* note 10. A code is considered much more operational than a constitution. Nonetheless, as discussed below, constitutional interpretation and code interpretation have much in common.

130. Article 31 of the Vienna Convention on the Law of Treaties provides that, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the

India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products demonstrates this instinct.¹³¹ In *India—Quantitative Restrictions*, the Appellate Body expends much effort in interpreting the correct meaning of “thereupon.” This illustrates the supranational organization’s concern with remaining bound to the treaty text, as reflected in their judiciary’s decisions. Thus, civil law participants, at least, will embellish any global agreements and implementing multinational governments in much the same way as the codes have been embellished.

The civil law incorporates a hierarchy of legislation. In civil law countries, there are both code provisions and statutes, and each has its own style.¹³² Statutes tend to cover very specific subjects, and are drafted very specifically. Merryman describes these “microsystems” that revolve around the Code.¹³³ These microsystems are created by decidedly political legislative action, not the work of an impartial team of legal experts. Within the microsystem are the executive actions and decrees. Such administrative actions are important to the implementation of a code framework.¹³⁴ The code provisions tend to be more general in nature, and more stable than these embellishments. “Thus new legislation should employ the concepts and institutions and follow the organization established by the scholars and embodied in earlier systematic legislation.”¹³⁵

A civilian will work with global legislation as frameworks in the nature of a code. Even among civil law nations, however, the same provision has been given different meaning, evidencing, even among systems that show initial agreement, the pull of forces such as customary law and national experience.¹³⁶ Thus, it is important to remember that civilians will bring to the global arena, not agreement on specifics, but a common legal philosophy, an ideology that will deeply affect the global legal culture. Civil law-trained global judges may resist efforts to use sources other than the language of agreements to establish general principles. They may accept reference to other sources, including other judicial

terms of the treaty in their context and in light of its object and purpose.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 [hereinafter Vienna Convention: Treaties]. But the Convention also allows modification by “subsequent practice.” *Id.* at art. 31(3)(b).

131. See generally WTO Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS90/AB/R, DSR 1999:IV 1763, 1766–69, ¶¶ 11–24 (Sept. 22, 1999).

132. The statutes represent the influence of common law countries, particularly the United States, on modern civil law countries.

133. MERRYMAN, *supra* note 102, at 151–52.

134. See *id.* at 154–55. The overshadowing of legislative policymaking by administrative action in modern society seems to be universally lamented but inevitable.

135. *Id.* at 81.

136. *Id.* at 142 (variety in rules).

opinions, but that acceptance must be carefully understood in the civil law context.

In a code system, judicial interpretations are overshadowed by the interpretations of the scholars and academic lawyers called “jurists.” Scholars are a crucial source of interpretation.¹³⁷ Lawson stated bluntly that, “Civil law is inconceivable without the jurist.”¹³⁸ Civilians will naturally assume that teams of experts will draft any global legal framework, and they will expect jurists to contribute significantly to future interpretation of that framework.¹³⁹ However, global judges themselves will rarely reflect the civil law model, and the civil law’s reliance on academic decision makers will be met by resistance among world participants. The extent to which learned individuals receive deference will be a point of tension.

B. Legal Dynamics in the Civil Law System

A perception of the civil law system is that code interpretation is prohibited, or at least closely constrained. True, at first, the French code drafting project thought to prohibit judicial interpretation and leave the legislature, as the democratic institution, to be the sole authority to evolve law from the code. But change and interpretation are inevitable, and code aficionados have no illusions that it could be otherwise.¹⁴⁰ Napoleon, himself, lamented shortly after the *Code Civil* came into effect: “The Code had hardly appeared when it was followed almost immediately, and as a supplement, by commentaries, explanations, developments, interpretations, and what not”¹⁴¹ Indeed, the original French code itself recognized the need for interpretation.¹⁴² “Consequently there is general agreement in civil law jurisdictions that judges do have the power to interpret evolutively.”¹⁴³ Still, as Zweigert and Puttfarcken observed, “Conspicuously lacking in civil law jurisprudence is a methodology of the judicial development of the law, a methodology which would analyze,

137. *Id.* at 66.

138. LAWSON, *supra* note 120, at 69.

139. Two examples of this instinct translated into a supranational regime are the European Convention on Human Rights, VAN DIJK, *supra* note 60 (noting that once the decision to proceed was made, the participants appointed a “Committee of Government Experts.”) and Belgium’s efforts to empower the ICJ, WATSON, *supra* note 23, at 11–12.

140. HALPERIN, *supra* note 81, at 15 (“The Code’s redactors were . . . persuaded that such detail must remain the work of judges and commentators (*jurisconsultes*), and left a wide berth for judicial interpretation. Of course, article 5 of the Code forbids judicial decisions that aspire to legislative character (*arrets de reglements*).”).

141. C.J. Friedrich, *The Ideological and Philosophical Background, in THE CODE NAPOLEON AND THE COMMON LAW—WORLD* 15–16 (Bernard Schwartz ed., 1954).

142. ZWIEGERT & KÖTZ, *supra* note 83, at 89–90.

143. MERRYMAN, *supra* note 102, at 46.

rationalize, and systematize the specific role of the judge in the process of finding and making law.”¹⁴⁴ The nature of the interpretative and evolutionary process serves as one of the premiere distinguishing characteristics of a code system.

It starts with a literal or structured approach. This expresses an atmosphere or attitude: a real commitment to language, often called a “grammatical” approach.¹⁴⁵ The courts pay more than lip service to the idea that if the language is clear, they must apply that language. Even when the statute is ambiguous, a judge must stick to the statute. Of course, the language does not often compel an outcome. Indeed, a code based upon the French system, particularly, is rarely so specific. Under those circumstances, the court is to engage in “logical interpretation.” De Cruz described the approach in this way: “If application of the grammatical meaning approach suggests more than one possible interpretation, the text may be construed in accordance with the ‘logical interpretation’ approach.”¹⁴⁶ Applying the logical interpretation approach, a judge may construe the legislative provision not just on its stated terms, but with the context of the entire body of rules comprising the legal system, derived from the same statute, in other laws or from recognized general principles of law.¹⁴⁷

The overarching goal of the civil law system is legal certainty.¹⁴⁸ In a way, the German system serves this goal better because its code is more precise than the French code. Yet the French system may be moving in that direction.¹⁴⁹ The balance between predictability and the process of change in the civil law system is important to understanding the operation of that system.

Certainty is guaranteed by the use of clear *concepts*. Clear concepts and principles provide elements of innumerable combinations designed to fit any particular situation.¹⁵⁰ The concepts move decision making ahead

144. Konrad Zweigert & Hans-Jürgen Kötz, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704, 715 (1970) (“From a common law point of view this must be the most astounding feature of civil law.”).

145. PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 267 (2d ed. 1999). However, “[i]f the text is unequivocal and can have only one meaning, but applying it would lead to absurdity or repugnance, both common law and civil law courts will disregard a statute’s grammatical construction or plain meaning.” *Id.* at 268.

146. *Id.*

147. See generally Mitchel de S.-O.-l’E. Lasser, “*Lit. Theory*” Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, 111 HARV. L. REV. 689 (1998).

148. See VRANKEN, *supra* note 79, at 37 (“For the drafters of the French *Code civil* a direct relationship existed between their desire for legal certainty and the need to produce a comprehensive text.”).

149. *Id.* at 60.

150. See LAWSON, *supra* note 120, at 66.

as in chess, according to clear and definite rules.¹⁵¹ Civil law aims for stability of the platform or framework, but not total prohibition of change. As Merryman observed: “[Certainty] is an abstract legal value. Like a queen in chess, it can move in any direction.”¹⁵²

The drive for certainty emphasizes systemic values, which concentrate on definitions and classifications. Categorization may be seen as a kind of applied formalism.¹⁵³ But unlike an extreme formalism which ultimately generates strict rules, categorization disciplines without inhibiting development. Indeed, categorization can be extremely creative.¹⁵⁴ Developing the law to serve society is an important aspect of the civil law system, more important in theory than individual justice.¹⁵⁵ It attempts, however, to direct the mental process by which one evaluates or evolves ideas, and its mental discipline has a natural tendency towards ordering.

Categorization structures experience and experimentation. The French jurist Tunc sought to explain this aspect of the civil law system:

If there is a sentence which a French lawyer has great difficulty in understanding, it is Holmes’ famous saying: ‘The life of the law has not been logic: it has been experience.’ It is questionable whether the opposition between logic and experience has any justification. Exact sciences are equally based on experience and on logic.¹⁵⁶

Indeed, categorization demands the reworking of classification with each new “sample” dispute resolution, which adds to the experience of law. Categorization recognizes that theory without application is empty *and* that application without order creates systemic chaos. Experience and theory are necessary partners in any progressive evolution of both practice and ideas. The categorization process does not slowly withdraw issues from reality as the rules become more wooden with use, a circumstance one might see with formalism.¹⁵⁷ Rather, categorization orders a creative decision-making process.

151. *Id.*

152. MERRYMAN, *supra* note 102, at 48.

153. “‘Formalism’ describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles.” Thomas Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 9 (1983).

154. STEVEN JAY GOULD, *WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY* 98 (1989) (implying that taxonomy can lead to very creative scientific development).

155. *See* LAWSON, *supra* note 120, at 85.

156. Andre Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 468 (1976).

157. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1001 (1987) (“A nonbalancing approach . . . does not require a court to be blind to the

Categorization is dynamic as well as creative. It is quite useful for adapting to new circumstances and new social problems. U.S. jurist Duncan Kennedy described the reciprocal nature of its developmental strategy, whereby practice influences the system of premises and the system of premises influences practice.¹⁵⁸ As to its operational strategy, he explained that, "The basic mode of this influence of theory on results is that the ordering of myriad practices into a systematization occurs through simplifying and generalizing categories, abstractions that become the tools available when the practitioner (judge or advocate) approaches a *new problem*."¹⁵⁹ Categorization is a decisional tool that can incorporate all relevant values in the face of new circumstances. The dynamic and adaptive, yet necessarily applied, nature of categorization form out of the bounded creativity of the civil law model.

The subtlety of this stable but dynamic approach to language may baffle non-civil lawyers on the global stage.¹⁶⁰ Civil law participants in the global arena will seek to create and perceive the language as creating concepts. In individual application, they will expect the concepts in international agreements to remain constant, applied in a principled way dictated by that language.¹⁶¹ Thus, tension over the manipulation of language, not disagreement over its flexibility, is likely between civilians and non-civilians.

consequences of constitutional rules or the social context in which constitutional rule or the social context in which constitutional questions arise.").

158. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. LAW & SOC. 3, 8 (1980) ("[Classical legal thought] is designed to tell us about the theoretical atmosphere within which practices occurred, and to tell us about the manner in which the theoretical atmosphere influenced particular results.").

159. *Id.* (emphasis added).

160. In an early case where English courts had to interpret and apply European Community regulations, Lord Denning described the problems English judges face:

What a task is thus set before us! The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness They have sacrificed style and simplicity

. . . .

How different is this treaty. It lays down general principles. It expresses its aims and purposes But it lacks precision An English lawyer would look for an interpretation clause, but he would look in vain.

Bulmer Ltd. v. Bollinger S.A., All. Eng. Rep. 1226, 1237 (1974).

161. Indeed, Palmer found that civilians may prefer the common law approach because it shows the adoption of common law principles. PALMER, *supra* note 77, at 46 ("*Stare decisis* may seem to be a needed check on judicial activism and provide safeguards against future erosion [of the civil law character].").

Civilians refer to the “teleological approach,” interpretation according to adaptations of rapidly changing social or economic conditions.¹⁶² The theory is that every code provision is considered a thread in one whole cloth. The significance of this strategy is that where there is an ambiguity in a code provision, the first place one looks is at other code provisions. Thus, judges in the civil law tradition can sometimes “read into” a code provision something, which is taken from another provision, which might, on its face, not seem terribly relevant. The result may not, however, be directly contrary to a conclusion derived directly from a grammatical or logical interpretation. It does not preclude contradiction by reference to legislative history, but original intent and legislative history are considered only after there is a determination that no answer can be found in the code. As Kötz explained: “As regards the civil law, it is an *overstatement* to say that a code is always completely self-contained and therefore excludes all reference to any source of law other than itself.”¹⁶³ Global tribunals may also follow the teleological approach.¹⁶⁴

The idea of individual interpretation in the civil law system is not so much to decide individual disputes but to anticipate broader solutions.¹⁶⁵ “[A]t no time can individual cases be allowed to blur the broader picture.”¹⁶⁶ The code provides a stable platform from which to make these leaps into the future. This grants the courts a broad sort of discretion. Civil law decisions are expected to anticipate the future itself outside the context of the individual controversy. Predictability of legal implications for others in the same position is more important than the implications of the result for a particular individual, even if the rule is harsh in a specific case.¹⁶⁷ Within this design is accommodation for equity in individual application. Consistent with the overarching strategy, the power to consider individual fairness must be delegated, although sometimes the delegation may be implicit.¹⁶⁸ Individual fairness must give way to legal certainty.¹⁶⁹

162. DE CRUZ, *supra* note 145, at 270.

163. Hein Kötz, *Taking Civil Codes Less Seriously*, 50 MODERN L. REV. 1, 11 (1987) (emphasis added).

164. For example, in WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001), the WTO Appellate Body was forced to interpret the Agreement’s numerous enunciations of “like products.” See *id.* at ¶¶ 96–98. In determining the correct definition, the Appellate Body noted that “the term ‘like product’ in Article III:4 must be interpreted to give proper scope and meaning to this principle. In short, there must be consonance between the objective pursued by Article III, as enunciated in the ‘general principle’ articulated in Article III:1.” *Id.* at ¶ 98.

