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# Judicial Review and Global Federalism

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# JUDICIAL REVIEW AND GLOBAL FEDERALISM

CHARLES H. KOCH, JR.\*

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## INTRODUCTION

At the most recent bilateral summit in Göteborg, Sweden, on June 14, 2001, President George W. Bush's first such summit, the European Union (E.U.) and the United States agreed to push together for a new round of multilateral trade negotiations. A joint statement advised, "[w]e seek a round that will lead both to the further liberalization of world trade and to clarifying, strengthening and extending [World Trade Organization (WTO)] rules, so as to promote economic growth and equip the trading system to meet the challenges of globalization."<sup>1</sup> This statement presages much more than further development toward a world market. It contains the dual significance of both the emergence of a world government and the E.U.-U.S. partnership in constructing that government.<sup>2</sup>

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1. Göteborg Statement: Summit of the United States of America and the European Union, 37 WEEKLY COMP. PRES. DOC. 904, 906 (June 18, 2001), *available at* <http://www.access.gpo.gov>; *see also* President's News Conference with European Union Leaders in Göteborg, Sweden, 37 WEEKLY COMP. PRES. DOC. 899, 900-01 (June 18, 2001) (affirming the strong E.U.-U.S. trade relationship and the need to create a growing world economy), *available at* <http://frwebgate.access.gpo.gov>.

2. This partnership is similar to that between France and Germany that led to the creation of the E.U. *See* L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 1 (5th ed. 2000) (providing that in 1950 the French Foreign

As the United States enters this new phase, the U.S. legal community must fully understand the implications of U.S. adherence to the goal of liberalization of world trade on national policy and, ultimately, on national sovereignty.<sup>3</sup> The free trade movement is part of a general and irresistible movement toward a global community.<sup>4</sup> The global trade movement will have an impact well beyond national trade policy. The softening of trade borders will result in a more general concession of national sovereignty to supranational institutions. The U.S. legal community, even more so than other U.S. communities, must understand the nature of this move toward "global federalism."

Fortunately, U.S. lawyers are intimately familiar with a federal legal system. In some senses, U.S. lawyers need only shift their perspective so that instead of working with a system in which the national government relates to the several states, they envision operating in one in which the national government relates to supranational governments, a perspective similar to the U.S. states in relation to the federal government. Still, the global legal system is nascent, it is not the mature U.S. federal system, and U.S. lawyers must be prepared to operate at a more formative stage. And, they must be prepared to deal with global institutions influenced by an

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Minister proposed to "place the whole of French and German coal and steel production under a common High Authority" where other European countries could participate).

3. The General Agreement on Tariffs and Trade (GATT) has served since 1947 as a framework for several global free trade negotiations by means of dispute resolution. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 51-52 (2d ed. 1999). GATT made no provision for formal, judicial dispute resolution. See *id.* That process changed in 1994 when the Uruguay Round of Multilateral Trade Negotiations agreed on dispute settlement procedures, known as GATT 1994. See 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. 1140, 1154. The Uruguay Round of Multilateral Trade Negotiations also established the WTO, embodied in the Agreement Establishing the World Trade Organization (WTO Agreement). See *id.* at 1143. GATT 1994 covers dispute resolution issues arising out of the WTO, and is incorporated in Article II of the WTO Agreement as Annex 1A. See *id.* at 1144-45, 1154. Article III establishes the WTO's general authority to resolve disputes among members, and provides that "[t]he WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes . . . in Annex 2 to this Agreement." *Id.* at 1145.

4. This globalization trend creates opportunities for assumption of power by adjudicators outside trade as well. The International Criminal Tribunal for the Former Yugoslavia asserted jurisdiction to determine the criminality of U.S. political and military leaders. The emerging International Criminal Court will assume jurisdiction throughout the world. Henry Kissinger observed, "[t]hese innovations reflect the new conventional wisdom, according to which traditional principles of sovereignty and noninterference in the domestic affairs of other countries are the principle obstacles to the universal rule of peace and justice." HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY TOWARD A DIPLOMACY OF THE 21ST CENTURY?* 234 (2001).

ever-widening array of governmental and legal cultures. Both present opportunities as well as drawbacks.

Insight into the natural evolution of a free trade regime may be gleaned from the fifty-year march toward the current E.U., which began with the signing of the European Coal and Steel Community Treaty in 1951. The European Economic Community, known popularly as the "Common Market," was established in 1957 by the Treaty of Rome.<sup>5</sup> This initial treaty has been amended on occasion to form a constitution or "basic law." Each iteration resulted in an added centralization of authority, memorialized by the name change to the "European Union."<sup>6</sup> Indeed, the E.U. has always been understood as a work-in-progress, and its members have agreed to "an ever closer union."<sup>7</sup> Recently, the German government has proposed a true federal government much like its own, but the other members are not ready for formalization of that degree of unification.<sup>8</sup>

The E.U. experience serves here as an eye-opening case study. The focus of the initial effort was on economic cooperation. George Bermann observed, "[d]ifficult 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."<sup>9</sup> The evolutionary process from this narrow vision to the E.U.'s robust and broad authority provides valuable insights as the United States draws further into a global trade regime.

Although U.S. lawyers have some two hundred years of historical experience, the recent E.U. experience might serve U.S. lawyers as a means to update their understanding of centralization.<sup>10</sup> The E.U.'s well-defined and

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5. See BROWN & KENNEDY, *supra* note 2, at 1-5 (providing a general history of the creation of a court of justice that would subject the European organization to judicial control).

