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Martin Shapiro

University California, Berkeley School of Law

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The Globalization of Law

MARTIN SHAPIRO*

By globalization of law, we might refer to the degree to which the whole world lives under a single set of legal rules. Such a single set of rules might be imposed by a single coercive actor, adopted by global consensus, or arrived at by parallel development in all parts of the globe. Although the end of bipolarity and the cold war brings some comfort, surely we have not moved very far toward a regime of international law either through the establishment of a single global law giver and enforcer or through a strong nation-state consensus. If we had, we would be speaking of international law, not the globalization of law.

Nor can we even confidently claim that law has become global or universal in the sense that everyone on the planet can be sure that wherever he or she goes on the planet, human relationships will be governed by some law, even if not by a law that is everywhere the same. Indeed, unless we move very far toward an anthropological merging of law and custom, we would probably conclude that a smaller proportion of the world's population enjoys legally defined relationships today than it did one hundred years ago. This retreat would have occurred on the basis of one great historical fact alone: the enormous population of China has moved from a regime of Imperial however thin and corrupted, to a Leninist regime of non-law. Moreover, in much of the post-colonial third world, the legal regimes of the colonial occupiers have been thrown out, but it has been impossible to replace them with new legal regimes or restore the pre-colonial legal regimes that the European imperialists disrupted. Indeed, if the Indian sub-continent and Indonesia could not be counted as having maintained some kind of rule of law, we would confront a world in which the relative number of persons living under regimes of law had declined so precipitously as to render talk of the globalization of law entirely misleading. When we speak of the globalization of law, we must be conscious that we are speaking of an extremely narrow, limited, and specialized set of legal phenomena set into a globe in which it is not at all clear whether the total quantum of human relationships governed by law has increased or decreased over the

* Cofforth Professor of Law, University of California, Berkeley Law School.

last century. We will almost always discover that we are really talking about North America, Europe, Australia, and New Zealand. Japan will sometimes be on and sometimes off this globe. The rest of Asia and Africa will almost never be seen, and, for most of us, Latin America south of Mexico will be irrelevant. Indeed, much of the time, the globe will turn out to be the U.S. and Western Europe with shadowy addenda.

I. GLOBALIZATION OF COMMERCIAL AND CONTRACT LAW¹ AND THE PROLIFERATION OF LAWYERS²

We speak of globalization of law in reference to a number of interrelated phenomena. As a concomitant of the globalization of markets and the organization and business practices of the multi-national corporations that operate in those markets, there has been some movement toward a relatively uniform global contract and commercial law. It is commonplace that, by their very nature, contracts are a kind of private lawmaking system. The two or more contracting parties create a set of rules to govern their future relationships. These are the various substantive provisions of the contract. Such a system of private lawmaking can exist transnationally even when there is no transnational court or transnational sovereign to resolve disputes between the contracting parties and to enforce those resolutions. The contracting parties may have specified in the contract itself some nongovernmental arbitration mechanism or the courts of some particular nation state, or both, to resolve contract disputes. Typically they also specify the contract and commercial law of some particular country as the law under which any contract dispute between them shall be resolved. So long as the courts and law of individual nation states are available, and the courts and law of each or most are prepared to recognize and enforce the judgments of the others, a global commercial law can come into being by private lawmaking. This event occurs when the standard incentives for uniformity, predictability, and transparency of law that are at play in all capitalist contract regimes move the substantial, but not enormous, number

1. See generally E. Paasivirta, *Internationalization and Stabilization of Contracts Versus State Sovereignty*, 60 BRIT. Y. B. INT'L L. 315 (1989); A. Briggs, *The Formation of International Contracts*, 1990 LLOYD'S MAR. & COM. L. Q. 192 (1990); M. Greenberg, *International Contracts: Problems of Drafting and Interpreting, and the Need for Uniform Judicial Approaches*, 5 B.U. INT'L L.J. 363 (1987).

2. 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (Richard L. Abel and Philip S.C. Lewis eds., 1988).

of significant multi-national, corporate, private lawmakers to generate a relative uniform set of contract provisions. Thus, there emerges a global commercial law independent of any global law giver or enforcer, although dependent on national legal and judicial institutions already long in place.³

Given the place of the United States in the world economy, this globalization of law through private corporate lawmaking rather naturally takes the form of the global Americanization of commercial law. Often when we speak of globalization we mean that certain American legal practices are being diffused throughout the world (for instance, the legal device of franchising). It may be not only American economic power, but some particular receptivity of common law to contract, and other commercial law innovation that is the engine of globalization in this sense. It is widely believed in Europe that European Community legal business flows to London because English lawyers are more adept than civil law lawyers at legal innovation to facilitate new and evolving transnational business relationships. For whatever reasons, it is now possible to argue that American business law has become a kind of global *jus commune* incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of many other nations.⁴

After World War II, a long run of relatively steady economic growth, the expansion of world trade, the communications and data processing revolutions, and the mergers and acquisition movement of the 1980s contributed to an enormous acceleration in business activity. More transactions conducted more quickly necessarily leads to more lawyers and more litigation if we choose law and lawyers as one of the means of perfecting such transactions and resolving conflicts about them when we do not achieve perfection.

One reason that choice was made has to do with enterprise organization. In the period before and just after World War II, vertical integration was the model of business organization. Vertical integration was the capitalist equivalent of socialist central economic planning, for capitalists trusted markets little more than socialists did. By bringing both suppliers and primary customers "in house," large manufacturing enterprises would

3. Martin Shapiro, *Judicial Activism, in THE THIRD CENTURY* (S.M. Lipset ed., 1979).

4. See Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

internalize and thus rationally coordinate the myriad of economic decisions vital to their health that otherwise would be made in external, and thus unpredictable and uncontrollable, markets. For reasons that I do not profess to understand, but which are probably related to rapid and unpredictable technological change and the expansion of international trade, business theory changed some time after World War II. The vision of the corporation as a rationalized, vertically integrated producer and marketer of a single or complementary line of products was replaced by the vision of the corporation as a bundle of capital and executive intelligence seeking profit wherever and however it was to be found. The supposedly optimal business organization changed from a closed one that emphasized clear boundaries between the corporation and the rest of the world, together with an irredentist attitude toward such boundaries, to an open one in which boundaries were blurred. Whatever arrangement promised to maximize profit (acquisition, joint venture, license, franchise, job shop, independent contractor, subsidiary, spin-off, long-term supply contract, patent pool, or bank coordinated interlocking financing) was the appropriate strategy. Nothing was forever, or indeed, for very long. Not building the boundaries, but pushing the envelope, became the corporate creed.