165. LAWSON, *supra* note 120, at 80.

166. VRANKEN, *supra* note 79, at 216.

167. MERRYMAN, *supra* note 102, at 82.

168. *Id.* at 52–53.

169. *Id.* at 71.

Accordingly, civil lawyers will expect supranational tribunals to individualize according to these priorities.

C. Courts and Judges

Civil law courts tend to be specialized and hierarchical.¹⁷⁰ The judges direct their proceedings. Their structure expresses a commitment to expertise and intellectualization. Thus, the civil law depends on the intellectual capacity of its judges. German judges, in particular, are likely to seek learnedness in their opinions.¹⁷¹

Civil law judges are part of the civil service.¹⁷² Judges enter a career of judging and advance through the judicial hierarchy.¹⁷³ They are educated and trained to be judges. In particular, their education and training equips them to work with language and to engage in the rational and scientific finding of the law. They then gain experience as judges. The judicial hierarchy allows judicial authorities considerable control over lower level judges.¹⁷⁴ Opinions are anonymous and collegial.¹⁷⁵ They rarely become known outside the legal profession, and even there, they do not attain a special status.¹⁷⁶ Their training and experience creates an elite, if anonymous, corps of adjudicators.

The same elite civil servants are not assured in the global judicial regime. Global judges will come forward from national regimes. The international community will hope that judges will be experienced, professional judges, but that is not now certain. Surely, they will not always have the training and experience that may be necessary to make the system work as a civil law system.

Civil law decision-making compels its own kind of fact-finding and record. Civil law judicial decision-making is supported by the "inquisitorial" procedures. The basic strategy of this procedural model is judicial control, in contrast to the "adversary" system, which bestows control upon the lawyers. At first blush, a judge-controlled process seems inconsistent with the basic distrust of courts. However, given the demands on civil law judges, they have a justifiable need for a record adequate to

170. VRANKEN, *supra* note 79, at 58.

171. ZWEIGERT & KÖTZ, *supra* note 83, at 130.

172. VRANKEN, *supra* note 79, at 62.

173. ZWEIGERT & KÖTZ, *supra* note 83, at 124.

174. See J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 17 (1999) ("This institutional structure radically shapes the incentives judges face: fundamentally it gives judges an incentive to act in those ways that the people deciding their transfers consider appropriate.").

175. VRANKEN, *supra* note 79, at 62.

176. ZWEIGERT & KÖTZ, *supra* note 83, at 125.

perform those functions and for a broad range of advice, including expert legal advice.

The ECJ provides a supranational adaptation of the judicial management and expertise orientation of the civil law process. After the pleading stage, the parties' control virtually ends, and the court takes over. One of the judges is assigned the case and serves as a "judge-rapporteur," responsible for building the record. The rapporteur's report will serve as the basis for a decision. An independent judicial officer, the "Advocate General," then considers the case. The Advocate General is part of the court, and prepares an opinion to "assist" the Court.¹⁷⁷ Although the extent to which the court adopts the Advocate General's opinion may vary, it is invariably of extreme importance.¹⁷⁸ As Arnall observed: "[M]ost students of the Court would probably say that it is fairly unusual—although by no means unheard of—for the Court to depart from the Opinion of its Advocate General and there are reasons for believing that, whether or not an Opinion is followed, the judges find it helpful."¹⁷⁹

The global tribunals might do well to borrow both the preparatory judge and the Advocate General function from the ECJ. The preparatory judges, as they do in the civil law process, balance out the inequality of representation and assure that the court has the record it needs. The ECJ-style Advocate General would provide expert support for global judges of varying training and ability. Such a permanent and impartial advisor to a global tribunal could also assure some certainty and uniformity among tribunals representing diverse judicial characteristics.¹⁸⁰

177. E.U. TREATY, *supra* note 36, art. 222.

178. Advocates General seem to borrow from some common law reasoning in their opinions, citing prior decisions as binding authority. This is not limited to Advocates General trained in common law Member States. Striking examples can be found in decisions of German Advocates General. T. Koopmans, *Stare decisis in European Law*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION* 11, 21 (David O'Keefe & Henry G. Schermers eds., 1982). It is also interesting to note that German barristers "try occasionally to convince the court that it should overrule an earlier decision." *Id.* at 21. Perhaps the German legal professional is more comfortable using case law in this way because case law is significantly important in Germany, even though it is not considered an actual source of law. An accepted view is that judicial opinion in Germany is an important authority in the development and application of new legal questions. See FRECKMAN & WEGERICH, *supra* note 30, at 46, 91; YOUNGS, *supra* note 109, at 53.

179. ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 8 (1999).

180. Several other elements from this model might also recommend it in global adjudications, over and above the civil law's predominance in national legal cultures around the world. Much of the preceding is in writing and the court has much more discretion to seek expert advice. Considerable resistance can be expected because, as discussed below, this process challenges a common lawyers' sense of fair procedure, even though many of these elements can be found in U.S. administrative adjudications.

In the civil law system, appellate courts review lower court judgments *de novo*.¹⁸¹ Civil lawyers will expect global review-level tribunals to engage in the same type of review. However, global judges may fall short of the civil law's juridical ideal. These tribunals will be more political, and their disagreement with lower tribunals will be suspect.¹⁸² A pattern of disagreement will certainly affect the perception of any emerging global review authority.

The civil law uses specialized tribunals. They serve the purpose of promoting the civil law's desire for expertise and the societal role of courts. However, the specialized tribunals also grew out of the need for court-like bodies separate from the "judiciary." Thus, certain categories of litigation, for example administrative disputes, proceeded through a special court system. Judges in these courts were not selected according to the strict professional standards of the judiciary, permitting selection for subject-matter expertise and social policy perspective. More importantly, these courts might take on functions that appear legislative.¹⁸³ Much the same development may be seen in the U.S., but perhaps for different reasons. Currently, many federal tribunals are not part of the judiciary as created by Article III of the U.S. Constitution.¹⁸⁴

III. BLENDING TRANSATLANTIC LEGAL CULTURES INTO A GLOBAL JUDICIARY

Having laid out some of the basic notions of the civil law model and suggested how those notions might play out in global perspective, the next step is to think about how the common law and civil law legal cultures may interact in the global arena.¹⁸⁵ Some observe a convergence of these two systems.¹⁸⁶ Surface similarities should not obscure the

181. VRANKEN, *supra* note 79, at 59. The Supreme Court of Cassation, the highest French court, is not strictly a court of appeals. It only reexamines points of law, and it may not revise decisions, as would a court of appeals. CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 189 (2d ed. 1996). Interestingly, Article III of the U.S. Constitution expressly grants the U.S. Supreme Court appellate jurisdiction over facts as well as law.

182. The same weakness is observed in U.S. administrative law when the review tribunal disagrees with the lower level.

183. MERRYMAN, *supra* note 102, at 134.

184. They are Article I courts and administrative agencies. See Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 *VAND. L. REV.* 1021 (1994).

185. National systems that mixed common law and civil law cover about 150 million people. PALMER, *supra* note 77, at 3. Reimann argued that mixed common law and civil law system can teach civilians about integration with modern legal cultures. Mathias Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 *TUL. L. REV.* 1337 (1999).

186. DE CRUZ, *supra* note 145, at 290 (summarizing convergence).

fundamental ideological difference in the way each system conceptualizes the law. Reimann recently observed:

[T]here are important divergencies between continental civil law and (English, Irish, and to some extent Scottish) common law in the fabric of private law itself. Even if one were to accept that the substantive discrepancies between the civil and common law have been overrated and that the systems have been converging, there remain indisputable disparities regarding the respective conceptual tools and general structures.¹⁸⁷

Because the differences are so deep seated, surface convergence is not likely to relieve the basic tension between the two legal cultures as they vie for place in the global arena.

The different fundamental principles and instincts lead lawyers and scholars to approach legal questions quite differently. Lawyers and officials from the two regimes approach drafting and interpretation of the framework documents in quite distinct ways. When a civil lawyer contests against, or works with, a common lawyer, the two will have a fundamentally different native sense of "law." Thus, it is useful to now turn to the risky prediction of how the two regimes will be accommodated in a global legal system. Again for emphasis, this framework anticipates the contribution of other legal systems but finds a civil law and common law base a very useful place to start.

A. Approach to Established and Foundational Legislation

The core distinction between civil law and common law is their approach to authoritative documents. Because of this difference, each will expect founding agreements, global legislation, and pronouncements from supranational governments to be drafted and interpreted with their own approach in mind.¹⁸⁸ Therefore, the merger will generate tension and perhaps misunderstanding in both drafting and interpretative principles.

The simplistic distinction that the civil law follows statutes whereas the common law leaves judges considerable freedom is belied by history. Statutory interpretation has always been crucial to common law legal reasoning.¹⁸⁹ Indeed, it seems that Justice Coke created a weak commitment to statutory interpretation and the exultation of judicial opinion. That view never really dominated English legal thought. Indeed,

187. Reimann, *supra* note 185, at 1342.

188. Civil lawyers draft keeping interpretative principles in mind. VRANKEN, *supra* note 79, at 38.

189. J.W. TUBBS, *THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTION* 61-62 (2000).

Bonham's case,¹⁹⁰ which established the principle of judicial dominance, is remarkable in fact as an exception to the dominance of statutory language, an exception that did not hold over time.¹⁹¹ Even Coke recognized that courts must follow the statute and exercise discretion only when the language fails to answer a particular case.¹⁹² This approach has not been completely lost in the modern common law practice.¹⁹³ Undeniably, however, U.S. jurisprudence has accepted a cavalier judicial approach to legislative language.

In both systems, judges are bound in some degree by the language of authoritative documents, and must engage in interpretation. As discussed above, the civil law is dominated by scholars and academic lawyers, whereas the common law is dominated by practitioners turned judges. Thus, another area of tension is the relative weight of judicial interpretation versus that of jurists. Merryman, for example, claims that the common law is the law of judges and the civil law is the law of law professors.¹⁹⁴ That is, judges who are the pinnacle of the law-development process dominates the common law, whereas the civil law exalts jurists and scholarly development. Islamic law is also built on the work of scholars.¹⁹⁵ Another one billion or so members of the world community are likely to place special value on scholarly interpretation.

Nonetheless, it is the nature of the foundational written law, the concept of a "code," and the ideology derived from a system founded on a written base, that distinguishes the two legal cultures.¹⁹⁶ The nature of the

190. Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B. 1610).

191. In commenting on Coke's audacity in declaring an act of Parliament void, Wade and Forsyth state that, "No modern judge could repeat this exploit, for to hold an Act of Parliament void is to blaspheme against the doctrine of parliamentary sovereignty." WADE, *supra* note 72, at 467-68.

192. SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTE OF THE LAWS OF ENGLAND § 21 (Philadelphia, Robert H. Small 1853) (1628).

193. MERRYMAN, *supra* note 102, at 26-27.

194. *Id.* at 59-60.

195. "Islamic law represents an extreme case of a 'jurist law'; it was created and further developed by private specialists, a phenomenon well known to sociology of law . . ." JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 209-10 (1964). Islamic law provides the unique phenomenon of legal science combined with scholarly handbooks having the force of law, not the state playing the part of a legislator (to the extent to which Islamic law was applied in practice). This "classical" view of Islamic law is challenged to the extent to which the formative scholars engaged in interpretation or creation.

196. This is not to say that the civil code has not been without its proponents in common law countries. Jeremy Bentham and David Dudley Field, from the U.K. and the U.S. respectively, were early proponents of civil law concepts. Jeremy Bentham's push for a 'complete body' of law stretched across the Atlantic, going so far as to solicit then U.S. President James Madison's permission to codify U.S. common law. See THE COLLECTED WORKS OF JEREMY BENTHAM: 'LEGISLATOR OF THE WORLD': WRITINGS ON CODIFICATION, LAW AND EDUCATION 5 (Philip Schofield & Jonathan Harris eds., 1998) (letter from Jeremy Bentham to James Madison). Early in U.S. history, the civil law vied with common law.

language itself is likely to be different. The code, as discussed above, is a framework, creating at once a stable platform and a guide to adaptation. Because experts draft the code, it constitutes an effort to rationalize the basic laws (thereby channeling statutory and administrative laws). The code concept requires faithfulness to language and a commitment to find the law in authoritative documents.

It is then not so much the code itself but the legal philosophy, which the code instills in the civil law mind that separates the two legal cultures. Statutory language for modern common law, at least as manifest in the U.S., is organic, a living creature. The U.S. approach easily recognizes the need for judicial adaptation. It has not committed itself to a stable approach to statutory interpretation. Judicial authority in the civil system, as discussed above, is limited. In other words, the strong judicial role of the common law system permits “soft” statutory language, where the weak civil judiciary requires “hard” language.¹⁹⁷

Civil law–like ideological constraints are evident in international tribunals. A somewhat extreme example can be observed when an international tribunal observes a *non liquet* and does not resolve the claims in a case. A *non liquet* occurs when a judicial body decides not to decide a case because there is a “gap” in the law.¹⁹⁸ The tribunal, in such a case, is unwilling to go beyond textual language to decide disputes not foreseen by treaty and statutory creators. GATT and WTO examples of *non liquets* are the unadopted panel report in *EEC Wheat Flour Export Subsidies* and the *Coconuts* case.¹⁹⁹ This approach to international adjudication is also seen in ICJ jurisprudence. In *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*,²⁰⁰ the ICJ refused to decide a case because of the

Throughout [the period between the Revolution to the Civil War], but especially in the middle decades, a determined effort was made by a succession of zealots to introduce into the United States the institution and methods of the civil law, if not as a substitute for, at least as a supplement to, those of the common law This propaganda campaign failed to achieve its objects and is now largely overlooked.