6. See Treaty of Amsterdam: Consolidated Version of the Treaty Establishing the European Union, Oct. 2, 1997, in 1 INTERNATIONAL LAW & WORLD ORDER § I.B.13c (Burns H. Weston & Jonathan C. Carlson eds., 2000) [hereinafter E.U. Treaty] (providing, "[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe").

7. See *id.*

8. The German state itself resulted from the progression asserted here. The several Germanic entities began to coalesce in 1833 with the establishment of the *Zollverein*, a German customs union. See ANKE FRECKMANN & THOMAS WEGERICH, *THE GERMAN LEGAL SYSTEM* 19 (1999).

9. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 355 (1994).

10. See, e.g., Mark Tushnet, *Federalism and Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 329, 334-36 (1996) (observing a natural tendency of the U.S. federal government into areas where it has no general "constitutional" power).

aggressive legislative structure has played a crucial role in centralization.<sup>11</sup> U.S. lawyers, however, might profitably focus on the potential role of supranational tribunals in the evolution of a global legal regime, and in the origins of the legal principles upon which decisions will be made. Therefore, this article is limited to developing understanding of the centralizing influence of judicial review with reference to the E.U. experience.

E.U. developments further serve as a valuable vision of the emerging global legal regime, because a world legal regime, at least its first stages, will derive from a melding of U.S. law representing the common law legal tradition, and E.U. law representing continental legal culture. Thus, this Article, with the aid of E.U. judicial developments, hopes to serve two purposes. First, this Article discusses the social policy scope of the commitment to a free trade regime and the natural shift from sovereign nations to supranational, ostensibly trade-oriented, organizations. Second, this Article demonstrates how free trade commitments might be understood quite differently by those from other legal cultures, particularly those trained in the continental legal culture dominating the law emerging from the E.U., and hence how the partnership of the E.U. and U.S. legal communities might impact the development of global review principles.

#### I. THE EFFECT OF SUPRANATIONAL JUDICIAL REVIEW ON NATIONAL SOVEREIGNTY

The judicial role in the drive to a "more perfect union" is not unknown to U.S. lawyers, particularly the part played by the U.S. Supreme Court

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11. See Treaty of Amsterdam: Consolidated Version of the Treaty Establishing the European Community, Oct. 2, 1997, in 1 INTERNATIONAL LAW & WORLD ORDER § I.B.13d (Burns H. Weston & Jonathan C. Carlson eds., 2000) [hereinafter E.C. TREATY]. E.C. Treaty Article 7 (ex Article 4) establishes five institutions: the European Parliament, the Council, the Commission, the Court of Justice, and the Court of Auditors. See *id.* art. 7. The Council and the Commission are constituted so as to represent the member states. See *id.* arts. 203, 213. The first three are 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. See BROWN & KENNEDY, *supra* note 2, at 8 (stating, "European Parliament is more like a national parliament."). The Commission, which also administers the laws, has sole authority to initiate legislation and the Council has final enactment authority. See *id.* at 11. The Parliament, which is directly elected by E.U. citizens, has various types of review or approval authority. See *id.* at 8. In general, Parliament has the power to stop or at least make legislation more difficult but the Council, with the advice of the Commission, has the final say. See *id.* at 8-10. The latter two institutions may be comparable in a parliamentary system to the "government," where the leadership of the dominant party or parties controls legislation as well as the executive. 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.

(U.S. Court). The role of the European Court of Justice (E.U. Court) in centralizing authority might not be well understood by U.S. lawyers, and yet that E.U. institution is particularly important to envisioning the evolution of global federalism.<sup>12</sup> While the United States brings its own history and experience to centralization of power issues, the E.U.'s evolution and the E.U. Court's role is more recent and its citizens and member nations will be more sentient in the initial steps from a trade regime to a supranational sovereignty. This section then seeks to use E.U. judicial review to predict the role global tribunals might play in global federalization. (Parallelism is sought here by referring to the European Court of Justice as the "E.U. Court" and the U.S. Supreme Court as the "U.S. Court").

#### A. Judicial Review in E.U. Centralization

The role of judicial review of national or "Member State" actions provides a particularly valuable lesson for U.S. lawyers. Like the U.S. Court, the E.U. Court has been extremely activist, and the law it created in the E.U.'s formative stage forms the bedrock of a strong central authority. George Bermann summarized the E.U. Court's role, stating, "[t]he 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 orders."<sup>13</sup> Even though the E.U. Court has recently been more cautious, as discussed below, the legal doctrines it created are still a major unifying force.

The birth of the E.U. was largely the result of a partnership between France and Germany,<sup>14</sup> although there were six founding members.<sup>15</sup> In

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12. Under the basic law, E.U. judicial power is exercised by the European Court of Justice (E.U. Court). See E.C. TREATY arts. 220-45 (describing the judicial mechanisms of the European Court of Justice). E.C. Treaty Article 220 provides "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." *Id.* art. 220. U.S. lawyers may perceive the E.U. Court of Justice as the Supreme Court of Europe.

13. Bermann, *supra* note 9, at 353.

14. See BROWN & KENNEDY, *supra* note 2, at 8 (stating that France and Germany wanted to establish an organization open to other European countries).

