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# A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization

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**A UNIFIED THEORY OF INTERNATIONAL LAW, THE  
STATE, AND THE INDIVIDUAL: TRANSNATIONAL LEGAL  
HARMONIZATION IN THE CONTEXT OF ECONOMIC AND  
LEGAL GLOBALIZATION**

JAMES D. WILETS\*

ABSTRACT

This Article presents an original theory of international law which reconciles the norm-making processes occurring at the international, state, and individual levels. It is the central thesis of this paper that economic globalization is not happening in a vacuum, but is rather engendering legal globalization, much in the way that centralized regulation followed trans-state economic globalization within the United States and Europe.

Traditional definitions of international law do not address this phenomenon and consider these new forms of transnational norm creation as simply exceptions to the general rule that international law is created by nation-states within the framework of multinational institutions. This Article addresses this serious shortcoming in our current definition and understanding of international law and the manner in which it is created.

TABLE OF CONTENTS

1.	INTRODUCTION .....	755
	1.1. <i>The Traditional Definition of International Law</i> .....	756
	1.2. <i>A Revised Definition and Theory of International Law:</i> <i>Transnational Legal Harmonization</i> .....	757
	1.2.1. <i>Regional Integration</i> .....	758
	1.2.2. <i>Imposition of Domestic Norms on Foreign</i> <i>Corporations</i> .....	758

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	1.2.3. <i>Private International Law</i> .....	759
	1.2.4. <i>Harmonization of Customs and Usages of Trade</i> .....	759
	1.2.5. <i>Harmonization of Legal Regulation Relating to Specific Subjects</i> .....	761
	1.2.6. <i>Harmonization through Market Forces</i> .....	761
2.	IMPLICATIONS OF TRANSNATIONAL LEGAL HARMONIZATION.....	762
	2.1. <i>The Debate over Free Trade</i> .....	762
	2.1.1. <i>The Negatives of Economic Globalization</i> .....	762
	2.1.2. <i>The Benefits of Economic Globalization</i> .....	764
	2.1.3. <i>TLH as a Potential Remedy?</i> .....	766
	2.2. <i>Federal Law and International Law</i> .....	768
	2.3. <i>The Role of the Nation-State as the Guarantor of Individual Rights and the Environment</i> .....	770
3.	OLLIE'S BARBEQUE AS AN ILLUSTRATION OF THE PARALLELS BETWEEN FEDERALISM AND INTERNATIONAL NORM CREATION .....	771
	3.1. <i>The Creation of the United States: From Confederation to Federalism</i> .....	775
	3.2. <i>The Articles of Confederation</i> .....	777
	3.3. <i>The U.S. Constitution</i> .....	779
	3.4. <i>The Implications of Economic and Legal Harmonization in the United States for Individual Political, Economic, Social and Human Rights</i> .....	787
4.	A CASE STUDY OF TRANSNATIONAL LEGAL HARMONIZATION: THE "FEDERALIZATION" OF EUROPEAN LAW .....	788
5.	OTHER EXAMPLES OF INCIPIENT TLH ON A REGIONAL AND NATIONAL LEVEL .....	797
	5.1. <i>Regional Institutions</i> .....	797
	5.2. <i>Individual State Participation in TLH</i> .....	799
	5.2.1. <i>National Regulatory Standards with Extraterritorial Effect</i> .....	800
	5.2.2. <i>Domestic Incorporation</i> .....	800
	5.2.3. <i>Domestic Legal Forums for Enforcement of International Standards</i> .....	801
	5.2.4. <i>Unilateral Conditions on Foreign Aid or Other Bilateral Transactions</i> .....	803
6.	THE POSSIBILITIES AND LIMITATIONS OF GLOBAL INSTITUTIONS AS PARTICIPANTS IN TLH: THE WTO, THE UN AND OTHER GLOBAL INSTITUTIONS .....	803

6.1. *The World Trade Organization*.....803  
 6.2. *The WTO’s Limitations as an Agent of TLH*.....807  
 6.3. *TLH as a Solution to the WTO Impasse* .....808  
 6.4. *The United Nations*.....810  
 7. RECONCEPTUALIZING THE STATE AS THE ULTIMATE  
 GUARANTOR OF INDIVIDUAL RIGHTS, LABOR RIGHTS, THE  
 ENVIRONMENT, AND THE COMMUNITY IDENTITY.....815  
 7.1. *TLH and the State* .....815  
 7.2. *The Nation-State* .....817  
 7.3. *TLH and the Nation-State*.....818  
 7.4. *The Process of State Dissolution and Reformulation* .....819  
 8. CONCLUSION .....824

1. INTRODUCTION

The current theoretical foundations of international law are inadequate to explain or address the interrelationship among three concurrent and interrelated phenomena: (1) economic globalization, (2) legal globalization, *i.e.*, the harmonization of legal rules and norms among sovereign entities, a process that itself frequently results from economic globalization; and (3) the changing role of the nation-state as the principal foundation of international law, and as the exclusive protector of the legal, economic, and security expectations of the individuals living within it.

The only manner in which to understand these concurrent phenomena is through a unified theory of international law that recognizes the linkages between each of these historical phenomena. Each phenomenon impacts the other process—and is being impacted in return—in a dialectical manner. These three processes require a revision of our conception of international law as being solely the creation of states, either among themselves or within global legal institutions such as the United Nations or the World Trade Organization.<sup>1</sup> The process of international lawmaking is much more complex and decentralized, and provides often overlooked opportunities for non-state actors to effect progressive change in the creation of global legal norms. The unified theory presented in this Article is termed “Transnational Legal Harmonization,” or “TLH.”

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<sup>1</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987) (limiting the definition of international law to the conduct of “states” and “international organizations”).

TLH is principally descriptive, not normative. It does not attempt to describe how the world should be, but rather to explain current global processes in a manner that avoids the conceptual pitfalls associated with viewing international and domestic law as discrete, static processes, occurring in opposition to each other.<sup>2</sup> TLH is a description of a dynamic, organic process.<sup>3</sup> TLH occurs as a result of phenomena that are already occurring in a myriad of unconnected entities, each of which acts according to its own normative value system, priorities and goals. Those entities include not only states, but also non-governmental organizations (NGOs), multinational corporations (MNCs), regional entities, and other non-state actors. TLH is not imposed from above, but is organic to the historical evolution of the world economy.

The globalization of norms that result from the process of TLH frequently consists of harmonization of rules rather than direct vertical application of international norms from a supranational body. It has implications for the state as the nation-state loses its role as the sole propagator of rules protecting and governing its citizens. It also has implications for the individual as individuals assert norm creation ability in increasingly diverse manners. Ultimately, the process of TLH will impact even traditional international law institutions as those bodies respond to pressure from below, instead of merely imposing their norms from above.

Before discussing this unified theory in greater depth, it would be helpful to examine the traditional definition of international law and how its shortcomings bespeak the need for a new definition of international law, as well as a new theory to explain how international law is presently created and applied.

### *1.1. The Traditional Definition of International Law*

The need for a revised definition of international law, and a reconceptualization of the way it is currently created, is apparent from the definition of international law used in the American Law Institute's RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE

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<sup>2</sup> TLH is therefore agnostic on political theories that advocate "one world government" or which attempt to argue for greater protection of individual rights through increased powers for international institutions.

<sup>3</sup> The term "organic" is used in this Article according to the definition: "Developing naturally: occurring or developing gradually and naturally, without being forced or contrived." MSN Encarta, Organic Definition, <http://dictionary.msn.com> (search "Dictionary" for "Organic") (last visited Mar. 1, 2010).

UNITED STATES. The Restatement reflects the outmoded view of international law as simply a legalization of diplomacy<sup>4</sup> and a product of international institutions. The Restatement states:

“International law,” as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.<sup>5</sup>

It appears from the language of the Restatement that the authors were attempting to grapple with the expanding scope of international law by including the last clause “as well as with some of their relations with persons, whether natural or juridical.”<sup>6</sup> This last clause, however, is hopelessly vague because it doesn’t define in any meaningful way which additional relations are covered by international law, but simply states “some.” The Restatement is an apt example of how contemporary international law theory suffers from incoherence as it clings to a traditional view of international law as a kind of legalized diplomacy, while simultaneously attempting to grapple with the changing manner in which international law is created and applied. A much more concise and accurate definition of international law is simply “a legal rule that is binding on more than one country.”<sup>7</sup>

1.2. *A Revised Definition and Theory of International Law:  
Transnational legal Harmonization*

To the extent that international law is simply one rule binding on more than one country, it is created whenever there is convergence or harmonization in law among countries. International law is not just an assemblage of rules governing the

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<sup>4</sup> See J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 1 (6th ed. 1963) (defining international law as: “the body of rules and principles of action which are binding upon civilized states in their relations with one another”).

<sup>5</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987).

<sup>6</sup> *Id.*

<sup>7</sup> In accordance with this simpler definition, the better definition of international organizations under traditional international law is “intergovernmental organizations,” which more accurately reflects the equal, sovereign, and completely independent relationships among the participating states in those organizations.

conduct of states and their relations with each other, but rather the end product of a legal harmonization process having little to do with legal rules regarding conduct among states. This process can occur through traditional forms of international law such as treaties. Furthermore, international law may be effectuated in at least six other ways that do not necessarily involve intergovernmental organizations. As we shall see, these forms of legal harmonization frequently arises, at least in part, as a result of economic harmonization.

### 1.2.1. *Regional Integration*

First, TLH is manifested through regional integration such as the type of "quasi-federal" process occurring in the European Union, whereby the norms of a central legal authority are imposed on the member states with the direct or indirect consent of the member states. As will be discussed later in this Article, the institutions involved in this "federalization" process may acquire a more supranational than intergovernmental or traditionally international character. This Article will also discuss the similarities between the transformation of international law into federal law in the European Union with the process resulting in the creation of the United States of America. This Article will also illustrate how other regional efforts such as NAFTA and MERCOSUR, ECOWAS, and other regional groupings have resulted in not just economic, but also nascent social and legal harmonization, albeit sometimes at a very limited level.

### 1.2.2. *Imposition of Domestic Norms on Foreign Countries*

Second, TLH is manifested by individual states imposing their own norms on other countries or entities by means of: (a) extraterritorial application of their own domestic law;<sup>8</sup> (b) conditioning of aid or trade benefits upon a foreign country, corporation, or individual's compliance with certain norms; and (c) judicial processes whereby international law norms are applied in domestic courts with *domestic* courts defining the scope and substance of the presumably international law norm involved.<sup>9</sup>

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<sup>8</sup> Some examples include the European Union's application of European antitrust law to mergers of foreign corporations and vice versa. Another example would be the extraterritorial application of environmental or securities law.

<sup>9</sup> Some examples of this would be certain countries' application of international criminal law to try individuals in domestic courts, with the domestic



### 1.2.3. *Private International Law*

Third, TLH is manifested through the creation of non-treaty based legal rules by non-state actors in what is commonly called “private international law.” Such law can include standardized rules, definitions, or terms adopted by international private commercial actors such as the International Chamber of Commerce or the International Institute for the Unification of Private Law (UNIDROIT), which then are uniformly used globally by commercial actors. Since those rules, definitions, or terms are then incorporated into global contracts, they form the binding legal rules for the relevant business transaction. Some examples include INCOTERMS 2000, which consist of standardized trade definitions incorporated into the great majority of international trade contracts.<sup>10</sup> Other examples include banking terms provided in the Uniform Customs and Practices for Documentary Credits, which constitute the operative legal rules for the vast majority of letter of credit transactions. Moreover, the International Chamber of Commerce has a role in creating international rules in such diverse areas as E-business, telecoms, financial services, insurance, taxation, trade and investment, international transportation, anti-corruption rules, arbitration, and customs, to name just a few.<sup>11</sup>

### 1.2.4. *Harmonization of Customs and Usages of Trade*

Fourth, TLH is manifested by a process that bears many similarities to the creation of traditional private international law and traditional customary international law. Certain transnational business practices may become sufficiently common to create expectation interests in those norms, even if those norms fall short of ripening into legally binding customary international law.<sup>12</sup>

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courts determining the substance and scope of the international rule in question. *See, e.g., Regina v. Bow Street Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 119 I.L.R. 136 (UKHL 1999) (appeal from Q.B.) (holding that English courts retained jurisdiction to try Chilean General Pinochet due to participation in the Convention against Torture by the United Kingdom, Chile, and Spain).

<sup>10</sup> *See, e.g.,* INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS 2000 (1999) (listing and breaking down the four groups of Incoterms and defining relevant terminology).

<sup>11</sup> *See* International Chamber of Commerce—The World Business Organization, <http://www.iccwbo.org> (last visited Mar. 1, 2010) (listing the various areas where the International Chamber of Commerce makes policy).

<sup>12</sup> Customary international law is created when a norm is recognized by the great majority of countries and those countries comply with that norm out of a

For example, the United States Uniform Commercial Code ("UCC") recognizes a type of domestic U.S. law binding on contractual parties which bears a great deal of resemblance to customary international law. U.S. UCC § 1-205, titled "Course of Dealing and Usage of Trade," provides an excellent analogy to the creation of customary international law and to the process of TLH. UCC § 1-205 provides:

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.<sup>13</sup>

Under UCC § 1-205, the course of dealing among parties, or the customary usage of trade in the particular business of the parties, can give rise to legal norms that are binding on a court when two parties are in a dispute and the contract among the parties does not squarely address the specific issue before the court. The customs of the trade or the course of dealing can thus give rise to norms that are as binding as if there were a contract between the parties. In other words, the business practices can create transnational norms, which are a quintessential form of TLH.

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sense of obligation. This sense of legal obligation on the part of countries is commonly referred to as *opinio juris*. It distinguishes simple custom, which may be followed from simple tradition or habit, from legally-binding customary international law, which is followed because countries believe they are supposed to follow particular practice or custom, whether or not there is a binding treaty or other positive law addressing the issue. One way to view customary international law is that it creates a reasonable expectation interest that a particular practice will be followed by a country, as long as that country has not previously indicated its intent not to follow the widely practiced custom.

<sup>13</sup> U.C.C. § 1-205 (2008).

### 1.2.5. *Harmonization of Legal Regulation Relating to Specific Subjects*

Fifth, TLH manifests itself through harmonization of legal regulation among countries, which may, although not necessarily, occur outside the scope of formal treaties. For example, the European Union and the United States have sought to harmonize their antitrust, securities, and other law to avoid inconsistent legal actions against corporations operating in both jurisdictions. Another example would be the recent efforts to coordinate banking and fiscal policies among the world's major economies in light of the global financial crisis.

### 1.2.6. *Harmonization through Market Forces*

Sixth, TLH manifests itself in the harmonization market forces whereby consumers or retailers in one country insist on the producer country implementing certain product safety, environmental, or other standards in the producer country that are consistent with those of the country in which the products are sold. Some examples include the controversy over product safety standards in China and the requirement of automakers to comply with the auto emissions standards of the market in which they intend to sell their vehicles. In other words, as the marketplace for goods becomes global, the quality standards for the production of those goods increasingly become harmonized as well. Nevertheless, it is important not to confuse quality standards for production of goods with labor standards associated with the production of goods. As discussed later in this paper, the labor conditions in the locale of production remain much less affected by TLH. However, even in these locations, there is some very modest movement towards harmonization, albeit primarily in those countries that are subject to other forms of pressures for TLH such as regional integration.

One of the most glaring lacuna in the process of TLH is its present inability to harmonize labor standards and environmental standards in the loci of production. As will be discussed later, there are certain institutional deficiencies in the present operation of international law that contribute to this deficiency. However, at least three of the six processes of TLH described above (regional integration, imposition of domestic norms, and market pressures) have the potential to greatly expand environmental, labor and human rights standards.

## 2. IMPLICATIONS OF TRANSNATIONAL LEGAL HARMONIZATION

### 2.1. *The Debate over Free Trade*

Economic globalization, and to a somewhat lesser extent the associated process of TLH, has frequently been viewed—with considerable justification—as adverse to human rights, labor rights and environmental protection. This Article acknowledges TLH's present shortcomings with respect to achieving global harmonized norms of basic human rights, labor, and environmental protection. This Article nevertheless makes the counterintuitive argument that TLH has the potential to result in greater net protection of human rights, worker rights, consumer protection, and even the environment, although this Article will discuss the very important caveats inherent in this assumption. TLH can be viewed, to some extent, as a remedy to the noxious consequences of economic globalization. Economic globalization has usually been adverse to individual, labor, and environmental protection in the short and medium term, and not infrequently in the long-term as well. Nevertheless, this Article will argue that TLH provides an opportunity to expand individual, labor, and environmental protection in a manner that traditional international law has not accomplished.

#### 2.1.1. *The Negatives of Economic Globalization*

Economic globalization has frequently been associated with environmental degradation, human exploitation, and other social ills.<sup>14</sup> Critics of economic globalization argue that it does not

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<sup>14</sup> Enormous demonstrations and furious street clashes between riot police and anti-globalization protestors have characterized almost every meeting associated with globalization since the Seattle meeting of the World Trade Organization in 1999, including Prague in September 2000, Genoa in July 2001, Washington D.C. in September 2002, Santiago in November 2004, and Melbourne in November 2006. These protests have included union members, environmentalists, human rights activists and other groups and individuals opposed to various aspects of economic globalization. Their opposition has included fierce criticisms of the process of globalization generally, as well as the global institutions created to facilitate globalization, principally the World Trade Organisation, the International Monetary Fund, and the World Bank. See, e.g., Clare Nullis, *Protests Aimed at WTO*, ASSOCIATED PRESS, Nov. 12, 2001, available at <http://www.globalpolicy.org/component/content/Article/174/30839.html> (last visited on Mar. 1, 2010); R.C. Longworth, *Globalization Foes Consider Joining Forces against WTO*, CHICAGO TRIBUNE, Aug. 20, 2001, available at <http://www>

benefit the people of either developed<sup>15</sup> or developing countries. Rather globalization only helps multinational corporations by enabling them to seek production locales with weak labor and environmental protections and other low social and economic costs for doing business. These corporations can then sell their goods produced at low-site locales without limitation in high-cost markets with elevated environmental, labor and other societal protections. This “race to the bottom” forces countries to abandon their own environmental and worker protections in an effort to either attract foreign investment, or to avoid losing already existing manufacturing capacity.<sup>16</sup> Critics of globalization also argue that there is a socio-cultural element of globalization that poses a real threat to social stability and indigenous cultures, particularly in developing countries.<sup>17</sup>

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.globalpolicy.org/component/content/Article/174/30833.html (last visited on Mar. 1, 2010).

<sup>15</sup> See, e.g., *More Pain Than Gain: Many Workers Are Missing Out on The Rewards of Globalisation*, *ECONOMIST*, Sept. 16, 2006, at 12 (arguing that workers’ real wages are decreasing as labor productivity is increasing in developed countries, debunking the argument that workers are better off as a result of globalization).