The Attraction of the Civil Law in Post-Revolutionary America, in PETER STEIN, *THE CHARACTER AND INFLUENCE OF ROMAN CIVIL LAW: HISTORICAL ESSAYS* 411 (1988). David Dudley Field was Bentham’s North American counterpart, working as the “pre-eminent figure in American law reform.” See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 186 (1981). He drew up his “Field Code” to replace New York common law, covering almost every aspect of the law, including criminal law, civil law, government organization, and court procedure. See Andrew P. Morriss et al., *Debating the Field Civil Code 105 Years Later*, 61 *MONT. L. REV.* 371, 373 (2000).

197. Mattei, *supra* note 128, at 17–18.

198. See William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 *J. INT’L ECON. L.* 79, 96 (2001).

199. *Id.*

200. 1966 *I.C.J.* 6 (July 18).

lack of an “objective rule.” It reasoned that any decision would force it to go beyond its judicial mandate.²⁰¹

In order to predict how the two interpretative tendencies will interact, one must begin by identifying the points of potential tension in the way each treats statutory language. As discussed above, civil law lawyers see interpretation as a scientific exercise.²⁰² So the real working difference between the two approaches to interpretation is the more structured approach of the civil law legal culture. Civil law interpretation proceeds according to rules. Commentators aptly analogize the core concept to chess.²⁰³ Civil law judges move, but according to well established rules, whereas common law judges often see statutory language as providing a mere springboard from which they create the law for a specific case. Language in civil law interpretation provides a stable platform, a framework, from which the civil law judge must work.²⁰⁴ This sense of stability may unsettle U.S. lawyers, and they may not readily understand the moves civil law insists on, especially since U.S. jurisprudence has become imbued with realism and post-modernism.²⁰⁵ While judges in each system must apply clear language, a civil law judge actually takes their duty to find the meaning of the language seriously, to honestly engage in *interpretation*.²⁰⁶ That approach is often termed “grammatical,” and is, in reality, quite different from “interpretation” engaged in by U.S. judges.²⁰⁷

201. Patricial Isela Hansen, *Antitrust in the Global Market: Rethinking “Reasonable Expectations”*, 72 S. CAL. L. REV. 1601, 1638 n. 197 (1999).

202. VRANKEN, *supra* note 79, at 63–64.

203. MERRYMAN, *supra* note 102, at 48. LAWSON, *supra* note 120, at 66. In some sense, however, this may be a universal character of law itself, existing in the common law system as well. Likewise:

There is a sense in which [Stanley] Fish’s conception of law as a self-contained practice is unexceptional. Indeed, to the extent that law is given structure by, and functions in accordance with, a particular combination of certain rules, norms, standards, and conventions, it seems clear that it is a unique and self-contained practice. In this sense, law is a self-contained practice just as is a game like chess or checkers.

MICHEL ROSENFELD, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS* 42 (1998).

204. DE CRUZ, *supra* note 145, at 270.

205. 3 ENCYCLOPEDIA OF ETHICS 1352 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001). “[A]ll [post-modernists] agree that moral responsiveness is neither a product of deliberation or argument, or something that a theoretical justification would secure.” Mattei, *supra* note 128, at 13. Mattei advocates a “hard” European code in this environment because the weak postmodern sense of the law works to the advantage of the economically and politically strong.

206. See DE CRUZ, *supra* note 145, at 267–69.

207. Lasser describes the difference in terms of two modes: grammatical and policy hermeneutics. “Unlike the French judicial system, which offers two relatively segregated modes of discourse (the official/grammatical and the unofficial/hermeneutic), the American judicial system tends to combine the grammatical and hermeneutic discourse in a single space—the judicial opinion.” Lasser, *supra* note 147, at 702. He goes on to demonstrate in these terms how, in the U.S., judicial text displaces the primary text:

A U.S. jurist might characterize the difference in the two visions of judicial conduct as between formalism and realism.²⁰⁸ A U.S. lawyer views the civil law approach as formalistic, even though such a characterization fails to capture the subtleties of the civil law approach. De Cruz has observed, for example, that the French approach is formalistic, the U.S. approach is instrumental, and English law lies somewhere in between.²⁰⁹ In U.S. jurisprudence, realism with respect to what judges do has been converted into what they ought to do. Its philosophy sets the judiciary free not just to interpret, but to “legislate,” restrained only by the context of the individual dispute. U.S. interpretation contemplates judges balancing the interests embodied in the legislation rather than merely finding meaning in the language.²¹⁰ It is not in its insistence on the binding force of language, but on the style of judicial development that civil law will contest with common law.

As discussed previously in Section IIA, the scientific method supporting the civil law approach parallels what in U.S. jurisprudence is termed “categorization.”²¹¹ Categorization has been an important, and often dominant, strategy in the U.S.²¹² Yet, categorization is often criticized by modern U.S. commentators as insensitive and static. As discussed, both the civil law system and categorization are adaptive and creative, but their progressive principles require a special kind of manipulation. Categorization creates a structured creativity in the law so that logic and experience move the law according to certain established concepts.

In modern U.S. jurisprudence, the categorization approach often gives way to balancing. “Balancing requires the explicit articulation and comparison of rights or structural provisions, modes of infringement, and government interests.”²¹³ One might argue that balancing is inherently

The shift to purposive discourse and effect orientation represents a shift away from grammatical reading; it represents the deprioritizing of a certain “literalist”—or, in current legal terms, “formalist”—mode of reading in favor of an explicitly hermeneutic approach. This new approach seeks to generate the meaning of the controlling legal text by reading the language of the text in terms of something else: its purpose and practical effect.

Id. at 703.

208. See generally Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089–90 (2000). For the impact in civil law, see MERRYMAN, *supra* note 102, at 45–46.

209. DE CRUZ, *supra* note 145, at 289.

210. See Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 456 (1989).

211. See MERRYMAN, *supra* note 102, at 63, 66–67.

212. See Kennedy, *supra* note 158, at 3–4. Kennedy’s “classical legal thought” seems the equivalent of what is termed here “categorization”: “Classical legal thought was an *ordering*, in the sense that it took a very large number of actual processes and events and asserted that they could be reduced to a much smaller number with a definite pattern.” *Id.* at 8.

213. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992).

consonant with common law in much the same way categorization is with the civil law.²¹⁴ Balancing presents some methodological opportunities that suggest it to the common law mind. Balancing offers an opportunity for a judge to tailor the law to a particular litigation; it seems less abstract and more sensitive to individual circumstances. On the other hand, balancing has been criticized as allowing judicial law making based on personal prejudice and preference.²¹⁵ A corrupt resort to the balancing strategy can be a tool for deceit and special interest promotion, just as honest employment illuminates sensitive comparisons of accepted values.²¹⁶ The freedom won through balancing, at its best, assists the judge in doing individual justice, but this freedom also necessarily creates the opportunity for abuse. Sullivan, for example, summarizes the view that categorization reduces the potential of the decision maker to “factor[] the parties’ particular attractive or unattractive qualities into the decision making calculus.”²¹⁷

The adaptability of balancing to judge-dominated policymaking is another aspect of balancing that fits the modern U.S. instinct for judicial activism but may offend civil law instincts. Balancing permits judges to justify policymaking based upon on the circumstances of the individual case before them. Yet, the very focus on an individual case recommends against balancing for broad policymaking. Through balancing, judicial policymaking may be opportunistic in disregarding and modifying past approaches, but they are also limited in their policy choices by the context of the case presented. On the other hand, as discussed in Part II, civil judges may not allow individual disputes to cloud their vision of societal values. In short, civil lawyers may find that balancing fails policymaking because of its tendency to narrow perspective as well as its weakness in incorporating past learning.

Balancing, however, is not a necessary aspect of the common law approach to interpretation. Not only is judicial resort to balancing a fairly new development in U.S. judicial justification, but U.S. courts still engage in categorization. Balancing was not prevalent in Supreme Court opinions

214. Aleinikoff, *supra* note 157, 961 (suggesting that balancing approaches mimic common law approaches, thereby permitting flexibility and providing a strategy for legal development).

215. *Id.* at 962.

216. Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 970 (1994) (asserting that a balancing method can be employed for honest or dishonest purposes, depending on the intent of the person employing the method).

217. Sullivan, *supra* note 213, at 62.

until the second quarter of 20th century.²¹⁸ Although the modern U.S. legal mind seems most comfortable with justifications based on balancing, judges today are just as apt to rely on categorization.²¹⁹ As Sheppard observed: “The Court balances, and the Court categorizes. Not only are both methods compatible, but both are now sufficiently entrenched as judicial tools of adjudication that the Court is unlikely to rewrite so much precedent merely because of a mode of interpretation.”²²⁰ Today, however, categorization is seen as doctrinaire and stifling, i.e. inherently conservative, and hence balancing has come to be seen as a progressive approach to law.²²¹

A balancing approach, used in a global context with diverse cultures, would be particularly difficult to implement. It would raise the specter of all sorts of cultural, racial, regional and ethnic conflicts. Balancing necessarily sets values, often fundamental, against each other. Balancing will thus generate tension independent of the level of freedom granted to judges. Even in the context of U.S. culture, some doubt that values are sufficiently commensurate to validate the use of a balancing approach in many cases.²²² For instance, it may be deceptive to attempt to denominate

218. Aleinikoff, *supra* note 157, at 949 (“The great constitutional opinions of the nineteenth and early twentieth century did not employ balancing as a method of constitutional argument or justification.”).

219. For example, Kathleen Sullivan observed that Supreme Court Justices divided over the choice between “rules” (a categorization-based approach) and “standards” (a balancing-based approach) in the 1991 term. Sullivan, *supra* note 213, at 69.

220. Sheppard, *supra* note 216, at 975.

221. *But see id.* at 973 (“[T]he discussion about whether the balancing or the categorical approach is better . . . reflects a false dichotomy.”). Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 838 (1994) (“The dispute over categorization and balancing is miscast for three reasons. First, the methods are not often determinative. Second, the methods can often be translated into one another. Third, . . . the dispute is miscast because the decision between balancing and not balancing is illusory.”). In fact, balancing often, especially in application, evolves into categories. Categories are in some sense established, justified and adjusted through “global balancing.” Aleinikoff, *supra* note 157, at 978. “Categoric balancing” may in reality be seen as either balancing or categorization; the balance once struck is applied as categories. Indeed, exposition on, or a derivation from, principles may look to balancing as well as classification. Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 819–820 (1994). Even ad hoc balancing would be too burdensome to decision makers without certain standards or limits on the range of issues for which balancing actually is to be employed. Gottlieb, *supra*, at 855–56. Sullivan concluded: “These distinctions between rules and standards, categorization and balancing, mark a continuum, not a divide.” Sullivan, *supra* note 213, at 61.

222. *E.g.*, Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 786 (1994). The incommensurability debate is informative, but is generally beyond the scope of this Article. *See Symposium: Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998).

rights in a single currency and weigh their relative worth.²²³ The often-subconscious realization that the interests involved are not actually comparable leads courts to camouflage the “intuitive” nature of their decisions with balancing justifications.²²⁴ Even if Schauer is correct in arguing that it may be preferable to base rights decisions on imperfect commensurability in values accepted in U.S. culture, the complexity of commensurability in the global community still dictates against judicial balancing as an interpretative device.²²⁵

In sum, both ideologies accommodate growth and adjustment in the treatment of authoritative documents. General principles of international law might support both. Whereas the Vienna Convention requires a strong commitment first to text, and then its history, it also recognizes modification by “subsequent practice.”²²⁶ Yet, the more structured civil law system’s approach to adaptation and creativity may be more defensible in the global arena.

B. Disagreement Over Fundamental Principles

Fundamental principles become important to interpretation under any legal regime. While civil law and common law legal cultures have some basic disagreements regarding interpretation, they share many fundamental principles. These philosophies and principles are not shared throughout the global community.²²⁷ Disagreements at fundamental levels are very difficult to negotiate and compromise.²²⁸ Thus, in the global arena, legal

223. Aleinikoff, *supra* note 157, at 973 (“The problem for constitutional balancing is the derivation of the scale needed to translate the value of interests into a common currency for comparison.”).

224. *Id.* at 975–76 (identifying several techniques courts “adopt to strike the unstrikeable balance.”). Aleinikoff finds that the U.S. Supreme Court resort to a vocabulary that creates the appearance of comparison, depreciation of one of the interests, and statements of the problem in balancing terms, but in actually they decide the case on very different grounds.

225. Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 806 (1994) (arguing that decision making that holds rights commensurable to the greatest extent possible may still be valuable). Schauer propounds a kind of second-best argument whereby shutting down the analysis in the absence of perfect commensurability is inferior to making a decision based on imperfect commensurability. *Id.* at 799.

226. Vienna Convention: Treaties, *supra* note 130, at art. 31(3)(b), 1155 U.N.T.S. 331, 340 (“any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

227. For example, some cultures might choose societal values over the dominance of the individual. JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 77 (1991) (noting criticism of the adoption of the civil law system because “intrinsic to Western private law was a radical individualism that could only erode Japan’s historical orientations and understandings involving the family, authority, and the state.”). *See also* VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 248 (1999) (“The Chinese constitutions assume that the purpose of rights is to enable citizens to support the broader interests of the community.”).

228. *See generally* ROGER FISHER ET AL., *GETTING TO YES* (2d ed. 1991).

notions derived from fundamental principles may be the focus of the most difficult legal conflicts to resolve.