15. The six founding members are: Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. See BROWN & KENNEDY, *supra* note 2, at 1. The E.U. currently has fifteen member states. Nine members have been added: Austria, Denmark, Finland, Greece, Ireland, Portugal, Spain, Sweden, and the United Kingdom. Twelve nations have begun the process of joining the E.U.: Cyprus, Hungary, Slovenia, Estonia, Czech Republic, Slovakia, Lithuania, Malta, Poland, Latvia, Bulgaria, and Romania. See EURECOM, SWEDES MAKE STRIDES TOWARDS EU ENLARGEMENT (July/Aug. 2001), at <http://www.eurunion.org/news/eurecom/2001/eurecom070801.htm>. As of August 2001, the first three had closed two-thirds of the negotiating chapters and all but the last two had closed more than half. See *id.*

E.U. Court case law, "where conflicts arise, the various approaches of the French, German, and more recently English legal systems, as well as those Member nations must be balanced."<sup>16</sup> In many ways, a humble Germany gave way to France. Therefore, the E.U. Court was modeled after the France *Conseil d'Etat*.<sup>17</sup> This choice is significant in procedures and judicial attitude. The attitude of the *Conseil d'Etat* has traditionally been much more activist than most European courts.<sup>18</sup>

Those with some understanding of the *Conseil d'Etat* will understand the E.U. Court's processes. Otherwise, its processes are quite foreign to U.S. lawyers and challenges their notions of appropriate process and proper judicial decision making. Therefore, a brief description of the E.U. Court's composition and procedures, with special attention to points of interest for U.S. lawyers, seems necessary.

The E.U. Court consists of fifteen judges and eight advocate generals, but planned enlargement will result in expansion. The E.U. Court hears cases in "chambers" of three to seven judges. Judges serve a term of six years with the prospect of reappointment. Of particular relevance to this discussion, Article 223 provides that "[judges] shall be appointed by common accord . . . of the Member States."<sup>19</sup> Although a representative from each state is not thereby required, as it is with the ultimate legislative authority, the "Council," this phrase assures that each state will have a representative because each can and do insist.<sup>20</sup>

Certain procedural aspects may also astound American lawyers. In many ways, the procedures have the feel of U.S. appellate proceedings but differ in fundamental ways. The first stage is the written application. This is not really pleading because it must contain, in effect, the applicant's whole case. The defendant has one month to respond, challenging "admissibility" (e.g., jurisdiction and standing) and merits or substance. At this point, the process significantly deviates from any U.S. judicial proceedings. The parties' control virtually ends and the E.U. Court takes over. One of the judges is assigned the case and serves as a "judge-rapporteur," responsible for building the record. The record will serve as the basis for a deci-

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16. See JURGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 9 (1992) (providing that judgments of the E.U. Court of Justice can sometimes have political consequences).

17. See L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW 266 (4th ed. 1993) ("[In procedures and composition] is to be seen the greatest resemblance between the European Court and the Conseil d'Etat.").

18. See 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.").

19. E.C. TREATY art. 223.

20. For an overview of the organization and processes of the Court, the appointment of judges, and the selection of Advocates-General, see generally E.C. TREATY, *supra* note 11.

sion. Witnesses are heard as part of the investigation and they are witnesses to the E.U. Court's, not to the individual party's. Evidence may also be taken in written form. The investigation may, but not necessarily, be followed by an oral hearing of an oral argument nature. The "Advocate General" then considers the case. Nothing in the U.S. system equates to this judicial officer in the Court's operation. The Advocate General is part of the E.U. Court and prepares an opinion to "assist" the Court. Although the extent to which the E.U. Court adopts the Advocate General's opinion may vary, it is invariably extremely important.

The judgment is reached in a secret meeting of the E.U. Court (without the attendance of the Advocate General).<sup>21</sup> The Court delivers a collegial judgment. The opinion is sparse, to say the least, by U.S. standards. Therefore, the Advocate General's opinion is often more illuminating, even if the E.U. Court does not agree. Also, the opinion is not attributed to an individual judge and there are no individual opinions, including dissents. While U.S. lawyers may find collegial judgments interfere with "reading" the Court, the practice does not seem to inhibit of the evolution of the law.

Like the U.S. Court, the E.U. Court has jurisdiction to enforce the basic law against both E.U. institutions and Member States.<sup>22</sup> The Court may void an act of an E.U. institution. More to the point, the Court may review actions by the Member States to determine if they have "failed to fulfill an obligation" under the treaty. A state must take necessary action to comply with the E.U. Court's judgment and, if it fails to do so, the Court may impose a "penalty payment."<sup>23</sup>

Member compliance may also be questioned 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 "inferior federal courts" in contrast to the drafters of the U.S. Constitution. They created only one central court and relied on national courts to a large degree. Moreover, unlike the U.S. federal court system, the E.U. Court may directly obtain a case from any national tribunal, from the highest national court to the lowest, even tribunals outside the judicial system.<sup>24</sup>

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21. See BROWN & KENNEDY, *supra* note 2, at 65 (stating that the advocate general does not attend the meetings at which the judges deliberate).

22. See E.C. TREATY art. 220 (providing "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed").

23. See E.C. TREATY art. 228 (providing that if a Member State does not comply with the Court's order, the Commission will bring the case before the E.U. Court and impose a penalty payment).

24. The Court of First Instance has limited potential jurisdiction under E.C. Treaty Article 225. The E.U. Court has appellate authority over the Court of First Instance and retains much of its original jurisdiction. See E.C. TREATY art. 225; see also E.C. TREATY art. 234 (providing the areas over which the E.U. Court has jurisdiction and authorizing "preliminary

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 in *Costa v. Ente Nazionale Per L'Energia Elettrica*, where the E.U. Court recognized:

The transfer, by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty, carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community, cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.<sup>25</sup>

Currently, E.C. Treaty Article 10 (the former Article 5 as applied in *Costa*) provides that Member States take all appropriate measures to ensure fulfillment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community, and notes that States should not undertake measures that may imperil the missions and purposes of the Treaty. Combined with the E.U. 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.