<sup>16</sup> Critics of free trade argue that it inevitably compromises the rule of law, environmental protectionism and basic human rights by promoting weak regulatory institutions to attract foreign investment. As proof of the negative effects of globalization, critics cite the growing disparity in wealth between the developed West and the developing Third World. Even in Europe, where international economic institutions engineered the Russian transition from communism to a market economy, globalization at times appeared to injure instead of help. Russia’s GDP fell to 60% of China’s GDP within a decade and suffered an unprecedented increase in poverty. See, e.g., U.S. Dep’t. of Commerce, *Census Brief: Russia’s New Problem – Poverty*, CENBR/98-5, Sept. 1998 at 1, available at <http://www.census.gov/prod/3/98pubs/cenbr985.pdf> (“Prior to the dissolution of the Soviet Union in 1991. . . . The Soviet leadership was legitimately able to say that their form of socialism had succeeded in virtually eliminating the kind of poverty that existed in Czarist Russia.”).

<sup>17</sup> Many of those opposed to free trade argue that it will erode cultural diversity by destroying traditional cultural expression (the “McDonald’s effect”). Sir James Goldsmith writes that:

[The] loss of rural employment and [subsequent] migration from the countryside to the cities cause a fundamental and irreversible shift. It has contributed throughout the world to the destabilization of rural society and to the growth of vast urban concentrations. In the urban slums congregate uprooted individuals whose families have been splintered, whose cultural traditions have been extinguished and who have been reduced to dependence on welfare from the state.

SIR JAMES GOLDSMITH, *THE TRAP* 104 (1994). Globally mobile capital produces financial circumstances that undermine socio-political stability such as the Asian financial crises of 1997.

### 2.1.2. *The Benefits of Economic Globalization*

Conversely, many proponents of free trade have argued that issues related to worker rights, human rights, and the environment should be separated from free trade. These proponents would argue that free trade, in and of itself, is a positive thing and that any negative consequences of pure free trade pale in comparison to its benefits. Again, because the arguments in favor of globalization have been the source of enormous literature, the bulk of that discussion will be limited to the footnotes herein. Those benefits can, however, be very briefly summarized as including the enormous and historically unprecedented lifting of millions of people from poverty in China, India, Vietnam, and other countries<sup>18</sup> and the development of a substantial middle class for the first time in recent history. Of course it must be acknowledged that the reduction of poverty in sheer numbers in the world may be accompanied by growing inequality *within* developing countries. Nevertheless, the emerging middle classes have traditionally been strong advocates for greater individual and political freedom,<sup>19</sup>

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<sup>18</sup> See, e.g., David Dollar & Aart Kraay, *Spreading the Wealth*, 81 FOREIGN AFF. 120 (2002). The authors argue that developing countries that opened their economies by easing barriers to trade and seeking direct foreign investment accelerated their national growth versus those countries that chose to restrict foreign investment and impose high tariffs on imports. The last twenty years in China and India exemplify this connection between economic growth and a subsequent reduction in poverty. World Bank studies estimate that China's GDP grew at ten percent on average per year whereas real income increased by six percent a year in India. Between 1981 and 2001, the proportion of the population living in poverty in China fell from fifty-three percent to just eight percent. The World Bank, Research—Fighting Poverty: Findings and Lessons from China's Success, <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20634060~pagePK:64165401~piPK:64165026~theSitePK:469382,00.html> (last visited Feb. 10, 2010). Moreover, the CIA World Factbook reported that Chinese poverty was estimated to be at 2.8% in 2006. Central Intelligence Agency, World Factbook, Population Below Poverty Line, <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html?countryName=China&countryCode=ch&regionCode=eas&#ch> (last visited Mar. 1, 2010). Statistics document a similar decrease in poverty rates in India: Estimated to be at twenty-six percent in 2005, down from fifty-two percent in 1981. The World Bank, India—New Global Poverty Estimates, <http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,contentMDK:21880725~pagePK:141137~piPK:141127~theSitePK:295584,00.html> (last visited Mar. 1, 2010).

<sup>19</sup> See, e.g., LARRY DIAMOND, *Economic Development and Democracy Reconsidered in REEXAMINING DEMOCRACY* 93 (Gary Marks and Larry Diamond eds., 1992) (critiquing Seymour Martin Lipset, *Some Social Requisites of Democracy*, 53 AM. POL. SCI. REV. 69, 71-85 (1959)). The author argues that an increase in economic

although this traditional development has been notably lacking in countries such as China and Russia. This traditional development derives in part from the greater participation of women in the economic<sup>20</sup> and even political systems,<sup>21</sup> and greater access of the

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prosperity creates a middle class. *Id.* at 119. This middle class inevitably vocalizes its desire for more political representation resulting in the rise of democratic institutions. *Id.* at 119-121. The author acknowledges that scholars criticized Lipset's connection between economic growth and democracy during the 1960s and 1970s when the world watched almost every fledgling democratic nation disappear into authoritarian regimes. *Id.* at 114. The author contends that the political transformations throughout Europe, East Asia and Latin America in the 1980s, that followed robust periods of economic development or coincided with a shift to a free market economy, appear to affirm the link between increased economic prosperity and the development of democracy. *Id.* at 126-27 Thus, where the existing government functions as an authoritarian regime, "prolonged economic success can contribute to the [public] perception that the exceptional coercive measures of the non-democratic regime are no longer necessary" and inspire the populace to force political change. JUAN LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION 78 (1996).

<sup>20</sup> Between 1990 and 2001/2002, in Argentina, Brazil, Chile, Peru and Uruguay, the percentage of women in each country's population earning a non-farm wage increased an average of 5.4% over the period. See POPULATION REFERENCE BUREAU, 2005 WOMEN OF OUR WORLD 10 (2005) [hereinafter WOMEN OF OUR WORLD] (reporting the percent of women non-farm wage earners in South American countries in 1990 and 2001-2002).

<sup>21</sup> Between 1995 and 2004, in Argentina, Brazil, Chile, Peru and Uruguay, the percentage of women in each country's parliament increased 6.4% on average. See WOMEN OF OUR WORLD, *supra* note 20 (reporting the percentage of women in parliament in South American Countries in 1995 and 2004). The Freedom in the World survey by Freedom House measured freedom in Argentina, Peru, Brazil, Uruguay and Chile between 2002 and 2008. The survey examined the opportunity to act spontaneously in a variety of fields outside the control of the government and other centers of potential domination—according to two broad categories: political rights and civil liberties. Political rights enable people to participate freely in the political process, including the right to vote freely for distinct alternatives in legitimate elections, compete for public office, join political parties and organizations, and elect representatives who have a decisive impact on public policies and are accountable to the electorate. Civil liberties allow for the freedoms of expression and belief, associational and organizational rights, rule of law, and personal autonomy without interference from the state. Freedom House rated both Brazil and Argentina as only partly free in 2002 with a score of 3.0 on a scale of 1 to 7—for political rights and an analogous rating for civil liberties; a rating of 1 indicates the highest degree of freedom and 7 the lowest level of freedom. See generally FREEDOM HOUSE, FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 2001-2002 48, 66, 118 (Adrian Karatnycky & Aili Piano eds., 2002). Chile and Peru earned a score of 2.0, free on the scale, in 2002. *Id.* at 153, 477. Uruguay had a score of 1.0 in 2002. *Id.* at 633. In 2008, every country except Peru increased freedom for its citizens. See FREEDOM HOUSE, FREEDOM IN THE WORLD 2008: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 41, 109, 156, 557, 759 (Arch Puddington et al. eds., 2008) (examining the status of civil and political rights in various South American

population to technological resources that connect them with diverse views,<sup>22</sup> although the efforts of China's government to block internet sites, and the efforts of the Russian government to manipulate domestic internet sites, and the media in general, suggest that increased internet usage is not perfectly correlated with greater access to diverse viewpoints.

With respect to the environment, it has been argued that overall economic growth as a result of trade can contribute to the development of cleaner technologies within a country's manufacturing sector,<sup>23</sup> although the extensive environmental degradation in China's industrial sector suggests that the correlation between a country's economic wealth and environmental improvement is shaky, and in any event, far from immediate.

### 2.1.3. TLH as a Potential Remedy?

This Article will demonstrate that both sides of the debate over free trade make the conceptual mistake of viewing economic globalization as a separate process from legal globalization and/or harmonization. In part, this conceptual misunderstanding arises from the widespread perception that the only possible regulator of the multinational corporation and the global economy is the nation-state. This Article will argue, however, that the process of TLH has the potential for changing the traditional role of the state, international institutions, and even the individual in making international law.

This perception of immunity from regulation is buttressed by the World Trade Organisation's prohibition of unilateral

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countries). Argentina and Brazil rose to 2.0; Chile shifted to 1.0 and Uruguay remained constant whereas Peru slipped to 2.5. *Id.*

<sup>22</sup> Between 2000 and 2008, Internet usage increased in Argentina by 540%, in Brazil by 900%, in Chile by 320%, in Peru by 205%, and in Uruguay by 197%. See Internet Usage World Stats—Internet and Population Statistics, <http://www.internetworldstats.com> (last visited on Mar. 1, 2010).

<sup>23</sup> See, for example, David I. Stern, *The Rise and Fall of the Environmental Kuznets Curve*, 32 WORLD DEV. 1419 (2004), wherein the author argues that an increase in economic prosperity may reduce pollution and employs a statistical analysis of this relationship through a bell shaped curve – called the Kuznets environmental curve – that depicts pollution levels initially rising with income then falling as income continues to increase. See generally Gene M. Grossman and Alan B. Krueger, *Economic Growth and the Environment*, 110 QUARTERLY J. OF ECON. 353 (1995) (discussing economists' estimates of the income level at which certain kinds of pollution peak).



imposition of environmental, labor or human rights standards that restrict trade, with some exceptions. As discussed *infra*, this refusal of the WTO to link trade with issues of human rights, the environment and business regulation is a clear limitation on the expansion of non-trade legal regulation through a global "commerce clause." Nevertheless, the process of TLH may make it easier to link the issues in a manner independent of the WTO, but still legally recognized by the WTO.<sup>24</sup> The United Nations cannot effectively regulate market forces since it is limited by the lowest common denominator of its diverse and numerous members and its focus on international security rather than regulation.

These traditional views of free trade and regulation overlook the central thesis of this Article that economic globalization very frequently leads to harmonization of *law* with respect to vast areas of legal regulation that are normally considered the province of state or domestic law. This last correlation is not inevitable, but this Article discusses below too many historical and contemporary examples of the correlation to argue that the correlation does not exist. For example, as discussed in greater length below, the United States and the European Union have "federalized" individual liberties in the United States and the European Union. The Council of Europe has harmonized individual liberties at a somewhat lower level throughout Europe, and this Article would argue that the reasons for the Council's lower level of protection is precisely because it is not linked to a common market.<sup>25</sup> MERCOSUR has increasingly established minimum human rights norms having little to do with trade within its enormous trading block.<sup>26</sup> The OAS, meanwhile, has somewhat less successfully attempted to harmonize human rights standards in the Americas. It has been hamstrung by not linking its attempts with trade, whereas membership in the Council of Europe was at least viewed as a precursor to membership in the EU common market. Note though that Russia's membership has weakened this assumption and the credibility of the Council of Europe's human rights enforcement credibility.

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<sup>24</sup> See *infra* text accompanying notes 130-135.

<sup>25</sup> In fact, it could be argued that some of its success is related to membership in the Council of Europe as a prerequisite to joining the European Union. Indeed, the admission of Russia, with the little chance of ultimate EU membership it has, weakened the credibility of the Council of Europe human rights system as binding on member nations.

<sup>26</sup> See *infra* text accompanying notes 119-124.

Cars sold on a global level have to meet California emission standards,<sup>27</sup> at least if the carmakers wish to take advantage of the huge Californian market, and the product safety concerns raised over China's products have demonstrated that even goods produced in countries with traditionally lower safety standards will, to some extent, have to meet the safety standards of those markets with higher standards.

The United States and the European Union are currently in the process of harmonizing their anti-trust and securities standards. The European Union has blocked numerous mergers between United States companies due to the effect of those mergers on the European Union market.<sup>28</sup> Consider the scrutiny Microsoft faced in the European Union even as it eventually passed the anti-trust hurdles raised by the United States Department of Justice. Various countries, including the United States, require that developing countries comply with "international labor rights" before they are granted tariff treatment more favorable than the standard Most Favored Nation treatment required by the World Trade Organization. Despite these developments, economic globalization has exploited the areas of labor rights and environmental regulation, the areas in which TLH has had the least success in effectuating substantial progress. Nevertheless, TLH, because it does not require the imposition of norms on recalcitrant countries, also has the greatest potential to effectuate progressive change in these areas. As demonstrated below, TLH has the potential to effectuate progressive change because it operates on the same principle that underlies federalism and other regional integrative systems—the linkage between commerce and legal rights and most importantly the indirect link to trade.

## 2.2. Federal Law and International Law

In undertaking this analysis, this Article will call upon contemporary and historical case studies of independent countries

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<sup>27</sup> Cal. Dep't. of Motor Vehicles, *What You Need to Know before Buying a Vehicle from Out-of-State*, [http://www.dmv.ca.gov/pubs/brochures/fast\\_facts/ffvr29.htm](http://www.dmv.ca.gov/pubs/brochures/fast_facts/ffvr29.htm) (last visited Feb. 23, 2010) (describing California's requirement that imported cars must be altered in order to meet emissions standards before being registered in the state).

<sup>28</sup> See Jeremy Grant & Damien J. Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1 J. COMP. L. & ECON. 595, 596 (2005) (examining the decision by the European Union to prevent the merger of United States companies General Electric and Honeywell).

forming a federal, confederative or other multinational integrative *legal* structure with regulatory power over a wide number of issues, even though such associations derived initially from efforts at *economic* integration. Those case studies principally focus individually on the European Union, the United States, MERCOSUR, ECOWAS, NAFTA and the African Union. The legal harmonization resulting from these different national associations vary widely. Some of the associations help to demonstrate the challenges facing the process of TLH in balancing the interests of economic globalization and insuring the health and individual liberties of the world's citizens.

TLH is comparable to the development of federalism in the United States, the development of the European Union, and the growing legal harmonization among different countries and economic regional groupings. The Article will also argue that TLH has parallels to the incorporation of fundamental civil, political, economic, and social human rights on a federal level in the US and the European Union. This "federalization" of economic, social, economic and human rights could not and would not have occurred without the initial economic harmonization that helped provide the initial impetus for these regional groupings. These regional groupings then eventually metamorphasized into something much more profound and much more protective of the human rights of the individual than could have been envisioned by the original protagonists of economic integration.

TLH has resulted in increasing transnational and trans-regional harmonization of laws and legal rules with respect to such diverse substantive areas as anti-trust, securities regulation,<sup>29</sup> labor standards, environmental regulation,<sup>30</sup> human rights, contract law,<sup>31</sup> and human health and safety, as the world community

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<sup>29</sup> This is illustrated in securities regulation trends between the United States and the European Union. See generally Eric J. Pan, *Harmonization of U.S.-EU Securities Regulation: The Case for a Single European Securities Regulator*, 34 *LAW & POL'Y INT'L BUS.* 499 (2003) (describing the reasons securities regulation between the United States and the European are moving towards harmonization and should be further unified).

<sup>30</sup> We see this illustrated in the Andean nations in South America. See generally Victor Tafur-Domínguez, *International Environmental Harmonization – Emergence and Development of the Andean Community*, 12 *PACE INT'L L. REV.* 283 (2000) (describing harmonization trends in the Andean community with respect to environmental law).

<sup>31</sup> Trends in the harmonization of contract law can be observed in Africa and Europe. See generally Salvatore Mancuso, *Trends on the Harmonization of Contract*

attempts to effectuate a global market, and finds that other kinds of regulation are necessary in order to do so effectively.<sup>32</sup>

### 2.3. *The Role of the Nation-State as the Guarantor of Individual Rights and the Environment*

This Article argues that the process of economic globalization is leading to the globalization of law, referred to in this Article as TLH. TLH, almost by definition, involves the concurrent transformation of the traditional role of the state as the *sole* guarantor of individual social, economic and other human rights, cultural identity, and individual security against domestic and external threats. This Article will also argue that the traditional model of the nation-state, under traditional international law and political scientific terms, is obsolete. From an empirical perspective, the traditional model of the nation-state is obsolete, since it does not accurately describe current or historical reality. It is also problematic from a normative perspective, since the very notion of the nation-state is often incompatible with fundamental human rights principles. This is particularly the case when the state is the juridical embodiment of the dominant ethnic or cultural group.

Examples of such incompatibility between the traditional nation-state and fundamental human rights and democracy can be seen in the increasing phenomena of separate nations arising within a single state. Some examples include the post-Franco emergence of the nation of Catalonia within the State of Spain, the

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*Law in Africa*, 13 ANN. SURV. INT'L & COMP. L. 157 (2007) (describing the benefits of—and the obstacles to achieving—contract law harmonization in Africa, a continent marked with particular cultural and legal diversity); Gülüm Bayraktaroğlu, *Harmonization of Private International Law at Different Levels: Communitarization v. International Harmonization*, 5 EUR. J. L. REFORM 127 (2003) (discussing harmonization between member states of the European Union).

<sup>32</sup> See generally Manning Gilbert Warren III, *The Harmonization of European Securities Law*, 37 INT'L LAW 211 (2003) (discussing the difficulties of implementing the EU securities code sans other regulation); Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401 (1995) (discussing the same phenomena in the context NAFTA); Tracy A. Kaye, *European Tax Harmonization and the Implications for U.S. Tax Policy*, 19 B.C. INT'L & COMP. L. REV. 109 (1996) (discussing the same phenomena in the European Union taxation system); Virginia Boyd, *Financial Privacy in the United States and the European Union: A Path to Transatlantic Regulatory Harmonization*, 24 BERKELEY J. INT'L L. 939 (2006) (highlighting the same phenomena by describing the role of data protection in the financial realms of the United States and the European Union).

establishment of Scottish and Welsh parliaments in the United Kingdom as part of that country's process of devolution, the uneasy co-existence of the Flemish and Walloon national groups within the State of Belgium with parallel political parties, educational systems and other parallel state institutions,<sup>33</sup> the existence of officially recognized French, German, Italian and Romansch cantons in Switzerland,<sup>34</sup> and Quebec's emergence as a separate nation within Canada, with sovereignty over language, immigration, culture, and a myriad of other issues.<sup>35</sup>

Finally, to the extent the European Union has assumed many of the traditional economic and other regulatory functions of a state, the European Union can increasingly be viewed as a state composed of numerous nations. This has become increasingly true as the elimination of borders within the European Union has led to the centralization of state regulatory functions, state security functions related to protection of the territorial region, and regulation of immigration and protection of European Union citizens from threats to their personal security. This Article will provide an empirical and historical examination of the historically aberrational and increasingly obsolete role of the nation-state as the fundamental building block and source of international law.