The underlying aspect of a natural law foundation inherent in the civil code, as noted in the prior section, might be difficult for other cultures to accept. Even U.S. lawyers, who might share some of the civil law's fundamental principles, might not accept their natural law source. Pound observed that both the civil and common law moved away from natural law in the 19th century.²²⁹ The two cultures diverge as to the implications of that movement. U.S. legal philosophy has little regard, even disdain, for natural law, whereas, as discussed in the prior part, natural law is still respected in the civil law world at least as one source of codification. Arguments with a natural law feel in the global context might have more currency for civilians than common lawyers.²³⁰

Similarly, the evolution of the civil law relied on *secular* natural law. Many of the world's legal systems, which include a large portion of the world's population, have strong, if not dominant, religious aspects.²³¹ Legal systems that are consciously religious, such as those with Islamic and Hindu elements, will resist even the secularization goal. More to the point, they can be expected to inject religious elements into the global legal dialogue.

On the other hand, the sources of fundamental principles in transatlantic legal culture are in fact religious. The religious base of transatlantic law will be a source of tension in the global arena. Canon, or Catholic, law is one of the three *jus commune*, or sources of civil law.²³² Although the code attempted to secularize the law, its religious genesis cannot be ignored. A look at any of its founding documents reveals that basic U.S. principles also have a religious base. Like the civil law, the U.S. legal culture has attempted to secularize these principles, but their origins cannot be denied. Those from non-Christian legal cultures will find the

229. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 145–47 (1963) (“Although eighteenth-century natural law had led to codification and had become an absolute system it was not equal to the philosophical problem of nineteenth-century law.”).

230. Interestingly, the code concept is based on an acceptance of natural law. See ZWEIGERT & KÖTZ, *supra* note 83. U.S. legal thought is not just hostile to natural law, but denies the existence of any essential principles. Nonetheless, much of the balancing analysis engaged in by U.S. courts has the feel of natural law analysis.

231. See Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISRAEL L. REV. 101, 103 (2000) (noting the “distinctive religious legacy” of these countries’ legal systems). Hindu law covers about 450 million people. ZWEIGERT & KÖTZ, *supra* note 83, at 313. Islamic law covers in some way all 1.2 billion Muslims. ENCYCLOPEDIA BRITANNICA 2002 BOOK OF THE YEAR 302. Approximately one billion Muslims live in either Islamic legal systems or a system in which Islamic law is mixed with other forms, usually either civil law or common law. See generally CIA WORLD FACTBOOK (Jan. 1, 2003), available at <http://www.odci.gov/cia/publications/factbook/index.html>.

232. MERRYMAN, *supra* note 102, at 10–11.

inherent validity of these principles debatable. Indeed, the religious background of the principles by itself will make them suspect. Many will prefer their own religiously-based legal principles. Again, these types of disagreements are particularly difficult to work out.

International agreements, rather than judicial decisions, will mediate many of these fundamental conflicts. To the extent that agreements establishing supranational governments are constitutional in nature, they will address some fundamental principles.²³³ Their constitutional stature will take issues off the table and hence dictate fundamental values to future generations.²³⁴ Thus, tension will grow between the vision of the founding generation and that of any current generation. Moreover, many non-transatlantic participants will not be able to affect the basic agreements. Those unable to participate will resent particularly the embedding of fundamental principles in basic documents of supranational governments.

On the other hand, international participants finesse rather than confront many of these issues in the basic agreements. The very emotional explosiveness of fundamental principles, especially those with religious bases, will convince negotiators to avoid those controversies, leaving many of them to be resolved in the adjudicative context. Many have observed that the concession of authority by political institutions often results from the desire to avoid difficult decisions.²³⁵ Global tribunals will need to defuse tensions by adjusting foundational language and resolving residual fundamental issues.

In short, global tribunals will have to accommodate a wide range of foundational principles. The comparative law's identification of "families" of legal cultures may help rationalize these fundamental conflicts.²³⁶ Zweigert and Kötz, in their leading comparative work, recommend that

233. Undeniably, the basic supranational agreements have constitutional aspects. See McGinnis & Movsesian, *supra* note 11.

234. Constitutions freeze fundamental values. See MERRYMAN, *supra* note 102, at 24 (explaining how the rigidity of constitutions "impair[s] the legislature's monopoly on lawmaking."). A constitution might be seen as resolving in an especially stable way certain fundamental societal issues, thereby permitting society to operate without (constantly) revisiting those issues. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 639 (1991) ("Constitutional provisions may be facilitative in quite another sense: a decision to take certain issues off the ordinary political agenda may be indispensable to the political process"). In a sense, a code does just the opposite; it identifies issues that must be resolved in individual context.

235. E.g., JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 93-94 (1978); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 499-500 (1985).

236. DAVID & BRIERLEY, *supra* note 110, at 17 ("In law, as in other sciences, one can detect the existence of a limited number of types or categories within which this diversity can be organized. . . . [T]he comparatist can classify laws by reducing them to a limited number of families.").

the world's legal cultures can be distinguished according to their "styles," much like different categories of literature or fine arts.²³⁷ They use five factors to classify legal families:

- (1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive institutions, (4) the kind of legal sources it acknowledges and the way it handles them, and (5) its ideology.²³⁸

Based on these factors, they identify six groupings (Romanistic, Germanic, Anglo-American, Nordic, Far East, and Religious) and provide careful analysis of their distinctive features. However, although academically predominant, the strong transatlantic bias in these classifications raises questions that may require contributions from other societies as the global legal culture evolves. Here, it is sufficient to view this approach and the sophisticated work done by these and other comparative scholars to find commonality among categories of legal cultures as a useful device for melding the world's legal cultures, even in terms of fundamental principles.

C. Use of Case Law

The function and status of case law is the generally understood difference between the two systems of civil and common law. However, as with the popular view regarding differences in statutory interpretation, the disparity here is subtle. First, as is generally recognized, the approach to judicial decisions does differ, both in kind and degree, but civil law opinions are not without effect. Nonetheless, a sense of convergence in attention to the work of other judges does not affect the ideological distinction between judicial authority and judicial law making within the two systems. Second, the civil law doctrine has its own commitment to consistency, but that doctrine aims at overall consistency, not just consistency in dispute resolution. Third, the reputed distinction between the common law's inductive approach and the civil law's deductive approach masks the real difference in the logic applied when deciding cases, and hence the very impact of case law. Fourth, it is generally perceived that common law judges have more authority over legal questions than civil law judges, but they do not have more authority over their own cases. That is, the

237. ZWEIGERT & KÖTZ, *supra* note 83, at 67-68.

238. *Id.* at 68. But categorization requires sophisticated analysis: "These are the stylistic factors which enable us to identify the families of legal systems and to attribute individual systems to them, but the weight to be given to each of these factors varies according to the circumstances." *Id.* at 72.

concept of judicial authority is different, but in deciding cases the difference may not be the degree of judicial power but the nature of judicial power. These confusions must be worked out in order to envision the melding of the two systems in a global regime.

First, while there is a difference in the weight each system gives to prior decisions, that difference only partially explains the difference in impact prior decisions make in judging. Civil law judges do in fact take prior decisions into account. Indeed, Merryman observed: "A lawyer preparing a case searches for cases in point, uses them in his argument; and the judge deciding a case often refers to prior cases."²³⁹ Only a fool would refuse to seek guidance in the work of other judges confronted with similar problems. The civil law system is unlikely to produce any more fools than the common law system.

Nonetheless, because the instincts of the two systems are fundamentally different, the convergence, some observe, confuses form with substance. The difference is not refusal to note precedent, but the ideology of *stare decisis*.²⁴⁰ That is, the common law holds onto the idea that prior decisions are binding on subsequent judges, so that judges and everyone else must consider case decisions to be "law." True, the relevant law is not fundamentally derived from judicial decisions in common law systems, and hence common law judges must interpret and apply statutory language. True, common law judges seem less inclined to observe *stare decisis* than common law doctrine would dictate. At the same time, civil law judges are paying more attention to their colleagues' decisions than one might assume. Lawyers in civil law systems certainly refer to prior decisions. As translated into E.U. law, civil law judges are assuming more authority, and are more actively making law. Still, in the end, judging individual cases is fundamentally different. There remains a great gap in respective judicial goals. And there remains a fundamental difference in the impact those decisions have.²⁴¹

239. MERRYMAN, *supra* note 102, at 47.

240. See, e.g., LAWSON, *supra* note 120, at 83. Furthermore:

[W]hether credence can be accorded to the popular view that the Civil Law is differentiated from the Common Law by its refusal to accept the principle of *stare decisis* . . . [p]ersonally I doubt whether any general answer can be given to it. Of course in the strict sense that a judge is absolutely bound by a previous decision which he knows to be radically wrong in logic, justice, and common sense, no Civil Law judge adheres to the principle.

Id.

241. Francisco Ramos, *Judicial Cooperation in the European Courts: Testing Three Models of Judicial Behavior*, 2 GLOBAL JURIST FRONTIERS 1, 16 (2002) (arguing that while European courts use other courts' decision, "[t]he fact that there is no obligation of *stare decisis* makes courts less aware and less use to the usage of decisions of other courts. This will certainly result in divergence among and within countries.").

In global decisions, global judges will pay attention to the opinions of their colleagues, and hence will tend towards a system of precedent. Renowned expert Shabtai Rosenne notes that the ICJ Charter,

contains an apparent limitation on the Court's freedom to employ judicial decisions as a subsidiary means for the determination of the rules of law. This, however, is not the interpretation placed upon that provision by the Court, which habitually refers to its own decisions and those of the [predecessor] Permanent Court.²⁴²

Therefore, global legal culture may already be accustomed to giving case law precedential force. But global tribunals may use precedent more as the civil law does, because its limits on judicial law development may be more appropriate to the international arena. Governments, including common law jurisdictions, will want more control, especially "statutory" control, over the global judiciary than afforded by the common law approach. The authority of case law in the global arena will be more a matter of acquiescence than imposition of common law *stare decisis*.

To some extent, the supranational tribunals themselves hold the key to asserting their authority to develop law. While the code concept itself grew from, and has largely been adopted around the world because of, a distrust of courts, a growing respect for courts is now present. The U.S. experience has demonstrated the advantages of strong courts. The status of courts has changed in European civil law countries. More to the point, their civil law progeny, the ECJ, has been a very activist court, and has enjoyed the trust of E.U. citizens.²⁴³ Therefore, the global judiciary can overcome any inherent distrust of courts. To the extent they do, they, like the ECJ, will find their opinions having considerable, even approaching binding, force outside the adoption of a formal sense of *stare decisis*.²⁴⁴

The increasing weight given precedent by the ECJ demonstrates natural evolution in supranational law, even one based on civil law principles. The E.U. treaty clearly envisions courts, both E.U. and national courts, being prominent players in European affairs and not being subjugated to other E.U. or national institutions.²⁴⁵ Ramos found that the very

242. ROSENNE, *supra* note 19, at 1609.

243. "Legal scholars have explained national government acceptance of the ECJ's supremacy declaration based on the compelling nature of legal reasoning, the authority of the legal process itself, and the respect and reverence accorded to the decisions of high judicial bodies." Alter, *supra* note 49, at 184 (noting also that others see it as a mere power grab).

244. The ECJ's ability to definitively interpret E.U. law gives its opinions force, creating a culture of attention to case law even in civil law countries. Tridimas & Tridimas, *supra* note 13, at 6 ("[A]lthough the judgment does not form binding precedent in the way understood in the Anglo-Saxon legal systems, it has normative value in that it settles a point of interpretation or validity").

245. See generally VRANKEN, *supra* note 79, at 194-209.

act of “law finding” in the E.U.’s quasi-civil law system naturally creates weight for precedent.²⁴⁶ In fact, judge-made law is apparent in the ECJ.²⁴⁷ In a preliminary ruling requested by a German court, for example, the ECJ noted that because the protection of legitimate expectations exists as a general principle of law in the E.U.’s member states, then it must be protected as a principle of Community law.²⁴⁸ However, in a later case, the ECJ applied the principle of legitimate expectations in a way, which seemed contrary to the laws of most, if not all, member-states.²⁴⁹ Akehurst described what occurred in this case: “Each successive judgment of the Court slightly alters the content of the principle, so that the Court can end up by applying a principle in a manner which is contrary to the laws of all the member states.”²⁵⁰ In short, its growing legitimacy and record of competence allows the ECJ to apply its own law with some force.

The use of case law in the global arena is complicated by the absence of a structured global judicial system. Precedent has both horizontal and vertical effects.²⁵¹ The horizontal effect of precedent defines how strongly a court feels bound by its own prior decisions. No matter which legal ideology is dominant, courts tend to use their own prior decisions to inform the case at hand. In the global arena, however, the vertical impact is ambiguous and ad hoc. Common lawyers are accustomed to great weight being given higher court precedent in lower courts.²⁵² In contrast, as described in Section II.C, civil law incorporates control over lower courts, but that control, in specific cases, is not nearly as strong as that in common law systems. In addition, the hierarchy of global judicial systems is not clearly established. In short, the lack of vertical authority in the global legal regime will continue to be most frustrating to common lawyers, certainly more so than to civilians. The tangle of both trade and rights supranational adjudicative structures will prevent a cure to this frustration,

246. Ramos, *supra* note 241, at 12. “[A]djudging in the European context has become more like a team enterprise.” *Id.* at 18.

247. Michael Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities*, 52 BRIT. Y.B. INT’L L. 29, 39–40 (1981).

248. *Westzucker GmbH v. Einfuhr- und Vorratsstelle für Zucker*, 1973 E.C.R. 723, 739.

249. *Commission v. Council*, 1973 E.C.R. 575, 584, 592–95. The court here applied legitimate expectations in a general way, but the laws of the member states allowed the principle to be applicable only to individual decisions.