A much more significant step was the E.U. Court's willingness to derive its responsibility under the basic law from the general principles of law. As would be expected, these principles are founded on continental legal doctrine, largely that of France and Germany (suggesting a parallel with the likely E.U.-U.S. foundation for a global legal regime).<sup>26</sup> This lawmaking is loosely based on E.U. Treaty Article 220's admonition that the Court ensure the treaty laws are observed. Nonetheless, it is conceded that these general principles are judicial creations. T. C. Hartley wrote, "[t]he general principles of law are, therefore, an independent source of law and there can be little doubt that the Court would have applied them even if none of the Treaty provisions . . . had existed."<sup>27</sup>

The Irish abortion case serves as a revealing example of the extent to which E.U. trade objectives authorize scrutiny of a state's constitutional as well as legislative law. *The Society for the Protection of Unborn Children Ireland Ltd. v. Grogan* questioned Ireland's authority to prohibit the distri-

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rulings" from "any court or tribunal of a member state" on treaty interpretations, validity of E.U. acts, and interpretations of statutes of bodies established by the Council).

25. Case 6/64, *Costa v. Ente Nazionale Per L'Energia Elettrica*, 1964 E.C.R. 585, 594, [1964] C.M.L.R. 425, 456 (1964).

26. See BROWN & KENNEDY, *supra* note 2, at 351 ("Whenever the Court is faced with a question of law which is not resolved by any written Community text, it is likely to be influenced by the laws of the Member States.").

27. T. C. HARTLEY, *THE FOUNDATION OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY* 131 (4th ed. 1998).

bution of abortion related information.<sup>28</sup> Three student organizations included in their student guides information regarding contacting abortion clinics in the United Kingdom. Irish legislation makes it a criminal offense for a woman to have or attempt to procure an abortion. Following a referendum in 1983, the legislature inserted a right to life provision into the Irish constitution. The E.U. Court first decided that the medical termination of pregnancy was a "service" under E.U. Treaty Article 50, which is protected under E.U. Treaty Article 49. Implicitly, it treated services in the same fashion as goods, so that any burden on trade, even in the absence of discrimination, is considered incompatible with the basic law. It thereby agreed with Advocate General Van Gerven's conclusion, which stated that "national rules which, albeit not discriminatory, may, overtly or covertly, actually or potentially, impeded intra-Community trade in services fall in principle within the scope of [the basic law]."<sup>29</sup> In response to the argument that such activity was considered immoral as evidenced by the Irish Constitution, referendum, and laws, the Court held that because abortion was legal in some member states, it would not substitute its moral judgment.<sup>30</sup> Still, it held that the E.U. law did not protect the student organizations, but for reasons that were not particularly sensitive to Ireland's public policy concerns. It held that the prohibition was compatible because it was "independent of the economic activity." The freedom was assured for the clinics themselves or persons engaged in fee-paying services or advertising.

This case is an enlightening example of the weight of authority assumed by the E.U. Court. The case demonstrates how easily a sensitive moral, philosophical, and social policy issue may be converted into a free trade issue. Any of the E.U.'s so-called "four freedoms" (free movement of goods, workers, establishment, and services) might justify judicial review of non-trade issues. A true free trade regime may not permit moral impediments, or the like, that might create obstacles to the free movement of goods, services, and people within the global market.

Trade principles also necessarily justify a uniform approach to morality and public policy. On this issue, the Advocate General advised:

Admittedly, those concepts may be defined to a considerable degree by the Member States. Yet that does not mean that they should not be justified and delimited *in a uniform manner for the whole Community* under Community law and therefore taking

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28. Case C-159/90, 1991 E.C.R. I-4685, [1991] 3 C.M.L.R. 849 (1991) (holding that a prohibition on the distribution of abortion information by a group unconnected with abortion providers is not contrary to Community law).

29. *Id.* at I-4715.

30. See *id.* at I-4739 (stating "[i]t is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally.").

into account the general principles in regard to fundamental rights and freedoms which form an integral part of Community law and the observance of which the Court is to ensure.<sup>31</sup>

Imagine U.S. law being evaluated against a universal world morality. In this regard, consider how little impact the constitutional nature of the Irish law had on the Court and the fact that it was affirmed in a referendum.

This case also demonstrates how easily international conventions can be brought into global legal principles and applied by a global court in the name of trade even against nations who are not signatory to those conventions. The Court entertained a freedom of expression defense based on the European Convention on Human Rights (the Convention). Formally, E.U. law did not directly adopt the Convention, and individual members were left to adopt it. Even though it ultimately rejected the argument, it followed other cases in which E.U. law incorporated the Convention where incorporation fostered the single market objectives.<sup>32</sup> Anne-Marie Slaughter observed the impact of the law developed by the European Court of Human Rights (ECHR) over courts outside Europe.<sup>33</sup> Thus, the demonstrated ease of converting trade jurisdiction into authority to apply the ECHR's opinions projects a similar move by a global trade tribunal relying on the views of various rights defining tribunals. Envision a global trade tribunal imposing a convention on the United States to which Congress has not agreed.

### *B. Shifting Sovereignty in a Global Legal Culture*

The E.U. experience demonstrates the natural tendency toward federalization in supranational organizations and the role judicial review plays in that movement. The WTO, even in its current form, presents the foundation for a similar shift.<sup>34</sup> Its tribunals will play their own role in the shift of sovereignty to the supranational organization. This shift will reach, as in the E.U. experience, well beyond trade.

John McGinnis and Mark Movsesian observed, "[t]he possibility of covert protectionism thus necessarily forces the WTO to address environ-

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31. *Id.* at I-4723 (emphasis added).

