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James M. Boyers

*Indiana University School of Law*

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# Globalization and the United States Constitution: How Much Can It Accommodate?

JAMES M. BOYERS\*

## I. INTRODUCTION

Globalization "denotes a process of *denationalization* of clusters of political, economic and social activities."<sup>1</sup> No longer may a country govern itself efficiently without considering its impact on the global community or the global community's impact on it. "[A]ll nation-states, including the United States . . . , are more vulnerable to actions and decisions rendered outside their respective borders than ever before."<sup>2</sup> The search for the best means of developing national, regional, and world economies has led to supra-national organization on a regional scale. The European Union (E.U.) provides the most integrated and long-standing example of this phenomenon. Within it, Member States have submitted themselves to a different and higher jurisdiction of law that directly affects their sovereignty.<sup>3</sup> By binding together economically, and now politically, on a regional level and establishing a program of integration, the countries of the E.U. aim to bring greater economic strength to themselves than they could have attained as individual states.<sup>4</sup> The pursuit of the common European good has resulted in confrontations with the constitutions of some E.U. Member States. In this discussion, Germany will serve as the prime example of these confrontations because its federal governmental structure is similar to that of the United States.

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\* J.D., 1998, Indiana University School of Law, Bloomington; B.A., 1994, Hanover College. The author would like to thank his parents, John and Mary, his classmates and professors in the Globalization Seminar, Shelly Gibson, Aron Mefford, and Gaya Abey for their support and assistance.

1. Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 *IND. J. GLOBAL LEGAL STUD.* 9, 11 (1993).

2. Earl H. Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives Challenges to Sovereignty and Governance*, 20 *CAN. - U.S. L.J.* 303, 303 (1994).

3. See PAUL CRAIG & GRAINNE DE BURCA, *E.C. LAW* 241 (1995) [hereinafter *E.C. LAW*]. The authors quote the European Court of Justice in an early case: "[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals." *Case 26/62 N.V. Algemene Transporten Expeditie Onderneming Van Gend En Loos v. Nederlandse Administratie der Belastingen* [1963] *E.C.R.* 1, [1963] *C.M.L.R.* 105 (1963) [hereinafter *Van Gend en Loos*].

4. See *Single European Act*, Feb. 28, 1986, [1986] *O.J. (L169)*, 25 *I.L.M.* 503, 507, in *E.C. LAW*, *supra* note 3.

The United States, Canada, and Mexico have jointly created a Free Trade Area to benefit their economic interests. By entering the North American Free Trade Agreement (NAFTA), the United States agreed to follow non-discriminatory trade policies regarding the other parties to the agreement, subject to the review of a binational arbitration panel.<sup>5</sup> Unlike the European Community, NAFTA fails to provide permanent supra-national governing institutions to ensure its proper implementation.<sup>6</sup> Despite its limited scope and institutional framework, NAFTA has definite constitutional implications within the United States.

This paper first explores the development of the E.U. and how Germany has dealt with the conflict between its constitutional system and its membership in the E.U. Second, it distinguishes the purposes of NAFTA from those of the E.U. Third, it considers possible conflicts between NAFTA's dispute resolution mechanism and the U.S. Constitution. It concludes by discussing what possibilities for further supra-national integration the Constitution provides.

## II. CONSTITUTIONAL EFFECTS OF THE EUROPEAN COMMUNITY ON ITS MEMBER STATES

"After the destruction and ruin of the war years, and the climate of nationalism which preceded them, many people hoped for a new model of political co-operation in Europe."<sup>7</sup> By establishing the European Coal and Steel Community (E.C.S.C.) in 1951, a few European countries began the slow process of European integration.<sup>8</sup> In 1957 those countries created the European Economic Community (E.E.C.) and the European Atomic Energy Community (Euratom), further integrating their economies.<sup>9</sup> The original E.E.C. members were later joined by the United Kingdom, Ireland, and Denmark (1973), Greece

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5. See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993), 32 I.L.M. 605 (1993) [hereinafter NAFTA].

6. See *id.* at 693. In additional contrast to the E.C., NAFTA fails to provide private rights of action against any of the Parties to NAFTA based on the agreement's provisions except as discussed in Straight, *infra* note 40.

7. E.C. LAW, *supra* note 3, at 2.

8. *Id.* at 4. France, West Germany, Belgium, Luxembourg, the Netherlands, and Italy were the countries involved in this integration.