### 3. OLLIE'S BARBEQUE AS AN ILLUSTRATION OF THE PARALLELS BETWEEN FEDERALISM AND INTERNATIONAL NORM CREATION

It may seem odd to introduce a unified theory of international law, the state, and the individual with a United States case that involved the outlawing of segregation in restaurant in Birmingham, Alabama. Nevertheless, the U.S. Supreme Court cases that outlawed segregation, *Katzenbach v. McClung*,<sup>36</sup> and its

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<sup>33</sup> See Belgian Government Website, The Structure of The Federal State and the Power Levels, [http://www.belgium.be/en/about\\_belgium/government/federale\\_staats/structure/](http://www.belgium.be/en/about_belgium/government/federale_staats/structure/) (last visited Jan. 20, 2010) (discussing the unique legal structure of the Flemish, Walloon, and Brussels regions).

<sup>34</sup> See ANDREAS WIMMER, NATIONALIST EXCLUSION AND ETHNIC CONFLICT: SHADOWS OF MODERNITY 233 (2002) ("French, Italian and Romansch are not considered to be less 'typically Swiss' or less representative of the Swiss nation than German.").

<sup>35</sup> See generally Quebec Government Website, <http://www.gouv.qc.ca/portail/quebec/pgs/commun/?lang=en> (last visited Jan. 20, 2010) (indicating Quebec's significantly independent sovereign status within Canada).

<sup>36</sup> *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (holding that Congress did not exceed its powers by prohibiting racial discrimination in restaurants that have close ties to interstate commerce).

companion case *Heart of Atlanta*,<sup>37</sup> provide a vivid illustration of one of the central themes of this work: the ways in which "supra-state" authorities such as federal law and international law have operated to vastly expand individual human rights protections, environmental regulations, and economic regulation in ways that blur the traditional view of states as sovereign entities with plenary authority to regulate individuals and other non-state actors within their territory. This Article will explore how United States federal law, European Union "federal" law, and international law have used their respective equivalents of the Commerce Clause, and the implied power associated with that commerce power, to regulate areas of the law quite removed from those associated with trade. In other words, the process of legal harmonization at work in the United States is qualitatively not radically different from the process of legal harmonization at work elsewhere in the world.

As this Article will illustrate, the distinction between federal law and international law is much hazier than commonly supposed, and in fact the process of implied power of supra-state authority based on trade power in *Katzenbach* is, in many respects, equally applicable to international law. Federal and international law can thus be viewed as points along a spectrum ranging from pure international law, such as that embodied in international/intergovernmental institutions like the United Nations, to purely unitary, domestic law exemplified by non-federal states such as Japan or Romania. This Article will explore how international law is being created in ways that fall outside the traditional definition of international law, and outside the traditional concepts of how international law is created. To this end, the Article will discuss the ways in which international law is created by non-state actors and in ways far removed from the traditional view of international law as a creation of international institutions.

In December 1964, the United States Supreme Court upheld the Civil Rights Act of 1964 (the "Civil Rights Act")<sup>38</sup> in the seminal case *Katzenbach v. Clung*. The Civil Rights Act, among other things, eliminated segregation in public accommodations, including

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<sup>37</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (holding that Congress did not exceed its Commerce Clause powers by prohibiting racial discrimination in motels that serve interstate commerce).

<sup>38</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as and amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

hotels, restaurants, theaters, retail stores, and similar establishments. The challenge to the Civil Rights Act presented in *Katzenbach* resulted from the absence of any explicit Constitutional basis for the federal government to regulate systematic discrimination by individuals within the several states.

Indeed, prior to the passage of the 14th Amendment following the Civil War, the federal government had virtually no Constitutional power to regulate the states' treatment of their own residents, even when those actions, such as slavery, which would now be characterized as crimes against humanity. States were largely free to treat their own citizens as cruelly or arbitrarily as they wished, as long as such policies did not affect the common market, foreign policy, or other limited area of federal jurisdiction. At the risk of stating the obvious, states could even enslave their own inhabitants and no state was under any requirement to provide any of the rights contained in the federal bill of rights to their own citizens.

In other words, prior to the passage of the 14th Amendment, the United States federal government had less legal power to regulate human rights abuses by U.S. states against their citizens than international law has to regulate human rights abuses by countries against their own citizens. In this respect, states enjoyed more sovereignty and autonomy from federal interference than individual nations currently enjoy in the international legal system. It is true that many countries are largely free to ignore international law with little fear of coercive repercussions, but they may not do so legally. The states in the United States, on the other hand, could violate the most basic rights of the humans living within their borders with *legal* impunity.

Even after the Civil War and the passage of the 14th Amendment, states still enjoyed certain kinds of sovereignty that even sovereign nations do not currently enjoy under international law. The concept of sovereignty normally implies the power to regulate the activity of individuals residing within the territory of the sovereign. Nevertheless, the United States Constitution originally envisioned the several states—not the federal government—as the primary regulators of individual activity, and this regulatory division continued even after the Civil War.

The inability of federal law to protect or regulate the conduct of *individuals*, as opposed to the respective *states*, is much more characteristic of traditional international law, not domestic law—Justice Marshall's opinion in *McCulloch v. Maryland*

notwithstanding.<sup>39</sup> Indeed, the growth of international criminal law has even shattered that fundamental distinction between international and domestic law.

This division of power left the federal government unable to prevent states from creating the pervasive system of private segregation that would now be characterized as a violation of *jus cogens* international law,<sup>40</sup> at least until Ollie's Barbeque was forced to serve its delectable, artery-hardening ribs to black and white customers equally.<sup>41</sup>

The United States Supreme Court was forced to resort to the Commerce Clause of the United States Constitution because, as mentioned above, no other Constitutional authority existed for federal regulation of individual discrimination of the kind presented by Ollie's Barbeque. However, as noted by the United States Supreme Court, Ollie's Barbeque was not alleged to have served customers from other states and certainly not customers from other nations.<sup>42</sup> The Supreme Court ultimately found the link between the restaurant's discrimination and the Commerce Clause in the \$70,000 worth of food served annually by the restaurant, some of which arrived at Ollie's Barbeque via interstate

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<sup>39</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) ("The government of the Union, then . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."). It could be argued that Justice Marshall's need to argue that the Constitution derived from the people of the United States, rather than from an agreement of sovereign states, is itself an indication that his sentiments were not universally shared at the time of his opinion. Indeed, Justice Marshall notes that "the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution [sic], to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states." *Id.* at 402.

<sup>40</sup> The practice of segregation was not limited to private actors after the Civil War, at least until *Brown v. Board of Education* and its progeny dismantled state-sponsored segregation. Nevertheless, the 14th Amendment *could have* permitted federal prevention of state laws requiring segregation if the U.S. Supreme Court had viewed such laws as a violation of equal protection. Thus, the existence of state segregation was not technically a lacuna in federal power, but instead the result of the characterization of segregation itself by the US Supreme Court.

<sup>41</sup> *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>42</sup> *Id.* at 298 ("There is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about \$70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress.").



commerce.<sup>43</sup> *Katzenbach* and its progeny enabled the federal government to exercise almost full sovereignty over its citizens until the application of the implied power of the federal government to regulate individual activity was checked, albeit in a limited fashion, by *United States v. Lopez*.<sup>44</sup>

Thus, it was only with the successful implementation of the Civil Rights Act that United States federalism achieved a full conceptual break with traditional international concepts giving each state the sovereign authority to regulate its own citizens. As this Article will discuss, the history of United States federalism is not an isolated example of sovereign entities coming together and delegating power to a central authority over limited areas of substantive law—it is simply an early example.

### 3.1. *The Creation of the United States: From Confederation to Federalism*

It is helpful to examine the creation of the United States to fully appreciate the evolution of United States federalism from a form of government that, in contemporary terminology, would be characterized as a kind of confederative international law, into a form of government that is now unquestionably “domestic” law. Some scholars have gone so far as to posit that the United States Constitution itself could, in substantive terms, be most accurately characterized as an international treaty among sovereign entities rather than an organic creation of a unitary sovereign entity.<sup>45</sup> It has been argued that since the United States was not a single country at the time of the creation of the United States, politically, economically, or even conceptually, there could not be a single “American people” from which an organic Constitution could

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<sup>43</sup> See *id.* at 300. Congress had provided in section 201(b)(2) and (c) of Title II, that the Civil Rights Act covers “any ‘restaurant . . . principally engaged in selling food for consumption on the premises’ under the Act ‘if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce.’” *Id.* at 298 (omissions in original).

<sup>44</sup> *United States v. Lopez*, 514 U.S. 549, 551–52 (1995) (finding that Congress did not have the power to enact the Gun-Free School Zones Act of 1990 because, in part, the possession of a gun within a school zone—a private, individual act—was insufficiently related to interstate commerce).

<sup>45</sup> See, e.g., FRANCISCO FORREST MARTIN, *THE CONSTITUTION AS TREATY: THE INTERNATIONAL LEGAL CONSTRUCTIONALIST APPROACH TO THE U.S. CONSTITUTION* (2007) (making the argument that the Constitution is an international treaty among sovereign entities—the states). But see *McCulloch*, 17 U.S. at 404–05 (declaring that the federal government’s power derives from the people).

emanate. In arguing that the federal government was a creation of the people, not of the sovereign states, Chief Justice Marshall nevertheless recognized, in the seminal 1819 case *McCulloch v. Maryland*, the opposing view. "It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give [the federal government]." <sup>46</sup> *McCulloch v. Maryland* undoubtedly established, as a legal matter, the Federalist view of the Constitution as a product of a unitary people, not the states, even if the historical reality was apparently more ambiguous.<sup>47</sup>

The states of the United States did not transform themselves from a collection of British colonies into a single country upon their declaration of independence from Britain. Rather the political integration of the states of the United States has been much more gradual, and it can be argued that the United States, in many respects, did not even achieve the level of political and economic integration achieved by the present-day European Union until the very recent past.

The antebellum United States resembled a confederation of truly sovereign, independent states much more than the current European Union. This was reflected in much of the U.S. legal literature and legal reality of the period. For example, antebellum legal theorists such as John C. Calhoun viewed the American union in terms that would currently be considered confederative, rather than federal.<sup>48</sup> These legal theorists took the 10th Amendment to the United States Constitution and state sovereignty theories

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<sup>46</sup> *McCulloch*, 17 U.S. at 404.

<sup>47</sup> See MARTIN, *supra* note 45.

<sup>48</sup> As Larry Catá Backer explains:

Under the old American orthodoxy, only nations can be federations, and only nations are governed by constitutions. Only constitutions can serve as the highest expression of domestic law. But federal systems have emerged which may not be nations, as conventionally understood. These non-nation federal systems are also governed by constitutions. These constitutions are derived from international law, yet they perform the core functions traditionally reserved for the basic internal law of nations. As core principles of transnational and international law become part of the domestic law of nations, and as nations themselves become subordinate parts of larger governmental organizations, the line between domestic and international law blurs. This is the brave new world of federal constitutionalism in the twenty-first century.

Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 178 (2001) (internal citations omitted).

seriously; not just as jingoistic assertions of anti-Northern sentiment, but as expressions of the original concept of United States federalism as thirteen independent nations delegating certain limited powers to a central government and otherwise retaining the attributes of state sovereignty. This view of state sovereignty is consistent with the empirical political reality of the United States. There is no other historical example in the last three centuries of one legally unified country where a class of people were full citizens in some jurisdictions and slaves in other jurisdictions within the same country. It is similarly uncharacteristic of a single unified country that as late as 1966, a mixed-race couple could be legally married in one state and be arrested and imprisoned for being married in another state.<sup>49</sup>

### 3.2. *The Articles of Confederation*

The Articles of Confederation, in existence from 1776 to 1789,<sup>50</sup> were not just a failed, ineffectual historical blip on the way to the inevitable creation of a “federal” United States. Rather, the Articles were an accurate representation of the newly independent states’ perception that they were sovereign, independent countries.<sup>51</sup> Consistent with a collection of sovereign states, the Congress had no power to enforce its laws or impose taxes.<sup>52</sup> As with any

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<sup>49</sup> See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (finding state anti-miscegenation statutes unconstitutional).

<sup>50</sup> See Library of Congress, The Articles of Confederation, <http://www.loc.gov/rr/program/bib/ourdocs/Articles.html> (last visited Jan. 31, 2010) (explaining that the Second Continental Congress, representing the newly independent colonies, began drafting the Articles in July 1776, and sent the Articles to the states for ratification in November 1777. The completion of the ratification process did not occur until March 1781, but the final draft of the Articles served as the *de facto* system of government until the Articles’ final ratification. The Articles remained in effect until 1789.).

<sup>51</sup> See, e.g., ARTICLES OF CONFEDERATION art. II (“Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”). See also KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION (2001) (explaining that while the states were not required to contribute to the national government, they had incentives to give the government funds); Backer, *supra* note 48, at 197 (pointing out that the European Union is similar to Antebellum states in that an autonomous general government can remain stable and democratic, only if it has built into it mechanisms for the dispersion and diffusion of power between the general government and its constituent parts).

<sup>52</sup> ARTICLES OF CONFEDERATION art. IX.

collection of independent countries, each state had an equal vote in Congress, a system still reflected in the current United States Senate. The Articles of Confederation were simply a pragmatic effort to create greater unity among those independent states in the face of the threat from Great Britain during the ongoing War of Independence and in foreign policy matters generally. In no way did the countries under the Articles view themselves as anything other than fully sovereign countries with full control over their economic, legal and *domestic* political affairs, except to the extent such matters might be delegated on a limited basis to other entities – much as contemporary countries delegate certain discrete economic, political and security matters to transnational or international entities.<sup>53</sup>

The Articles created a “Congress of the Confederation,” whose formal name was the “United States of America in congress assembled.”<sup>54</sup> Each state, regardless of its size and consistent with an intergovernmental organization, was entitled to one vote in the Congress<sup>55</sup> – this remains true with the present day United States Senate.<sup>56</sup> Each state maintained its own currency, customs controls and port fees.<sup>57</sup> They imposed tariffs on goods from other states and Congress had no ability to regulate trade,<sup>58</sup> although the people’s freedom of movement was guaranteed.

As noted, Congress had no power to enforce its laws and had no power to impose taxes, but simply had the right to request contributions to its budgets from the several states. The Congress even lacked the means to compel such contributions by the states, and the requested contributions were frequently not met.<sup>59</sup>

The practical problems inherent in the Articles, particularly the inability to compel contributions to the central treasury and to stop economic conflicts among the states, led many American leaders to contemplate a substantial revision of the Articles, which ultimately

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<sup>53</sup> See *id.* art. II. (“Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”)

<sup>54</sup> *Id.* pmbl.

<sup>55</sup> *Id.* art. V § 4.

<sup>56</sup> *Id.* art. V; U.S. CONST. art. I, § 3.

<sup>57</sup> ARTICLES OF CONFEDERATION art. IX (not including these abilities in Congress’s enumerated powers).

<sup>58</sup> *Id.*

<sup>59</sup> DOUGHERTY, *supra* note 51, at 7.

led to the creation of an entirely new document: the United States Constitution.

### 3.3. *The U.S. Constitution*

The political integration of the U.S. states during and following the ratification of the Constitution has been much misunderstood. The federalism that existed at the time of the Constitution's creation was a very different kind of political integration than what is currently understood to be federalism.<sup>60</sup> At the founding, the U.S. Constitution and the Articles of Confederation differed in significant ways. However, the *scope* of this difference appears greater when viewed in hindsight than it actually was at the time the Constitution was created. In terms of present-day understandings of political institutions, federalism at the time of the founding was more akin to our present system of international law than domestic law. At the danger of echoing the rhetoric of those who promoted slavery, segregation and other atrocities under the banner of "states rights,"<sup>61</sup> it is nevertheless important to recognize that the structure of the Constitution reflected the widespread view at the time of the Constitution's creation that the United States was more like a union of quasi-sovereign entities than a truly single political entity. The paradox of a "union" of "sovereign entities" reflects the tension inherent in the experiment that was the early United States. There can be little question that the Supreme Court of the United States, as a *legal matter*, definitively resolved the supremacy of the central government in *McCulloch v. Maryland*,<sup>62</sup> yet the very existence of the case suggests that the legal issue was not completely resolved prior to the Court's decision. The discussion below illustrates more fully the hazy distinction between early American federalism and contemporary international law.

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<sup>60</sup> See Backer, *supra* note 48, at 183 (noting that pre-Civil War conceptions of federalism valued "the great animating principles of for the concurrent majority and nullification").

<sup>61</sup> Contrary to those advocates of states' rights, a central thesis of this Article is that the federalization of civil rights in the United States resulted in a vast increase in net individual and human rights in the United States, even though this laudable development may not have been explicitly intended by many of the Founders.

<sup>62</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that state action may not impede valid, constitutional exercises of power by the federal government).

First, the political structure of the U.S. government was more characteristic of a union of sovereign, or quasi-sovereign states, rather than a single political entity.<sup>63</sup> As noted above, the Articles gave each state an equal voice in the Congress of the Confederation regardless of that state's population, which is consistent with a confederation of independent states. To some extent, this structure continued under the new Constitution with a Senate consisting of two senators from each state regardless of population. This structure is even more striking when one compares the political structure created by the Constitution to that of the European Union. The European Union, like the United States, faced a conflict between more and less populated states. The compromise in both entities was to create a representative body based on population and a body that reflected the equal weight of each state, which is also characteristic of intergovernmental bodies.<sup>64</sup> In the European Union, two of the bodies created were the European Parliament and the Council of Ministers, with the Parliament being analogous to the United States House of Representatives and the Council of Ministers being analogous to the United States Senate. However, unlike the Senate, each country's vote in the Council of Ministers corresponds to the country's population however inaccurately.<sup>65</sup> In this sense, the Senate continues to be a much less representative institution of the people of the entire country than

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<sup>63</sup> See, e.g., ARTICLES OF CONFEDERATION art. II ("Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

<sup>64</sup> U.S. Senate: The Connecticut Compromise, [http://www.senate.gov/artandhistory/art/common/generic/Connecticut\\_Compromise\\_Unveiling.htm](http://www.senate.gov/artandhistory/art/common/generic/Connecticut_Compromise_Unveiling.htm) (Last visited Jan. 31, 2010)

When the framers of the U.S. Constitution met at Independence Hall in Philadelphia on July 16, 1787, they reached a crucial agreement that provided for a dual system of congressional representation. . . . This Great Compromise, or Connecticut Compromise, was named in honor of its architects, Connecticut delegates Roger Sherman and Oliver Ellsworth.