32. *See id.* at I-4741 (stating "where national legislation falls within the field of application of Community law the Court, when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights—as laid down in particular in the European Convention on Human Rights—the observance of which the Court ensures.").

33. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1111 (2000) (discussing how the ECHR possesses no formal authority over any courts outside of Europe).

34. *Supra* note 3.

mental, health, and safety issues.”<sup>35</sup> They offer two models: 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 “in light of its academic and political support, the regulatory model will likely compete with the antidiscrimination model in shaping the WTO of the future.”<sup>36</sup> While both models presage significant shifts in sovereignty, their regulatory model suggests a more aggressive imposition of a global social policy on WTO member nations. It would particularly erode the sovereignty of less developed countries whose level of economic development cannot support environmental regulation and other social policies equivalent to that of more developed economies so that the drive for global uniformity will be more restrictive on their social policy choices and their freedom to attack what they find to be more pressing concerns.

The E.U. experience supports a view that these commentators and many others in the United States might find disagreeable in terms of economic liberalization. This experience suggests a shift in national control of internal social policy: a shift of sovereignty. Early, the E.U. Court expressed the broad impact of the movement towards a single market. In *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (generally known as *Cassis de Dijon*), the Court made E.U. policy that an internal market required more than a prohibition against discrimination.<sup>37</sup> The German law applied equally to both imported and domestic products, but the Court assumed the authority to question any “obstacle to trade.”<sup>38</sup> In short, the single market goal demanded the elimination of any national regulation that inhibited any of the four freedoms, regardless of whether the regulation prejudiced goods, services, workers, or establishments from other Member States.

More to the point, in response to national claims that such E.U. law prevented Member States from protecting their citizens, the Court responded that the members should then promote the adoption of such protection for all E.U. citizens, all “Europeans.” Thus, European law conforms to the regulatory model described above which McGinnis and Movsesian find is

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

36. *Id.* at 552.

37. Case 120/78, 1979 E.C.R. 649 (1979) (discussing trade within the European Community).

38. *Id.* at 664. The case has that interpretation even though, or perhaps because of, the facts suggest that the German regulation was, in fact, discriminatory.

competing for global dominance. In this way, the Court shifted a substantial body of social policy authority from the states to the E.U. institutions. A similar movement in the global trade regime seems likely.

The general global trend towards devolution tempers, but does not master this tendency.<sup>39</sup> The E.U., despite the pressure for an ever-closer union, has not been immune from the devolution movement. Again, the E.U. experience suggests the future of global judicial review. The E.U.'s concept of shared power might presage a global future with an ebb and flow of national versus global sovereignty.

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 member authority beyond that intended or wished by the members and their citizens.<sup>40</sup> In short, it expresses a preference for social policy decision making at the level nearest those affected while still achieving the desired shared goal. E.C. Treaty 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."<sup>41</sup>

The E.U. controversy revolving around subsidiarity, the allocation of authority between the central authority and the states, is very familiar to U.S. lawyers. In U.S. constitutional law, the poles in this allocation are termed "Nationalist," which endorses a strong federal authority, and "Fed-

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39. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 339-40, 445-47 (1998) (stating domestic experimentalism, whereby governmental agencies are free to set their own goals and essentially act as a self-governing unit, represents a shift toward balancing the ideals of limited government and an all-powerful government purportedly acting in the best interest of the citizenry); see also Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 206-07 (1990) (defining devolutionary federalism as a constitutional order that redistributes authority from a centralized entity to sub-parts, which then assume their own authority over the matter). The European Community is an example of a supranational constitutional system that has embraced devolutionary federalism. See *id.* at 207-11.

40. The doctrine began to emerge from several different venues in the early 1980s. The 1992 Maastricht Treaty, formally the Treaty on European Union (TEU), incorporated the concept into the basic law. There has been a discussion of the Amsterdam Treaty's treatment of subsidiary 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. S106, S127 (1999) (concluding 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.").

41. E.U. TREATY art. 5.

eralist," which favors considerable retention of authority by the states.<sup>42</sup> U.S. federalism and subsidiarity contrast in ways that might inform any predictions about the future of shared authority between global authority and its national members.

George Bermann urged that equating E.U. subsidiarity with U.S. federalism "is misleading and possibly false."<sup>43</sup> He distinguished the two concepts, arguing "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."<sup>44</sup> U.S. federalism principles may look to an array of justifications for centralized decision making in a particular area of public policy. Subsidiarity focuses only on whether the relative capacities of federal and state government can deal "effectively" or "adequately" with the problem or policy at hand.<sup>45</sup> In applying it, central action may be taken only in areas of shared jurisdiction, whereas U.S. federalism relies on the political branches to make the necessary public policy trade-offs.<sup>46</sup> That is, E.U. subsidiarity places the burden on the E.U. institutions, including the E.U. Court, to demonstrate that centralization is superior but U.S. federalism makes the centralization choice a political question.

Thus, global review based on U.S.'s federalism concepts would allow future global political authorities to entertain trade-offs between global and national resolution of an issue. Global review based on E.U.'s subsidiarity would force the global authority to demonstrate that it was superior in a given context. Thus, the E.U. concept trusts more concrete borders, whereas the U.S. concept trusts the soundness of institutional divisions of labor.

## II. THE SHIFT FROM NATIONAL TO GLOBAL REVIEW PRINCIPLES

The federalization process also forces national legal principles into a complex matrix in which various existing national and global legal principles interact. Anne-Marie Slaughter observed both the "vertical" relations and "horizontal" relations among national and supranational courts.<sup>47</sup>

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42. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1145-49 (1988) (describing how the two models are applied in the context of the apportionment of government powers between the states and the federal government).