9. *Id.* at 9-10. This foundation included sharing the European Court of Justice and the Parliamentary Assembly to implement the purposes of the E.E.C. A Council of Ministers and a Commission, though initially separate, were merged and shared by the Communities in 1965. *Id.* at 10.

(1981), Spain and Portugal (1986),<sup>10</sup> and Austria, Finland, and Sweden (1995).<sup>11</sup> The Single European Act (1986)<sup>12</sup> and the Maastricht Treaty (1992)<sup>13</sup> further developed the role of the E.U. with these Member States.

### A. Decisions by the European Court of Justice

Following *Van Gend en Loos*, the European Court of Justice (E.C.J.) continued to expand the influence of E.U. law. The next step came in 1964 when the E.C.J. held that Member States were bound to apply the laws of the E.U. as their own.<sup>14</sup> The E.C.J.'s decision relied not on the text of the Treaty itself, but on the practical necessity of the supremacy of Community law to fulfill the Treaty's purpose of integration.<sup>15</sup> Building upon these precedents, in 1970, the E.C.J. continued to expand the influence of Community law to the point of asserting its supremacy over constitutional guarantees of its Member

10. *Id.* at 14.

11. See G. Porter Elliot, *Neutrality, the Acquis Communautaire, and the European Union's Search for a Common Foreign and Security Policy Under Title V of the Maastricht Treaty: The Accession of Austria, Finland and Sweden*, 25 GA. J. INT'L & COMP. L. 601, 603 (1996).

12. See Single European Act, *supra* note 4. This agreement

gave a formal legal basis to European political co-operation . . . , formally recognized the European Council, amended the existing treaties . . . , set out the internal market aim . . . , [introduced] qualified majority voting by the Council . . . into a range of areas which had previously provided for unanimity . . . , and added to the existing substantive areas of Community competence (co-operation in economic and monetary union, social policy, economic and social cohesion, research and technological development, and environmental policy).

E.C. LAW, *supra* note 3, at 20-22.

13. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 (1992), 31 I.L.M. 247 (1992) [hereinafter Maastricht]. The provisions of this treaty include: setting economic goals, creating a timetable for legal steps to establish effective functioning of the common market, establishing that nationals of Member States are nationals of the Union with the right to vote and stand as candidates in elections for European Parliament and municipal elections, and setting goals for future agreements (common foreign and security policy, harmonizing elements of justice and home affairs, and eventually implementing a single currency for all Member States).

14. Case 6/64, *Flaminio Costa v. Enel*, [1964] E.C.R. 585, [1964] C.M.L.R. 425, 593 (1964). Paul Craig and Grainne De Burca's discussion of the court's arguments justify its holding. "[T]he treaty created its own legal order which immediately became 'an integral part' of the legal systems of the Member States. . . . Member States created this legal order: i.e. by conferring on the new Community institutions 'real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community.' [T]he spirit and the aims of the Treaty [made it] . . . 'impossible' for the Member States to accord primacy to domestic laws." E.C. LAW, *supra* note 3, at 244.

15. E.C. LAW, *supra* note 3, at 245.

States.<sup>16</sup> In *Amministrazione delle Finanze dello Stato v. Simmenthal Spa*<sup>17</sup>, the E.C.J. established that "all national courts are obliged to enforce directly and immediately a clear and unconditional provision of Community law even where there is a directly conflicting national law . . . [even] one which had no jurisdiction in the domestic legal system to question or to set aside national legislative acts."<sup>18</sup> Despite these expansive holdings, "the constitutional orders of some of the Member States do not easily accommodate the principle of supremacy."<sup>19</sup>

### *B. The Reaction of the German Constitutional Court to Supra-National Advancements*

The German Constitution makes possible the delegation of some legislative power to international organizations.<sup>20</sup> In 1972 the German Administrative Court stated:

The integration powers contained in Article 24 enable the Federal legislature to alienate its legislative monopoly in certain spheres in favor of international institutions. The Community organs have thereby obtained the power to enact law directly effective within the territorial scope of the Constitution without a separate writ of enforcement . . . [T]he Federal legislature could not, when ratifying the EEC Treaty, disclaim the observance of elementary basic rights in the Constitution.<sup>21</sup>

This holding reserved ultimate review of Community law to Germany's court system. In 1974, the German Constitutional Court, reviewing the case quoted

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16. See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle fur Getreid und Futtermittel*, [1970] E.C.R. 1125, [1972] C.M.L.R. 255 (1972), translated in E.C. LAW, *supra* note 3, at 246. "[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure." *Id.*

17. Case 106/77, [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263 (1978), translated in E.C. LAW, *supra* note 3, at 247.