In the world of the vertically integrated firm as in the world of socialism, economic relationships are determined by internal command. The inter-office memo, rather than the contract, is the mode of communication. Internal negotiation is among principals and is set in a hierarchical command structure. In even the most decentralized participatory vertical firm, democratic centralism is the most that is sought or could be achieved. In such a firm there may be many rules, but there is little room for lawyers and none for judges. At most there is a kind of inspectorate that sees that rules are obeyed and forwards observed uncertainties and disputes about rules to higher executive authority for resolution.

The new, open corporation is essentially a deal maker. Instead of taking the form of internal directives, decisions are much more in the nature of negotiated agreements with outsiders or quasi-outsiders. Although power positions may be very unequal, many of these outsiders are at least nominally independent and many of them really are. Common corporate culture, common expertise, shared hierarchy, and even a common expectation of future long-term relationships are often absent. In the absence of such commonalities, principals are less likely to negotiate with

one another and more likely to seek go-betweens who specialize in bridging gaps between differing perspectives.

If two old-line General Motors (GM) automotive engineers in different divisions needed to work out an agreement on a common engine block, they did it themselves. If they came to an impasse, they kicked it upstairs to their GM engineering superior. If a watch-the-bottom-line executive at the Omnibus Corporation needs to decide whether the western clothing franchises should be required to carry their own customer credit or factor it to a bank partially owned by Omnibus's parent, a holding company, all of that old-style GM intimacy is missing. (This tendency should not be exaggerated. With the onset of the recession, many corporations began to strip off some disparate divisions to concentrate on the central activities that they knew best and thus could do most efficiently. In the process, some movement back to a vertical structure occurred. On the other hand, the recession also seems to have accelerated off-shoring and other forms of subcontracting to lower-cost independents that move more operations from internal to external status.) In this new world of external, disparate, one-of-a-kind deals, potentially the lawyer flourishes and the judge is sought far more than in the vertically integrated, single product corporation. I say "potentially" because in such a world, go-betweens and expert negotiators are needed, as are instruments of coordination other than simple commands and devices for conflict resolution other than hierarchy. But that does not mean that lawyers, contracts, judges, and litigation are necessary. The degree to which business relationships are legalized varies greatly among the members of the global industrial and post-industrial economy.

It often has been claimed that from colonial times Americans have been particularly litigious.⁵ Certainly lawyers have played a particularly large role in American public life. It is also claimed that American business style is particularly adversarial.⁶ The absence in America of an aristocracy, and the absence of a small elite based on education in a handful of prestigious institutions such as in England and France, the predominance of fee simple ownership of small agricultural holdings over much of American history, the multiplicity of governments, the relatively low level of cartelization of industry and banking compared to Europe, the geographic dispersal of

5. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 84 (1973).

6. See MICHAEL L. DERTOUZOS ET. AL., *MADE IN AMERICA: REGAINING THE PRODUCTIVE EDGE* (1989).

corporate headquarters, and the fact that the American political capital and its business and culture capital are not in the same place, all may be factors in the American propensity to deal through lawyer go-betweens.

When a handful of powerful men of common class background, who were all literally at school together, who all live in the same neighborhood of the same city and whose families intermarry, run the dozen or so major industrial concentrations and the handful of financial giants that dominate the national economy, and also control the nation's highly centralized government, then there is little room for lawyer go-betweens, because there is little desire for arms-length transactions. Business and government are intimate affairs to be conducted by a small circle of intimates in a style of muted, mutual accommodation that fits such a circle. This has traditionally been the situation in most of the industrialized states other than the United States. America may use so many lawyers in business and governmental dealings less because we have a special affection for lawyers, than because economic and political power has been widely dispersed among scattered, disparate elites who cannot get together at their club or countryhouse, because they do not have one, and who would find that they had little in common upon which to build mutual trust even if they did have a meeting place. Where there are no gentlemen, there have to be contracts, rather than gentlemen's agreements.

Of course, the argument is one of degree. America has had the trusts, and the Ivy League and Wall Street and the money aristocracy of Vanderbilts, Carnegies, and Rockefellers, but it has had neither the degree of concentration nor the degree of intimacy among the concentrators that has existed in Europe.

Perhaps another rather mysterious chicken and egg dimension ought to be added. Aside from the peculiar case of English solicitors, European lawyers have had certain singular difficulties in serving business, particularly big business, which American lawyers have not experienced.⁷ From the revival of the civil law in Italy, continental legal education and those who received it were particularly tied to government service. Law as a body of learning flowered quickly and massively because the possessors of that learning proved to be ideal recruits for the bureaucracies that princes and emperors were building as key instruments in the recentralization of political

7. See Yves Dezalay, *Marchands de Droit* (1991) (unpublished dissertation, École des Hautes Etudes en Sciences Sociales (Paris)).

power after the dispersions of feudalism. The bulk and the best of the law graduates entered government civil or judicial services. The remainder who exercised their learning at all went to private practice; private practice itself, however, particularly in the Latin countries, was viewed as a public office. Lawyers were a kind of nobility of the robe holding independent positions of honor from which legal advice was bestowed as a kind of public benefaction from the learned to the unlearned. Until very recently in most European countries, being an employee was incompatible with membership in the bar.⁸ Moreover, and again particularly in the Latin countries, the traditional role of lawyer as orator survived from classic times. The lawyers spoke in court for those not capable of speaking for themselves. Finally, and paradoxically, while European law was far more noble than American, in America law was concentrated in a set of professionals while in Europe it was spread among the entire elite. American legal education, first by apprenticeship and then by small, highly specialized, separate law schools, produced lawyers, that is, persons who practiced law. In Europe, the bulk of regular university degrees were in law or medicine. People with law degrees were not lawyers, but jurists. Most did not practice law. Most who did not enter government service entered the general world of affairs, not the special practice of law.

The result was first that the European lawyer could not display quite the enthusiasm for the getting and spending of trade that his plebeian American counterpart was never embarrassed about. Business advising and contract writing tended to be left to separate and lesser branches of the profession, the advocate reserving himself for litigation. More importantly, European lawyers have experienced great difficulty in adjusting to corporate business. The corporation did not fit the image of the unlearned individual seeking a benefaction and gratefully tendering an honorarium. The lawyer could not be employed by a corporation, for employment was incompatible with bar membership. Moreover, the corporation did not need to employ lawyers, except for appearances in court, because nearly all of its executives who were not technologically trained themselves had legal educations. But these "in-house" legally trained persons felt and owed no allegiance to an independent legal profession and its norms. They were not lawyers "in"

8. THE CIVIL LAW WORLD, *supra* note 2, at 20-26.

corporations, but corporate officers who happened to possess legal learning.

Thus, the continental legal profession has been identified with the civil service, distanced from the practice of business, unnecessary for day-to-day corporate routine legal applications, and unwanted in the tight, interlocking executive circles that coordinate inter-corporate affairs and corporate relations with government.