See also Treaty Establishing the European Economic Community art. 234, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter "Treaty of Rome"].

<sup>65</sup> See Council of the European Union, [http://europa.eu/institutions/institution/council/index\\_en.htm](http://europa.eu/institutions/institution/council/index_en.htm) (Last visited Jan. 31, 2010) (noting that decisions in the Council are taken by vote such that the bigger the country's population, the more votes it has, but the numbers are weighted in favor of the less populous countries).

the Council of Ministers is of the people of the European Union. Although this singular aspect of the United States' political structure does not render the United States federal structure more international than the European Union, it does reflect that the tensions between sovereignty and union in the creation of the Constitution were very similar to those present during the contemporary discussions of the European Union's political structure.

Second, the Constitution appears to reflect assumptions about the right to withdraw from the Union that would be more characteristic of a union of sovereign states. Legal commentators such as Daniel Farber have argued that the failure of the writers of the Constitution to include a provision regarding the right to withdraw from the Union was not accidental, but rather reflected a lack of unanimity on the issue.<sup>66</sup> The lack of such a provision is even more surprising given the Articles' formal title: "The Articles of Confederation and Perpetual Union." Although Farber ultimately concludes that the Constitution prohibited secession, he cites Thomas Jefferson and John Calhoun for his proposition that this view was not unanimous among the early American leaders and was therefore left out of the finished document.<sup>67</sup> The ongoing debate during the first decades of the United States regarding whether states had the right to unilaterally nullify federal laws deemed unconstitutional on state law grounds buttresses Farber's view.<sup>68</sup>

Third, the Constitution specifically enumerated the powers of the federal government, retaining all other rights of sovereignty to the individual states, as evidenced by the Tenth Amendment. As

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<sup>66</sup> See DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003) (examining the principles through which Abraham Lincoln defended his executive actions during his administration, especially with respect to military and political decisions during the Civil War).

<sup>67</sup> See generally *id.*; cf. THOMAS DI LORENZO, *THE REAL LINCOLN* (Prima Lifestyles 2002) (suggesting that Abraham Lincoln revolutionized the functions of the federal government by transforming it from a decentralized state into a highly centralized, activist state).

<sup>68</sup> See, e.g., Thomas Jefferson, *The Kentucky Resolutions*, Dec. 3, 1799 (explaining that the state of Kentucky had constitutional authority to nullify an act of Congress, here the Alien and Sedition Act, on state law grounds. This debate ultimately led to the South Carolina "nullification crisis" from 1828 to 1833.); see generally STANLY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* (1995) (providing an analytical survey of political, economic, and military concerns as they related to federalism between 1788 and 1800).

James Madison noted in Federalist Paper No. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>69</sup>

Although the list of federal powers articulated in the Constitution appear impressive, in fact they are largely limited to addressing: (a) the creation of a common market with free movement of goods, peoples and services across state boundaries,<sup>70</sup> much like the common market that exists in the European Union;<sup>71</sup> and (b) the creation of a coherent, unified voice of the United States in its relations with other countries.<sup>72</sup> Although these two areas of federal jurisdiction embody many aspects of national sovereignty, it is important to consider what the original, pre-Constitution document did *not* cover.

Before the passage of the 14th Amendment in 1868, the federal government had virtually no power to regulate the manner in which a state treated its own citizens.<sup>73</sup> States were largely free to treat their citizens however cruelly or arbitrarily as they wished as long as such laws did not affect the common market, foreign policy, or other limited areas of federal jurisdiction. No state action better exemplifies this fact than the institution of slavery, which was practiced extensively by many states until the late 19<sup>th</sup>

<sup>69</sup> THE FEDERALIST NO. 45 (James Madison).

<sup>70</sup> U.S. CONST. art I, § 8.

<sup>71</sup> Part I, Article 2 of the Treaty Establishing the European Community states:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

The Treaty Establishing the European Community, part I, art. 2, C 325/33 (Dec. 24, 2002).

<sup>72</sup> *United States v. Belmont*, 301 U.S. 324 (1937) (holding that "in the case of all international compacts and agreements . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.")

<sup>73</sup> See U.S. CONST. amend. XIV.



century. These states enslaved their own inhabitants, despite the fact that slaves were eligible for citizenship in other states.

Furthermore, no state was required to provide any of the rights contained in the federal Bill of Rights to its own citizens.<sup>74</sup> In the past 300 years, there are no other instances in the histories of legally unified nations where a class of people enjoyed full citizenship in some jurisdictions but were enslaved in other jurisdictions.

Before the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the US Constitution, which ended peonage and extended full citizenship and legal protections to former slaves, the United States practiced one of the most racially polarized systems of slavery ever promulgated. The United States' experience with slavery was not just unique to the western world, but arguably to world history generally. As noted by the report of the Brown University Steering Committee on Slavery and Justice (hereinafter "Brown Report"):

If American slavery has any claims to being historically "peculiar," its peculiarity lay in its rigorous racialism, the systematic way in which racial ideas were used to demean and deny the humanity of people of even partial African descent. This historical legacy would make the process of incorporating the formerly enslaved as citizens far more problematic in the United States than in other New World slave societies.<sup>75</sup>

This helps to explain the historical distinction in racial attitudes between the United States and countries such as Brazil that had an even longer history of slavery than the United States.<sup>76</sup> The United States was, perhaps, unique in the history of the world in its racialization of slavery. As noted by the Brown Report: "Few if any societies in history carried this logic further than the United

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<sup>74</sup> See *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833) (holding that the federal bill of rights did not apply to the states prior to the passage of the Fourteenth Amendment.)

<sup>75</sup> REPORT OF THE BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE, *SLAVERY AND JUSTICE* at 8, available at [http://www.brown.edu/Research/Slavery\\_Justice/documents/SlaveryAndJustice.pdf](http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf) [hereinafter BROWN REPORT].

<sup>76</sup> See HERBERT S. KLEIN, *AFRICAN SLAVERY IN LATIN AMERICA AND THE CARIBBEAN* 217-20 (1988) (explaining that the American system of slavery differed in several meaningful ways as compared to other North and South American countries).

States, where people of African descent came to be regarded as a distinct 'race' of persons, fashioned by nature for hard labor."<sup>77</sup>

In other words, prior to the passage of the 14<sup>th</sup> Amendment, the U.S. federal government had less legal power to regulate human rights abuses by U.S. states against their citizens than international law has to regulate human rights abuses by nations against their own citizens. In this respect, the American states enjoyed more sovereignty and autonomy from federal intervention than individual nations currently enjoy in the international legal system.

The sovereign American states prior to the Civil War thus retained many of the attributes of what we would today normally consider independent states where sovereignty is regularly curtailed by certain supranational institutional rules affecting economics,<sup>78</sup> taxation,<sup>79</sup> labor, human and animal health,<sup>80</sup> product safety, anti-trust and securities regulation, to name just a few.

Thus, at a minimum, the pre-Civil War, or "antebellum" states maintained much greater sovereignty over their *domestic law* than the member states of the supposedly non-federal contemporary European Union. In this sense, the Antebellum United States resembled a confederation of truly sovereign, independent states much more than the current European Union. This was reflected in much of the U.S. legal literature and legal reality of the period. For example, antebellum legal theorists such as Calhoun viewed the American union in terms that would currently be considered confederative, rather than federal. These legal theorists took the 10<sup>th</sup> Amendment to the U.S. Constitution and state sovereignty seriously, not just as a jingoistic assertion of anti-Northern

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<sup>77</sup> BROWN REPORT, *supra* note 75, at 8.

<sup>78</sup> See, e.g., Llewellyn H. Rockwell, *WTO Foments a TradeWar*, LUDWIG VAN MISES INSTITUTE, Jan. 21, 2002, <http://mises.org/Article.aspx?Id=874&FS=WTO+Foments+A+Trade+War> (Last visited Jan. 31, 2010) (indicating that, for example, the World Trade Organisation, for the purpose of creating an integrated world market, has had a tremendous impact on US law, requiring the US to modify a substantial number of its laws and regulation regarding the environment, taxation, product health and safety, and of course domestic rules regarding trade).

<sup>79</sup> *Id.*

<sup>80</sup> James D. Wilets, *A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization* (2009) (unpublished manuscript, on file with the Berkeley Electronic Press) ("Even sections of US domestic statutes protecting dolphins and sea turtles have been ruled violative of the General Agreement on Tariffs and Trade, even though there has never been any allegation of any protectionist intent behind the passage of such acts.").

sentiment, but as an expression of the *original* concept of American federalism: thirteen independent nations delegating certain limited powers to a central government and otherwise retaining the other attributes of state sovereignty.<sup>81</sup>

However, even after the Civil War and the passage of the 14<sup>th</sup> Amendment, U.S. states still enjoyed certain kinds of sovereignty that even sovereign nations do not currently enjoy under international law. Sovereignty normally implies the power to regulate the activity of individuals residing within the territory of the sovereign. Nevertheless, the Constitution originally envisioned the several states as the primary regulators of individual activity, not the federal government, and this regulatory division continued even after the Civil War.<sup>82</sup>

The inability of federal law to protect, or to regulate, the conduct of *individuals*, as opposed to respective *states*, is much more characteristic of traditional international law, not domestic law. Indeed, the growth of international criminal law has shattered that fundamental distinction between international and domestic law.

This division of power left the federal government unable to prevent creation by the states of a pervasive system of private segregation that would now be characterized as a violation of *jus cogens* international law.<sup>83</sup> Nevertheless, the division of powers between the federal and state governments left the federal government powerless to require states to eliminate the pervasive system of private segregation.

The system of racial apartheid in southern U.S. states was unique to the industrialized world and, as of the early 1960's, was officially practiced only in the outlaw nations of Rhodesia and South Africa. Even two individuals of different races married in one state could be arrested in another state for the simple act of

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<sup>81</sup> See Backer, *supra* note 45, at 178.

<sup>82</sup> *United States v. Lopez*, 514 U.S. 549, 567-8 (1995) (holding that while Congress has broad authority to enact laws through its constitutional powers, the states are the primary regulators of local, private conduct and are protected from undue federal encroachment).

<sup>83</sup> It is true that segregation was not limited to private actors after the Civil War, at least until *Brown v. Board of Education* and its progeny dismantled state-sponsored segregation. Nevertheless, the Fourteenth Amendment *could have* permitted federal prevention of state laws requiring segregation if the U.S. Supreme Court had viewed such laws as a violation of equal protection. Thus, the existence of state segregation was not technically a lacuna in federal power, but the characterization of segregation itself by the U.S. Supreme Court.

being married until 1967, hardly a legal characteristic of a country with one unified coherent domestic legal system.<sup>84</sup> Indeed, the parents of President Barack Obama would have been arrested simply for being married had they chosen to visit any one of such sixteen U.S. states during the time of their marriage.

The enormous advances in human rights protections in the United States that resulted from the elimination of American slavery and apartheid came not from a consensual political process within the United States, but from the fact that the values and mores of the North were imposed on the South through a violent strengthening of the federalist process. Similarly, the end of apartheid in the United States came about only through a strengthening of the implied powers of federalism, piggybacking on the Commerce Clause of the Constitution, which itself was intended only to create a common market, not to create a national civil rights law.<sup>85</sup> The U.S. Supreme Court was forced to resort to the Commerce Clause of the U.S. Constitution, and in some cases the Spending Clause,<sup>86</sup> because no other Constitutional authority existed for federal regulation of individual discrimination. As discussed in the following paragraphs, the European Union's central lawmaking authorities have had, in many cases, less difficulty in finding explicit or implicit authority in EU treaties for more far-reaching "federal legislation."

As in the EU, it was the creation of a unitary economic market, as provided by the Commerce Clause, which gave the U.S. federal government the implied power to regulate issues with only very attenuated relationships to interstate commerce. The federal government's exercise of implied power to regulate entities not explicitly subject to federal regulation occurred as the American

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<sup>84</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia's antimiscegenation law had no legitimate purpose other than invidious racial discrimination and therefore violated the Fourteenth Amendment).

<sup>85</sup> See *Katzenbach v. McClung*, 379 U.S. 294 (1964) (explaining that the Commerce Clause authorizes Congress with the legislative power to prohibit segregation in privately owned public accommodations).

<sup>86</sup> U.S. CONST. art. I, § 8, cl. 1 vests the federal government with the power to require states to take certain actions as a condition of receiving federal funds in areas where the federal government has no direct power under the Constitution to regulate the states or individuals. In other words, the "Spending Clause" gives the federal government the power to do indirectly what it does not have the power to do directly.

market and economy became more national.<sup>87</sup> Legal regulation of a wide variety of economic and social issues then moved from the state to the federal level. A similar phenomenon is occurring at the international level. Globalization is creating a unitary economic market and moving regulation from the national to the international level.

### *3.4. The Implications of Economic and Legal Harmonization in the United States for Individual Political, Economic, Social and Human Rights*

As noted above, prior to the passage of the Civil War Amendments to the U.S. Constitution, the United States practiced one of the most, if not the most, racialized systems of slavery ever promulgated. Even after the passage of the Equal Protection Clause, many Southern states promulgated a system of racial apartheid unique to the industrialized world and, as of the early 1960's, officially practiced only in the outlaw nations of Rhodesia and South Africa. The federalization of civil rights laws, originally only a concern of the individual states, brought the citizens of numerous states up to a minimum, albeit highly imperfect, standard of human rights protection, while permitting other states in the United States to grant their citizens even greater rights.

Similarly, the process of TLH can result in substantial increases in net individual rights, primarily by raising the floor of minimal human rights protections of the least protective jurisdictions.<sup>88</sup>

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<sup>87</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress may regulate intrastate commerce if the local economic activity, in the aggregate, has a substantial effect on interstate commerce).

<sup>88</sup> It must also be noted, however, that this process of guaranteeing individual rights and providing minimal environmental, labor and other standards was under considerable pressure in the United States during the Bush administration, and to some extent in the European Union as well. For example, under the Bush administration, federal supremacy was used as a means of attacking the relatively more stringent environmental standards in California and other states, and as a means of preempting state law on issues related to same-sex marriage, drug regulation, abortion, euthanasia, and stem-cell research. See, e.g., 1 U.S.C. § 7 (2006) (defining "marriage" as "only a legal union between one man and one woman as husband and wife"); 28 U.S.C. § 1738c (2006) (stating that states and territories were not required to give effect to the public acts, records, or judicial proceedings of any other state or territory that recognized a same-sex relationship as a marriage). Congress passed a statute that deprived all same-sex couples legally married in a U.S. state from receiving more than 1,000 federal benefits flowing from marriage. *Id.* Conversely, the conservative justices on the federal Supreme Court have invoked the limited power of the federal government

#### 4. A CASE STUDY OF TRANSNATIONAL LEGAL HARMONIZATION: THE "FEDERALIZATION" OF EUROPEAN LAW

In 1956, Italy, France, Germany, the Netherlands, Belgium and Luxembourg, the six original members of the European Union (then known as the European Economic Community), signed the Treaty of Rome. The Treaty, and its subsequent revisions, provided for the creation of a true common market with complete freedom of movement of goods, people, services and labor among the member nations, a European version of the U.S. Commerce Clause.<sup>89</sup>

There is a relative dearth of literature on the parallel aspects of U.S. federalism and European integration in part because many legal and social commentators on both sides of the Atlantic resist any equivalency between the United States and Europe. Scholars on both sides of the Atlantic tend to view federalism in the U.S. through the lens of domestic law,<sup>90</sup> without recognizing the striking parallels between U.S. federalism and the process by which international law is created, although increasingly greater numbers of scholars have noted the parallels between the two phenomena.<sup>91</sup> Legal harmonization in the European Union has been viewed, arguably incorrectly, as a *sui generis* phenomenon

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in striking down several federal laws buttressing individual civil rights. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1996) (narrowly interpreting Congress's power to enforce Section 1 of the Fourteenth Amendment).

<sup>89</sup> See Consolidated Version of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) 37, 44 (charging the Community with the task of implementing common policies to establish a common market and an economic and monetary union). See also *id.* ("[A]n internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, person, services and capital . . .").

<sup>90</sup> Part of the problem lies in the contemporary tendency to overlook the plain intent of the Constitutional framers to preserve many of the sovereign characteristics of the originally independent states of the United States. Indeed, a number of Constitutional scholars have argued that it would be more accurate to characterize the U.S. Constitution as a treaty among independent countries, rather than a document originating solely with the American people as a unified whole. See, e.g., MARTIN, *supra* note 45. See also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819) (noting Maryland's law is inconsistent with the U.S. federal constitution).

<sup>91</sup> See, e.g., Backer, *supra* note 45, at 183-85 (discussing how John C. Calhoun's theories of federalism in antebellum United States may represent a conceptual framework upon which non-national federal systems of government, like the EU, can be understood by comparing contemporary European federalism to the American federalist model post-1865).

with no other parallels, but definitely much more a creation of traditional international law than the United States.<sup>92</sup> They would argue that the European Union is a creation of specific treaties among fully independent and sovereign countries, as opposed to the U.S. Constitution, which supposedly was created organically from the “people.”<sup>93</sup> As has been discussed previously, this distinction is more illusory than real in practice. The creation and development of United States federalism arguably bears much more similarity to contemporary notions of international law than most commentators in the United States would currently admit. Similarly, many European commentators have also overlooked the similarities between the ostensibly international EU law and federal law in the United States.<sup>94</sup>

The European Community law of the European Union shares the four core legal characterizations of U.S. domestic federal law.

First, EU law enjoys supremacy over individual EU Member State law, equivalent to U.S. federal supremacy over state law in those limited areas where the federal government has authority to legislate.<sup>95</sup>

Second, as in U.S. federal law, much of European law, with the exception of directives, is directly effective in the domestic legal system of EU Member States without further action by EU Member States.<sup>96</sup> There is an argument that some countries’ legal systems

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<sup>92</sup> See MARTIN *supra* note 45, at 209–10.

<sup>93</sup> *Id.* at 180–81.

<sup>94</sup> *Id.* at n.21 (noting “Europeans dismiss the American experience as irrelevant because of a mistaken belief that the American Constitutional founders, and those who came after, shared a common view of the nature of a federal state and that the nature of federalism in the United States has remained substantially unchanged since 1789”) (citing Mackenzie Stuart, *Problems of the European Community Transatlantic Parallels*, 36 INT’L & COMP. L.Q. 183 (1987)).

<sup>95</sup> It should be noted that some EU states such as Italy and Germany dispute the supremacy of EU law over their constitutional law in theory, but have recognized the principle in practice. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 2 C.M.L.R. 540 (1974) (F.R.G.) (recognizing the supremacy of EC law *so long as* the provisions of Community law fulfill the requirements of the German Constitution); Corte cost., Dec. 27 1973, n.183, 2 C.M.L.R. 372 (1974) (stating that if European law violated the fundamental rights contained in the Italian constitution, the Court would not have applied the European law).