18. E.C. LAW, *supra* note 3, at 248.

19. *Id.* at 250.

20. *Id.* at 256.

21. *Internationale Handelsgesellschaft v. Einfuhr*, [1972] C.M.L.R. 177 (1972), translated in E.C. LAW, *supra* note 3, at 257.

above, supported the earlier ruling by holding: "In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanisms."<sup>22</sup> The Constitutional Court failed to recognize the supremacy of the Community law over the German Constitution. This failure placed the legitimacy of E.U. law on a somewhat shaky foundation.

By 1986, however, the Constitutional Court had moved away from its earlier position. Because the Community law and protections are essentially the same as those provided for by the German Constitution, the Court held that so long as the European Communities and the E.C.J. provided for the protection of fundamental rights against the actions of the E.C., it would no longer review E.U. legislation.<sup>23</sup> This compromise recognized both the E.U.'s need for unquestioned legitimacy of its law and the German Constitutional need for protection of fundamental rights.

When the Maastricht Treaty was signed in 1992, this led Germany to amend its Constitution. "[T]he newly amended Article 23 specifically authorize[d] the Federation to transfer sovereign rights to the European Union. [However], a possible violation of the German Constitution was still an issue because Article 79(3), in conjunction with Article 20 declares any constitutional amendment that infringes on the democratic principle inadmissible."<sup>24</sup> The Constitutional Court found that the provisions of Maastricht did not violate this democratic legitimacy.<sup>25</sup>

Later in the opinion, the Constitutional Court established the limits to the E.U.'s legitimate activities established by the German Constitution. The E.U. cannot enact laws that directly apply to Germany unless those laws fall within areas specifically established by existing agreements. Otherwise "it would be possible for the European Communities to exercise functions and powers which

22. 2 C.M.L.R. 540, 549-50 (1974) (F.R.G.), *translated in* E.C. LAW, *supra* note 3, at 258-59.

23. *Re Wunshe Handelsgesellschaft*, [B VerfG] [Federal Constitutional Court], [1987] 3 C.M.L.R. 225, 265 (1986) *translated in* E.C. LAW, *supra* note 3, at 260.

24. Manfred H. Wiegandt, *Recent Developments: Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, 10 AM. U.J. INT'L L. & POL'Y 889, 891 (1995).

25. *Brunner v. European Union Treaty*[BverfG] [Federal Constitutional Court], [1994] 1 C.M.L.R. 57 (F.R.G.), *translated in* 33 I.L.M. 388, 417 (1994).

are not mentioned."<sup>26</sup> This effectively prevents the E.U. from overstepping its enumerated powers. "[T]he Constitutional Court in *Brunner* has made clear that it will continue to review the actions of European 'institutions and agencies'—which presumably includes the Court [E.C.J.]—to ensure that they remain within the proper limits of their acquired powers."<sup>27</sup>

The move toward European integration and supra-national governance has created a tension between the Member States and the E.U. While Germany has amended its Constitution to accommodate greater integration and has recognized the supremacy of Community law within specified areas, its Constitutional Court has reserved for itself the right to determine when the E.U. goes beyond the scope of its enumerated powers. This does not amount to unconditional acceptance of the supra-national power of the E.U. The German Constitutional Court serves as a check on the E.U.'s ability to expand its area of power. "[T]here are fundamental limits on the process imposed by desires for local autonomy over certain issues."<sup>28</sup>

### III. DISTINGUISHING NAFTA FROM THE EUROPEAN UNION

A study of NAFTA and the E.U. conjures up the proverbial comparison of "apples to oranges." The E.U. "has assumed functions in a wide array of areas hitherto considered typical State prerogatives . . ."<sup>29</sup> For example, the E.U. has observer status in the U.N. General Assembly,<sup>30</sup> has governing institutions,<sup>31</sup> and perhaps most strikingly, has created E.U. citizenship.<sup>32</sup> NAFTA has nothing comparable. In fact, NAFTA has a relatively loose structure to achieve its purposes. It aims to reduce and eventually eliminate tariff and non-tariff

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26. *Id.* at 422.

27. E.C. LAW, *supra* note 3, at 263. This decision made clear that goals mentioned in the Maastricht Treaty, such as cooperation in security, justice, and home affairs, could not be governed by the E.C. without further separate agreements by the Member States. Wiegandt, *supra* note 24, at 894.