As aforementioned, the exception has been the British solicitor who has always been deeply involved in business. Yet the division between barristers and solicitors, the higher prestige of the former, and their isolation from day-to-day business advising and negotiation, leads to quite a different situation than in America. Like their continental counterparts, British business executives have been prone to intimate negotiations rather than arms-length transactions. Solicitors may be skilled and wealthy, but they are not quite at the appropriate status level. Barristers are, but only become involved too late, that is, when litigation threatens. The British legal profession is set at a slightly awkward angle to perform the kind of corporate tasks done by the big American law firm that combines the solicitor's intimate business knowledge with the barrister's clout.

Thus, viewed either as the result of peculiar American traits or peculiar European ones, the intrusiveness of law, particularly in business dealings, is often seen as particularly American and the globalization of this intrusiveness as Americanization. European lawyers are now profoundly interested in the growth of the large law firm, both the movement of American firms into Europe and the increasing size of European firms. The difficulties of continental lawyers in providing legal services to corporate business are now being consciously addressed. Multi-national corporations are moving toward demanding the incredibly detailed, completely researched, contracts in Europe that they are accustomed to in the United States. The growth of multi-nationals, the growth of European-wide business, the movement of regulatory authority from national capitals to Brussels, the incursion of foreign competition on former national quasi-cartels, the existence of flagship firms, etc., all reduce the intimacy of business and business government dealings. The American style of more arms-length, more legalized, business dealings is growing apace in Europe.

II. GLOBALIZATION OF PUBLIC LAW

Certain global commonalities in law develop from a universal, and apparently growing, popular distrust of government, or more precisely, of bureaucratic discretion based on claimed expertise.⁹ The century from 1850 to 1950 is roughly the period of technocratic government.¹⁰ Bureaucracies grew enormously in size and policy-making authority and were legitimated on the basis of their technical expertise at accounting, war, engineering, and the like. In the Leninist states, to be sure, the legitimating expertise has been, in a sense, political, rather than technical. The party bureaucracy rules because it knows the political truths of Marxism. Even in those states, however, the government bureaucracy has consisted largely of engineers, economists, agronomists, and other technicians. Although clearly ultimate policy discretion in all states has to be wielded by some political authority—the people, the party, the leader—most of the day-to-day activity of government has become essentially a technical enterprise to be conducted by experts in the various sciences and technologies, including the social sciences and the science of public administration. In the United States, the Progressive movement¹¹ and the New Deal¹² were central vehicles for the acclaim of bureaucratic expertise. French and Prussian civil services provided universal models.¹³ Fascism also had a strong technocratic strain. The allegedly inspired amateurism of the English and British imperial civil services and the hysterical charisma of the Nazis may be counter-tendencies. But behind the Nazis lurked the standard German civil servants. And even the British civil services made their way more by accumulating “facts,” and claiming that they were the only ones who had all the facts, than simply by asserting their superiority of class and literacy. The most dramatic recent assertion of the superiority of technocratic government is to be seen in the

9. Shapiro, *supra* note 3; MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?* (1988).

10. DON K. PRICE, *GOVERNMENT AND SCIENCE: THEIR DYNAMIC RELATION IN AMERICAN DEMOCRACY* (1962).

11. See SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT 1890-1920* (1957).

12. See MICHAEL E. PARRISH, *SECURITIES REGULATION AND THE NEW DEAL* (1970).

13. Fritz M. Marx, *The Higher Civil Service as an Action Group in Western Political Development*, in *BUREAUCRACY AND POLITICAL DEVELOPMENT* (Joseph LaPalombara ed., 1963); *BUREAUCRATS AND POLICY MAKING: A COMPARATIVE OVERVIEW* (Ezra N. Suleiman ed., 1984).

European Community, where the Commission claims the central role in Community policy making as a kind of technocratic juggernaut.¹⁴

For a number of reasons, faith in technocracy waned after World War II. In the West, experts began to be seen less as neutral truth seekers above the fray of interest group politics and more as themselves, interest bearers who sought their own advantages from government. The military-industrial complex was the first technocracy denounced. The green movement then discovered that the government agronomists, chemists, and foresters were more like allies rather than restrainers of the evil, corporate, nature destroyers—just as others had discovered earlier and announced in the “capture” theory of regulatory agency behavior.¹⁵ And finally, the vast party and government bureaucracies of the Leninist states have been overthrown far less because of a political revulsion against Marxism, than because their claims of technocratic expertise have been proved false by the virtual collapse of the production technologies that they are supposed to be running. The current post-audit being conducted of the economic, environmental, and social devastation wrought by the largest bureaucracies the world has ever seen necessarily has a global impact.

No one, however, proposes doing away with bureaucratic government or even proposes that the defining characteristic of bureaucracies should cease to be technical expertise. Instead, what is sought globally is increased transparency of, and increased public participation in, bureaucratic decision-making. Because modern bureaucracies are indeed what Weber said they are, rational-legal,¹⁶ it seems obvious that law is an available instrument for achieving greater transparency and participation. Globalization here refers primarily to the industrialized states. In the period from roughly 1960 to 1990, the United States went through a virtual revolution in administrative law.¹⁷ Much growth and innovation also occurred in Canada and Australia.¹⁸ It is alleged, although with little hard evidence, that English administrative law revived in parallel fashion.¹⁹ Very recently, the

14. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

15. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* ch. 3 (1955).

16. Max Weber, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* (H.H. Gerth & C. Wright Mills eds. & trans., 1958).

17. SHAPIRO, *WHO GUARDS THE GUARDIANS?*, *supra* note 9.

18. G.G.L. Peiris, *The Administrative Appeals Tribunal of Australia: The First Decade*, 6 LEGAL STUD. 303-24 (1986); *Administrative Law: Past, Present & Future*, 16 QUEEN'S L.J. 5-224 (1991).

19. E.C.S. WADE & A. W. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* at ix (10th ed. 1985).

European Community has begun to experience a vivid urge to shop for new legal devices to govern the work of the Commission. Of course, the post-Leninist states are now desperately working to create a rule of law.