43. Bermann, *supra* note 9, at 453.

44. *Id.* at 450.

45. *Id.* at 451.

46. *See id.* at 452 (stating that subsidiarity "entails approaching federalism with the . . . attitude that federal action should be taken in areas of shared competence only if the goal in question cannot adequately be achieved by action at the state level or below.").

47. *See generally* Slaughter, *supra* note 33, at 1112 (stating these relations are leading

Therefore, U.S. law increasingly affects not only the evolution of global law, but also the evolution of national laws throughout the world and that law affects U.S. law as well. This shift introduces a new complexity into national law well beyond international trade oriented practice.

The *Wheat Gluten* case considered by a WTO panel provides an example of the new dimensions facing U.S. national law.<sup>48</sup> There the United States argued that the E.U.'s assertion of a "proportionality rule" constituted a proposed a "novel standard" of the E.U.'s own "invention." A look into this assertion illuminates the tensions in the merger of common law legal culture, as manifest in U.S. review law, and the continental legal culture, as manifest in E.U. review law. It shows the entwining of global and various national legal doctrines.

The E.U. accused the United States of establishing a quantitative restriction on the importation of wheat gluten in violation of General Agreement on Tariffs and Trade (GATT).<sup>49</sup> The U. S. International Trade Commission (ITC) determined that wheat gluten was being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry. The United States adopted a "definitive safeguard measure" placing a quantitative restriction on certain imports. The E.U. requested the establishment of a WTO panel to inquire into the safeguard measure. Among other challenges, it asserted that the ITC's action violated the principle of proportionality.

It further asserted that Article 5 of the Safeguard Agreement (SA) established that review principle with the language that a "Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."<sup>50</sup> The E.U. contended "[SA Article 5] is the application of the proportionality principle . . . As the ITC itself acknowledged in its report, a quantitative restriction is the most extreme and restrictive measure that a Member could take. It is the most trade-disruptive measure of all possible measures."<sup>51</sup>

Thus, it urged "the principle of proportionality under Article 5.1 did not allow the United States to choose a quantitative restriction without having demonstrated that the applied measure was the least trade restrictive meas-

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to an emerging judicial comity).

48. See REP. OF THE PANEL, UNITED STATES—DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF WHEAT GLUTEN FROM THE EUROPEAN COMMUNITIES (July 31, 2000), available at 2000 WL 1146580.

49. See *id.* § 2.9 (stating about eighty percent of the wheat gluten consumed in the United States is used by the milling and baking industries), available at 2000 WL 1146580 at \*6.

50. Agreement on Safeguards, art. V, Apr. 15, 1994 (1994).

51. See REP. OF THE PANEL, *supra* note 48, at Attachment 1-1, § 131, available at 2000 WL 1146580 at \*85.

ure possible.”<sup>52</sup> The dispute settlement body did not reach this specific argument because it found that the United States had violated other, more expressed, GATT requirements. Therefore, it was unnecessary to decide whether to transport E.U. law into WTO law, especially over U.S. objections.

The panel was able to save itself the task of dealing U.S. parochialism. Far from being a “novel invention,” the principle of proportionality has a long history in continental review law. As a general principle of law in Europe, it quickly became an integral part of E.U. review law and is now considered a fundamental, perhaps dominant, aspect of that law. The principle is a product of German law.<sup>53</sup> It has spread throughout Europe and it has become widely accepted in continental European law. Even the common law English courts have increasingly expressed themselves in such terms.

A few E.U. cases will provide a sense of how proportionality is used to create judicial authority over an array of national policy choices. In *Commission v. French Republic*, the E.U. Commission brought an action against France under E.C. Treaty Article 226 for failing “to fulfil [sic] an obligation under this [t]reaty.”<sup>54</sup> A French regulation required registration and labeling of medical “reagents”; chemical or biological substances specially prepared for use in vitro for medical biology analyses.<sup>55</sup> The Commission noted that since “the [enforcing E.U.] Commission . . . does not dispute that the contested decree pursues an objective of the protection of public health, the issue of the dispute is confined to whether the provisions at issue comply with the principle of proportionality.”<sup>56</sup> The test is whether the regulation was “*necessary* to attain the objectives of protection being legitimately pursued . . . .”<sup>57</sup> The Court agreed with France that the registration requirement was necessary because registration furthered detection of unreliable or ineffective reagents.<sup>58</sup> However, the Court struck down the labeling regulation, holding that “[i]n view of the existence of less restric-

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52. *Id.* at Attachment 1-6, § 98, available at 2000 WL 1146580 at \*175.

53. See HARTLEY, *supra* note 27, at 145 (stating that *Verhältnismässigkeit* or proportionality is regarded as underlying certain provisions of the German constitution).

54. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, art. 226, Oct. 2, 1997, O.J., (C 340) I (1997).

55. Commission Decree 96/351 of 19 April 1996, J.O., April 26, 1996 O.J. (L 761-14-1) 6386.

56. Case C-55/99, *Commission v. French Republic*, 2000, available at <http://curia.eu.int>, ¶ 20.

57. *Id.* ¶ 29 (emphasis added).

58. See *id.* ¶ 35 (describing obligations and duties of the government in creating the data bank of reagents and maintaining the filing systems of those reagents).

tive means, the obligation at issue does not therefore comply with the principle of proportionality.”<sup>59</sup> This case is among those that demonstrate how the principle of proportionality empowers the court to delve deeply into national policy choices not directly related to trade.