28. William J. Davey, *European Integration: Reflections on its Limits and Effects*, 1 IND. J. GLOBAL LEGAL STUD. 185, 203 (1993).

29. Christoph Scheuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447, 451 (1993). "These include regulation of external trade, economic policy, anti-trust regulation, social policy, regional policy and environmental protection to name just a few." *Id.*

30. *Id.* at 462.

31. E.C. LAW, *supra* note 3, at 10.

32. Scheuer, *supra* note 29, at 469. "The creation of a 'citizenship of the Union' as provided in the Maastricht Treaty gives legal expression to broader political identifications going beyond the State of the individual's nationality." *Id.*

barriers within the North American region.<sup>33</sup> NAFTA "grants national treatment not only for imported goods . . . but also for investments and services as diverse as banking, brokerage, insurance, law, and transportation."<sup>34</sup> NAFTA does not mention any regional governing institutions with supra-national powers.<sup>35</sup> Because "each member nation acquires a stake in the region's economic and environmental progress . . . NAFTA does not require a supra-national court of compulsory jurisdiction and coercive sanctions to enforce fairness of treatment; the most effective sanction is the loss of a market."<sup>36</sup>

NAFTA utilizes a system of binational arbitral panels to resolve disputes between parties to the agreement. Chapter 19 of NAFTA sets up a system of binational panel review for the resolution of disputes between Parties regarding anti-dumping and countervailing duties.<sup>37</sup> Chapter 20 applies "to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement . . . ."<sup>38</sup>

Article 2001 of Chapter 20 establishes a Free Trade Commission comprised of cabinet level representatives of each government to supervise the implementation of NAFTA, oversee its further elaboration, resolve disputes that may arise regarding its interpretation or application, establish rules and procedures for the resolution of such disputes, and oversee a Secretariat charged with providing administrative assistance to such entities as the Commission shall create.<sup>39</sup> Parties to a dispute "must use consultations and arbitration prior to a request for NAFTA panel proceedings."<sup>40</sup> Should these activities fail to resolve the dispute, the next step involves establishing a panel.

These panels are selected from rosters of up to thirty individuals from each country who "have expertise in law, international trade, . . . or the resolution of

33. Boris Kozolchik, *NAFTA in the Grand and Small Scheme of Things*, 13 ARIZ. J. INT'L & COMP. L. 135, 138 (1996).

34. *Id.*

35. Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 918 (1992).

36. Kozolchik, *supra* note 33, at 139.

37. NAFTA, *supra* note 5, at 682-93.

38. *Id.* at 694.

39. *Id.* at 693.

40. Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 224 (1995).



disputes arising under international trade agreements" and who are chosen on the "basis of objectivity, reliability and sound judgment."<sup>41</sup> First, the Parties must agree upon a chairman of the panel, then select two panelists who are citizens of the other Party.<sup>42</sup> Once the panel is selected, the Parties shall be entitled to "initial and rebuttal written submissions" as well as "at least one hearing before the panel."<sup>43</sup> From this point, Chapter 19 and Chapter 20 differ as to result and procedure.

#### *A. Dispute Resolution Under Chapter 19*

Chapter 19 deals with the narrow area of anti-dumping law and countervailing duties. In contrast to Chapter 20, "private parties are guaranteed the same right that they possess under domestic law to challenge agency determinations."<sup>44</sup> When reviewing determinations of administrative agencies the panels that determine Chapter 19 disputes shall use the same standard of review that the courts of the challenged party would apply.<sup>45</sup> These Chapter 19 panel decisions, unlike Chapter 20 determinations, will be binding on the Parties "with respect to the particular matter between the Parties that is before the panel."<sup>46</sup>

These decisions may be appealed to a special extraordinary challenge committee composed of three members "selected from a 15-person roster comprised of judges or former judges" from each Party's equivalent of the federal level in the United States.<sup>47</sup> A panel decision may only be reviewed on the following grounds: panel members materially violated the rules of conduct, the panel seriously departed from its rules of procedure, or the panel exceeded

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41. NAFTA, *supra* note 5, at 695.

42. *Id.* at 696.

43. *Id.*

44. Straight, *supra* note 40, at 232. "An involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of the final determination, request such review." NAFTA, *supra* note 5, at 683.