Globalization and Americanization go together here precisely because the almost frantic pace of American innovation put the United States well "ahead" of the rest of the world. In the 1960s, 1970s, and 1980s, American federal courts, seconded by Congress, created an enormous new apparatus of administrative law designed to maximize both the participation of interest groups in the bureaucratic policy-making process and the obligation of bureaucracies to make public every bit of their fact gathering, analysis, and policy choice processes and to prove publicly their every claim of expertise. Indeed, it may be argued that Americans went far beyond the point of optimal returns in this crusade. Not only were enormous amounts of new administrative law generated, but a steep level of increase in the vigor of judicial supervision of bureaucracies was achieved. In a very real sense, precisely because he was a layman rather than an expert trained in any of the technologies that modern bureaucracies wield, the judge was set to watch the technocrats. American judges of the 1940s and 1950s deferred to bureaucratic expertise because the experts knew everything and the judge nothing. By the 1980s, those same judges were demanding that the bureaucrats fully, completely, and publicly explain what they were doing and do so in such a way that the judge, a person totally devoid of technological training and knowledge, could understand. It is clear that the American felt need for transparency and is now felt across the industrialized world. It is also clear that across that world attention is being paid to the use of law to achieve those goals. It is not at all clear, but rather is a subject of global debate, whether other nations should convert their judges, as America did, from industrial fools to post-industrial heroes.²⁰

The promotion of the judge into the position of a kind of anti-bureaucratic hero may have been seen as part of what comparative politics scholars speak of as a "legitimacy crisis."²¹ In democratic states, where polling data can be somewhat trusted, there do appear to be rather long-term and steep declines in public approval of government institutions. Such a decline has obviously been precipitous in the post-Leninist sphere. From

20. See SHAPIRO, *supra* note 3, at 125-26; Martin Shapiro, *Special Issue on Judicialization of Politics*, INT'L J. POL. SCI. (forthcoming).

21. See G. BINGHAM POWELL, *CONTEMPORARY DEMOCRACIES* (1982).

another perspective, we are looking at the same phenomenon when we observe the recent worldwide preoccupation with new written constitutions dividing government powers and guaranteeing individual rights, the spread of constitutional courts and constitutional judicial review, and the fervor and effectiveness of the human rights movement. Here again, Americanization and globalization partially overlap. The American constitutional experience, including the Bill of Rights and judicial review, has appeared to be singularly innovative and successful and thus serves as a world model. For a time after World War II, as new constitutions with bills of rights and judicial review appeared, it could be argued whether they were emulations of the American model or simply the imposed products of American conquest. But that particular hallmark of American constitutionalism, constitutional judicial review, has certainly now come to flourish endogenously in Germany and Italy.²² Even more notably, France, whose legal and political culture has been most resistant to constitutional judicial review and who was a World War II ally of the United States, not a conquered enemy, now finds itself with an active constitutional court and a constitutional bill of rights.²³ The Court of Justice of the European Community has turned itself into a constitutional court with human rights jurisdiction, and that magic could hardly have been accomplished unless constitutions and rights had become a European habit.²⁴ Even before that the Western Europeans had created a Europe-wide bill of rights and a European Court of Human Rights.²⁵ The transmuted Eastern European states have adopted constitutional judicial review almost automatically, as have Asian post-Leninist states like Mongolia.

Constitutional judicial review lies at the convergence of two streams of limitations on government. The first is the division of government powers, the famous American "checks and balances." Of course, we will tend to divide those government powers we fear the most. The framers of the U.S. Constitution feared the legislature the most and divided it. The post-

22. DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1989); Mary Volcansek, *Judicial Review and Public Policy in Italy: American Roots and the Italian Hybrid*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 89-105 (Donald W. Jackson & C. Neal Tate eds., 1992).

23. ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS* (1992).

24. Weiler, *supra* note 14.

25. See Jochen Frowein et al., *The Protection of Fundamental Human Rights as a Vehicle of Integration*, 1 *INTEGRATION THROUGH LAW* (Mauro Cappelletti et al. eds., 1986).

Leninist states fear the executive the most and tend to divide its transmuted power between President and Prime Minister. Whenever a constitution divides powers, it almost always necessitates a constitutional court to police the boundaries. The French felt compelled to add a constitutional court when, and only when, they felt compelled to divide executive authority between a President and a Prime minister.

A second stream of government limitation is, of course, constitutional guarantees of individual rights. You can have bills of rights without judicial review. Indeed, many constitutions have some rights that are judicially enforceable and others that are not. Nonetheless, the whole Western tradition of rights is heavily law laden, and if rights are legal, it seems appropriate that they be handled by courts. And if you prefer to have a constitutional court anyway because you need somebody to police the constitutional division of powers and/or the boundaries between central and member states that occur in federalism, it becomes almost irresistible to give that court rights jurisdiction as well. That is the story of the European Court of Justice and the French Constitutional Council.²⁶ The new Eastern European states did not even have to decide which of the two, division of powers or human rights, was the chicken and which the egg of constitutional judicial review, so naturally did the two go together.

When we think of the global vogue in constitutional human rights as a manifestation of a global distrust of government, the picture is easiest to see for the so-called "negative" or conventional constitutional rights in which the right is stated as a reserve of individual autonomy against government interference. Freedom of speech, that is, the right to speak freely without government censorship or fear of punishment by government, is an obvious prototype. Post-World War II constitutions tend to be replete not only with negative rights, but also with positive ones such as the right to education, housing, health care, and employment. Here the demand is not that the government stay out of things, but rather that it act positively to assure the well-being of the citizens. Such constitutional provisions really exhibit the same distrust of government. Nearly all of the nations in which pressure has been experienced to put welfare rights in the constitution already have, or clearly anticipate having, systems of economic and social rights secured by statute. The push toward constitutionalizing these rights is far less a

26. Martin Shapiro, *The European Court of Justice*, in *EUROPOLITICS: INSTITUTIONS AND POLICYMAKING IN THE NEW EUROPEAN COMMUNITY* 123, 148-53 (Alberta Sbragia ed., 1992).

movement to endow government with new tasks than an expression of lack of trust in legislatures to adequately fund and bureaucracies to adequately implement mere statutory rights programs.

III. GLOBALIZATION OF PROTECTIVE LAW

The constitutional rights movement is one aspect of a global movement that goes beyond distrust of government to distrust of all hierarchical authority and concentrations of power. The individual is seen as needing protection from all the larger forces that threaten to crush him, not simply from the governmental ones.²⁷ Law is seen as one instrument for such protection. Thus, in speaking of globalization, we move from the realm of constitutional law to the more mundane realm of torts, product standards, consumer protection, and occupational health and safety.²⁸ Of course, most legal systems around the world have always dealt with personal injury, fraud, and shoddy goods. The industrial revolution brought together men and man-maiming machines; Twentieth-Century technology generated the most maiming of all, the automobile, plus a host of consumer goods so complex that the rule of caveat emptor was no longer fair. The same may be said for business organization and finance, areas where securities and corporate governance law expanded to protect the investor. Globalization here refers to a worldwide increase of legal protection against the ill effects of technical, economic, and social devices too complex, distant, or powerful to make individual self-protection possible. The most recent manifestation of this movement is the great outburst of environmental protection law that is partially fueled by a concern with nature itself but tends to achieve its greatest impetus when that concern is coupled with putative injury to individuals from pollutants.