250. Akehurst, *supra* note 247, at 40. Akehurst went on to state, “what the Court is *really* doing is *creating* law . . . there is no reason to believe that the law created by the Court of Justice of the European Communities will be any less satisfactory than the English common law . . .” (emphasis in original).

251. PALMER, *supra* note 77, at 51–53.

252. The strength of hierarchical precedent in practice is somewhat ambiguous. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedent?*, 46 STAN. L. REV. 817 (1994) (explaining how lower U.S. courts find ways around high court precedent).

until a firm judicial hierarchy is agreed upon for whatever theoretical weight should be assigned to precedent.

A second subtlety in distinguishing the use of case law in the two systems derives from the civil law's own doctrines compelling consistency, the overarching concept of "legal certainty".²⁵³ Both philosophies attempt to provide certainty to those covered by the law. The civil law system requires its judges to be faithful to statutory schemes, and the common law system requires commitment to prior, like decisions. Civil law judges must assure certainty within the whole society and not just consistency in dispute resolution. They decide individual cases in the context of a broad fabric of the law.²⁵⁴ Legal certainty requires the civil law judge to be sensitive to societal factors.²⁵⁵ In contrast, the common law judge is charged with applying the "law" in order to render individual fairness, but is also committed to treating like cases alike.

For this reason, civil law judges are more constrained than common law judges by specific statutory language. Nonetheless, U.S. jurisprudence also struggles with the overall confusion created by judicial law making. Justice Scalia of the United States Supreme Court has been a strong advocate for judicial faithfulness to language. For example, in his concurring opinion in *Conroy v. Aniskoff*,²⁵⁶ he criticized the Court for not adhering to the literal language of the statute. He argued that free-wheeling interpretation "undermines the clarity of law."²⁵⁷ Many common law jurists over the years have argued that the law should be predictable. Treating like cases alike can do this, but perhaps not on as broad a scale as the civil law doctrine of legal certainty. Tension between the two legal ideologies in the global arena then may be better characterized as disagreement over the doctrine employed to ensure predictability in the law.

253. "The most commonly invoked rational judgment criterion is a specific form of consistency—the maintenance of a stable rule over time. This principle, captured in the doctrine of *stare decisis*, secures structural values such as predictability, stability, efficiency, and judicial legitimacy." Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2306 (1999) (citing Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–602 (1987)).

254. See VRANKEN, *supra* note 79, at 43; see also LAWSON, *supra* note 120, at 80–81.

255. The doctrine of legal certainty itself has its own law-making capacity. For example, the ECJ in Case 69/89, *Nakajima All Precision Co. v. Council*, 1991 ECR I-02069, constructed the estoppel rule, which has no equivalent in Europe, out of the legal certainty and legitimate expectations principles. In doing so, "[t]he Court . . . promote[d] an adequate standard of civil rights' protection and procedural guarantees in Community law." Jürgen Schwarze, *Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation*, 51 INT'L & COMPAR. L.Q. 17, 21 (2002).

256. *Conroy v. Aniskoff*, 507 U.S. 511, 518–19 (1993) (Scalia, J., concurring in judgment).

257. *Id.*

A third subtlety is that a difference in the logic used to decide cases has been expressed too formally. Civil law reasoning is said to be “deductive” (conclusions following from broad premises), whereas common lawyers are said to engage in “inductive” reasoning (reasoning from particular to general, or from a part to the whole). According to a Canadian Supreme Court judge conversant with both systems, there is:

[A] difference in intellectual approach, in the quest and ordering of knowledge. Each approach reflects one of the modes of functioning of the human intellect, that is, on the one hand, the empirical mode based on specific instances from which one may eventually draw rules and even identify principles and, on the other, the theoretical approach based on established principles from which concrete consequences and applications are drawn.²⁵⁸

This traditional distinction may not, however, express the true difference. As Lawson observed:

I have some doubt [that civil law reasoning is deductive whereas common law reasoning is inductive] In both cases the general principle has to be found, in typical Common Law reasoning by grouping together a number of decisions and constructing equations explaining them, in the Civil Law by grouping together a number of texts A more important difference is probably to be found in the fact that whereas the materials from which the common lawyer has to find his general principles are constantly added to, and their general shape and balance altered by new decisions . . . [the civilian’s] ultimate mass of materials remains unchanged.²⁵⁹

Actually, there probably is some sense in which civil law instinctively reasons from larger principles, as judges and lawyers must start with the code framework, and the common law instinctively begins with specific decisions that must be put together in order to divine the large principles. That is what common law lawyers learn to do starting from law school. But this difference in “logic” is probably the result of the sources and stability of sources, rather than a conscious commitment to a particular logical methodology.

A fourth subtlety must be recognized based on the difference between the authority of judicial opinions and the authority of judges. The theoretical power to make law is not the same as the power to decide the law

258. VRANKEN, *supra* note 79, at 215–16, quoting Charles D. Gonthier, *Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings*, 21 CAN. BUS. L.J. 323 (1993).

259. LAWSON, *supra* note 120, at 65.

in an individual case. In a particular case, civil law judges have more discretion than common law judges because they may decide how much weight to give the opinions of other judges.²⁶⁰ Theoretically, common law judges are bound by like cases whether they agree or not.

So, because civil law judges have more discretion about the weight they give to prior decisions, in a sense they have more authority to think about their cases in broader terms than common law judges. Common law judges concentrate on applying the law to the individual dispute. Thereby, as cases are decided individually, the law evolves interstitially. Civil law judges are expected to decide their cases as part of a broader fabric. They are more interested in finding the right decision, assuring aggregate fairness, than in assuring fairness in the individual case before them. Thus, the freedom from binding precedent is the freedom to assure that the case at hand conforms to the scheme of authoritative documents and the "law" in general, rather than to agree with colleague's judgments of equally narrow scope.

In sum, added together, these subtle differences in legal philosophy will affect the use of case law in the global arena. U.S. jurists will argue for strong, even binding, effect for precedent.²⁶¹ Civil law jurists will not resist the use of prior cases in making arguments and decisions, but they will expect global judges to exercise the freedom to find the law in individual cases consistent with their system. Global law will no doubt evolve through case law, but it is doubtful that case law will ever attain *stare decisis* effect.

D. Nature of the Judicial Decision Makers

Much of the division between the civil law and common law results from different perceptions of the courts, and the relationship between courts and the "democratic" institutions of government. The diverse historical experience with courts will affect how the systems are adapted in the global arena. Simply put, the common law grew out of distrust of majorities in democratic government, and the civil law reflects a distrust

260. Mitchel de S.-O.-l'E Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1332 (1995) ("He is left entirely to his own devises.").

261. Bhala advocates the use of *stare decisis* in supranational tribunals. Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. INT'L L. REV. 873 (2001); see also Raj Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1 (1999). Bhala proposed an amendment to GATT adopting *stare decisis* as the rule in WTO adjudications. *Id.* at 878.

of elitist courts.²⁶² Although not universal, civil law jurisprudence grew out of experience that suggests that courts can do at least as much damage as any other institution of government.

Such experiences are rare in U.S. history. The courts have more often been the vehicle of progress and protection of individual rights. In the early English experience of the common law, judges were allies of parliament in the struggle against royal (executive) authority. In the U.S., judicial independence from majoritarianism begins with Article III of the Constitution, and carries forward in essential concepts evolved over some 200 years.²⁶³ The U.S. experience may justify a special commitment to the courts as the "least dangerous" branch, as the contrary experience in civil law nations justified distrust of courts.²⁶⁴

Many emerging democracies come from a revolutionary experience similar to France. This experience provides much of the real world impetus behind the choice of the civil law system.²⁶⁵ Constraining judicial abuse runs through civil law judicial thinking. This reality resonates around the world because emerging democracies also have reason to distrust their judiciaries. Indeed, revolutionary Communist constitutions subjugate the judiciary to the legislature. Hence, the former Communist countries, influenced by their previous regimes, are acutely aware of the potential for judicial abuse.²⁶⁶

Because the ideologies of the civil and common law emerged from conflicting realities, it may be hard to reconcile the two visions of the

262. VRANKEN, *supra* note 79, at 63. Perhaps it is significant that Montesquieu, the godfather of U.S. separation of powers theory, served as president of a *parlement* at a time when those courts were fighting to retain their traditional powers and privileges. SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 107 (1989). Indeed, one contemporary commentator admonished: "O Montesquieu, you are a Magistrate, a Gentleman, a rich man; you found it congenial . . . to demonstrate the advantages of a government in which you occupied an advantageous place." *Id.* at 121.

263. Actually, long tradition, rather than the U.S. Constitution, insulates courts from the democratic institutions, because it is generally conceded that Art. III, if read literally, provides for significant legislative control of the judiciary.

264. Brickel's famous and perhaps elitist characterization incorporates the notion that courts are also dangerous but somewhat more trustworthy than the democratic institutions. ALEXANDER M. BRICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

265. VRANKEN, *supra* note 79, at 63, *see also supra* footnote 262, and accompanying text.

266. For example, the Chinese Constitution Article 128 provides that, "The Supreme People's Court is responsible to the National People's Congress and its Standing Committee." XIANFA art. 128 (1982). Article 67 states:

The Standing Committee of the National People's Congress exercises the following functions and powers:

(1) to interpret the Constitution and supervise its enforcement;

....

(4) to interpret statutes . . .

Id. at art. 67.

courts. Even in Continental Europe, however, courts are increasingly called upon to vindicate individual rights and societal values. The ECJ, the E.U. court created and accepted by civil law E.U. members, has not been put under strong restraints.²⁶⁷ The E.U. treaties themselves authorize the Court to review and overturn legislation as well as discipline member governments. The ECJ has found its power similar to that of the U.S. judiciary: its power to mediate between the executive and legislative branches, and between the federal government and the states, is a source of much of its power. Its very un-civil law activism has resulted from this authority.

For whatever reason, not only is the ECJ a much more activist court, more closely aligned with U.S. courts, but it has made other European courts much more aggressive. Thus, we might predict that the attitude of the U.S. courts over the last few generations, and that of the ECJ and its effect on member's courts, have combined to create an emerging global judicial attitude in which courts do not shrink from challenging legislative and executive action either by their own supranational governments or by member state governments.²⁶⁸ This attitude contrasts with the traditional civil law attitude, but has been increasingly accepted in civil law legal cultures.

One can expect both the WTO and the ICJ to be reasonably aggressive in carrying forward their respective global missions. The ICJ has already been characterized as activist.²⁶⁹ Those familiar with the history of U.S. federal courts and the ECJ will predict that, in this era at least, supranational tribunals will accept broad authority, and members will ultimately concede the necessity to do so. For example, a former ICJ Registrar noted that Court's development in this direction:

The impression I had initially when I came to the Court was that it appeared as if the intellectual effort was being made to dismiss cases on the ground of lack of jurisdiction in the period before 1984, and that this effort had turned, rather, to try to find ways to

267. See generally VRANKEN, *supra* note 79.

268. An extreme example of judicial activism is the Indian Supreme Court's decision striking down a properly enacted constitutional amendment because the amendment violated fundamental rights. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible*, 37 AM. J. COMP. L. 495, 510 (1989). "[I]nconvenient Supreme Court decisions on the constitutionality of state action were simply overturned by amending the constitution until the 'basic structure' of the constitution was declared unalterable." *Id.* at 501. On the other hand: "The notion that the constitution has an unalterable basic structure remains a highly problematic and controversial element of Indian constitutional law." *Id.* at 501, n.34.

269. American Society of International Law, *International Law in Ferment and the World Court: A Discussion on the Role and Record of the International Court of Justice*, 94 AM. SOC'Y INT'L L. PROC. 172, 174 (2000) (recognizing, according to a former judge and several practitioners, the justice of such a characterization).

assert the jurisdiction, and the Court went to some lengths to do that.²⁷⁰

The WTO adjudicative bodies are likewise asserting themselves, as discussed in Part I. Given the evolution of their own courts, lawyers from both sides of the Atlantic will be comfortable with this trend. Indeed, those in tune with global goals will be quite happy with it.

Another aspect of the civil law system that will assuage the civil law mind when confronted with activist global tribunals is the civil law's own use of courts technically outside the judiciary for tasks that require broader discretion. The French Council of State was created to review legislative and other government action. Since the Council was not part of the judiciary, it could engage in aggressive policy-oriented review.²⁷¹ Most civil law nations have separate administrative courts to insulate their regular courts from involvement with the government.²⁷² Civil law systems have also established constitutional courts rather than authorize the "judiciary" to review legislation.²⁷³ These courts are not considered part of the judiciary, and hence, may engage in review of legislation consistent with civil law ideology. Through these courts, the civil law culture has become accustomed to judicial review, and those from civil law cultures will have fewer problems with global "courts" exercising functions traditionally prohibited to the civil law judiciary.

There remains a distinction between how the civil and common law envision the judicial role in society. Common law judges are lawmakers, and hence, it is natural to conceive that common law judges have greater authority. It is certainly true that, in the aggregate, they are expected to evolve the law. Therefore, as an institution, a common law judiciary seems to have a more important social role than that of a civil law judiciary. The common law judiciary has more status in the system, as well. This status is enhanced in the legal community by the fact that common law judges come to the bench as successful members of the practicing bar. It is not difficult to see why both judges and the bar constantly press for a common law conception of the judicial role. Experience with mixed systems, those combining common law and civil law elements, suggests

270. *Id.* at 175. Those unfamiliar with the ICJ should understand that the Registrar is an extremely important official. They head a staff that prepares the case for trial, and drafts judgments, advisory opinions, and orders. They also check these documents before they are issued by the Court, as well as assist the judges much as law clerks assist U.S. judges. *See* ROSENNE, *supra* note 19, at 442.

271. BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 11 (1954) ("[The Council of State's] decisions were swayed just as much by policy as by law."). Many civil law systems borrowed the council of state model but have now removed the adjudicative function.

272. WATKIN, *supra* note 81, at 370–71.

273. LOUIS FAVOREU, CONSTITUTIONAL COURTS 6 (2001).

that global tribunals and their bars will attempt to assert authority for their law-making powers using common law arguments.²⁷⁴

As the two legal cultures conceive of a global judiciary, the source of authority in individual cases will also create a basis for contention. Civil law judges have discretion in deciding their cases, but the source of that discretion differs from the common law. In the civil law system, a court must find some delegation, sometimes implied, to do equity.²⁷⁵ In contrast, a common law judge has inherent authority derived from the separate equity tradition.²⁷⁶ Since civil law judges interpret their authority to do equity, they might seem to have similar authority. But the nature of the distinction between the two cannot be ignored. On the world stage, civil law and common law lawyers and judges will be skeptical of each other's approach to equity authorization. Civil law judges and lawyers will argue authority based on some delegation, whereas common law judges and lawyers will assume that global judges will have inherent authority to consider individual fairness where they see fit. Both because civil law lawyers predominate and because assumptions of discretion, even to do individual fairness, are suspect, global legal culture will probably more closely resemble the civil law approach. Nonetheless, U.S. lawyers are not unarmed. Their administrative and constitutional law is rich with delegation jurisprudence.

The two transatlantic legal cultures differ in the operation of their judicial hierarchy. While there is no established global hierarchy, rulings of the ICJ are usually given great deference by other supranational tribunals. However, a similar tendency is not apparent regarding trade. The WTO Appellate Body's pronouncements seem to hold no particular weight in other supranational trade tribunals. Rights tribunals do not feel bound by ICJ law either.²⁷⁷ This situation not only affects the nature of precedent, as described above, but it weakens the overall concept of a global judiciary. U.S. lawyers will favor a unified hierarchical judicial regime. They are accustomed to one Supreme Court of ultimate authority. More basically, the common law system of judicial law making requires an ultimate judicial authority, but the civil law system does not need such a final judicial authority.

274. PALMER, *supra* note 77, at 35–36.

275. MERRYMAN, *supra* note 102, at 52–53.

276. *Id.* at 51–52.

277. “There is no hierarchy of courts with predetermined jurisdiction. Instead there exists a more complex and haphazard multiplicity of courts, with no pretense of schematic hierarchy between them.” ROSENNE, *supra* note 19, at 529. On the other hand: “While there is no formal hierarchy of international courts and tribunals, the pre-eminence of . . . the present International Court is today generally accepted. Any other international adjudicatory body which ignored relevant dicta and decisions of the International Court would jeopardize its credibility.” *Id.* at 1609.

U.S. lawyers are likely to press the system to form a unified global judicial regime.²⁷⁸ Europeans, on the other hand, are more accustomed to separate court systems, and might not be as anxious to unify the courts.²⁷⁹ The several global tribunals might have and could still form into a unified judicial regime, but civilians will not have the instinct to do so in a way that may well drive U.S. lawyers.²⁸⁰ They will see the WTO judiciary and the ICJ as founded on two very distinct governmental institutions whose “competences” should be kept separate. The need for different expertise is one of the forces that has kept supranational tribunals separate.²⁸¹

Europeans and Americans differ on the use of specialized court systems. Europeans are more familiar to separate court systems. The French have the Cassation, the final court for general law, and the Council of State, the final court for administrative law, along with a separate constitutional council.²⁸² The Germans have five separate court systems and a Constitutional Court. A constitutional court, separate from those that handle regular legal issues, is the norm in civil law countries.²⁸³ In the European supranational regime, the ECJ has jurisdiction over trade and the ECHR has jurisdiction over rights enforcement. The CFI provides another E.U. example of the continental European tendency to create specialist courts.

Still, a unified system would no doubt provide coherence in the development of global law, and coherence is essential to legitimacy. Indeed, the E.U. could be used as a counter-example to the civil law tendency toward establishing specialist courts. The ECJ, in the exercise of its trade jurisdiction, has taken on many rights-enforcement questions, and it would take little technical effort to shift jurisdiction over issues of rights into that court and create a supreme court of Europe. International law has

278. Spelliscy, *supra* note 6, at 171 (“Given the disastrous consequences that incoherence could have on the international judicial system, it is time to abandon the orthodoxy and insist on the formalization of the relationships between tribunals.”).

279. *See id.* at 153–54.

280. Jackson observed that the precursor to the WTO, the International Trade Organization, would have had appeals to the “World Court,” or in other words, the ICJ. John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, in *FROM GATT TO THE WTO: THE MULTILATERAL TRADING SYSTEM IN THE NEW MILLENNIUM* 68–69 (2000).

281. Spelliscy, *supra* note 6, at 149.

282. Had the “star chamber” survived, it might have evolved into something like the French Council of State, and the common law world might have become accustomed to a dual judicial system as well. Though vilified in history, that review body was a casualty of politics, not principles. LAWRENCE BAXTER, *ADMINISTRATIVE LAW* 20 (1984) (pointing out that the Star Chamber was “fairly popular with the public” but “[c]ommon lawyers considered the court a threat to the jurisdiction of King’s Bench.”).

283. WATKIN, *supra* note 81, at 6 (“Another hallmark of civil law systems therefore is their possession of a constitutional court or some such body to hear and determine [whether a particular piece of legislation offends against the fundamental law of the State].”).

never had a unified system.²⁸⁴ Nonetheless, the proliferation of global and supranational tribunals is increasingly creating incoherent and sometimes contradictory principles.²⁸⁵ Consistency and certainty suffer, so that in the end the U.S. legal view may have the strongest practical case.

E. Procedure

Much of the tension in the emerging global legal culture will revolve around procedural principles. Tension will arise at the theoretical level because procedural principles express a legal culture's understanding of fundamental fairness, making alien ideas about process inherently suspect. Practicalities also fuel this tension because practical lawyers will feel disadvantaged by unfamiliar procedural designs.

A significant gulf exists between the common law "adversarial" model and the civil law "inquisitorial" model. The common law lawyer has been traumatized by the "star chamber" horror story ever since the English judges helped parliament triumph over the executive-monarch. The very term "inquisitorial" calls up these horrible images. On the other hand, much about the adversarial model offends fundamental instincts among civil lawyers as well. In fact, these terms do not capture the true difference between the two models. The overarching contrast is the relative position of lawyers and judges. Civil processes are adversarial in their own way, and one would hope that the common law process aims at inquiring into the truth. They differ in the techniques employed to assure participation and discovery of the truth.

The judge-managed process of the civil law has advantages in assuring equality of opportunity. As described above, once the parties have brought a case to court, the court assumes responsibility for the effective handling of the case.²⁸⁶ In contrast, common law pleadings merely get the plaintiff into the courthouse. The lawyers must then develop the case and

284. See Jonathan Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 74 (1996) (noting that the ICJ, and the PCIJ before it, promoted the rule of law "in the context of a mixed system that allows for a variety of other forums to decide matters of international law."); Carl-August Fleischbauer, *The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg*, 1 MAX PLANCK Y.B. U.N. L. 327, 333 (1997) (discussing how the ICJ and the Hamburg Tribunal will divide international legal cases and labor).

285. See Spelliscy, *supra* note 6, at 159-68 (discussing the conflicting views of the ICJ and the International Criminal Tribunal for the Former Yugoslavia regarding state responsibility for acts of state officials). While the ICTY trial level court applied the ICJ precedent, the appellate body explicitly refused to apply ICJ law. *Id.* at 167-68.

286. Issues and evidence, however, are still controlled by the parties. See MERRYMAN, *supra* note 102, at 111-23.

build the record, with the judges acting more like referees. The information that becomes the record will be validated during trial.²⁸⁷

The role of the trial itself is quite different between the two systems. A common law trial is the end product; all the real work is done at trial, and everything else is preparatory. In contrast, the civil law depends on a *process*, with the trial some part of that process. It is not usually the dominant part, except when the final decision is made.

The civil law depends much more on writing. The common law distrusts written proceedings.²⁸⁸ Its oral orientation requires writing to be converted essentially into testimony and validated by admission at trial under specific rules of admissibility. In short, the relative competence of the parties' lawyers determines the effectiveness and equality of opportunity in the common law process, whereas the civil law process focuses more on a sense of fairness and the sensitivity of its judges.

The civil law's focus on judge control is in many aspects more appropriate to the global tribunals. Judicial control assures that the court itself has an adequate record. Civil law procedures allow the court to consult experts, including legal experts, more readily. The adversarial process would require most experts to appear as witnesses, and hence limiting their usefulness to the court. Section II.C. describes the ECJ's incorporation of the preparatory judge and the judicial advisor. In that court, the case is assigned to a "judge-reporter" who prepares the docket, while the court relies upon the legal advice of an "advocate general" who

287. Thibaut and Walker, in their empirical study of the two, found that institutionalization of either the adversarial process or its continental rival have an affect on the type of facts presented to fact finders. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 39-40 (1975). They demonstrated that the "inquisitorial" process used on the continent has disadvantages in confronting sampling error. "However, this study has identified a major, and heretofore unsuspected, effect of adversary decision making: the model introduces a systematic evidentiary bias in favor of the party disadvantaged by the discovered facts." *Id.* at 40. That is, the adversary process creates an incorrect view of the balance of information where the weight of the evidence clearly rests on one side of the controversy. On the other hand, another process may create other accuracy biases, as does the "inquisitorial" model. The fundamental procedural choice is actually based on the "brand" of inaccuracy preferred in the legal culture. In general, the U.S. system of procedural design is committed to the adversarial process because it focuses on the quality rather than the quantity of the evidence.

288. However, increased use of written materials may be making its way into English courts. See T.H. Bingham, "There Is a World Elsewhere?": *The Changing Perspectives of English Law*, 41 *INT'L & COMP. L.Q.* (1992) 513, 526 ("[I]f a judge of (say) the immediate post-war period were to return to the courts today, whether at first instance or on appeal, he would feel himself to be in an environment that would feel quite strange and, as he might think, un-English.").

prepares a thorough legal analysis.²⁸⁹ The Court may order expert reports under the supervision of the judge-reporter.²⁹⁰

These aspects of the inquisitorial model will offend common lawyers who are used to having greater control of their cases. Understandably, lawyers prefer the common law procedure in which they are dominant. Empirical evidence suggests that the judge-controlled process is less satisfactory to ordinary citizens as well.²⁹¹ Yet, great diversity within the judiciary argues in favor of helper judges. In addition, the unequal quality of representation among participants in global litigation will be mitigated by the ability of the court to control the record. Given the even greater likely disparity in the resources available to litigants in global adjudications, the civil law use of court experts, rather than the common law's insistence that experts appear for the litigants as witnesses, surely will enhance the technical competence and equality of judicial decision-making.²⁹²

Process in the two systems may also conflict at the appellate level. In contrast to the U.S. inclination, the civil law empowers appellate courts to

289. KOEN LENAERTS ET AL., *PROCEDURAL LAW OF THE EUROPEAN UNION* § 1-011 (1999).

290. Rules of Procedure of the Court of Justice of the European Communities, art. 49, 1991 O.J. (L 176) 7, available at <http://curia.eu.int/en/instit/txtdocfr/main.htm>.

291. However, Thibaut and Walker, in their empirical study of the two process models, provided an in-depth empirical examination into the factors that ensure satisfaction in a legal process. See THIBAUT & WALKER, *supra* note 287, at 1-5; see also Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 750-60 (1976). Thibaut and Walker compared the so-called "adversary" process, the passive decision-maker model, with its continental rival, the active decision-maker model unfortunately termed "inquisitory" process. They found that: "One of the most intriguing findings for participant subjects was the linear increase in satisfaction with the procedure, perceived fairness of the procedure, and opportunity for evidence presentation as the procedural mode moved along the continuum from the inquisitorial to the choice adversary method." THIBAUT & WALKER, *supra*, at 94. Other studies have confirmed this finding in various settings. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 211-14 (1988). Uninvolved observers and continental subjects (those not habituated to the adversarial process) showed a similar preference for the adversary process. See THIBAUT & WALKER, *supra*, at 77-80. This satisfaction emanates from leveling, even though it distorts the true balance of factual support for one of the positions. *Id.* at 77. Also, they found that "subjects are more willing to trust an adversary system than an inquisitorial attorney to produce accurate, unbiased judgments." *Id.* (emphasis in the original). That is, participants and observers were impressed by the adversarial model's restraints on the conduct of the decision makers.

292. The limitation of certain types of expert evidence in WTO panels has caused some controversy. While statutes confirm that the panels have broad authority to investigate and evaluate the facts in each case, WTO Appellate Body decisions indicate that some evidence is now limited to the explanations and evaluations of the evidence provided by the parties. Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 INT'L & COMP. L.Q. 325, 354 (2002) ("It unduly restricts the inquisitorial role of WTO panels as international tribunals and constitutes an *unwarranted transplantation of common law principles* into the WTO process.") (emphasis added).

engage in de novo review.²⁹³ This may be a natural extension of the choice of judicial control versus lawyer control. Since the parties are responsible for the common law record, it is natural that the courts should accept “their” record. Whereas, since the judiciary is responsible for the civil law record, it is natural that each level of the court system should check on the record, as well as the application of the law to the record. Regardless, civil law and common law practitioners will have very different expectations at the appellate level as well as the “trial” level. Perhaps because of U.S. influence, global tribunals with appellate authority are limited to questions of law.²⁹⁴ Because of the complexity of fact-finding in global disputes, this common law-type appellate review might be best solution.