45. Straight, *supra* note 40, at 233.

46. NAFTA, *supra* note 5, at 683.

47. *Id.* at 688.

its powers, authority, or jurisdiction.<sup>48</sup> Once a panel decision has been requested, a Party may not subject the controversy to concurrent judicial review in its domestic courts and a Party may not request that its legislature provide for judicial review from a panel decision.<sup>49</sup> This element of dispute resolution between the Parties holds the greatest evidence of a loss of sovereignty by the Parties. In contrast, NAFTA has created controlling jurisdiction in only one very limited area. This reflects the vast differences in purpose and institutions between NAFTA and the E.C.

### *B. Chapter 20 Dispute Resolution*

Panel decisions under Chapter 20 reflect the hesitation on the part of the Parties to relinquish final control over their own state activities. One author argues that NAFTA has a weak dispute resolution system because contentious dispute resolutions might "undermine the political stability of the new regional arrangement" and that NAFTA likely would not have been approved had it created a system that would interfere with sovereign national institutions.<sup>50</sup> In effect, the United States and Mexico decided not to be bound by the decisions of the binational panels under Chapter 20. "Canada agreed that Canadian courts can enforce the decisions [of the panel] . . . [w]hereas the U.S. and Mexico say 'no, we will decide whether we accept it or not, and if we do not, we are willing to pay for it.'"<sup>51</sup> Article 2019 of Chapter 20 establishes that the complaining or winning party may, if the losing party refuses to honor that decision, suspend equivalent benefits to the losing party.<sup>52</sup> This puts the decision in the hands of the state, which must measure its ultimate decision according to its sovereign needs.

## IV. NAFTA'S CHALLENGES TO THE U.S. CONSTITUTION

NAFTA fails to institutionalize bodies with binding supra-national powers except in a limited area. However, by joining the agreement, the United States has created conflicts with its own Constitution. One can argue that NAFTA

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48. *Id.* at 683.

49. *Id.*

50. Abbot, *supra* note 35, at 944-45.

51. Gary N. Horlick, *Sovereignty and International Trade Regulation*, 20 *CAN. - U.S. L.J.* 57, 60-61 (1994).

52. NAFTA, *supra* note 5, at 697.

offends Article III,<sup>53</sup> violates Article II treaty requirements,<sup>54</sup> and affects the sovereignty of the fifty states.<sup>55</sup> This section shall evaluate each of these arguments.

### A. *The Article III Argument*

"NAFTA removes certain cases from the jurisdiction of federal courts and places those cases within a new dispute resolution mechanism . . . . It envisions a significant role for federal judges as panel and challenge committee members."<sup>56</sup> Article III places "the judicial power of the United States . . . in one supreme Court, and in such inferior courts as Congress may . . . establish."<sup>57</sup> Article III gives federal judges life tenure, prevents their salary from being reduced, and limits federal jurisdiction to cases and controversies.<sup>58</sup> These provisions were created to ensure an independent judiciary and guarantee citizens an impartial hearing of their cause.<sup>59</sup> We must consider if the NAFTA dispute resolution system invades the realm of the Article III courts or threatens Article III's purposes.

In limited circumstances, the Supreme Court has found certain Article I courts unconstitutional.<sup>60</sup>

[T]he key issue in an Article III case is whether a given forum is exercising "the judicial Power of the United States," and therefore must possess the attributes of life tenure, non-diminishable compensation, and case-and-controversy

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53. See Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141 (1994).

54. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1272-78 (1995) (discussing the Treaty Clause requirement of two-thirds Senate approval for all treaties and the post-World War II use of congressional-executive international agreements).

55. See Julie Long, *Ratcheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements*, 80 MINN. L. REV. 231 (1995).

56. Metropoulos, *supra* note 53, at 149.

57. U.S. CONST. art. III, §1.

58. *Id.*

59. Metropoulos, *supra* note 53, at 149-50.

60. *Id.* at 151. These "include courts in the District of Columbia, the U.S. Tax Court, [Bankruptcy Court] and military courts-martial." *Id.*

adjudication, or whether that forum is merely carrying out congressional powers under Article I.<sup>61</sup>

However, the Supreme Court has also held that Article I bankruptcy courts cannot hear common law claims that arise in bankruptcy proceedings.<sup>62</sup> In *Commodity Futures Trading Commission v. Schor*,<sup>63</sup> the Supreme Court established a balancing test to determine when Article III is violated. In addition, the Court held that the Commodity Futures Trading Commission did not violate Article III by adjudicating state law counter-claims because the right to Article III adjudication had been waived by the respondents.