<sup>96</sup> See What Are EU Regulations?, [http://ec.europa.eu/community\\_law/introduction/what\\_regulation\\_en.htm](http://ec.europa.eu/community_law/introduction/what_regulation_en.htm) (last visited Mar. 3, 2010) (“Regulations are the most direct form of EU law – as soon as they are passed, they have binding legal force throughout every Member State, on a par with national laws. National governments do not have to take action themselves to implement EU

would consider the direct effect of European law to be consistent with the manner in which international law is treated by some countries. However, even EU Member States that do not recognize the direct incorporation of international law into their domestic law nevertheless accept this principle in the context of the European legal system.<sup>97</sup> Thus, this characteristic of EU law is also much more typical of a federal system than international law.

Third, judicial review by the European Court of Justice ("ECJ") of Member State judicial decisions for compliance with EU law is actually even more stringent and comprehensive than federal judicial review of U.S. state law or judicial decisions.<sup>98</sup>

Fourth, the implied powers of the EU lawmaking bodies to legislate on matters not explicitly delegated to it by the EU treaties are, as discussed above, the aspects of U.S. federalism that ultimately enable the United States to forge what can now be considered a unified state.<sup>99</sup>

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regulations."). It should be noted that EU regulations enjoy this status in European law, as opposed to EU directives which require each EU state to implement the goals and purposes of the directive. C.f. What Are EU Directives?, [http://ec.europa.eu/community\\_law/introduction/what\\_directive\\_en.htm](http://ec.europa.eu/community_law/introduction/what_directive_en.htm) (last visited Mar. 3, 2010) ("EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so.").

<sup>97</sup> The United Kingdom, for example, has a dualist legal system whereby international law is normally not recognized as domestic law until Parliament passes a statute making it such. Nevertheless, as a member of the European Union, the United Kingdom must, along with all other EU member nations, give full effect to EU law within its domestic law. See also Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOK. J. INT'L L. 341 (2006) (arguing that international human rights law should be applied as an interpretative tool for informing domestic law).

<sup>98</sup> For example, any court at any level in any EU national court system can refer an issue involving EU law directly to the ECJ for immediate adjudication of that EU legal issue for remand to the national court. Moreover, after a national constitutional court has made a final ruling on an issue of EU law, the ECJ is required to review that national court decision for compliance with EU law. See Treaty of Rome, *supra* note 64.

<sup>99</sup> See CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 216 (2007) (discussing the development of implied external powers to parallel the European community's internal competence); MARTIN BARTLIK, *THE IMPACT OF EU LAW ON THE REGULATION OF INTERNATIONAL AIR TRANSPORTATION* 62 (2007) (analogizing U.S. powers under the implied-power theory to the EU context); PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 90 (2008) (providing both the narrow and wide formulations of implied powers); Competences of the European Union, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/competencesoftheeuropeanunion.htm>



Not only does EU law share the core fundamental legal characteristics of U.S. federalism, EU treaty law codifies the four freedoms of the movement of people, goods, services and capital that are the legal equivalent of the U.S. Constitution's Commerce Clause. This is all the more significant since the Commerce Clause is one of the few areas wherein U.S. federal law can legally regulate the actions of individuals, as opposed to simply the several states.

The European Union has thus witnessed a similar "federalization" of broad substantive areas of law as has the United States. Aside from defense and foreign policy, admittedly substantial exceptions, it is difficult to see how European Union law differs from U.S. federal law in terms of its effect as *domestic law*. Moreover, increasing areas of law and policy related to foreign policy and external relations are being "federalized" to the extent that: 1) many foreign policy issues are trade issues, which by definition must be dealt with at the EU, not national, level; 2) the freedom of movement of people, goods, capital and services within the European Union has meant that the relevant borders for issues related to business regulation, immigration, criminal control, product safety, and public safety are usually the borders of the EU, not the borders of each EU state.<sup>100</sup>

As the subsequent discussion illustrates, in many respects the evolution of European "federalism" has been even more dramatic than that of U.S. federalism. The members of the European Union began the process as not just independent countries with different

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(last visited Mar. 1, 2010) (discussing the competences of the EU granted in treaties as well as through implied powers).

<sup>100</sup> See, for example, Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84, which facilitates the free movement of people, goods and services between EU member countries by removing all internal border checks among the signatory countries, thus literally creating a single, external border. See also the Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing The European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C340) 1, available at <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>, which incorporated the Schengen policies into the EU's legal and institutional framework as the Schengen *acquis* to create a common set of rules to govern cross-border movement of EU citizens and immigration, to enhance security by enabling greater cooperation between customs, police and judicial officials of member countries and to establish the Schengen Information System designed to combat terrorism and organized crime by centralizing data for access by all member countries.

languages and vast cultural differences, but as historical adversaries with a vicious history of nationalist conflict. It was almost inconceivable in 1945 that the countries of Western and Central Europe would, within a span of approximately 50 years, emerge as a unified common market with most physical borders eliminated. For example, the Schengen Agreement, of which the great majority of EU countries are members, eliminates virtually all aspects of a physical border between member countries.<sup>101</sup>

The European Union now enjoys a completely unified common market largely identical to the national economy of the United States.<sup>102</sup> As in the United States, upon entry of a good in any European Union port, it becomes an EU domestic good and faces no internal obstacles or discrimination in its sale or distribution anywhere in the EU. As a result of the Schengen Convention, most countries have now completely eliminated any type of border controls whatsoever, so that it is often not even apparent when a traveler leaves one EU country and enters another.

However, in certain ways the federalization and unification of the European Union has gone further than that of the United States, at least domestically. It is easier for lawyers to practice law in a different EU Member State than it is for U.S. lawyers to practice in different individual state jurisdictions.<sup>103</sup> Unlike in the United States, students wishing to study in another EU state not only cannot be charged higher tuition than citizens of the other EU state, but they are also entitled to receive the same living stipends as students from the host country.<sup>104</sup> In summary, the European

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<sup>101</sup> See Press Release, Enlargement of the Schengen Area to be Completed: Border Controls to be Lifted at Airports on 30 March (Mar. 28, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/472> (last visited Mar. 1, 2010) (announcing the dismantling of air border controls as the final step to eliminating internal border controls within the EU).

<sup>102</sup> See generally Consolidated Version of the Treaty Establishing the European Community, *supra* note 89 (establishing a common market and economic and monetary union to promote sustainable development and a high degree of competitiveness).

<sup>103</sup> See Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons For the United States?*, 34 INT'L LAW. 307, 307-08 (2000) (comparing the laws governing lawyers in America with those in the European Union).

<sup>104</sup> Compare *Vlandis v. Kline*, 412 U.S. 441, 441 (1973) (recognizing the right of state universities to charge preferential tuition rates) with *Case C-293/83, Gravier v. Liege*, 1985 E.C.R. 593, 593 (granting entitlements to students from a country other than the host country to the same minimum subsistence allowance provided by the host country) and *Case 184/99, Grzelczyk v. Centre Public D'Aide Sociale*

Union frequently applies its principles of non-discrimination against individuals from other states,<sup>105</sup> and the EU equivalent of the U.S. Constitution's Privileges and Immunities clause,<sup>106</sup> more rigorously than the United States. The European Union even frequently applies Article 3 of the Treaty of Rome, embodying the EU common market principles of the four freedoms of movement, in a more rigorous and methodical fashion than do U.S. courts with respect to the U.S.'s own Commerce Clause.<sup>107</sup>

However, over the years it became increasingly apparent that the creation of a common market inevitably implicated much more than a unified economy. The lack of borders between EU states meant that the only meaningful border was that between the EU itself and non-EU states. Accordingly, immigration and asylum standards are in the process of being harmonized to prevent non-EU individuals from immigrating to the most permissive EU states and then freely relocating elsewhere in the EU.<sup>108</sup> Open borders have also meant that criminal regulation has had to be harmonized and coordinated. Current extradition standards are not based on international law, but rather permit an arrest warrant or extradition for crimes that may not necessarily be illegal in the country from which the alleged criminal is sought, a deviation from the "double-criminality" requirement in extradition law. In addition, environmental law has become increasingly

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d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. 6193 (charging different fees to students of other Member States is discriminatory).

<sup>105</sup> The principle of non-discrimination based on nation of EU nationality is embodied in Article 12 of the Treaty of Rome and is roughly analogous to the manner in which the U.S. Constitution's Equal Protection Clause is applied to prevent discrimination based on residency. *See generally* Treaty of Rome, *supra* note 64, at art. 12.

<sup>106</sup> The principle of European Union citizenship is embodied in Article 18, conferring rights roughly analogous to the U.S. Constitution's Privileges and Immunities Clause. *See id.* art. 18.

<sup>107</sup> Compare Case 302/86, *Comm'n on the Eur. Cmty. v. Denmark*, 1988 E.C.R. 4607 (prohibiting Denmark from imposing beverage container regulations) with *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473-474 (1981) (permitting Minnesota to impose requirements that beverage containers be made of cardboard, a product significant in Minnesota manufacturing). Differential tuition based on state residency is acceptable in the United States, but not in the European Union. *See generally* *Vlandis*, 412 U.S. at 452-53; Case 293/83, *Gravier v. Liege*, 1985 E.C.R. 593.

<sup>108</sup> *See* European Commission, *Immigration, Towards a Common European Union Immigration Policy*, [http://ec.europa.eu/justice\\_home/fsj/immigration/fsj\\_immigration\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/immigration/fsj_immigration_intro_en.htm) (last visited Jan. 11, 2010) (reporting how immigration standards are becoming more unified across nations).

“federalized” with environmental protection a central stated goal of the EU treaties.<sup>109</sup>

It is, however, in the areas of civil, political, economic and social human rights that the European Union has most clearly demonstrated the connection between economic and legal harmonization exemplified by TLH and by U.S. federalism. The jurisdiction of the EU’s European Court of Justice is technically limited to the law encompassed by the EU’s treaties.<sup>110</sup> Until relatively recently, EU treaties have largely focused on issues relating to the creation of the common market and largely avoided addressing human rights issues, much like the original US Constitution before the creation of the Bill of Rights. Human rights in the European Union, and in Europe in general, have been traditionally enforced by the European Court of Human Rights, which has jurisdiction over all the member countries of the Council of Europe, encompassing almost all of the countries in Europe.<sup>111</sup>

The governing treaty of the European Court of Human Rights is the European Convention on Human Rights and Fundamental Freedoms.<sup>112</sup> The European Court of Human Rights is an enormously respected institution, and its decisions are almost universally recognized and enforced by the member states of the Council of Europe. However, the EU treaties have increasingly begun incorporating greater human rights protections above and beyond those guaranteed by the European Convention, the role of the EU’s European Court of Justice as a guarantor of human rights has vastly increased.<sup>113</sup> This has resulted in the European Union’s

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<sup>109</sup> Consolidated Version of the Treaty Establishing the European Community, *supra* note 89, art. 174.

<sup>110</sup> See Court of Justice of the European Union, Jurisdiction: The Various Types of Proceedings, [http://curia.europa.eu/jcms/jcms/Jo2\\_7024/#competences](http://curia.europa.eu/jcms/jcms/Jo2_7024/#competences) (last visited Jan. 12, 2010) (defining the boundaries of European Court of Justice jurisprudence).

<sup>111</sup> See European Court of Human Rights, 50 Years of Activity: The European Court of Human Rights—Some Facts and Figures at 3, [http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFigures_EN.pdf) (last visited Feb. 21, 2010) (recounting how the European Court on Human Rights functions and listing the breadth of participants).

<sup>112</sup> *Id.* at 3.

<sup>113</sup> See European Commission, Respecting Fundamental Rights While Ensuring Security and Justice in the European Union, [http://ec.europa.eu/justice\\_home/fsj/rights/fsj\\_rights\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/rights/fsj_rights_intro_en.htm) (last visited Feb. 21, 2010) (noting that the best known tool for ensuring human rights is “the Charter of Fundamental Rights proclaimed by European Union leaders in December 2000”).

“federalization” of what were previously European international human rights norms. Because the human rights criteria for entry into the European Union are much more stringent than for entry into the Council, and because the benefits of EU membership are so much more valuable than membership in the Council because of the attendant economic and other advantages, the European Union is arguably able to force all of its member states to comply with its more rigorous human rights norms. With the admission of Russia into the Council of Europe, it has become more difficult for the Council of Europe to effectively enforce the norms in the European Convention, and more difficult to reach a consensus among the numerous and politically diverse members of the Council of Europe regarding what precisely those norms are. In this sense, the European Court of Human Rights has begun looking less like the European Human Rights Supreme Court and is coming to resemble a more traditional international law court.<sup>114</sup> This is occurring even as the European Court of Justice, by increasingly ruling on human rights protections explicitly provided for or implied within the Treaty of Rome, has come to resemble the United States Supreme Court in the sense that its jurisdiction has come to cover the full ambit of what would normally be domestic law.<sup>115</sup>

In this sense, the European Union has evolved from a common market into an entity that is perhaps potentially the most potent protector of individual human, economic and social rights the world has ever seen. It has the possibility of surpassing even the Council of Europe as the most effective and comprehensive protector of basic human rights in the world.

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<sup>114</sup> See Judy Dempsey, *Russia Most Concerned with Itself in the Battle for Human Rights*, INT'L HERALD TRIB., June 29, 2007, available at <http://www.nytimes.com/2007/06/29/world/europe/29ihtletter30.1.6413527.html> (recounting Russia's prior attempts to free itself of international supervision of its human rights practices).

<sup>115</sup> See, e.g., The Treaty of Lisbon Dec. 13, 2007, 2007 O.J. (C 306) 1. The Treaty of Lisbon incorporated the EU Charter of Fundamental Freedoms into EU Law, making that far-reaching treaty binding on EU member states. The Treaty of Lisbon also provided for the EU as a whole to become a party to the European Convention on Human Rights and Fundamental Freedoms, as opposed to previously where each EU member was party to the European Convention, but not the EU as a whole. See generally, EUROPA, *The Treaty at a Glance*, [http://europa.eu/lisbon\\_treaty/glance/index\\_en.htm](http://europa.eu/lisbon_treaty/glance/index_en.htm) (last visited on Jan. 14, 2010.). These steps are consistent with the European Union adopting an identity much more similar to a state than a league of countries.

This position is likely controversial since most human rights commentators regard the Council of Europe and its European Court of Human Rights as the preeminent human rights regional body in the world.<sup>116</sup> In fact, it could be argued that the European Union's European Court of Justice is an even more potent example of such regional human rights protection as it addresses the increasingly broad human rights protections offered by the European Union treaties, which will only be increased by the final ratification of the Lisbon Treaty.<sup>117</sup> The failure of most human rights theorists to recognize this reality reflects the classical and increasingly outdated dichotomy between international and domestic law.<sup>118</sup> When international norms are incorporated into "federal law" such as European Union law, with much more direct, expansive and binding authority, than traditional international bodies such as the European Court of Human Rights, that federal body has now arguably become a much more effective enforcer of human rights norms. Similarly, the elimination of some of the most horrific human rights abuses (slavery and American apartheid) occurred not through application of international law using traditional international legal institutions, but through the forceful application of those norms using federal law.<sup>119</sup>

As will be discussed later in this Article, this transformation of international law into federal law has been occurring at an accelerating rate in the European Union, and to a lesser extent in other regions of the world. As this Article will explore, this transformative process from international law to "federal law" has profound implications for international implementation of individual protections and regulation of labor, the environment, and other substantive areas of the law normally associated with national law.

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<sup>116</sup> See Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 793 (2006) ("[T]he European Court of Human Rights for all practical purposes has become Europe's constitutional court in matters of civil and political rights.").

<sup>117</sup> See, e.g., Treaty of Lisbon, *supra* note 115.

<sup>118</sup> See, e.g., Buergenthal, *supra* note 116.

<sup>119</sup> See U.S. CONST. amends. XIII, XIV, XV.

## 5. OTHER EXAMPLES OF INCIPIENT TLH ON A REGIONAL AND NATIONAL LEVEL

### 5.1 *Regional Institutions*

In addition to the European Union, other regional associations such as NAFTA, MERCOSUR, ECOWAS and the African Union, are tentatively and still inadequately moving towards basing their economic relationships on mutual respect for certain fundamental human rights norms, particularly those human rights<sup>120</sup> encompassing labor rights and other social and economic rights. The forums in which regional standards are discussed can, arguably, produce a particularly valuable opportunity for NGOs and other societal actors to participate in development of these regional norms in a manner that is frequently not recognized in traditional political science or international law theories of norm development. This regional dialogue in turn has a significant impact on the national policies of the member states. It is a dialectical process of norm “feedback” that is the essence of TLH. These non-state actors arguably have much more influence in regional forums than in global forums. This could result, in part, because personal and professional links that result from these forums can be maintained in order to produce a continuing dialogue for change. This is more effective than global forums where the participants are much less likely to maintain consistent communication and dialogue. Moreover, to the extent these forums are occurring in the context of economic regional associations, it is possible that the professional relationships among the participants are far more significant.<sup>121</sup>

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<sup>120</sup> See, e.g., MERCOSUR: A Space for Interaction, a Space for Integration, <http://www.unesco.org/most/p80ext.htm> (“Mercosur is much more than a commercial or investment phenomenon. It is a historical, cultural and political phenomenon, with vast ramifications in the Latin American and international scene.”). See also *id.* (“In fact, many other actors and societal forces are becoming active at the regional level, such as scientific and university communities, social movements (feminism, environmentalism, indigenous peoples, human rights movements), non-governmental organisations of various sorts (such as those engaged in the promotion of active citizenship of federations of grassroots organisations).”)

<sup>121</sup> The observations in this paragraph are based on the Author’s firsthand participation in numerous international NGO forums within the context of MERCOSUR and in other regional and international contexts.

NAFTA, through its labor side agreement,<sup>122</sup> provides an admittedly weak—but historically novel—mechanism for labor unions or government bodies to bring complaints against another NAFTA member for violations of labor rights, many of which are now universally recognized human rights.<sup>123</sup> The NAFTA Environmental Side Agreement provides for an analogous, although weaker, mechanism for environmental violations.<sup>124</sup>

MERCOSUR has begun to implement association-wide labor, human rights, environmental and other standards not explicitly related to trade among the countries.<sup>125</sup> For example, MERCOSUR had taken measures addressing discrimination based on race,<sup>126</sup> ethnicity,<sup>127</sup> gender,<sup>128</sup> and sexual orientation<sup>129</sup> on an association-

<sup>122</sup> North American Agreement on Labor Cooperation, U.S.-Can.-Mex, art. I, Sept. 13, 1993, 32 I.L.M. 1499.