Global patterns are, however, far from uniform here. The United States has experienced a tort explosion.²⁹ Many other nations have not. American experience has not become global in this area, except as a cautionary tale, in part because most other industrialized nations have more developed systems of tax-supported health care and income maintenance that

27. LAWRENCE FRIEDMAN, *TOTAL JUSTICE* (1985).

28. See Marc Galanter, *Law Abounding: Legalization Around the North Atlantic*, 55 *MOD. L. REV.* 1 (1992).

29. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989).

reduce the impact on individuals of personal injuries. The American securities market has also become a global cautionary tale, but one that is generating a worldwide move to certain American securities law innovations, such as the ban on insider trading. There has been an enormous, global flood of product standards and other consumer protection law, but not only are developments much faster in some nations than in others, but the substantive standards and rules adopted also vary widely.

Perhaps globalization is clearest and most dramatic in environmental law. As it became increasingly clear that the externalities of environmental degradation crossed national boundaries and that some of them, like ozone depletion, were truly global, parallel developments in national environmental law accelerated as did efforts at multi-national and/or international environmental protection law.³⁰ Given the global uniformity of the industrial technologies threatening the environment, a considerable substantive uniformity emerges even in national environmental rules.

When we consider the collective impact of consumer protection and environmental law, a major potential conflict is identifiable between the globalization of markets and the globalization of law. As various movements toward free trade (such as the General Agreement on Tariffs and Trade and the initial European Community treaties) break down tariff barriers to global markets, the large numbers of differing national product standards and rules on advertising and marketing intentionally or unintentionally become final and often very effective barriers to global trade. National economic sectors disadvantaged by global competition, which once experienced all this consumer protection law as meddling government regulation, now foster it as the last dike against the invasion of cheap and shoddy foreign goods and services. Most of the action is directed at vigorous enforcement of existing standards rather than the generation of new ones because the existing random differences in national standards are what serve as national trade boundaries.

The bonanza for those opposing globalization of markets lies in the new concern for the environment, which hit at the same time as the movement toward global markets. The sudden move to new, aggressive, and national environmental laws can, in some instances, provide the perfect cover for creating new legal barriers to trade to replace eroding tariff barriers. The

30. See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* (1992).

growing recognition that differing national environmental regulations can either deliberately or accidentally disrupt global markets then leads to a push for transnational environmental regulation, which is added to the push toward such regulation that comes from the perception of transnational spillovers of environmental degradation costs.

Developments in the European Community provide a microcosm of these potential global dynamics.³¹ The initial Community treaties attacked tariffs in order to create, or at least aim at, a European quasi-customs union.³² Disadvantaged national economic sectors then retreated to vigorous enforcement of national product standards, actively aided and abetted by national customs bureaucracies who were about to lose their missions and their jobs. Popular national support could be generated in the name of the traditional national quality of beer or carving knives that could not have been engendered in the name of tariff-protected higher prices. For many years the principal political institution of European Community building was the Court of Justice. In one of its most famous cases, it struck at this new protectionism by announcing the Community law doctrine of mutual recognition.³³ Each member of the Community must recognize the product standards of every other so that products lawfully manufactured in any member state must be admitted for sale in all of the others.³⁴

Later, when national political and economic elites within the Community concluded that they wanted to go forward in Community-wide market building, this principle of mutual recognition became the cornerstone of the Single Act, or "1992," agreement.³⁵ Under the Single Act, by 1992 an attempt would be made to harmonize, that is, enact Community-wide product standards. All standards not harmonized were to be subject to the rule of mutual recognition.

The political dynamic of globalization here is interesting. The Single Act couples these provisions on product standards with new voting rules on the Council, which must enact harmonized standards if there are to be any.

31. See Martin Shapiro, *Federalism, Free Movement and the Regulation-Averse Entrepreneur*, in *NORTH AMERICAN AND COMPARATIVE FEDERALISM* (Harry Scheiber ed., 1992); Shapiro, *supra* note 26, at 123-56.

32. Thomas Heller and Jacques Pelkams, *The Federal Economy: Law and Economic Integration and the Positive State—The U.S.A. and Europe Compared in an Economic Perspective*, in *INTEGRATION THROUGH LAW 245-412* (Mauro Cappelletti et al. eds., 1986).

33. Case 120/78 *Cassis de Dijon*, 1979 E.C.R. 649.

34. *Id.*

35. Single European Act 1987 O.J. (L 169) 1 [hereinafter Single Act].

Voting moves from a rule of member state unanimity to majority voting, with each member state casting a number of votes roughly proportionate to its proportion of Community population. Standing alone, the rule of mutual recognition threatens a "race to the bottom." Whichever member state has the lowest standards for a particular product should attract much of the manufacturing of that product. But freed of single member state veto, the Council is more capable of enacting harmonized regulations. It now has a strong incentive to do so in order to avoid the rush to the bottom. Or, more precisely, the states with the highest current stake in the manufacture of any particular product have a strong incentive to push for Council harmonization to avoid a race to the bottom, which they are likely to lose, while the threat of moving to mutual recognition gives the less industrialized members a bargaining chip in seeking more advantageous Community regional policy. Thus, the threat of mutual recognition spurs market globalization, that is, in this instance, Community-wide markets, by spurring the enactment of Community-wide uniform product standards. For all the fuss over Maastricht, the Single Act is now a working reality and major advances in product standard harmonization have already occurred.³⁶

Yet, at the same time the Single Act moves toward debilitating consumer protection law as a trade barrier, it sets up a potential move to environmental law as a trade barrier. The Single Act was drafted in the midst of environmental enthusiasm and thus pushes two potentially conflicting goals: economic growth and environmental protection. By virtue of the Act, the Community itself acquires statutory recognition of environmental powers it was already exercising. In addition, however, specific provisions of the Act allow member states to enact more rigorous environmental regulations than those of the Community as a whole, even if such deviations from uniformity incidentally hamper free trade.³⁷ These provisions are, of course, worded in such a way that the Court of Justice may strike down sham national environmental laws that are nothing more than new trade barriers in disguise. But it is not always easy to unmask such shams; many a national statute that severely limits trade might have legitimate environmental goals, particularly since many national legislators could have voted in favor of the law for environmental reasons as easily as

36. Shapiro, *supra* note 26, at 131-33; Renaud Dehousse, *Integration v. Regulation? On the Dynamics of Regulation in the European Community*, 30 J. COMMON MKT. STUD. 383 (1992).

37. Shapiro, *supra* note 26, at 137-38.

for economic ones. However, the danger is that many disadvantaged nations will frequently dress demands for new economic protection in environmental protection costumes.

Yet, here again the changes in voting rules on the Council, plus the active Community environmental bureaucracy, create an interesting dynamic. As national economic interests seize upon environmental loopholes in the Single Act, free trade and environmental interests can both be protected simultaneously by very rigorous, harmonized, Community-wide environmental standards that displace peculiar national ones.