Demetrios Metropoulos argues that a recent decision by the E.C.J. striking down a similar dispute resolution system between the E.C. and the European Free Trade Area (EFTA) indicates how the U.S. courts will react.<sup>64</sup> In *In Re Draft Treaty on a European Economic Area*,<sup>65</sup> the E.C.J. held the dispute resolution system invalid on three grounds: the substantial overlap in subject matter jurisdiction between the existing court system and the proposed new court would create confusion, the E.C.J. did not agree with having its own judges "serve two masters"; and the E.C.J. objected to granting advisory opinions to EFTA courts because it would change the nature of the E.C.J.<sup>66</sup> These threats to the E.C.J. justified rejecting the proposed dispute resolution system.

61. *Id.* "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated with a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 840 (1986). See Metropoulos, *supra* note 53, at 162.

62. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (4-justice plurality).

63. *Commodity Futures Trading Comm'n*, 478 U.S. 833. In determining whether a non-Article III tribunal has encroached upon Article III guarantees the Supreme Court considers several things, none of which by itself leads to the determination. "Among the factors upon which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." *Id.* at 851.

64. See Metropoulos, *supra* note 53.

65. Case 1/91, 1 C.M.L.R. 245 (1992).

66. Metropoulos, *supra* note 53, at 158-59. Metropoulos gives a factual background of the European Economic Area (EEA) Treaty between the E.C. and EFTA which discusses the make up of the proposed EEA Court (five of eight judges from the E.C.J.) and the role of the E.C.J. in granting advisory opinions to EFTA Member States. *Id.* at 156.

The operation of two different entities on the same laws, judges serving two masters, and the granting of advisory opinions would arise under the NAFTA framework as well.

“[S]pillover” of jurisprudence is . . . possible . . . , as Article III courts continue to adjudicate claims against non-NAFTA exporters (and those NAFTA exporters who do not elect panel review) while non-Article III panels assess similar claims under NAFTA . . . Article III judges will serve as panelists . . . [and] Article III judges . . . will be issuing advisory opinions on statutory amendments.<sup>67</sup>

In other words, utilizing Article III judges for non-Article III activities creates a definite constitutional problem. This problem may justify a holding against the binational panel system of NAFTA.

Applying the *Commodity Futures Trading Commission* test may prove to be a more accurate assessment of how the Supreme Court would resolve this issue. The first element, intrusion on Article III power, can be found in the exercise of traditional Article III powers (entertaining motions, reviewing briefs, hearing oral arguments, and writing opinions that are binding without a federal court order) and traditional Article III jurisdiction (including anti-dumping, subsidy, and trade disputes).<sup>68</sup> The second element, “the nature and importance of individual rights transferred,” comes out in favor of NAFTA because the binational panels will deal with public rights.<sup>69</sup> The third element, the congressional interest in departing from Article III courts, does not effectively reduce court backlog or create courts in highly specialized areas, two previously accepted reasons for departing from Article III courts.<sup>70</sup> Article III could amount to a large stumbling block should there be a constitutional challenge to NAFTA’s dispute resolution system.

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67. *Id.* at 160-61.

68. *Id.* at 162-63.

69. *Id.* at 163.

70. *Id.* at 166-67. The Metropoulos argues that the U.S. Court of International Trade already deals with these problems. *Id.* at 167.

*B. Article II: A Treaty or Not a Treaty*

A treaty is a "compact made between two or more independent nations with a view to the public welfare."<sup>71</sup> NAFTA fits this definition. The United States Constitution establishes the power of the President with regard to treaties: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . ."<sup>72</sup> President Clinton submitted NAFTA to both the House and Senate for pure majority approval of both bodies according to a procedure called "congressional-executive agreement."<sup>73</sup> The Senate approved NAFTA with only sixty-one Senators voting for ratification and thirty-eight against.<sup>74</sup> This bicameral treaty ratification explicitly fails to satisfy the textual requirements of the Constitution. However, this issue never arose during the Congressional discussion on ratification.