Lawyers and jurists from the two systems might disagree about the function of reviewing courts in any global judicial hierarchy. Based on the French model, the highest courts in civil law systems are likely to be courts of “cassation.” Cassation means that the reviewing court may “quash” a lower court decision it finds to be incorrect, but may not substitute its judgment for that of the lower court.²⁹⁵ The reviewing court is limited to returning the case for reconsideration. Common law practitioners will expect global courts to conduct appeals. Experience with mixed civil and common law systems show a natural tendency for courts to evolve into courts of appeal.²⁹⁶

The procedures for supervision of state courts by a central judiciary will be another source of tension. U.S. lawyers are likely to be shocked by some ideas that might come out of the E.U. procedures. In the U.S., the Supreme Court may only review state decisions involving federal issues that have been addressed by the highest state court. The E.U. has a “preliminary ruling mechanism” that allows *any* member tribunal, no matter how lowly, to refer E.U. questions directly to the ECJ.²⁹⁷ A former president of the ICJ has recommended that a similar mechanism be available so that national courts may refer international questions directly to the ICJ.²⁹⁸ U.S. lawyers will be very uncomfortable with such an approach.

Of course, questions of procedural design have already been addressed in the global arena. Where the U.S. participates, the U.S. has had

293. See generally VRANKEN, *supra* note 79.

294. The WTO is a good example. Debra P. Steger & Susan M. Hainsworth, *New Directions in International Trade Law: WTO Dispute Settlement*, DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION 31 (James Cameron & Karen Campbell eds., 1998); Terence P. Stewart & Amy S. Dwyer, *HANDBOOK ON WTO TRADE REMEDY DISPUTES: THE FIRST SIX YEARS (1995–2000)* 2 (2001).

295. ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM* 86 (2d ed. 1998).

296. PALMER, *supra* note 77, at 39 (discussing the evolution of the Puerto Rican Supreme Court from a classic cassational style to a court of appeals).

297. E.U. TREATY, *supra* note 36, art. 234 (ex art. 177).

298. American Society of International Law, *supra* note 269, at 181.

its way on procedural issues. The U.S. has been able to insist on adversarial-type hearings. As more and more “regular,” non-international practitioners find themselves engaged in these global tribunals, the tension will increase. Civil law lawyers may be less accepting of common law processes. And common law practitioners may begin to recognize that non-practitioners have been willing to trade substantive principles for process. In short, the current detente on procedure, such as it is, may not be as stable as it seems.²⁹⁹

F. *Impact of Non-Judicial Institutions*

Not directly related to conflict between the civil law and common law systems as such, but nonetheless equally important to anticipating global judicial regimes, is the contrast in the judiciary's overall position in government between a parliamentary system and a presidential system. The different principles behind the position of the judiciary in these two governmental models will reach into the global legal culture. Here, the U.S. will diverge from even its common law partners.

The U.S. version of separation of powers structurally divides the two political functions into the legislative and executive governmental branches. In the parliamentary system, the executive, or “government,” is the leadership of the legislative. An informal separation exists between the ‘ins’ and the ‘outs’, rather than an institutional separation between legislative and executive actors as in the presidential system. Not only will the outs include the minority parties in the legislature, but also the non-leadership “backbenchers” of the controlling party or parties. The key separation in the parliamentary system then is between the democratic institutions of government and the judiciary. The parliamentary system reinforces the civil law conception of the role of the courts in which the courts have a specially-defined function regarding litigation with the government, often to guarantee that courts do not interfere in the business of government. But even common law parliamentary systems ensure separation between the political branches and the judiciary. England, the font of the common law, evidences the

299. Jackson criticizes the WTO/GATT dispute settlement structure for its ossification of procedure. As many as 80 changes, most involving “fine tuning,” have been proposed. The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, available at http://www.wto.org/english/docs_e/legal_e/53-ddsv.pdf, calls for a review of procedures. Jackson notes: “One of the geniuses of GATT . . . was its ability to evolve partly through trial and error and practice.” Jackson, *supra* note 280, at 77. In contrast, he observed constraints on a similar evolutionary process regarding procedures. *Id.* Surely, there is value in stabilizing procedures because of the number and diversity of participants with various resources. Still, creating a judicial regime for the whole world should justify a good deal of new thinking and experimentation. Of course this may be a mere expression of an U.S. lawyer's obsession with procedure.

long struggle between an elite judiciary and a representative parliament, which justified creation of a “parliamentary sovereignty.”³⁰⁰

On the other hand, the presidential model empowers the judiciary. Separation of the executive from the legislative branch in the presidential system puts the courts in the position of arbiter between the two political branches. Thus, the presidential model enhances judicial authority because the judiciary is the ultimate institution to mediate between the executive and the legislature. Because most parliamentary systems combine control of the two political functions, the judiciary is weakened by its position of second-guessing the majoritarian institutions of government.

It is difficult to predict how separation of powers theory will play out in the global community. The E.U. has evolved closer to a U.S. separation of powers system, even though it consists of countries with a parliamentary system.³⁰¹ Perhaps there is a natural tendency in the direction of the U.S. view that will play out in the global arena. One useful global experience is the Lockerbie case discussed above.³⁰² The case involved Libya’s resistance to U.S. and U.K. efforts to extradite those who planted the bomb that caused the crash over Lockerbie, Scotland. Libya filed its case with the ICJ in conflict with a U.N. Security Council decision. The ICJ’s resolution of the conflict established that both the Council and the Court have certain quasi-judicial functions.³⁰³ Nonetheless, the Court made it clear that, while it is bound to cooperate with the other “principle organs,” the ICJ is equally bound by considerations of international law.³⁰⁴ On the other hand, its decision-making may not be confined to such considerations.³⁰⁵ While the ICJ ducked a direct confrontation with the Council by applying a separation of powers-related concept similar to the U.S. “political question” doctrine, it asserted its own authority to review non-judicial institutions.

300. WADE & FORSYTH, *supra* note 72, at 29. In addition:

The sovereignty of Parliament is a peculiar feature of the British constitution which exerts a constant and powerful influence. In particular, it is an ever-present threat to the position of the courts; and it naturally inclines the judges towards caution in their attitude to the executive, since Parliament is effectively under the executive’s control.

Id.

301. See Bignami, *supra* note 93, at 468–69.

302. Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14).

303. Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT’L L. 643, 661 (1994).

304. *Id.* at 674.

305. ROSENNE, *supra* note 19, at 118 (“[W]hile the Court’s task is limited to functions of a legal character, its power of action and decision is subject to no limitation deriving from the fact that the dispute before it might also be part of a dispute which is within the competence of some other organ.”).

The distinctions of the two governmental models also affect judicial authority over administrative acts. Legislative and administrative acts are more clearly distinguished in the presidential model, and hence courts have been able to assume significant authority. Similar action in parliamentary systems is evidence of another type of legislation—making judicial assertion of authority that is antidemocratic, rather than protective of the citizenry.³⁰⁶ The very terms used to describe administrative functioning express the great gulf between judicial treatment in the two systems. In the U.S., it is called ‘rulemaking,’ and in the parliamentary system it is called ‘delegated legislation,’ or subordinate legislation. Delegated legislation, as administrative pronouncements delegated to the government—part of the legislature, properly takes on the aspects of legislation. From a judicial review perspective, they are much the same as legislation. In the U.S., such administrative pronouncements are conceptually distinct from the legislation which they are intended to implement.³⁰⁷ Pronouncements made pursuant to delegated authority, or “legislative rules,” have special force, even though not classified as actual legislation.³⁰⁸

The E.U. experience, leaning more toward separation of powers than its parliamentary members, suggests that a global legal regime will include administrative “legislation” more akin to the U.S. mode.³⁰⁹ The

306. It seems consistent that administrative interpretations have less force in civil law systems than in a U.S. common law system. DE CRUZ, *supra* note 145, at 269.

307. Another manifestation of the separation between the judicial and political institutions in civil law is the careful distinction between public law and private law. U.S. law is not without this dichotomy, but it is not as grounded as it is under the civil law. Indeed, these categories go back to Roman law. In the U.S., the government is not “protected” by separate courts. Not only is the government subjected to oversight by generalist courts, but U.S. thinking is that such a system is necessary. Remember, the U.S. believes that the judiciary is the least dangerous branch. However, review of government decisions by generalist judges is suspect, and hence limited by several doctrines, e.g., political question, of administrative law.

308. In our system, the Harmonized Tariff Schedules of the United States (HTSUS) must be characterized as legislative rules. HTSUS are “recommended” by the International Trade Commission, and issued by presidential decree. 19 U.S.C. §§ 3004–3006 (2002). They are incorporated by reference into the statute itself. 19 U.S.C. § 1202. It is most nearly our system’s equivalent to “delegated legislation” as found in a parliamentary system. Delegated legislation is literally legislation made by the executive, which is part of the legislature. *See, e.g.,* WADE & FORSYTH, *supra* note 72, at 859. In our system, however, where the legislative and the executive are constitutionally separate, Congress cannot delegate actual legislative authority, and hence rulemaking may not be considered “legislation.” Thus, the HTSUS must be seen as legislative rules made pursuant to delegated authority. *See Chrysler v. Brown*, 441 U.S. 281, 304–06, 99 S. Ct. 1705 (1979) (inquiring into whether an executive order represents sufficient delegation to be considered “law”).

309. The dominant procedural requirements for E.U. “secondary legislation,” or rulemaking, were established by the “Comitology” decisions. The Commission may adopt rules under the indirect control of the Council. Control is indirect because a committee of Member State experts is charged with day-to-day supervision of Commission rulemaking. The second Comitology decision gave parliament power similar to legislative veto. Council Decision

E.U., however, represents more of a middle ground between the presidential and parliamentary models. The U.S. will view administrative pronouncements as lacking legislative-like weight, but E.U. adherents might see it as "secondary legislation." The former will carry the authority of an executive interpretation of a statute. The latter, to some extent, will carry the authority of the legislature itself. These characterizations will substantially affect judicial freedom in the face of such pronouncements.

Differences in separation of powers ideology can also affect judicial participation in the legislative process itself. Advisory judicial opinions are more readily accepted in continental European systems than in the U.S.³¹⁰ Europeans are likely to push for an advisory role for global tribunals or for tribunals designed for that purpose, replicating the constitutional courts. French President Jacques Chirac advocated that the ICJ be invested with a "regulatory role, advising international organizations with advisory opinions requested to reconcile in cases where the international law of environment, trade, and labor standards conflict."³¹¹ U.S. courts are constitutionally prohibited from issuing advisory opinions.³¹² In contrast, the constitutional courts of many nations regularly engage in advisory opinions.³¹³ Legislators are often specifically authorized to take legislation to the constitutional court. Legislative standing in the U.S., in contrast, is not permitted.³¹⁴ The ECJ has expressed jurisdiction over parliamentary actions against the other E.U. institutions. The two approaches to judicial advice might be hard to reconcile, but the U.S. might accept the continental approach because its prohibition is based on the constitutional language and not the rationality of the concept.

G. *Qualification and Selection of Global Judges*

Another sensitive aspect of the global judicial regime will be the mundane question of judicial selection and qualification. The tension

1999/468/EC, 1999 O.J. (L 184) 23. See Christoph Demmke et al., *The History of Comitology, in SHAPING EUROPEAN LAW AND POLICY: THE ROLE OF COMMITTEES AND COMITOLGY IN THE POLITICAL PROCESS* 61 (Robin H. Pedler & Guenther F. Schaefer eds., 1996); Ellen Vos, *The Rise of Committees*, 3 EUR. L.J. 210 (1997). Generally, rules involving significant normative choices require more procedures than those involving routine administrative matters.

310. See HELFER & SLAUGHTER, *supra* note 1, at 312-14.

311. Speech of Jacques Chirac, *quoted in American Society of International Law, supra* note 269, at 180.

312. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 56 (6th ed. 1995).

313. FAVOREU, *supra* note 273, at 22-23 (noting, however, that the extent to which constitutional courts engage in *a priori* review is decreasing).

314. *Raines v. Byrd*, 521 U.S. 811, 828 (1997) ("There would be nothing irrational about a system which granted standing in these cases; some European constitutional courts operate under one or another variant of such a regime But it is obviously not the regime that has obtained under our Constitution to date.").

between the common law view of the nature of the judiciary and that of the civil law goes deeper than conflict over representation and professional qualifications. Common law judges are amateur judges. That is, they are not trained or apprenticed as judges, and are selected from among practicing lawyers. As discussed above, civil law judges are trained as judges, and they move up a hierarchy as they prove themselves at lower levels. They are products of a judicial bureaucracy, "faceless bureaucrats."³¹⁵ Common lawyers are likely to be appalled by such judges, just as civil law lawyers are likely to be appalled by the lack of training and experience of common law judges.³¹⁶

The two selection regimes no doubt change the actual judicial decision-making. For one thing, common law judges, coming from the same fraternity, find practitioner judges more acceptable. Studies show that practicing lawyers, not surprisingly, bring their practice perspective with them to the bench.³¹⁷ Civil lawyers might find that this tendency detracts from the integrity and impartiality of judicial decision-making. Common lawyers may find that civil law judges lack the touch of reality, and have the propensity to over-conceptualize. Yet, civil law judges have their own brand of experience—experience at being judges. Representatives of those systems may be forgiven for believing that that experience is superior and less likely to create bias.