The connection between trade and the failure of the regulation was more direct in *Commission v. Italian Republic*, but the case is otherwise instructive in how stringent review under that standard might be.<sup>60</sup> The regulation’s objective was to protect the national citrus crop from the importation of damaging disease. The national government issued a decree limiting the points of entry of grapefruits. The Commission, in another enforcement action against a Member, urged that the regulation was not essential.<sup>61</sup> The Court, however, struck down the regulation because lesser alternatives were not “impossible.”<sup>62</sup> The Court did not accept administrative difficulties as sufficient justification.

Proportionality may even serve to question judgments regarding the administration of legal requirements. In *Sudzucker Mannheim/Ochsenfurt AG v. Hauptzollamt Mannheim*, the E.U. Court considered whether implementing rules were proportionate.<sup>63</sup> Commission sugar regulation required as proof of compliance certain endorsements on an export license. The customs office refused to accept equivalent proof and the exporter appealed. On reference, the E.U. Court noted that “[w]here Community legislation makes a distinction between a primary obligation . . . and a secondary obligation, essentially of an administrative nature, it cannot, without breaching the principle of proportionality, penalise failure to comply with the secondary obligation as severely as failure to comply with the primary obligation.”<sup>64</sup> In this case, however, it found that the prescribed formality was part of the primary obligation, hence compliance could be penalized without violating the proportionality.<sup>65</sup> Although this case actually re-

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59. *Id.* ¶ 45. See also Case C-478/98, *Commission v. Kingdom of Belgium*, 2000, available at <http://curia.eu.int>, ¶ 59 (stating that proportionality “must not go beyond what is necessary in order to attain [an appropriate objective].”).

60. See generally Case C-128/89, *Commission v. Italian Republic*, 1990 E.C.R. I-3239 (stating Member States may not impose unfair trade restrictions on each other or erect obstacles to the free movement of goods across borders).

61. See *id.* ¶ 8 (noting the Commission found the grapefruit import policy to be discriminatory and in breach of the tenet of proportionality).

62. See *id.* ¶¶ 24-28 (concluding Italy’s grapefruit import procedures violated E.C. law).

63. See Case C-161/96, 1998 Report of Cases Before the Court of Justice and the Court of First Instance I-281.

64. *Id.* ¶ 31.

65. See *id.* ¶ 43 (noting that compliance with customs formalities are part of the obligations of the Member State in connection with the proper functioning of a quota system for

viewed an E.U. regulation, enforced by a national agency, it serves as an example of the reach of proportionality review.

The importation of such a fundamental E.U. review principles will be irresistible. The process whereby proportionality, as an example, entered the E.U. Court's review responsibility demonstrates the borrowing and negotiation that will form global review principles. Proportionality is a universal concept in E.U. law, but it originated in German, not French law.<sup>66</sup> Similarly, a review principle, here proportionality, representing a fundamental part of one dominant legal system, the E.U. and Europe, is urged by that system on the supranational tribunal. The American system finds it novel and doubts its legitimacy. Like the Court of Justice, a global tribunal will likely adopt a principle familiar to a significant legal culture despite the initial resistance from another significant culture. Indeed, one might expect a common law advocate, perhaps even the United States, to assert the principle if doing so will serve its purpose.

So, proportionality is not novel to E.U. law and it is not surprising that the E.U. would argue for its inclusion in WTO law. Indeed, Article 5 language quoted by the E.U. must have seemed to continental lawyers representing the E.U. a clear expression of the principle. Similarly, the WTO's Dispute Settlement Understanding Article 3.2 defines a dispute settlement body's job as "providing security and predictability."<sup>67</sup> This language may have no special meaning for U.S. lawyers but European lawyers may see it as adopting the principle of "legitimate expectations" or "legal certainty." This principle became part of E.U. review law from both German and French review principles. Applying it, a court must assure that the government may not unilaterally disturb settled legal relationships. In its French expression, it refers to "legal security" (*sécurité juridique*), which precisely matches the understanding in the original language.<sup>68</sup> Consistent with the WTO language, it is understood to require predictability.<sup>69</sup> Thus, legitimate expectations is another example of a European review principle

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goods).

66. See SCHWARZE, *supra* note 16, at 680, 685.

67. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1226 (1994).

68. See HARTLEY, *supra* note 27, at 139 (stating the three most important sub-aspects of legal certainty (or legal security) are non-retroactivity, vested rights, and legitimate expectations).

69. See JAMES HANLON, EUROPEAN COMMUNITY LAW 63-65 (2d ed. 2000) (commenting the principle of predictability is found in the legal systems of all Member States, and involves the principles of legitimate expectations and non-retroactivity, which is defined as precluding a measure from taking effect before its publication).

that will find its way into WTO review even though it is not a part of U.S. law.

This vertical impact of principles from other cultures can also be expected to have indirect horizontal impact on U.S. law. Global review's adoption of principles borrowed from other nations will transform U.S. principles so that the principles of other legal cultures will migrate through global review into U.S. law. The acceptance of E.U. review principles into the English, i.e., common law, legal culture might presage the 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.<sup>70</sup> Continental review principles themselves are also finding their way into English law. For example, English law increasingly recognizes proportionality and legitimate expectation.<sup>71</sup> Robert Thomas described how proportionality has become part of English law, and how 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."<sup>72</sup> Lord Denning, who seems to have added legitimate expectation review to English law, asserted that he thought of it himself.<sup>73</sup> Foreign review principles are finding a place in the review arsenal of the English judiciary. Whether borrowing is conscious or not, the general continental usage of the principle no doubt helps legitimate arguments for its adoption in England.