Recently, the debate on the applicability of the Treaty Clause to international agreements such as NAFTA and WTO surfaced in two articles in the Harvard Law Review.<sup>75</sup> Bruce Ackerman and David Golove argue that because the Senate acquiesced to a series of "congressional-executive" agreements in 1945 and 1946, in the face of a possible constitutional amendment to legitimize the "congressional-executive" agreement, this new agreement gained constitutional legitimacy.<sup>76</sup> In addition, they conclude that the Necessary and Proper Clause justified the Senate's abdication of authority.<sup>77</sup>

In response to this argument, Lawrence Tribe asserts that when the Senate allowed the House to participate in approving international agreements it did not change what the Constitution requires, but showed "an apparent *willingness to circumvent what national leaders still widely saw as its* [the Constitution's]

71. BLACK'S LAW DICTIONARY 1502 (6th ed. 1990).

72. U.S. CONST. art. II, §2, cl. 2 [hereinafter Treaty Clause].

73. Tribe, *supra* note 54, at 1223. Laurence Tribe's article debates an article advocating that NAFTA's ratification was constitutional. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

74. 139 CONG. REC. S16, 712-13 (daily ed. Nov. 20, 1993).

75. See Tribe, *supra* note 54; Ackerman & Golove, *supra* note 73.

76. Ackerman & Golove, *supra* note 73, at 874.

77. *Id.* at 913. Quoting Chief Justice Marshall in *McCulloch v. Maryland*, "Let the end be legitimate . . . and all means which are appropriate . . . which are not prohibited . . . are constitutional," the authors utilize an expansive reading of the Necessary and Proper Clause to justify their Constitutional understanding in the context of NAFTA. *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819)). They maintain that because Article I establishes Congress' power to regulate foreign commerce, the end purpose of NAFTA is legitimate, appropriate, and constitutional. *Id.* at 914.

*unambiguous command.*"<sup>78</sup> Ackerman and Golove use pragmatic concerns and political decisions to justify what appears, on its face, to be a direct conflict with the text of the Treaty Clause. The debate shall continue until the Supreme Court makes a ruling based on the use of "congressional-executive" agreements in international affairs.<sup>79</sup> NAFTA may not create the controversy necessary to lead to a reevaluation of recent treaty modifications. However, any future treaties having greater effects on U.S. sovereignty would likely provoke Congressional debate on this issue.

### *C. Encroachment on States' Sovereignty?*

Based upon the Supremacy Clause and Congress' power to regulate foreign commerce, the federal government has the authority to make laws regarding foreign commerce that limit the actions of the individual state and local governments.<sup>80</sup> However, areas such as taxation have traditionally been left to the states to control. Powers historically reserved to the states will not be overrun by federal regulations unless those regulations express a "clear and manifest purpose" to do so.<sup>81</sup> NAFTA and its implementing legislation likely satisfy the requirement of a "clear and manifest purpose" to supersede some state laws. The U.S. courts will explore the extent to which NAFTA might require change of state laws.<sup>82</sup>

*Barclays Bank P.L.C. v. Franchise Tax Board of California*<sup>83</sup> provides an example of the Supreme Court limiting the federal influence on the California tax system. The Court found that California's tax system did not violate the

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78. Tribe, *supra* note 54, at 1301 (emphasis added).

79. The Supreme Court recently discussed the issue of the expansion of Congressional powers. "The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." *New York v. United States*, 505 U.S. 144, 182 (1992). This line of reasoning could be used to exclude the Senate's "consent" in the context of the "congressional-executive" agreement.

80. Fry, *supra* note 2, at 315. This includes taxation, regulation, export assistance, and investment incentive packages. These could all be considered "trade-distorting practices" that might be subject to federal preemption based on NAFTA. *Id.*

81. *Rice v. Santa Elevator Corp.*, 331 U.S. 218, 230 (1947).

82. "[C]ourts faced with a challenge involving a level of authority outside the federalist system must ask whether the benefit of passing that discretion to the supranational body is worth the cost to federalism as a whole." Long, *supra* note 55, at 262.

83. *Barclays Bank P.L.C. v. Franchise Tax Board of California*, 512 U.S. 298 (1994). For a discussion of this case in the same context, see Long, *supra* note 55, at 239-42.

Commerce Clause.<sup>84</sup> While emphasizing that state power is more limited in the realm of foreign commerce, the Court found insufficient evidence that the tax system "impose[d] inordinate compliance burdens on foreign enterprises."<sup>85</sup> In its holding, the Court found that California did not prevent the United States from speaking with one voice in foreign commerce.<sup>86</sup> This case demonstrates the Court's desire to preserve traditional state sovereignty.