<sup>123</sup> See generally Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 339-43 (1994) (discussing similar labor rights espoused by the International Labour Organization in foundational treaties of the EU, directive of the EU Commission, and the United States Generalized System of Preferences program).

<sup>124</sup> See North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 37, Sept. 14, 1993, 32 I.L.M. 1480 (citing Article Five's enforcement mechanisms, which are subject to Article 37's stipulation that "[n]othing in this Agreement shall be construed to empower a Party's authorities to take . . . enforcement activities in the territory of another Party"); Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 3, 6-9 (1994) (describing the various deficiencies of the Side Agreement's enforcement mechanisms, e.g., international obligations based on domestic standards, excusing enforcement based on lack of resources, and resistance to employing sanctions).

<sup>125</sup> Federico Luis Larrinaga, *Argentina, A New U.S. Non-NATO Ally*, 53 NAVAL WAR C. REV. (2000) (noting that the union of Argentina, Brazil, Paraguay, Uruguay and the United States has encouraged defense agreements between other countries to promote peacekeeping, environmental protection, and humanitarian relief).

<sup>126</sup> Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U. C. DAVIS J. INT'L L. & POL'Y. 13, 16 (2003) (noting that in addition to protecting basic labor rights, MERCOSUR includes a right to "freedom from discrimination in employment based on race, gender, age or other characteristic").

<sup>127</sup> *Id.*

<sup>128</sup> See, e.g., Regional Conference on Women in Latin America and the Caribbean, Mar del Plata, Arg., Sept. 7-8, 2005, Report of the Thirty Eighth Meeting of the Presiding Officers of the Regional Conference on Women in Latin America and the Caribbean, ¶ 13, U.N. Doc. LC/L.2430 (MDM. 38/4) (Dec. 2, 2005), available at <http://www.eclac.cl/publicaciones/xml/3/24033/lcl2430i.pdf>:

In terms of achievements in the region, [the Chairperson of the Presiding Officers] mentioned the incorporation of the Council of Ministers for



wide basis. It is particularly notable that MERCOSUR took a joint position on evidence released regarding the cooperation among the military regimes of southern South America during the 1970s and 1980s in the abduction and murder of political opponents of the military regimes of those six countries—the countries frequently referred to as the “Condor Group.” Indeed, the South American press “has christened cooperation between the dictatorships “the MERCOSUR of Terror.”<sup>130</sup> In 2010, the African Union threatened Madagascar with economic and other sanctions if the government did not comply with a power-sharing agreement.<sup>131</sup>

It would be reasonable to expect that as economic integration in MERCOSUR and other regional organizations progresses, social and political harmonization will follow as a means of reducing economic externalities with respect to investment decisions within the economic associations.

### 5.2. Individual State Participation in TLH

Quite apart from quasi-“federalism” and other kinds of regionalization, individual countries also participate in TLH through: (1) national regulatory standards with extraterritorial effect; (2) incorporation of international legal standards into

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Women’s Affairs of Central America (COMMCA) into the Central American Integration System (SICA). She also referred to the development, growth and strengthening of the Mercosur specialized meetings on women (REM), stressing that it was important to consolidate the mechanisms that existed in the region, to guard against their impairment and to enhance their profile . . .

See also INT’L LABOUR OFFICE, EQUALITY AT WORK: TACKLING THE CHALLENGES: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 5, (2007) (discussing the tripartite commission).

<sup>129</sup> See Press Release, Int’l Gay and Lesbian Human Rights Comm’n, Latin America: First Hurdle for LGBT Rights Passed Within Latin American Union (Aug. 30, 2007) (on file with author) (detailing the human rights committee of the Southern Common Market issuance of a declaration to recognize and promote an end to discrimination against sexual and gender minorities by member countries); Press Release, Int’l Lesbian, Gay, Bisexual, Trans and Intersex Ass’n, Mercosur Countries and Associated States Commit Themselves to the Fight Against Homophobia (Sept. 29, 2006) (on file with author).

<sup>130</sup> Mario Osava, *Latin America: The ‘Mercosur of Terror’ or Integrated Repression*, INTER PRESS SERVICE, Jan. 10, 1999.

<sup>131</sup> David Clarke & Angus Swan, *AU Gives Madagascar Leader Sanctions Deadline*, N.Y. TIMES, Feb. 19, 2010, available at <http://www.nytimes.com/reuters/2010/02/19/world/international-us-madagascar-crisis.html> (last visited Feb. 22, 2010).

national law ("Domestic Incorporation"); (3) provision of domestic legal forums for enforcement of international law; and (4) creating unilateral conditions on foreign aid or other bilateral transactions.

#### 5.2.1. *National Regulatory Standards with Extraterritorial Effect*

As discussed above, one jurisdiction can contribute to TLH simply by force of its domestic market. Most global automakers feel compelled to comply with California emissions standards in order not to be foreclosed from its enormous market.<sup>132</sup> China has been forced to address shortfalls in its product safety standards as a result of a public outcry in Europe and the United States and elsewhere over some of its dangerous products.<sup>133</sup> The generally more rigorous regulatory climate of the European Union has earned the European Union a reputation as the "world's regulator."<sup>134</sup> As long as such product or other regulations are based on objective and scientifically based standards, and do not arbitrarily restrict trade or constitute disguised restrictions on international trade, they are not foreclosed by the World Trade Organization's prohibition of quantitative restrictions on trade.<sup>135</sup>

#### 5.2.2. *Domestic Incorporation*

When a country incorporates international legal norms into its domestic law, it is, by definition, harmonizing its law with that of the international community. Examples include national constitutional provisions, such as those of The Netherlands, that provide that international law shall have automatic domestic effect, and in some cases, shall be supreme to national law or even the nation's constitution.<sup>136</sup> The United Kingdom, one of the most

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<sup>132</sup> Ken Bensinger, *California Emission Waiver Looms for Carmakers*, L.A. TIMES, Jan. 19, 2009, available at <http://Articles.latimes.com/2009/jan/19/business/fi-fueleconomy19?pg=1>.

<sup>133</sup> See Jeremiah Marquez, *China Will Look into Report of Cadmium in Children's Jewelry*, USA TODAY, Jan. 12, 2010, available at [http://www.usatoday.com/news/health/2010-01-10-childrens-jewelry-probe\\_N.htm](http://www.usatoday.com/news/health/2010-01-10-childrens-jewelry-probe_N.htm).

<sup>134</sup> *Brussels Rules OK: How the European Union Is becoming the World's Chief Regulator*, ECONOMIST, Sept. 22, 2007, at 66.

<sup>135</sup> General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (detailing the general exceptions to the obligations under the agreement).

<sup>136</sup> Rett R. Ludwikowski, *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, 9 CARDOZO J. INT'L & COMP. L. 253, 280 (2001) (explaining that in the Netherlands the constitution resolves a conflict between a treaty and the constitution so that the treaty may prevail if this result was

resistant countries to domestic incorporation of international law, has incorporated the European Convention on Human Rights into British law, giving individuals the right to bring a suit in any British court based on the Convention, the same as with any other British law.<sup>137</sup> Article VI of the United States Constitution gives direct effect and supremacy to international treaties, although the judicially created doctrine of “non-self-execution” has limited domestic incorporation of international law in practice. It is thus easy to see why many Europeans would view the supremacy of EU law as consistent with international law and not a type of federal law.

### 5.2.3. *Domestic Legal Forums for Enforcement of International Standards*

Many countries recognize the ability of individuals to enforce international legal norms, even in disputes among non-domestic entities. For example, in the United States, the Alien Tort Claims Act (“ATCA”) permits an alien to bring a lawsuit against another alien, as well as against U.S. defendants, for violation of customary international law.<sup>138</sup> The ATCA has also been used against multinational corporations that have been alleged to violate international law.<sup>139</sup> It is clear that the ATCA has become the focus of enormous opposition from many in the U.S. business community.<sup>140</sup>

Belgium provided competence to its national courts to hear cases against non-Belgium nationals for violations of international

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approved by the vote of two-thirds of the Parliament, the number of votes needed to amend the constitution).

<sup>137</sup> Human Rights Act 1998, c. 42, § 2 (U.K.).

<sup>138</sup> 28 U.S.C. § 1350 (2006).

<sup>139</sup> See, e.g., *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (residents of Papua New Guinea allowed to bring claim against mining corporation in U.S. courts under ATCA); *Doe I v. Unocal Corporation*, 395 F.3d 932 (9th Cir. 2002).

<sup>140</sup> See Demian Betz, Note, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163 (2001) (critiquing imposing liability on U.S. companies through the ATCA); see also Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 460 (2001) (“The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives.”).

criminal law, even for cases that had no factual connection to Belgium.<sup>141</sup> Essentially, the Belgium national courts were serving as a nationally operated International Criminal Court. Under pressure from the United States, Belgium changed its laws limit its courts' competence to cases involving a nexus with Belgium. Nevertheless, principles of universal jurisdiction and some international treaties grant the same ability to any national court to potentially exercise the same kind of jurisdiction. In the *Pinochet* case, the UK's House of Lords ruled that the United Kingdom had personal jurisdiction over former Chilean President Pinochet under the Convention against Torture in order to extradite him to Spain in order to stand trial for crimes against humanity.<sup>142</sup> It is not necessary under universal jurisdiction or the European Convention on Human Rights to demonstrate a nexus between the defendant and his or her actions, and the forum country.

In 2009, Spain continued to pursue indictment of six high level Bush Administration officials for violations of international criminal law<sup>143</sup> and the United States prosecuted Chuckie Taylor, the son of deposed Liberian President Charles Taylor for violations of the Convention against Torture in Liberia.<sup>144</sup>

The significance of these prosecutions in domestic courts of individuals for violations of international law cannot be overstated. To the extent the defendants are being prosecuted, or are being subject to civil suit, for violations of international law committed abroad, national courts are essentially taking on the functions of international courts. There are few more dramatic examples of the implementation of TLH than national courts applying international treaties or common principles of international criminal law against these defendants.

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<sup>141</sup> See Ian Black, *Belgium Asserts Right to Try Sharon*, THE GUARDIAN, Feb. 13, 2003, available at <http://www.guardian.co.uk/world/2003/feb/13/israel> (last visited Feb. 22, 2010) (discussing the amendment of Belgium's "universal jurisdiction" law and its application to former Prime Minister Ariel Sharon).

<sup>142</sup> *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L.) (U.K.).

<sup>143</sup> Julian Borger & Dale Fuchs, *Spanish Judge to Hear Torture Case Against Six Bush Officials*, OBSERVER, Mar. 29, 2009, <http://www.guardian.co.uk/world/2009/mar/29/guantanamo-bay-torture-inquiry>.

<sup>144</sup> Carmen Gentile, *Son of Ex-President of Liberia Gets 97-Year Prison Sentence*, N.Y. TIMES, Jan. 10, 2009, at A14.

#### 5.2.4. *Unilateral Conditions on Foreign Aid or Other Bilateral Transactions*

Many countries impose certain human rights, labor, environmental, and other conditions on their assistance to other countries. The United States, for example, requires that any country receiving unilateral tariff benefits extended by the United States to lesser developed countries must comply with "international labor standards."<sup>145</sup> The United States imposes similar standards for other types of foreign assistance.

It is a thesis of this Article that such conditionality can, in some circumstances, provide powerful incentives for the largest economic and political actors in those foreign countries to comply with these norms by harmonizing their national law, thus effectuating TLH.

### 6. THE POSSIBILITIES AND LIMITATIONS OF GLOBAL INSTITUTIONS AS PARTICIPANTS IN TLH: THE WTO, THE UN AND OTHER GLOBAL INSTITUTIONS

#### 6.1. *The World Trade Organization*

The World Trade Organization (WTO) is one of the two principal global governance body and, as discussed below, its substantive jurisdiction is complementary to that of the United Nations (UN). Whereas the UN has jurisdiction over any issue that may come before it, the WTO's jurisdiction has been strictly limited to issues involving trade.<sup>146</sup> Although the WTO's substantive jurisdiction is more restrictive than that of the UN, the WTO arguably has the potential to play a much more effective role in TLH. Indeed, this Article will argue that the WTO, in many respects bears several characteristics of a quasi-federal institution while remaining a quintessentially intergovernmental institution.

This idea is not as overreaching as it may first appear. As discussed earlier in this Article, the process of federalism was, to a great extent, grounded in a process of regional economic

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<sup>145</sup> It should be noted, however, that the "international labor standards" referenced by U.S. law, are essentially U.S. formulated norms, not actually international norms.

<sup>146</sup> Marrakesh Agreement Establishing the World Trade Organization art. II, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 [hereinafter Marrakesh Agreement or WTO Agreement].

globalization. As barriers to the free movement of people, goods, services and capital were removed, and entities such as the European Union and the United States realized that those four factors of economic activity implicated, to some extent, the majority of domestic law. To the extent the WTO's goal is to replicate regional economic globalization on a truly global level, the same logical tension between globalization and national law would appear to be present. This tension presumably expresses itself in the forms of TLH already discussed in this Article that are occurring outside the WTO framework. This tension may also need to be resolved within the WTO itself.

The WTO, like most international institutions, makes rules that are binding on more than one state. What distinguishes the WTO and its substantive law from other international law and institutions is the scope of the WTO's lawmaking power.<sup>147</sup> Normally, traditional international law is created on an issue by issue basis through specific treaties or by the evolution of a specific customary international law norm. As we saw in the creation of the United States and the European Union, the member states did not just create agreements among themselves regarding certain issues; they delegated decisionmaking power to a central authority with jurisdiction over a wide variety of substantive areas, and gave that central power the implied authority to go beyond the explicit grant of power in the founding documents. Thus, it can be argued that WTO members have such an important investment in WTO membership, and that membership is critical to their economic functioning, that they sign up for the entire package, even if they disagree with specific rulings or rules promulgated by the WTO. As this Article posits, the United States and EU states made the same kind of bargain when they entered their union.

WTO member states delegate to the WTO broad decisionmaking and rulemaking authority over a vast array of issues relating to trade, investment, intellectual property, and a myriad of other trade and economically related issues.<sup>148</sup> Even though the WTO's substantive jurisdiction is presumably strictly

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<sup>147</sup> The WTO has, for example, assumed jurisdiction over such diverse subject areas as: taxation, intellectual property, foreign investment, most kinds of services, government procurement, benefits to developing nations, agriculture, product "dumping," customs valuation, safety measures for protection of a country's citizens against disease or other unhealthy products, etc. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>148</sup> See, e.g., Marrakesh Agreement, *supra* note 146, art. II.

limited to issues directly related to trade, WTO judgments involving trade have also necessarily implicated and sometimes overturned countries' environmental, intellectual property, investment, and other policies normally considered domestic in character. The World Trade Organization thus exhibits many of the characteristics of U.S. and European federalism, even if on a less expansive scale.

It would seem appropriate for the WTO to assume a greater role in global governance since it is in a unique position to tie trade to compliance with human rights, environmental, and other norms. It can be argued that it is unfair to have the WTO promote and enforce free trade without regulating the abuses that can accompany unlimited free trade. The WTO is theoretically well-equipped to assume this role for at least four reasons.

First, the WTO is able to enforce its judgments in a way that the UN cannot. WTO judgments involve substantial economic consequences to the violators of its norms, sometimes involving denial of trade benefits amounting to millions and sometimes billions of dollars. Conversely, the United Nations does not have a mechanism in place to force countries to comply with its rulings short of extreme sanctions in particularly egregious and rare circumstances.

Second, because membership in the WTO entails enormous benefits, the incentive for countries to agree to be subject to the WTO's strong enforcement mechanisms is tremendous. One of the reasons the WTO enjoys global compliance with its norms in comparison with the UN is because the WTO produces tangible benefits for economic actors that are the principal political actors in the vast majority of countries. Unfortunately, there are not extensive or powerful human rights lobbies in the great majority of countries, and human protection issues do not affect peoples' material interests in the way that WTO membership does.

Third, although the WTO's jurisdiction is limited to trade, the WTO's requirements of "fair competition" and economic transparency have had an impact on member countries' domestic law.<sup>149</sup> The requirements of fair competition and transparency

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<sup>149</sup> Particularly in the area of subsidies, WTO rulings have required numerous countries to significantly modify their domestic economic policies that create an unfair advantage for their national companies over foreign competitors. See Marrakesh Agreement, *supra* note 146, art. XVI, par. 4 ("Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements"); see also RAJ BHALA,

does, however provide an opportunity for even greater domestic legal changes as the requirements of free trade require that countries be transparent to meet WTO minimum legal requirements, and countries' failure to fully comply with these requirements cannot be indefinite.

Fourth, it can be argued that environmental issues, economic regulation generally, and human rights issues (particularly labor rights issues), are in fact rationally related to trade. It follows from this argument that a company that takes advantage of weak labor, environmental, or safety standards in less protective countries and then sells its products in countries that have higher levels of protection enjoys an arguably unfair trade advantage.<sup>150</sup> It also undermines those standards for human protection in the more protective country by creating a powerful economic argument for lowering standards in those more protective countries. Labor unions obviously recognize this, and have begun to mobilize internationally. Their motive does not come principally out of concern for their brethren in other countries, but rather because they realize that raising international labor norms protects the norms in their own countries.<sup>151</sup>

As discussed below, however, the WTO's failure to tie free trade to these other related issues has been the greatest problem in

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INTERNATIONAL TRADE LAW HANDBOOK 14-18 (2001) (listing the trade-related statutes in U.S. law); DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 2 (2008) ("In many cases, these national laws are the domestic implementation of WTO Obligations").

<sup>150</sup> See, e.g., Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 338 (1995) (arguing that labor rights and international trade are linked as "[t]he neat division between commercial and social aspects of trade has evaporated under the wrenching pressure of new forces in a globalized economy and its shifting patterns of investment and disinvestment").

<sup>151</sup> See, e.g., Ronaldo Munck, *Globalization and Democracy: A New "Great Transformation"?*, 581 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 14-15 (2002):

[I]t is now widely recognized that the impact of globalization on workers worldwide has brought about a profound process of rethinking and reorganizing within labor on a global scale, with even the once remote and conservative International Congress of Free Trade Unions advocating such radical measures as a global social movement unionism to counter capitalist globalization. Labor is not everywhere in retreat, and workers' rights, though undercut by neoliberalism, are continuously and vigorously fought for across the world.

(citation omitted).



effective TLH with respect to these issues. This Article will present the reasons why the WTO has failed to live up to its potential, and suggest how TLH can help resolve this problem.

### 6.2. *The WTO's Limitations as an Agent of TLH*

Despite some similarities between the WTO and federal structures, it would be inappropriate to characterize the WTO as even a quasi-federal structure. The implied powers of the WTO to make rules, although vast with respect to international commerce, are strictly circumscribed to only issues directly related to trade.<sup>152</sup> The discussion below will illustrate why the WTO has been reluctant to take on a scope of substantive competence beyond the competence over trade issues it currently has.