315. Civil law opinions are collegial; they are the opinion of the court. Common law judges identify themselves. Common law lawyers are accustomed to working with the identity of judges, not just appellate judges. There are good and bad justifications of both, but there is certainly a choice which might be rectified intellectually, albeit more difficult to satisfy practitioners. At present, the WTO appellate tribunal does not identify the individual judicial views. Jackson, *supra* note 280, at 71 ("There is no indication of particular authorship of any part of an Appellate Body report and no provision for dissenting opinions."). However, a recent WTO Appellate Body decision may suggest that this is changing. In the *Asbestos* case, one of the panelists wrote a concurring opinion, changing the long-standing practice to write unanimous opinions. WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001). The ECHR, however, is an example of a supranational judicial body that does allow for both dissenting and concurring opinions. Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 51(2), 213 U.N.T.S. 221.

316. Lord Goff discusses the quality of common law judges, stating that it is experience that counts most in common law systems. The essential quality of the judge then is not knowledge, but wisdom. Goff, *supra* note 103, at 755. Mixed common-civil law jurisdictions suggest a natural tendency toward selecting experienced practitioners where the civil law tradition of specialized training is not in place, choosing experience over education. See PALMER, *supra* note 77, at 37.

317. Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1470 (1998) ("Although we initially shared [skepticism about the impact of prior employment], our study found nearly every prior employment variable of these judges, with the exceptions of law professor and political experience (and perhaps prosecutorial experience), to be significant in some manner.").

The European judicial selection was made flexible in order to accommodate its common law members' judicial traditions. With the U.K. and Ireland, prominent members of the European community, qualification of European judges had to accommodate the difference between common law and civil law judicial selection. Thus, candidates for both the ECJ and ECHR must satisfy alternative qualifications.³¹⁸ Candidates qualify under the agreements either as qualified for judicial appointment in the national court or as those "who are jurisconsults of recognized competence."³¹⁹ These criteria recognize scholarship as a qualification for judges in accord with civil law respect for jurists, as well as the common law insistence on practical legal experience and reputation.

A similar divide can be expected, as global tribunals become more court-like. Qualification for membership on the ICJ offers a similar compromise. Judges are qualified if they have "qualification required in their respective countries for appointment to the highest judicial office, or are jurisconsults of recognized competence in international law."³²⁰ Indeed, other alternatives might be contemplated to satisfy other legal cultures.

Characteristics of the adjudicators functioning in the WTO dispute process reflect more the political, negotiation character of the process than a true adjudicative character. The initial or "trial" level proceeding is conducted by "Dispute Panels," the qualifications for which is prior service on or representation during a panel, previous employ as a government representative under GATT, employ as a Secretariat expert, having a scholarly record in international trade law or policy, or having served as a Member's senior trade policy official.³²¹ Members of the Appellate Body must have recognized standing in international law or trade. To some extent the acceptance of scholarly background leans more towards the civil law approach. But in the end, the WTO bodies are not currently peopled by judicial types under either legal culture. Thus, if these bodies become more court-like in operation, the question of selection and qualification of real judicial officials will have to satisfy those

318. See L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 49–50 (5th ed. 2000).

319. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 223 (ex art. 167), O.J. (C 340) 3 (1997).

320. Statute of the International Court of Justice, June 26, 1945, art. 2, 59 Stat. 1055, 1055, 3 Bevens 1179, 1179, available at <http://www.icj-cij.org/> (last visited Jan. 12, 2004). See also ROSENNE, *supra* note 19, at 367 (criticizing the order in which these two alternatives are written, because experience at the highest domestic judicial office does not assure expertise in international law).

321. KONSTANTINOS ADAMANTOPOULOS, *AN ANATOMY OF THE WORLD TRADE ORGANIZATION* 61–62 (1997); see also DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE* 68–69 (1999).

from both legal cultures. Again, the “judicial” nature of the adjudicators may be a characteristic that must satisfy diverse legal cultures.

Perceptions of the necessary characteristics for independence are also likely areas of tension. The U.S. is strongly committed to the value of life tenure. The E.U., true to its civil law roots, believes that a term of years is in fact the best way to assure independence.³²² It is very unlikely that global tribunals will ever have life tenure judges, for reasons that are more political than choosing the legal system. The best chance for judicial independence will be prohibition against reappointment.

Another independence issue, although not necessarily to pit transatlantic participants against each other, is national representation in supranational judicial bodies. Because of Congressional participation in the selection of federal judges, U.S. federal courts generally have local representation. In the E.U., all its institutions, parliament, commission, council, and the *courts*, explicitly incorporate Member State identity. The ECJ, as a practical matter, assures representation from each member.³²³ The E.U. itself, however, recognizes that it must change in light of expansion.³²⁴

At present, and in any foreseeable future, global tribunals will be sensitive to national or regional representation. However, real equality of representation is impossible because of the size of the world community. What must replace national representation is sensitivity to representation from various legal cultures. The ICJ has adopted this approach. Article 9 provides:

At every election, the electors [UN members] shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.³²⁵

This must certainly be a difficult judgment, but a necessary spirit.³²⁶

322. E.U. TREATY, *supra* note 36, art. 223 (ex art. 167) (“The Judges . . . shall be appointed by common accord of the governments of the Member States for a term of six years.”).

323. Brown & Kennedy, *supra* note 318, at 48 (explaining that it is not required, but since each member must agree on an appointment, states will insist on representation).

324. Alan Dashwood, *The Constitution of the European Union After Nice: Law-Making Procedures*, 26 EUR. L. REV. 215, 216 (2001); Jan Wouters, *Institutional and Constitutional Challenges for the European Union—Some Reflections in the Light of the Treaty of Nice*, 26 EUR. L. REV. 342, 343 (2001) (criticizing, unfairly in light of recent events, the Nice Intergovernmental Conference for not contemplating reforms beyond those needed for expansion).

325. Statute of the International Court of Justice, *supra* note 320, art. 9. *See also* SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 54–62 (5th ed. 1995).

326. One possibility is the well-recognized comparative law groups called “legal families.” DAVID & BRIERLEY, *supra* note 110, at 17–20. As discussed in Section III.F., these legal

H. Legal Representation Before Global Tribunals

In the end, the *practice* of law gives substance and reality to the rule of law. Its success will be determined by the successful merger of principles and theory, which separate legal representation around the world. Until recently, the practice of law has been largely a local or, at most, a national enterprise, and implementation of the rule of law has struggled within many isolated venues. In our emerging global society, a coherent vision of the rule of law becomes an imperative. Hence, insulated legal practices are no longer acceptable.

The practice of law in the world's legal systems can be quite different. Indeed, culture may have more to do with the practice of law than legal theory. Global practice will witness diversity among the various cultures of the world, even those adopting one of the transatlantic models. Whereas this Article notes some major ideological distinctions between two major legal cultures, the practice of law among common law systems varies greatly, as does the practice of law among civil law systems. Even at their base, civil law systems differ among themselves. For example, French civil law was intended to make lawyers unnecessary, and even though it does not accomplish that, its legal culture is influenced by that philosophy. German law seeks to provide legal certainty and faithfulness to the past.³²⁷ Law as practiced in the U.S. differs substantially from practice in England and Ireland. In short, the style and nature of representation in the global arena will experience clashes of multiple cultures, even within the larger categories of civil and common law.

Faithfulness to language in authoritative documents will be a major area of tension. The degree of attention common and civil law representatives pay to language is likely to differ. As discussed, statutory language can no more be ignored in the common law systems, even in the U.S., than in the civil law systems. In the end, a court must obey statutory language in either system. Nonetheless, U.S. representatives must be prepared to argue from authoritative language in a way that seems somewhat literal and repressed to them. On the other hand, civil law advocates may find themselves somewhat freed by their association with common law representatives. They might find themselves plumbing new approaches to language. Indeed, this experience might support the movement in the civil law away from the grammatical approach, and it may give more credence to a certain degree of formalism in U.S. jurisprudence.

families may offer a device whereby the global legal culture may coordinate the various world legal cultures. See ZWEIGERT & KÖTZ, *supra* note 83, at 63–73.

327. MERRYMAN, *supra* note 102, at 31–32.

The treatment of case law is the second major area of tension that will affect representation. Most likely, as justified above, precedent will have force in the global legal culture, but will never attain the binding effect it has in common law jurisprudence. As discussed, precedent does influence civil law, so that the difference between systems is really one of degree. Supranational tribunals seem inclined to value precedent, and the dynamics of creating a global legal culture itself demands reference to prior judicial treatment. Legal historians explain that case authority depended historically on the availability of judicial opinions in England.³²⁸ Since the cases were available, common law lawyers and judges naturally used them in support of their positions, especially in the power grab of the formative years.³²⁹ This experience suggests that the readily available reports of the decisions of global tribunals will necessarily lead to a more precedent-oriented advocacy in the global legal culture. Rosenne said of the ICJ, "The constant accretion of judicial precedents is creating what is now a substantial body of international case-law."³³⁰ Representatives will naturally refer to prior decisions in support of their positions, even if those decisions have no formal *stare decisis* effect. It will be hard for lower level tribunals to ignore related decisions by appeals tribunals. Similarly, appeals tribunals will find it difficult to avoid their own prior decisions. Add the common law practitioners' inclination to use prior authority and it can be predicted that a case-oriented representation and judicial decision-making will become part of the global legal culture.

The common law glorifies lawyers and gives them ultimate control over the law. Judges are practitioners who see legal representation from the perspective of practicing lawyers. Legal analysis then will also differ depending on the sources considered to be the best authority. Civilians can be expected to advocate from scholarly works with more force than common law advocates. As noted above, in the civil law, scholars actually propound the law, whereas in common law, scholarship seeks to explain and influence the law made by judges.³³¹ In practice, however, lawyers in lower courts rarely cite jurists, even in civil law systems.³³² The real tension will come when civil lawyers expect their jurists to have compelling

328. See CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552-1634)* 507 (1956) ("Even Francis Bacon acknowledged it. 'Had it not been for Sir Edward Coke's *Reports* . . . the law by this time had been almost like a ship without ballast, for that the cases of modern experience are fled from those that are adjudged and ruled in former time.'").

329. See generally COKE, *supra* note 192.

330. ROSENNE, *supra* note 19, at 1609.

331. See GLENN, *supra* note 90, at 227 (describing the emergence of "judges actually making law (and binding law at that)").

332. See LAWSON, *supra* note 120, at 84 ("I have heard advocates say that they rarely cite the views of jurists before any court lower than the *Cour de Cassation* . . .").

force at the “appellate,” or law–developing, stage. They will expect scholars to have significant *practical* impact, and representatives from other cultures, e.g., an Islamic legal culture, will also give special weight to the work of legal scholars. Even in the common law, scholars have considerable weight in appellate decisions. Again, the difference is one of degree and form.

Each group of representatives will rely on familiar techniques, and will incorporate familiar strategies. On the other hand, representatives will make the best arguments they can. Therefore, global practice will find common law advocates arguing from authoritative language as well as jurists’ comments, and civil law advocates arguing from judicial opinions and a balancing of interests approach. Global judges will likely find themselves justifying their decisions in similarly flexible ways. In short, the global practice of law will borrow from all cultures. That does not diminish the overarching premise of this Article: that the subtle differences among legal cultures must be understood as their representatives engage in the process of fashioning a global legal culture.

CONCLUSION

Globalization will necessarily lead to an ever-stronger union of constituent states under an increasingly empowered supranational government. Judicial institutions will develop in this government. Global tribunals will become increasingly more like courts over the years. This prediction is relatively easy because the evolutionary process is already moving well along. The exact contours of the judicial institution are still to be determined, but the WTO Dispute Settlement Body, combined with the human rights adjudicators of the ICJ, provide very viable first–generation antecedents.

Envisioning the legal culture that will emerge from these supranational tribunals is more problematic. This Article has attempted to provide the framework for projecting the evolution of the global legal culture. Its major subtext is the practical necessity for U.S. readers to learn about the world’s legal cultures, starting with the often quite unfamiliar ideologies and practices of the continental European systems. It observes that the two dominant legal cultures in the world are now the civil law system and the common law system. Together they form at least a significant component of 62% of the world’s jurisdictions, covering 70% of its population. To add some coherence, the U.S. is cast as the major common law system, and the E.U. represents the manifestation of civil law jurisprudence. A look to these two transatlantic systems is justified by the fact that both are federal in the sense that they represent a union of several

sovereigns, and hence their experience with legal unification will serve the global legal culture. Their dominance in that global legal culture might be supported by their current influence on both the world culture and the world's economy.

The vision of this Article can be no more than a look at the first generation. Strong and influential alternatives to these transatlantic legal cultures will no doubt cause continual reworking of the global legal culture. Islamic law, for example, covers in some way perhaps a billion people, nearly 19% of the world's population, or the same as the coverage of the common law. It has shown a resilience and adaptability that guarantees that it will be a major factor in the final design of the world legal culture. The Hindu legal family is said to cover 450 million people—a greater population than the U.S. or all the E.U. countries combined. A variety of indigenous legal cultures may emerge from under superficial acceptance of the European legal systems. Non-transatlantic instincts, such as the Chinese and Japan exultation of cooperative values over individuality, will also increasingly vie for place in the world's legal philosophy. And history and humility tell us that there are influences, philosophies, and value systems that cannot now be identified which will someday change, perhaps radically, the make up of the legal system.

This Article then presents only a framework for contemplating the future of the world's legal culture. It starts from the known dominant legal regimes to offer only one of a large, perhaps infinite, variety of extensions of these regimes into the world. And it has largely ignored the assured influence of any number of alternatives. For example, it has not attempted to predict the impact of human imagination and creativity on the emerging global legal culture. Still, I hope it is a fair start in envisioning the substance and scope of our future global legal culture.