NAFTA differs from the situation in *Barclays* for one important reason: NAFTA does not provide for private remedies when individual states violate its provisions. NAFTA states that "state law cannot be declared invalid because it is inconsistent with NAFTA, except in an action brought by the United States to declare the state law invalid."<sup>87</sup> In other words, NAFTA does not have direct effect upon the individual states. NAFTA actually provides for consultations between the federal government and the governments of the states in order to bring state law into accordance with NAFTA requirements.<sup>88</sup> Only the federal government will be held responsible when states fail to comply with NAFTA norms.<sup>89</sup>

In developing NAFTA, the United States went to great pains to avoid creating a supra-national entity that would create laws with direct effect upon the states. However, this process will create definite changes. "[S]overeignty and federalism will evolve rather substantially before NAFTA is fully implemented in 2008."<sup>90</sup> Instead of being an international agreement with direct effect on the states, NAFTA will push the federal government into more areas traditionally reserved to the states. Some hope that the seeds planted by NAFTA will lead to the creation of supra-national institutions capable of

84. The complaining party must demonstrate "that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State." *Barclays Bank P.L.C.*, 512 U.S. at 310-11.

85. *Id.* at 314.

86. *Id.* at 327-28. In its analysis, the Court supported its conclusion by stating "Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income." *Id.* at 322.

87. Straight, *supra* note 40, at 249.

88. The President consults with the states through policy advisory committees to ensure their conformity, and the U.S. Trade Representative consults with the states about issues that will impact them. *Id.* at 250. Only if these means fail will the federal government take action to challenge the state or local law. *Id.*

89. Letter from Michael Kantor, U.S. Trade Representative, to Rep. Henry A. Waxman, Chairman, Subcomm. on Health and the Environment (Sept. 7, 1993), *reprinted in* 93 U.S.C.A.N. 2858, 2862 (responding to concerns that section 105 of NAFTA would require preemption of state laws), *in* Straight, *supra* note 40, at 252 nn.192, 214.

90. Fry, *supra* note 2, at 317.



harmonizing the laws of the three countries.<sup>91</sup> For those seeds to grow to that extent, a constitutional amendment will need to be ratified.

#### V. CONCLUSION

The development of the E.C. has not been a smooth transition. Although its members stand committed to the concept of integrating at a certain level, this level may not be the same for all of them. Integrating into a supra-national framework creates fundamental problems of legitimacy. Even after a constitutional amendment to open Germany up to greater involvement within the E.U., the German Constitutional Court reserved for itself the right to check the ability of the E.U. to go beyond its specifically enumerated powers. Other Member States have reserved similar powers.<sup>92</sup> This reflects a lack of the unity necessary to make supra-national governmental bodies strong enough to withstand a truly divisive crisis.

NAFTA developed in a much different environment than the E.U. Unlike the E.U. members, the parties to NAFTA never faced the continental destruction of a massive armed conflict. The United States stands as the only super-power in the world. None of the European countries have equal independent power. This lack of independent strength created a great incentive for Europeans to bind together to become more competitive on a global scale. In order to insure this cooperation between former enemies, they created a supra-national entity with binding powers. The United States has different and less compelling motivations for seeking the economic cooperation of its neighbors. NAFTA only enhances the United States' dominant role in international trade.

The U.S. Constitution serves as the foundation and source of legitimacy for our government. As globalizing forces require our country to face new challenges, the Constitution will limit the means of meeting these challenges. If NAFTA, which has modest aims in comparison to the E.U., creates legitimate constitutional conflicts, integrating on a greater scale into any supra-national framework will not be feasible without a Constitutional Amendment.

At this time, the United States lacks the incentive to pursue greater integration. If globalizing forces change our incentives in the future, the

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91. Abbott, *supra* note 35, at 948.

92. See generally E.C. LAW, *supra* note 3 (discussing Italy, France and the United Kingdom).

following Amendment should replace the beginning of Article II, Section 2, Clause 2:

**The President shall have the power, by and with the advice and consent of the Senate and the House of Representatives, to make Treaties, to join economic and trade agreements that establish international dispute resolution bodies of special and limited jurisdiction, and to appoint members of such dispute resolution bodies, provided three-fifths of those Representatives and Senators present concur.**

This Amendment would provide protection of individual state sovereignty while including a popular support element, protect our nation from delegating its sovereignty on the narrowest of Congressional majorities, and fail to foreclose the possibility of Article III review of any dispute resolution body decisions. Such an amendment could serve as a helpful change to satisfy those afraid of losing too much sovereignty. It would create a greater sense of constitutional legitimacy in our international activities.