IV. GLOBAL ACCELERATION OF LAW AND LAWYERS

Yet one more phenomenon that leads to talk of globalization is a step-level increase in the sheer volume and penetration of law. The bureaucratic state generates legal rules at a rate quite beyond the capacity of legislatures or courts. The regulatory state keeps expanding its reach through law in spite of talk of deregulation. The changes in Eastern Europe will result in a vast new outpouring of regulatory law, because the social control of economic enterprise, which in socialist states is achieved by internal directives within the state ministries that "own" the enterprises, is achieved by exterior, regulatory law when enterprise is privatized. The citizens of modern democratic states expect their governments to cope with whatever becomes defined as a social problem, from child abuse to the aging of symphony audiences. When the government can cope, and even more when it cannot, it passes a law as one step toward satisfying those demands. Perhaps in the 1950s and 1960s the production of wealth appeared to be so boundless that the welfare state could simply give money and services away without constraining and rationing rules. The hated means tests would disappear and welfare workers would provide social services to "clients" rather than determine the eligibility of "applicants." By the 1980s, the welfare state appeared to reach the limit of the resources of even the most affluent states. Cost containment brings an avalanche of new rules to replace the strategy of simply giving people as much as they ask for.

If the bureaucratic and regulatory welfare state manufactures legal rules at an astounding rate and pushes them into more and more human relationships, it may be argued that the private sector does not lag far behind. There are more lawyers, more lawsuits, and more law talk all the time. Newspapers and magazines now carry regular law sections next to

their music sections. Everybody knows about the litigation explosion. The crowd of lawyers becomes so prominent that it can serve as a target in presidential campaigns. The number of lawyers and the size of law firms expands exponentially.

It is notoriously difficult to achieve reliable data on litigation rates either over time in one country, or comparatively between countries. It may well be that there is no litigation explosion in relative terms, but it is only that modern industrial states multiply so greatly the number of human interactions that provide the potential for litigation, that the absolute amount of litigation grows.³⁸ With or without the litigation explosion, however, there does seem to be an increased worldwide prominence of law, lawyers, and judges in both private and public affairs.

This prominence may be the result of a host of developments that have little direct relation to one another. One set of factors does interlock. If bureaucratic and regulatory welfare states generate more and more legal rules, if we are distrustful of bureaucracies so that we seek more transparency and public participation in bureaucratic law making processes, and we choose judicial review as a major mode of achieving transparency and participation, then there will be a growth in judges and lawyers to match the growth in bureaucracy. To say the same thing only slightly differently, if we give individuals more legal rights to protect themselves better against big public and private power holders, there will be a growth of lawyers and courts to match the growth of rights. If we now wish to protect every individual by law from every harm, then there will be such a growth. As we multiply litigation opportunities in order to achieve greater transparency, participation, and protection, those who lose economic, social, or political struggles go to court to attempt to recoup their losses.

There are other causes of lawyer, judge, and court prominence that appear to operate rather separately from this interlocking set. For instance, the rapid expansion of European university education after World War II and the sudden opening of law as a plausible education and career for women led to a sudden surge in the total number of persons trained in the law in the industrialized world during the 1970s and 1980s.

Is there a difference between more law, on the one hand, and more lawyers, more legal costs, and more litigation, on the other? Because we

38. See Martin Shapiro, *Lawyers, Corporations and Knowledge*, 38 AM. J. COMP. L. 683 (1990).

want a more accountable bureaucracy, and more protection of individuals from government, corporate power, and the general vicissitudes of modern life and choose to achieve these goals through more finely knit legal fabrics, must we necessarily accept the globalization of the U.S. style of adversary legalism in which “have your lawyer see my lawyer” becomes the password for every relationship, whether simplistic or intricate? I doubt that there can be more law without more lawyers and more litigation. The globalization of markets means a distancing of business relationships. The distrust of bureaucracy, technology, and hierarchical authority and the concern for protecting individuals from them creates another kind of distancing. Legal rules are a standard and an almost irresistible mode of insuring the fairness of distanced relationships. But if distrust of government is one of the very generators of such rules, we can hardly put our faith in government bureaucracies to enforce those rules either on themselves or on the business community. The answer must be either self-enforcement or some neutral, trusted, non-bureaucratic enforcer or some combination of the two. The U.S. style of adversary legalism is precisely such a combination.³⁹ Everyone hires a lawyer to construct and invoke protective rules, and when irreconcilable disputes about the rules arise, resort is had to an apparently neutral, non-bureaucratic, non-technocratic, non-hierarchical, non-power pursuing third party—the judge.

Some nations, like Japan, may successfully pursue a policy of limiting legalism by using draconian measures to shut their citizens off from lawyers and courts. The globalization of markets, however, means that even in these nations the many companies linked to international transactions will need and acquire legal services, if necessary. Under such circumstances, it seems unlikely that regimes that profess some level of democracy can keep lawyers away from their domestic affairs indefinitely. The one exception, and of course a very important one, is China. Chinese imperial law was the one major legal system in the world in which a complex and theoretically all-encompassing web of law was implemented almost without lawyers and certainly without a private, professional bar.⁴⁰ (The government legal secretaries, although technically private employees of the magistrates, were for all intents and purposes civil servants, and some of the officials of the

39. Robert Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANAL. & MGMT. 369 (1991).

40. See DERK BODDE AND CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967).

provincial appellate courts and the central ministry of punishments were essentially professional lawyer-judges, although they had not received specialized legal educations.) This legal tradition, combined with the country's incredible size, population, and authoritarian regime, will almost certainly allow China to enter global markets while shielding most of its population from the globalization of law, unless it eventually experiences the collapse of the regime that has overtaken other Leninist states.

The post-Leninist states will almost certainly experience major increases in lawyers and litigation. In part, these increases will be a natural result of movement from socialist to capitalist production, which, after all, is a move from the most vertically integrated, internalized business enterprise of all to a regime of externalized economic enterprise. But, in part, the increase will occur as a conscious effort to build a private bar as an essential element in reintroducing the rule of law to bureaucratic government. In spite of a veneer of socialist legality, a central characteristic of Leninist regimes is the discretion of a bureaucratized party melded with government bureaucratic discretion in a way quite impervious to law. The government bureaucracies were actually under no real obligation to obey the laws of the state or even their own bureaucratically generated rules, although they were under a very real compulsion to obey the discretionary directives of the party. One of the central tasks of post-Leninist reconstruction is to introduce the fundamental practice, which is almost taken for granted in the West, that requires public officials to obey laws and their own rules and calls them to account when they do not. Western consultants on law and constitutional organization must remind themselves that Western institutions designed to achieve the rule of law, such as judicial review, presuppose the existence of a prosperous, active, private bar. Such bars will have to be created in parts of Eastern Europe and Asia either from scratch, by building on the small criminal defense bar, or by converting the large legal staffs of the now obsolete procurators' offices into a private bar.