The U.S. Supreme Court, "regarded by many foreign judges and lawyers as resolutely parochial," has increasingly observed foreign principles.<sup>74</sup> As in England, proportionality is a plausible candidate for the gradual importation into United States law as other legal culture participate in global judicial process. The judicial application of concepts embodied in the principle of proportionality are not unknown in U.S. law. While it is not a formal review principle in the U.S., reviewing U.S. courts, as their English counterparts, often reason in ways that suggest the principle. A particularly

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70. See WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 15-17 (8th ed. 2000) (describing the movement in the English courts to move away from "unfettered" administrative discretion and toward a system protecting individual rights through due process).

71. See generally ROBERT THOMAS, *LEGITIMATE EXPECTATIONS AND PROPORTIONALITY*: IN *ADMINISTRATIVE LAW* (2000).

72. *Id.* at 39.

73. See *id.* at 47 (noting that Lord Denning claimed that the concept of legitimate expectation "came out of my own head and not from any continental or other source.").

74. Slaughter, *supra* note 33, at 1117, 1118-19 (contending that Justices Breyer and O'Connor along with Chief Justice Rehnquist are particularly willing to consider foreign legal principles).

relevant example is the judicial test for determining the appropriateness of legislation under section 5 of the 14th Amendment. The U.S. Court struck down application of the Age Discrimination in Employment Act (ADEA) to states because it was disproportionate. States challenged the amendment of the act to include state employees. The U.S. Court considered whether Congress abrogated sovereign immunity under the 11th Amendment through the powers granted by section 5 of the 14th Amendment in *Kimel v. Florida Board of Regents*.<sup>75</sup> Finding that Congress intended to abrogate state sovereign immunity, the *Kimel* Court then considered whether it could validly do so. In *City of Boerne v. Flores*, the U.S. Supreme Court considered whether the means adopted were narrowly tailored to achieve the desired end.<sup>76</sup> Conceding that Congress has wide latitude, the Court noted that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>77</sup> In *Kimel*, it held that "[t]he substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."<sup>78</sup>

In all these ways, participation in a world trade regime means U.S. law cannot remain an isolated legal island and U.S. lawyers will no longer be immune from the principles of other legal cultures. For an ever-widening range of legal disciplines, attention must be given to global legal doctrine and the principles from other legal cultures that will affect global adjudications. The future of U.S. law in many areas may also see national law assimilating the principles from other legal cultures as they become more familiar.

#### CONCLUSION

The above is not an anti-free trade demonstration, but an alert to U.S. lawyers that the practice of U.S. law has fundamentally changed. Moreover, while nearly every aspect of U.S. law will feel the affect of globalization, U.S. public law, and the U.S. public policy behind it, will continue to feel the most immediate impact as the United States enters the global legal culture. The effect is both vertical and horizontal, involving the interaction

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75. 528 U.S. 62, 91 (2000) (holding that Congress exceeded its authority under the 14th Amendment). See also U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article").

76. 521 U.S. 507, 508 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeded Congress's 14th Amendment enforcement powers).

77. *Id.* at 520.

78. *Kimel*, 528 U.S. at 63. "A review of the ADEA's legislative record as a whole reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." *Id.* at 64.

between national law and global law and between our legal culture and those of other systems.

This Article then expresses some urgency. For one thing, U.S. lawyers must take steps to understand the effect of globalization, particularly the global trade regime, on national law. Perhaps more importantly, this is the point at which the U.S. legal community, particularly those engaged in public law, can affect the fundamental principles of the global legal culture. The two dominant legal cultures in the globalization will be the United States, representing the common law systems and its own public policy embellishments, and the E.U., representing an amalgam of the continental legal systems. These two legal cultures will form the basis of the global legal system, as did Germany and France in the formative years of E.U. law.

Inevitably, globalization will result in an increasing shift of sovereignty from the national government to global institutions. This Article discusses two aspects of that shift in sovereignty. First, it explores a shift resulting from the emerging free-trade regime, which may not be obvious to many U.S. lawyers. Second, it suggests a change in judicial lawmaking, which will result, or has begun to result, from globalization.

The fifty-year effort to create a single European market demonstrates the shift of sovereignty necessary to accomplishing that goal, and hence is instructive in predicting the future of a global free trade regime. A single market was found impossible without attacking national laws and national public policy. Thus, the E.U. Court, along with the other E.U. institutions, had to question separate national standards even if not protective or discriminatory. Not only can it be confidently predicted that global trade regime must similarly evolve, but the WTO, even though much weaker than the E.U. government, has already begun that process.

More subtle is the shift in the sovereignty of national courts. Again, the E.U. experience is instructive. The initiating legal cultures of Member States set the foundation for E.U. law. However, over time, the direction has shifted so that increasingly E.U. law or uniform principles began to affect national law. As national law could be measured against the uniform European legal principles, control over national law shifted from national courts, along with national governments in general. Moreover, national law itself began to accommodate and incorporate general principles identified by E.U. law. Both national law and E.U. legal development became a complex matrix. Particularly instructive for U.S. lawyers is this effect on the one common law culture in the E.U., that of the United Kingdom.

The operational point is that a broad range of members of the U.S. legal community, as well as other public policy participants, must become active in the global regime. This point must be embraced by those other than the

trade or international legal community because global development will insinuate itself into most aspects of U.S. law and public policy. The relative parochialism of the U.S. legal community is a severe handicap, but U.S. lawyers have advantages, one of which is that U.S. lawyers are comfortable with a federal system.<sup>79</sup> While considerable catching up is in order, U.S. lawyers are well equipped to deal with the concept of global federalism.

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79. See Charles H. Koch, Jr., *Introduction: Globalization of Administrative and Regulatory Practice*, 54 ADMIN. L. REV. 409 (2002).