It can be argued that if the WTO were to tie trade issues with human rights, environmental, and labor issues, it could not perform its central function for at least three reasons.

First, by definition, the WTO is predicated upon the participation of the vast majority of the world's countries. If the WTO undertook the function of enforcing norms not directly related to trade through sanctions, it would run the risk of having a large number of the world's countries leave the WTO. The WTO's power lies precisely in its ability to impose rules without countries abandoning the system.

Second, human protection norms encompassing environmental, labor, and human rights are highly subjective. A country may be viewed by some countries as a serious human rights violator deserving of economic or other sanctions, while other countries may disagree. For example, the United States attempted to impose economic sanctions on foreign companies doing business in Cuba in provisions of the Helms-Burton Act. The United States has agreed not to enforce those provisions under threat of WTO sanctions since those provisions would essentially require foreign companies to observe a trade embargo against Cuba when no other country has such restrictions.<sup>153</sup> In other words, there may be dispute over whether an action by a particular country is in fact a violation of human rights norms. Even if there

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<sup>152</sup> See Marrakesh Agreement, *supra* note 146, art. II.

<sup>153</sup> See generally Stefaan Smis and Kim Van der Borght, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227 (1999) (describing the back and forth between the United States and European Union with regard to U.S. policy toward Cuba).

is consensus on the existence of such violations, there may be a dispute over what is the appropriate action to be taken in the face of such violations.

Third, if the WTO did explicitly tie trade benefits to human protection norms, it would become a de facto United Nations since it would be obligated to define the norms that it would enforce through trade sanctions, requiring the same negotiation among very diverse countries that limits the United Nations. Moreover, such negotiation would probably result in an even lower level of norm creation than that which exists now since the penalties for non-compliance would be so much more severe.

### 6.3. TLH as a Solution to the WTO Impasse

Despite the inherent limitations of the WTO, it is important to recognize that real opportunities may exist for synergy between the WTO and TLH in effectuating compliance with human protection norms.

The WTO will not generally enforce a trade rule that conflicts with independently created international law, even if that particular norm is recognized in a treaty signed by a limited number of nations, as long as it is not otherwise arbitrary or a disguised restriction on trade.<sup>154</sup> For example, WTO rules normally prohibit quantitative limitations on imports. It has, however, allowed countries to do so in compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This potential conflict has been the source of much legal commentary and concern among environmentalists.<sup>155</sup> Thus,

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<sup>154</sup> See, e.g., Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903, 904-05 (2004):

For example, when the US agrees to a WTO treaty one day, and the next day it agrees to an MEA [Multilateral Environmental Agreement], the US acts as one and the same state (even though it does so in different fora). The WTO should *not* be used as a trade-only safe haven to circumvent MEA obligations that are, in principle, of equally-binding force between WTO members that are also party to the MEA.

(Alteration in the original).

<sup>155</sup> See Shannon Hudnall, *Towards a Greener International Trade System: Multilateral Environmental Agreements and the World Trade Organization*, 29 COLUM. J.L. & SOC. PROBS. 175, 182 (1996) (asserting that world trade regulation must include environmental concerns as one of its objectives); Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT'L L. 673, 719-20 (2001) (recognizing the North American Free Trade

although the WTO does not itself formulate human and environmental norms it may take into account norms produced by TLH or other forms of international law in determining whether an environmentally based trade restriction measure violates WTO rules. There is still ambiguity about the precise hierarchy of such conflicting rules.<sup>156</sup>

Thus, there is arguably the possibility that countries will tie trade benefits to independently created international norms, even if such norms are not adopted by a majority of the world's countries, as long as such norms are not arbitrary or disguised restrictions on trade.<sup>157</sup> This could provide an opportunity for trade unions in developed countries to push for implementation of a global or near-global minimum wage or other labor protections. Countries could then tie trade advantages to compliance with these international standards without violating WTO rules. This linkage has been a source of tremendous political debate with respect to the free trade agreements that the United States has signed with various Latin American countries. Ultimately, the argument can be made that it is not the WTO that has prevented such linkages but rather domestic politics in the relevant countries.<sup>158</sup>

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Agreement for incorporating environmental concerns into a side agreement, but emphasizing the limited nature of their enforceability); David Palmett & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L. L. 398, 412 (1998) (acknowledging that international agreements may alter the legal obligations of WTO member states); Wen-chen Shih, *Conflicting Jurisdictions over Disputes Arising from the Application of Trade-Related Environmental Measures*, 8 RICH. J. GLOBAL L. & BUS. 351, 387-88 (2009) (identifying a potential source of conflict where the WTO and the enforcement mechanism of multilateral environmental agreements would solve the same dispute in different ways); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 919-21 (1996) (concluding that WTO policies and multilateral environmental agreements are fundamentally at odds with each other because the former seeks to open trade while the latter are enforced through trade restrictions); Elizabeth Granadillo, Note, *Regulation of the International Trade of Endangered Species by the World Trade Organization*, 32 GEO. WASH. J. INT'L L. & ECON. 437, 453-57 (2000) (identifying several points of tension between WTO regulation and the Convention on International Trade in Endangered Species)

<sup>156</sup> See Wold, *supra* note 155, at 917-18 (characterizing the dispute as one addressing both who defines the criteria to evaluate environmental concerns, as well as who may legitimately apply it).

<sup>157</sup> See Shih, *supra* note 155, at 357 (citing current examples of trade-related environmental measures).

<sup>158</sup> See Christian Brandt, *Laboring Toward Equality: NAFTA's Effects and CAFTA's Wisdom*, 27 HAMLINE J. PUB. L. & POL'Y 77, 92-95 (2005) (attributing the bulk of CAFTA objections to those addressing labor provisions); Marianne Hogan, *DR-CAFTA Prescribes a Poison Pill: Remediating the Inadequacies of Dominican*

WTO member countries are unlikely to adopt such linkages in the policies of the WTO by themselves because of the enormous political, economic, and social diversity that characterizes the membership. Because of this diversity, the problem of the lowest common denominator makes such linkages within the WTO problematic.

Nevertheless, it is a thesis of this Article that TLH allows groupings of countries to implement norms that *effectively* bind non-participating countries by creating rules of trade that have to be followed by all countries wishing to trade with that particular grouping of countries. The elegance of TLH is that it permits shifting coalitions of countries or other interest groups to implement such norms, creating a “ratcheting up” of protective international norms.

#### 6.4. *The United Nations*

The United Nations and its affiliated institutions are one of the principal institutions of global governance, particularly with respect to issues of human rights and international security.<sup>159</sup> The United Nations system remains the only truly global body with an unrestricted mandate to develop and implement international law. Nevertheless, cognizant of its global role as a representative body of liberal and illiberal states, it has simultaneously adopted a procedurally statist approach with considerable deference towards state sovereignty and a strong bias against coercive intervention.<sup>160</sup>

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*Republic-Central American Free Trade Agreement Labor Provisions*, 39 SUFFOLK U. L. REV. 511, 532-36 (2006) (arguing that CAFTA does not provide incentives to improve labor standards and outlining improvements for the future); Lyndsay D. Speece, Comment, *Beyond Borders: CAFTA's Role in Shaping Labor Standards in Free Trade Agreements*, 37 SETON HALL L. REV. 1101, 1124 (2007) (suggesting that labor standard enforcement mechanisms found in the United States' Free Trade Agreement with Jordan be incorporated into CAFTA to make the agreement more effective); Brandie Ballard Wade, *CAFTA-DR Labor Provisions: Why They Fail Workers and Provide Dangerous Precedent for the FTAA*, 13 LAW & BUS. REV. AM. 645, 677 (2007) (concluding that the failures of CAFTA to improve labor standards should not be repeated in other free trade agreements negotiated by the United States).

<sup>159</sup> See U.N. Charter art. 1, para. 1, para. 3 (articulating the four main purposes of the United Nations, including “[t]o maintain international peace and security” and “promoting and encouraging respect for human rights”).

<sup>160</sup> The Charter of the United Nations articulates a clear commitment to respect state sovereignty:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic

Accordingly, consistent with its normative embrace of human rights, the United Nations' bodies have frequently condemned human rights abuses in member nations, but have only infrequently authorized coercive intervention in response to those violations with economic sanctions<sup>161</sup> or military force.<sup>162</sup>

It is this gap between the normative human rights framework of the United Nations, and its inability or unwillingness to enforce these rights in a more assertive manner which has provided the justification and need for regional human rights and security bodies. It is a central thesis of this Article that many regional bodies with the ability or potential to advance human rights norms and other issues are originally based on economic foundations. They have expanded their jurisdiction to encompass human rights and other issues as they have realized that true economic integration is difficult or impossible without harmonization of indirectly related legal norms.<sup>163</sup>

There are numerous benefits of TLH as a *complementary*, non-coercive, organic, and frequently more effective means of advancing human rights and other goals of international well-being.

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jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII [Actions with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression].

U.N. Charter art. 2, para. 7. To the extent violations of the human rights of a country's people constitutes a "threat to the peace" intervention may be permitted under the Charter of the United Nations. U.N. Charter art. 39.

<sup>161</sup> Examples of such intervention include the authorization of economic sanctions and an arms embargo against Rhodesia and South Africa. As noted by Louis Sohn:

Apartheid in South Africa became transformed through interpretations of United Nations law from a social evil, to a repugnant practice, to a crime under international law, to a threat to the peace that must not be tolerated by the international community and which warranted the imposition of mandatory economic sanctions against the deviant government.

Louis B. Sohn, *The UN System as Authoritative Interpreter of Its Law*, in 1 UNITED NATIONS LEGAL ORDER 169, 228 (Oscar Schachter & Christopher C. Joyner eds., 1995).

<sup>162</sup> Examples of such intervention include Security Council authorization of military intervention in Haiti and the Serbian province of Kosovo.

<sup>163</sup> See *supra* Sections 2-5.

First, TLH avoids the problem of international norm creation and enforcement being subject to the lowest common denominator. The United Nations, as an institution composed of the world's nations, is hindered in developing norms that many of its member states do not recognize in their own legal systems. To the extent it serves as a human rights enforcement mechanism for the world community (except those few countries that have been expelled for particularly egregious human rights abuses or threats to the peace), its enforcement mechanisms and norms are necessarily subject to a much "lower" common denominator. To the extent the United Nations has, in fact, developed international legal norms that many of its members do not observe,<sup>164</sup> it is unable to enforce those norms. The development of legal norms in TLH, on the other hand, is aided by the ability of smaller groups of countries or other entities agreeing on a common set of norms, permitting the greatest possible promulgation and enforcement of human protections within any grouping of countries.

In terms of enforcement, the only way the United Nations could truly "enforce" its relatively modest "floor" of human rights protections is to expel those countries that refuse to comply. The problem with this mode of enforcement is that it destroys one of the most important functions of the United Nations as a global body with an almost universal membership. This is not to say that the system should not constantly strive to strengthen its enforcement mechanisms and norms, but rather that it is necessarily limited by the extraordinarily diverse constituency it serves.

Some international law commentators have advocated the articulation of a universal set of human rights standards applicable to all countries and denying participation in the international community to those countries that fail to fulfill those global standards.<sup>165</sup> It certainly may be appropriate to expel certain

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<sup>164</sup> For example, every member of the United Nations is obligated to respect the Universal Declaration of Human Rights, either because it is incorporated into the UN Charter or because many of its provisions have become part of customary international law. *See, e.g.,* *Filartiga v. Peña-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (identifying the prohibition of torture as an element of international customary law, as evidenced by its inclusion in the Universal Declaration of Human Rights). Moreover, numerous countries are signatories to the ICCPR and other UN conventions while clearly in non-compliance with the treaties' provisions.

<sup>165</sup> *See, e.g.,* FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 2 (1998) (arguing that states must "respect human rights as a precondition for

countries from the United Nations that engage in systematic and severe human rights violations. Though, but for the “all-or-nothing” approach to mean anything other than the system that is already in place, a substantially greater number of countries would have to be expelled from the United Nations. A truly useful institution for world dialogue among vastly different countries would then lose much of its original purpose. Another problem with the all-or-nothing approach is that it does not address what system of human rights protection, or even world order, would have to exist to regulate the conduct of those countries that do not comply with those global standards, but are short of constituting true international “outlaws.” These all-or-nothing legal commentators likely underestimate the importance of maintaining a system of global relations, which permits liberal and illiberal countries to coexist peacefully and maintain communication through dialogue. In other words, even assuming the underlying normative assumptions these advocates must assume, the all-or-nothing approach still leaves unanswered the question of what the international community’s strategy should be with respect to those countries that are *not* eligible to join the international community. Those countries that are ineligible will continue to exist, and unless a system of international relations provides rules that allow all of the countries of the world to coexist, the potential for conflict can only rise.

TLH, on the other hand, arguably serves as a valid alternative to the all-or-nothing approach. The theory promotes using higher standards of human protection than can be utilized on the UN floor, while still allowing the UN to use its weak enforcement mechanisms on those countries that would tolerate nothing more.<sup>166</sup> There are examples of associations of states formed independently of the United Nations that address human rights violations outside the borders of their member states. Such examples include the North Atlantic Treaty Organization

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joining the international community” because international law can only be based upon an alliance of states that respect the human rights of their own citizens).

<sup>166</sup> See James D. Wilets, *Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection*, 6 ILSA J. INT’L & COMP. L. 645, 649–651 (2000) (discussing the advantages of using regional human rights systems to avoid the “all-or-nothing” approach that a monolithic, unipolar form of human rights enforcement would engender).

(NATO)<sup>167</sup> and the Economic Community of West African States Monitoring Group (ECOMOG),<sup>168</sup> the latter of which militarily intervened in the Liberian and Sierra Leone Civil Wars.<sup>169</sup> Nevertheless, NATO's belated intervention in Bosnia and Herzegovina, its delayed threat of military intervention in Kosovo, and the willingness of the alliance to negotiate with Slobodan Milosevic illustrates the limitations of such efforts.

Second, TLH is an organic process, relying on a web of mutual benefits and incentives for compliance with common rules. Thus, TLH contains disincentives with varying degrees of effectiveness, for member countries to deviate from their harmonized norms. The use of economic integration, which is at the heart of TLH, could provide a clear economic incentive for members of regional groupings not to stray from international norms developed through TLH.

Third, because TLH accounts for a deeper integration of the human protection norms existing in the participating countries, it helps to dialectically protect the domestic system of human rights support in those countries. Its international norms will arguably only contribute to domestic justice as long as countries are willing to recognize the authority of those norms in their domestic legal system. This Article posits that this willingness to recognize international norms is much more likely to occur as a result of TLH than when imposed by an international institution from above.

Finally, the process of creating and enforcing a norm of human rights protection is most effective when done in a synergistic and dialectical manner between TLH and the UN. Just because the United Nations is limited in its ability to enforce the norms it creates does not mean that the norms serve little or no purpose. It is thus possible that the creation of ostensibly non-enforceable norms leads to practical enforcement by other entities

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<sup>167</sup> See generally North Atlantic Treaty Organization (NATO) Homepage, <http://www.nato.int/cps/en/natolive/index.htm> (last visited Jan. 23, 2010) (describing the history and function of NATO).

<sup>168</sup> ECOMOG is the military arm of the Economic Community of West African States (ECOWAS). See generally Economic Community of West African States ECOWAS Homepage, [http://www.comm.ecowas.int/sec/index.php?id=about\\_a&lang=en](http://www.comm.ecowas.int/sec/index.php?id=about_a&lang=en) (last visited Jan. 23, 2010) (describing the history and function of ECOWAS and ECOMOG).

<sup>169</sup> See *Profile: Ecomog*, BBC NEWS, [http://news.bbc.co.uk/2/hi/africa/country\\_profiles/2364029.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/2364029.stm) (2004) (last visited Jan. 23, 2010) ("The bloody civil war in Liberia prompted the Economic Community of West African States (Ecowas) to set up an armed Monitoring Group—Ecomog for short—in 1990.").



independently of the UN through the process of TLH.<sup>170</sup> In order for TLH to develop normative standards recognized by the participants in TLH, it is helpful to have internationally recognized human protection standards with which to begin. Moreover, many international law norms have been used in litigation against companies that perpetuate the countries' human rights violations, including severe labor rights violations.<sup>171</sup> After all, it can be argued that in most countries more people are affected personally by work related human rights violations than human rights violations committed by a political leader—the latter is usually limited to individuals who are courageous enough to speak out against the political leader.

The willingness of countries to entertain such suits may be affected, in turn, by the extent to which TLH has created incentives for that country to increase its human rights enforcement mechanisms.

## 7. RECONCEPTUALIZING THE STATE AS THE ULTIMATE GUARANTOR OF INDIVIDUAL RIGHTS, LABOR RIGHTS, THE ENVIRONMENT, AND THE COMMUNITY IDENTITY

### 7.1. *TLH and the State*

There is a tremendous amount of literature examining the effects of globalization on the ability of a state to regulate economic and other processes happening within itself. What has been overlooked, however, is the dialectical relationship between the state and international law, and the state and the individual as a result of TLH. There has also been relatively little research on the changing relationship between the state and the national and/or ethnic groups that live in the territory of the state as a result of economic and legal globalization.

To the extent that tensions between the state and the different national, ethnic or religious groups have contributed to armed

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<sup>170</sup> See *infra* notes 175–77 and accompanying text.

<sup>171</sup> An example in the United States is the Alien Tort Claims Act, which has been used to bring suits against companies that have collaborated, even in an indirect manner, with human rights abuses by the government of the country in which they are doing business. See, e.g., *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000) *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002) (acknowledging that corporations can be held liable under the Alien Tort Claims Act for violations of international human rights norms in foreign countries).

conflict and even genocide, TLH may hold the promise of ameliorating one of the greatest sources of conflict in the world today. It can do so by separating the concept of the nation from the state, thereby eliminating the impetus for armed conflict between minority groups and the state. Indeed, the principal underlying rationale for the European Union was to eliminate war in the European subcontinent as the functions of the state shifted from nation-states to a state authority unaffiliated with a specific national or ethnic group.<sup>172</sup> This Article will demonstrate that the state's role as the creator of community identity has been normatively problematic for exactly the reasons described above, and its role as the guarantor of individual and environmental interests is becoming increasingly irrelevant as an empirical matter. In order to understand how the process of globalization has affected the state, and the implications of that effect, it is important to define what the "state" is and has been, in terms of the essential functions it has served, and to determine how those functions have been affected by globalization.