In Western Europe, large private bars already exist. What is new and thus seen as "globalization" is the growth of large law firms, American and domestic, in Europe. The more significant aspect of globalization, in the sense of many lawyers and much litigation, is closely connected to the globalization of law as an instrument to insure transparency and accountability of bureaucracies.

As we have already noted, the strengthening of the European Community has increasingly centralized and distanced government

regulatory power in Brussels, and as a result there is increasing European interest in increasing the transparency of, and public participation in, the decisions of the new Eurocrats.⁴¹ Europeans inquire about such U.S. devices as independent regulatory commissions, the huge body of administrative law generated by the courts out of the Administrative Procedures Act and legislative oversight. Traditionally, European regulatory style has tended to be closed, intimate, and consensual. Government regulators, business leaders, and often union and local government leaders, negotiated confidentially to a mutually agreed result. In contrast, American regulatory style has tended to be confrontational, adversarial, public, litigation oriented, and thus full of lawyers on all sides. Indeed, when it is not, we suspect the regulators of having been "captured" and the public interest having been betrayed. There is no question that the U.S. style has achieved great transparency and participation (although perhaps at too high of a cost in regulatory inefficiencies). Community participants are now weighing the costs and benefits of the U.S. style. Certainly, Community regulation is already generating new lawyer demand. Both as providers of legal services and as lobbyists, lawyers are already playing a larger role in Community regulatory affairs than they traditionally have played in the national regulation undertaken by the member states. It may also be that the shift from unitary to "federal" regulation entailed in the growth of the Community also generates more lawyer demand because of the multiplication of laws simultaneously applicable to a given transaction.

The shapers of the Community have themselves tended to multiply litigation opportunities. The European Court of Justice for many years was the most dynamic community building institution. Of course, it did its community-building through the medium of litigation. Among its central community building achievements has been the extension of the opportunity to litigate Community law matters to private citizens through the "direct effect" doctrine. The framers of the Community treaties themselves carefully extended the opportunity to participate in Community litigation to the lower as well as the highest national courts, through the "reference" procedures of Art. 177.⁴² The Community has now established a court of

41. See Martin Shapiro, *The U.S. Administrative Procedures Act and the European Community*, in *NIEUW EUROPEES CONSTITUTIONEEL RECHT* (H.J. de Ru and J.A. Hofman eds., 1992).

42. See Shapiro, *supra* note 26.

first instance alongside the Court of Justice.⁴³ The Community reform agenda now includes extending the jurisdiction of the court of first instance to subject matters beyond those originally granted it, and thus inevitably increasing the size of that court. (Because of the European tradition of placing a large number of judges in a single court divided into “chambers” and sitting in small panels, the number of judges and the opportunities for litigation can be expanded almost indefinitely and almost invisibly by simply creating more judicial positions on a given court rather than having to create new courts. This device is also used in the “superior courts” of many U.S. cities and counties and in the lower federal courts.)⁴⁴ To some unknown degree, whether government regulatory style becomes more confrontational and litigious depends upon the propensity of judges to second-guess agencies. (There is, of course, a chicken-and-egg problem. Judicial propensity may increase as litigation increases, as well as vice-versa.) That propensity waxes and wanes at various times in various countries and perhaps for quite different reasons. It is all something of a mystery. Even within Europe, German administrative courts appear to be more active reviewers than do French, and it is unclear whether English judges have lately really become more active or whether this is just wishful thinking among English administrative lawyers. The stage is now set in the Community for a major growth in lawyering and litigation in the regulatory sphere, but as yet we do not know much even about the first act, let alone how the play will end.⁴⁵

It is sometimes claimed that the various urges and movements I have enumerated, such as the growth of administrative law to achieve bureaucratic transparency and participation, and the growth of law protective of the individual, add up to a massive and generalized, global “legalism”—to the deeper penetration of law, litigation, and lawyers into every aspect of social life. Cartoon children who used to be captioned “I say it’s spinach and I say the hell with it” are now depicted as announcing “I say it’s spinach, and I’m going to sue for child abuse.” It is alleged, particularly in the United States, but in Europe as well, that the politics of the ballot box are

43. Emile Noel, *The Transformation of the European Community*, 15 SUFFOLK TRANSNAT’L L.J. 514, 553 (1992).

44. See J. CULVER AND HAROLD STUMPF, *THE POLITICS OF STATE COURTS* (1992); cf. DEBORAH BARROW AND THOMAS WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988).

45. See Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179.

increasingly supplanted by the politics of litigation, especially by those who would lose at the ballot box if they openly announced their purposes and sought popular support.⁴⁶ A plague of lawyers emerge from the law schools and settle in an increasingly populated profession that feeds on the ever higher transaction costs that lawyers themselves generate.

All of this must be taken with more than a grain of salt. It is extremely difficult to establish either baseline data or current data on litigation rates, let alone on the far more intangible matter of the intensity of penetration of law into the social fabric. Given the enormously accelerated rate of human interaction resulting from the communications and information revolutions, it is not at all clear that legal transaction costs have increased relative to the total value of the transactions. In politics, all but the very stupid go to whatever part of government will help them, including courts. People may be going to government more for help, but it is not at all clear that they are going disproportionately more to courts. In much of the world, there has been less actual new judicialization of politics than there has been greater new understanding of the political role that courts have always played. This new understanding is partly a result of the spread of U.S. scholarship on the politics of courts and partly the result of changes in the public awareness of judicial policy-making. For instance, in shaping and reshaping the common law, British judges have always played an enormous role in creating British economic and social policy. Nevertheless, the politics of the judiciary was submerged in part because the judges acted in private and technical “lawyers’ law” spheres that did not appear to be of public concern. We now hear much of the politics of the English judiciary, since English judges are now more often involved in public law matters due to a greater body of public law.

Perhaps it is not best to seek to deal with a global legalism, that is, a global growth in the general pervasiveness of law, given that we do not know, and probably cannot know, whether it has occurred. It is probably the better part of valor and scholarship to deal with the few particular common developments and the many particular parallel developments in law across the globe that we can more precisely isolate and observe.

46. See Kagan, *supra* note 39.

V. GLOBALIZATION OF LAW AND THE GROWTH OF U.S. LAW

We have been looking at the globalization of law along a number of vectors. The global distrust of hierarchical authority and concentrated public and private power generates growth in administrative law, constitutional, and other rights law, and in legal regulation of economic enterprise. The global desire to protect the individual generates growth in personal injury, consumer protection, environmental law, and even family law. The globalization of markets and business enterprise generates the growth of a worldwide law of business transactions. The global multiplication of exterior business relationships and the growth of arms-length regulatory styles fuel a growing demand for lawyers and their involvement in more and more social, economic, and political relationships. Frequently, we have encountered a certain overlap between globalization and Americanization.