The state, by definition, possesses a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.<sup>173</sup> The *functions* of a state can generally be categorized as: (1) providing security and civil rights for individuals and communities within the state, with respect to internal and external actors; (2) providing rules for the conduct of economic activity within the state, including property rights; (3) providing services for the population in the state such as education, provision of water, transportation and other basic needs of the population; and (4) providing a sense of common identity for the citizens of the state.<sup>174</sup>

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<sup>172</sup> See, e.g., Europa, *The History of the European Union*, [http://europa.eu/abc/history/index\\_en.htm](http://europa.eu/abc/history/index_en.htm) (last visited Jan. 14, 2010). ("The European Union is set up with the aim of ending the frequent and bloody wars between neighbours...").

<sup>173</sup> See, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 100 (1965) (describing an early articulation by the American Law Institute of the minimum requirements to be considered a state by other nations); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) ("Under international law, a state is an entity that has a defined territory a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

<sup>174</sup> See Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 137-39 (2005) (explaining the traditional functions of states and nation-states).

## 7.2. *The Nation-State*

"Nation-states," i.e., those states which function as juridical and political embodiments of their dominant national group,<sup>175</sup> take the fourth function described above one step further by tying the national identity of the state/country to the identity of the dominant national/ethnic group within the country. In a classic nation-state, the state expressly and directly promulgates the cultural identity and other interests of the dominant national/ethnic group within the state. Examples of classic nation-states include France, Japan, Germany, Bhutan, Nepal and Israel, where citizenship has traditionally been tied to either a sanguineous or cultural connection to a particular ethnic/national identity.

A nation-state cannot have equal protection under the laws and non-discrimination for its citizens if the state itself is the juridical embodiment of only one ethnic/national group. Therein lies the normative issue with those states that can be characterized as "nation-states." As this Article argues, however, the diminishing role of the state as a result of TLH suggests that the traditional role of the nation-state as the building-block of international law can be modified, and often even eliminated, without diminishing the four functions that citizens have traditionally drawn from the state.

Although the contemporary dominance of the nation-state in the international legal system would seem to suggest that it is the natural building block and basic unit in international law, the discussion below illustrates that the nation-state (as opposed to the state itself) has historically been an aberration.<sup>176</sup> As Stein Rokkan notes, even France, the quintessential nation-state, was still engaged in nation-building as late as the nineteenth century in its peripheral territories such as Brittany and Occitania.<sup>177</sup> Eugen

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<sup>175</sup> The nation-state is traditionally defined as "a relatively homogenous group of people with a feeling of common nationality living within the defined boundaries of an independent and sovereign state, especially a state containing one as opposed to several nationalities." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1505 (1981) (emphasis added). The term "nationality" is itself vague. It is commonly defined as "a usually large and closely associated aggregation of people having a common and distinguishing origin, tradition and language and potentially capable of or actually being organized in a nation-state." *Id.*

<sup>176</sup> See *infra* note 184 and accompanying text.

<sup>177</sup> See STEIN ROKKAN, *Cities, States, and Nations: A Dimensional Model for the Study of Contrasts*, in BUILDING STATES AND NATIONS 84 (S.N. Eisenstadt & Stein

Weber gives figures from eighteen sixty-three that show 7,426,058 Frenchmen did not speak French as their first language versus 29,956,167 who did.<sup>178</sup> He noted that the process of integrating certain regions such as Corsica was still ongoing in the twentieth century.

### 7.3. TLH and the Nation-State

TLH's influence on the nation-state is profound and manifold. First, as state and lawmaking functions are increasingly assumed by multi-state entities, like in the case of the European Union, it becomes apparent that many traditional state functions do not have to be tied to a particular nation or state. The traditional rationale for the nation-state is that the national identity promulgated by the state reinforces the cohesion and unity of the state. As discussed immediately below, however, we are increasingly witnessing lawmaking power in countries such as Spain, Belgium, and the United Kingdom, simultaneously flowing downward to the local level with respect to issues of local concern, and upwards to the international level for issues of economic or security concern.<sup>179</sup> For example, the United Kingdom has witnessed the emergence of the Scottish and Welsh parliaments with jurisdiction over lawmaking of particular concern to the Scottish and Welsh national groups.<sup>180</sup> Meanwhile, European Union law now comprises a substantial portion of the lawmaking done in any particular EU country.<sup>181</sup> Much of the legislation resembles the kinds of federal legislation passed in the United States. The irony, of course, is that as TLH makes the central government of the nation-state increasingly irrelevant, it also empowers local jurisdictions and national groups to assume lawmaking control over the issues most important to them.

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Rokkan eds., 1973) (describing the relatively modern nation-building activities undertaken by the French Empire).

<sup>178</sup> EUGEN WEBER, PEASANTS INTO FRENCHMAN: THE MODERNIZATION OF RURAL FRANCE 1870-1914, 500-01 (1976).

<sup>179</sup> See *infra* notes 179-80 and accompanying text.

<sup>180</sup> The Scottish Parliament, History, <http://www.scottish.parliament.uk/vli/history/index.htm> (last visited Jan. 14, 2010) ("When the Scotland Act 1998 was passed it led to the establishment of the first Scottish Parliament since 1707."); Welsh Assembly Government, History, <http://wales.gov.uk/about/history/?lang=en> (last visited Jan. 14, 2010) (explaining that the National Assembly for Wales was established in 1999).

<sup>181</sup> See *supra* note 100 and accompanying text.

The concept of simultaneous delegation of powers to a higher level and devolution of other powers to the local level is alluded to by James Baker in a speech before the Berlin Meeting of the Council of Foreign Ministers of the Council on Security and Cooperation in Europe:

Evolution and devolution are not alternatives, but complementary, and indeed interdependent developments . . . [T]he architects of a united Europe have adopted the principle of "subsidiarity," something like American "federalism"—that is, the devolution of responsibility to the lowest level of government capable of performing it effectively. By the same token, the process of devolution in the East will lead to fragmentation, conflict, and ultimately threaten democracy if it is not accompanied by the voluntary delegation of powers to national and even supranational levels for basic matters such as defense, trade, currency, and the protection of basic human rights—particularly minority rights.<sup>182</sup>

Second, TLH demonstrates that not only is the nation-state an unnecessary institution for primary lawmaking, a strong argument can be made that the nation-state can frequently, by its very definition, violate fundamental human rights.

#### 7.4. *The Process of State Dissolution and Reformulation*

It may seem premature to question the suitability of the nation-state as the foundational element of international law when the last decade has seen the proliferation of numerous nation-states throughout Eastern Europe and Asia, and increased demands for secession from national movements in countries as diverse as Canada, China, Georgia, India, Indonesia, Nigeria, Russia, Serbia, Spain, Sri Lanka, Sudan, The Congo, and the United Kingdom.

However, concurrent with the centrifugal process of nationalism and secession is an ongoing centripetal process of nation-states coming together to form larger political entities as exemplified by TLH.<sup>183</sup> The seemingly contradictory centrifugal

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<sup>182</sup> James A. Baker, *The Euro-Atlantic Architecture: From East to West*, Address Before the CSE Council of Foreign Ministers in Berlin (June 18, 1991), reprinted in VOJTECH MASTNY, *THE HELSINKI PROCESS AND THE REINTEGRATION OF EUROPE 1986-1991*, at 308 (1992) (emphasis added).

<sup>183</sup> See *supra* Section 4.

forces of nationalism and secession, and the centripetal forces of globalization, confederation and federation, can be understood as different stages of the same historical process that has been occurring since well before the Seventeenth Century.<sup>184</sup> This historical process has consisted of roughly four stages: (1) the formation of groups of individuals into an identifiable "nation," "tribe" or "people;" (2) the formation by force of large, multi-ethnic empires, incorporating numerous nations, tribes or peoples into a single "state;" (3) the dissolution of those multi-ethnic empires into their elemental tribes or nation-states; (4) the coming together of those nation-states, or national groups, into larger associations of a federative or confederate nature<sup>185</sup> on the basis of equality and mutuality. This last stage, incorporating the concept of initial equality and mutuality, harks back to the concept of "original contract," a concept which has formed much of the theoretical foundation for our modern concepts of individual human rights and which John Locke, and more recently John Rawls, have devoted considerable attention.<sup>186</sup> This Article will refer to this entire process as "State Dissolution and Reformulation."

The process of State Dissolution and Reformulation can occur through forcible or peaceful disintegration of a multi-ethnic political entity into separate political entities ("State Dissolution").<sup>187</sup> Alternatively, the process can occur *internally*, within the political framework of an existing state, through the peaceful accommodation of the legitimate aspirations of ethnic and national minority groups while still preserving the political integrity of the original state ("Internal National Accommodation").<sup>188</sup> Thus, the creation of the nation-state out of

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<sup>184</sup> For a cogent history of the development of the nation-state, see Rokkan, *supra* note 177.

<sup>185</sup> The Swiss Confederation is a notable early historical example of this process of confederation, as is the United States, which was initially a confederation of sovereign entities. A more contemporary example is the European Union and the emerging MERCOSUR/L Union in South America.

<sup>186</sup> See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (rendering thoroughly a "justice as fairness" theory based off of contract principles).

<sup>187</sup> Examples of states and entities that underwent this process include: the Soviet Union, Czechoslovakia, Yugoslavia, the Ottoman Empire, the Hapsburg Empire, the Holy Roman Empire, the Roman Empire, the Macedonian Empire, and the Persian Empire.

<sup>188</sup> Examples of states that underwent this process include: Canada, the present-day United Kingdom, the Swiss Confederation, and, to some extent, Spain.

multi-ethnic empires or states is simply one—rarely used—alternative for a state to respond to the pressures of its multi-ethnic character. To the extent the nation-state does not accommodate its national, religious or other minorities through National Accommodation, it will do so unwillingly through State Dissolution.

International law must respond to the concomitant centrifugal and centripetal forces of State Dissolution and Reformulation and avoid the worst aspects of nationalism. This can be done by acknowledging ethnic and national aspirations for cultural and national development *while simultaneously disassociating those aspirations from the concept of statehood*. Our concept of the state must be revised. The state's role cannot constitute the juridical and political embodiment of the dominant national group. The state must be disassociated from the nation precisely because no national group should claim a monopoly or hegemonic interest in the coercive power of the state.<sup>189</sup>

The stages described in the process of State Dissolution and Reformulation are far from discrete and may frequently overlap, and the states emerging from the process are themselves far from static entities. The United States, for example, is a state which was originally a confederation of several smaller states. The "American" people, or nation, which emerged from that confederation has itself evolved from one that identified itself entirely as one of European origin to one that has slowly, but still incompletely recognized its diverse ethnic and racial composition.

Moreover, it may be difficult to distinguish many contemporary nation-states from their multi-ethnic imperial predecessors. For example, Spain can be viewed as a classic nation-state, where the state is the embodiment of the dominant Castilian national identity, but tolerates the existence of other

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<sup>189</sup> The coercive hegemony of one group over others within a single political entity, particularly to the point that it violates the rights of ethnic, racial, religious or national minorities constitutes a violation of numerous international human rights treaties, declarations and customary international law. *See, e.g.,* the Universal Declaration of Human Rights, G.A. Res. 217A, at 72, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 2, 1948) (prohibiting deprivation of rights and freedoms on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 212 (specifying the ways in which coercive hegemony on the basis of race is prohibited, as first articulated by the Universal Declaration of Human Rights).

nationalities such as the Basque and Catalan nations.<sup>190</sup> Yet, in definitional terms, this may be little different from the Roman Empire, where a central Latin nation asserted its political domination over other nations, while largely tolerating the existence of the other nationalities as long as they did not threaten the political supremacy of Rome.<sup>191</sup> This resemblance exists to the extent that both entities: (1) contained national minorities within their state boundaries;<sup>192</sup> and (2) were created by a coercive process through which subaltern nationalities were subordinated to the dominant national group's political will, but permitted to retain their own cultural and/or religious identity. In fact, this Article argues that, in many cases, the process of nation-state formation has frequently been more coercive towards subaltern national groups than the process by which multi-ethnic empires have been created.

Contemporary models for the separation of national identity and the traditional functions of the state are suggested by the European Union, Switzerland, Canada, and Belgium, and to a lesser extent, the emerging supranational and international economic, political and social institutions such as international human rights bodies, international trade agreements, and multi-purpose political bodies such as the United Nations, the Council of Europe, the Organization of American States, and the African Union. It can be argued that the entire process of globalization involves the weakening of the nation-state's monopoly control over economic, social and even political forces.<sup>193</sup> The success, or lack thereof, of these national models appears to be largely determined by the extent to which the original union of different

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<sup>190</sup> See Estatuto de Autonomia Para el Pais Vasco [The Statute of Autonomy of the Basque Country] (B.O.E. 1979, 30177) (creating autonomy for Basque Country within Spain). See also Reforma del Estatuto de Autonomia de Cataluña [Reform of The Statute of Autonomy of Catalonia] (B.O.E. 2006, 13087) (creating autonomy for Catalonia within Spain).

<sup>191</sup> See generally A.N. SHERWIN-WHITE, RACIAL PREJUDICE IN IMPERIAL ROME 86-101 (1967). Cf. ERICH S. GRUEN, CULTURE AND NATIONAL IDENTITY IN REPUBLICAN ROME (1992); Paul Veyne, *The Hellenization of Rome and the Question of Acculturations*, 106 *DIOGENES* 1, 1-27 (Scott Walker trans., 1979).

<sup>192</sup> See, e.g., Stephen Kinzer, *Germans Plan to Make it Easier for Some to Obtain Citizenship*, N.Y. TIMES, Jan. 25, 1993, at A8 (noting that Germany currently has a citizenship law based principally on German nationality). See also *Outsiders All: Japan*, ECONOMIST, Jan. 16, 1993, at 36 (discussing Japan's treatment of foreign residents and current criteria of who is a Japanese national).

<sup>193</sup> See, e.g., Munck, *supra* note 151, at 12.



nationalities was accompanied by mutuality and non-coercion. Thus, those multi-ethnic states whose political control over diverse national groups lacked this mutuality and non-coercion, such as Canada,<sup>194</sup> stand on less stable ground, even as they attempt Internal National Accommodation. In Canada, this attempt at overcoming the lack of mutuality through Internal National Accommodation appears to be working, for now.<sup>195</sup> In other cases, such as Belgium, the outcome is considerably more ambiguous with persistent political and cultural conflict between the Flemish and the Walloon ethnic groups.<sup>196</sup> Other multi-ethnic countries, such as Russia, do not even attempt Internal National Accommodation in as significant a manner as Canada and Belgium have, and have suffered the attendant consequences.<sup>197</sup>

Nevertheless, the examples of Canada, Europe, Belgium and Switzerland demonstrate the possibility of separating the economic and defense functions of the state from the state's traditional function as the juridical and political embodiment of the dominant national group in a particular geographical territory. Canada also provides an example of how Internal National Accommodation can avoid State Dissolution, with its frequently negative consequences. The United States, while not presently facing the likelihood of State Dissolution, nevertheless provides a model of

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<sup>194</sup> Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, 32 VA. J. INT'L L. 583, 611 (1992) ("While New France's incorporation into the British empire in 1763 was manifestly against the will of its people, their descendants joined the Canadian federation in 1867 in more voluntary circumstances.").

<sup>195</sup> Canada's efforts at Internal National Accommodation appear to be bearing fruit as the support for secession has been progressively declining over the last few years. See, e.g., Ian Austen, *Seeking Majority, Quebec's Premier Sets Election*, N.Y. TIMES, Nov. 6, 2008, at A14 ("Quebec's separation from Canada will not be a major theme of any platform.").

<sup>196</sup> See generally James D. Wilets, *The Demise of the Nation-State: Towards a New Theory of the State Under International Law*, 17 BERKELEY J. INT'L L. 193, 224 (1999) (chronicling the political pressure on Belgium caused by the Flemish minority); Paul Belien, *After Belgium: Will Flanders and The Netherlands Reunite?*, CANADA FREE PRESS, Aug. 25, 2007, <http://www.canadafreepress.com/2007/brussels082507.htm> ("Since the 1970s Flemish parties have radicalized, demanding larger autonomy over welfare issues.").

<sup>197</sup> After years of Chechnya trying to break away from the Russian Federation, resulting in war, economic downfall, and the breeding of radicalism, Chechnya is being reconstructed, but it is unclear whether the conflict is really over. See Luke Harding, *War-Ravaged Chechnya Transformed, But at What Price?*, GUARDIAN (U.K.), Feb. 22, 2008, available at <http://www.guardian.co.uk/world/2008/feb/22/russia>.

how principles of National Accommodation can help remedy the past injustices to its racial and ethnic minorities, and incorporate those previously excluded groups into the national legal and political identity.<sup>198</sup>

In summary, TLH plays an integral role in the process of Internal National Accommodation by diffusing decision making to both the local and supranational level, thereby decreasing the stakes any one national group has in entirely controlling the previously considerable power of the state. With Internal National Accommodation all the more possible because of TLH, the nation-state becomes all the more irrelevant and inappropriate as a foundation of international law.

## 8. CONCLUSION

The era has passed when international law, defined as one rule affecting more than one country, was largely a creation of nation-states acting *solely* through traditional international legal institutions and through formal international law such as treaties or customary international law. The process of global legal norm formation is more decentralized than currently recognized, and operates on a global, regional, national, corporate, and individual level. The traditional definition of international law is not only inaccurate, but it fails to capture the full scope of the transnational legal harmonization taking place in the world as a result of economic and legal globalization, and the potential opportunities such a process presents.

Such opportunities include: (1) the ability of the world community to regulate transnational corporations that are increasingly able to produce their products in countries with little to no regulation and sell their products in countries with effective environment, consumer, labor, and human rights protection, similar to how federal law regulates business activity across state borders; (2) the ability to "ratchet up" environmental, human

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<sup>198</sup> See, e.g., U.S. CONST. amends. XIII, XIV, XV; Education Amendments of 1972 tit. IX; Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56 (1963); Age Discrimination in Employment Act of 1975, 29 U.S.C. §§ 621-34 (2006), Pub. L. No. 90-202, § 2, 81 Stat. 602 (1967); Fair Housing Act 42 U.S.C. §§ 3601-3619 (2006); Age Discrimination Act, 42 U.S.C. § 6101-6107 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213 (2006); Civil Rights Act of 1964, Pub. L. No. 88-352, tits. VI-VII, §§ 601, 701, 78 Stat. 252-53 (1964); Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965); Voting Rights Act of 1970, Pub. L. No. 91-285-110, § 2, 84 Stat. 314 (1970).

rights, labor rights, and other standards for the public's protection among varying coalitions of countries without relying solely on global institutions that are hampered by the lowest common denominator of their diverse membership; (3) separating the economic, security, and protective functions of the state from a particular dominant national or religious group within or among countries, thereby reducing the greatest single source of violent conflict in the Twentieth century: conflict based on race, ethnicity or religion; and (4) facilitating the processes described immediately above by creating federal or quasi-federal economic and/or political entities that can consolidate the process of TLH within the framework of what we normally consider domestic law.

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