While in some instances U.S. responses to various global needs may have served as models to be diffused, in others our experience may well be a cautionary tale involving the traditional U.S. vice of excess. We may have too much distrust of governmental and corporate power, too much rights talk, too much adversarial, confrontational regulation, too much administrative and constitutional law, and indeed too much law, lawyers, and litigation in general. U.S. legal experts are rushing into the post-Leninist states to help them establish the rule of law. The European Community inquires about American regulatory style. Business firms everywhere look to the legal services provided by the big American-style law firm. All this occurs at the very time that U.S. citizens are increasingly uneasy about "too many lawyers" and "too much litigation."

Let us briefly mount a small, demonstrative parade of horrors. As other nations look for legal devices to insure more transparency and participation in government decision-making, must we not honestly testify to them that the administrative law and adversary legal system that has developed in the United States in the realm of government regulation has become pathological, endlessly delaying regulatory decisions and ultimately reducing their transparency by increasing their complexity?⁴⁷ As all the world talks of human rights, must we not inform the world that transforming social problems into rights issues and thus empowering courts over

47. Shapiro, *supra* note 3.

electorally responsible political leaders has not been an unblemished success in the United States and has not resulted in the courts solving most of the social problems assigned to them?⁴⁸ As all nations seek to protect their citizens from the potential harms with which modern industrial societies surround them, must we not admit that some of our environmental and consumer protection legislation has turned into mere binges of anti-corporate hatred that end up diverting scarce resources to their least important protective uses or that simply collapse of their own ambitions?⁴⁹ Think of Superfund and product safety standards. Our tort regime already provides a horror story that is known worldwide.⁵⁰ Should we be particularly anxious to export our free-wheeling, open, lawyer-lubricated style of corporate development in light of the junk bond and savings and loan scandals? Ought we warn outside emulators that the large U.S. law firms may be about to implode as a result of having committed themselves to practices that generate geometric growth rates that cannot be sustained indefinitely?⁵¹ Should not our corporations warn their transnational brethren to control their legal costs, as U.S. corporations are beginning to do?

In telling the stories of globalization of markets and of politics, my colleagues may be able to speak of both large opportunities and large threats for U.S. society. One aspect of the globalization of law, the worldwide adoption of certain aspects of U.S. style law as applied to business transactions, certainly provides opportunities for U.S. lawyers, particularly those in the large law firms. The globalization of environmental law may pose large threats to the United States economy because, as the largest and most profligate national industrial entity, the United States must be the principal regulatory target. Certain moves toward internationally uniform and enforceable bodies of law, such as the law of intellectual property,⁵² entail potentially great costs and benefits for U.S. interests. Differing

48. *See generally* GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991); R. SHEP MELNICK, *COURTS AND THE WELFARE STATE* (1993).

49. *See* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve and Fred L. Smith, Jr. eds., 1992); JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* (1988).

50. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989).

51. *See* MARC GALANTER AND THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991).

52. *See* ROBERT BENKO, *PROTECTING INTELLECTUAL PROPERTY: ISSUES AND CONTROVERSIES* (1987).

regulatory regimes impose differing production costs on enterprise so that national deregulation or the export of high regulatory standards may provide opportunities for U.S. economic advantage or disadvantage over its international competitors.

On the whole, however, the globalization of law is for U.S. citizens less a matter of opportunities and threats than simply one of prospectives, at least in the short and medium run. For all the internationalist talk, it remains true now, as it long has, that law and the political structures that produce and sustain it are far more national and far less international than are trade and politics as such. There are more nations now than there have ever been and more are emerging daily. The tendency toward finer and finer ethnic political subdivision is one of the most striking features of the new global politics and is probably being accelerated by the expansion of global markets. But the global result in law is more nationally and locally distinct, not necessarily more globally common law. If the Mongolians produce television sets, our economy may have to do something about it. But if they produce new constitutional provisions protecting the rights of their Kazak minority, chances are our laws need not do anything about it. If their efforts fail and their ethnic minority seeks independence or absorption by Kazakhstan, then our politics may have to do something about it, but our law will still be untroubled. In short, I would argue that our domestic legal regime may have to respond to global changes in markets and in politics far more often than to global changes in law.

For the most part, national regimes of law and lawyering will remain self-generating. They will be self-generating, however, in response to certain aforementioned globally perceived needs, such as the need to limit technocratic-bureaucratic discretion. Thus, U.S. lawyers and lawmakers may find comparative legal studies more fruitful than they have in the past. There may be somewhat more rapid legal borrowing and diffusion among national legal systems than there has been in the past. But, except in certain special areas, which no doubt will be the duty of globalization of law specialists to identify, the American agenda of legal change will continue to be built largely out of domestic legal materials. It may be true that a certain degree of U.S. style law is a real feature of the globalization of law. It is highly unlikely, however, that the traffic will flow equally in both directions, that there will be much Europeanization, let alone Asianization or Africanization of U.S. law. For the United States, globalization of law will be much more a matter of parallel development than of direct borrowing or

response. Again, I must emphasize that the globalization of markets and of the politics of the environment may indeed drive much legal change in the United States, but most of the change is likely to come from domestic, rather than global, legal materials.

The enormous costs and failures of the U.S. style of adversary legalism are coupled with the continued American enthusiasm for rights and our continued derogation of political authority, most recently evidenced by the popularity of legislative term limitations. This dynamic sets the agenda for legal change in the United States. It is highly unlikely that we will respond to the pathologies of legalism by moving toward less law, although just possibly we may move toward fewer courts or less active court intervention in policy-making. Alternative dispute resolution and judicially facilitated settlement are much bruited. We may have passed the peak of judicial policy-making in both constitutional and administrative judicial review. Yet, most reforms are likely to move toward different, rather than less, law. In shaping legal reform, it may be of some help to appreciate that certain phenomena are now globally common and generate globally parallel legal responses. We may have increasing confidence that the successes and failures of legal innovations in country A will be predictive for country B. In certain special areas of law, globally common and globally enforceable rules are beginning to emerge. For the most part, however, U.S. law will indubitably continue to resemble traditional U.S. law, generated by domestic responses to perceived domestic problems, although many of those domestic problems are generated by our global interrelationships. The whole world marches into the international future with its feet firmly planted in the ever more fertile soil of nationalism, as a glance at any day's newspaper will make clear. Studies of globalization of law will depend as much on a subtle appreciation of differences among peoples of the globe as on similarities.