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JUDICIAL DIALOGUE FOR LEGAL MULTICULTURALISM

*Charles H. Koch, Jr.**

Globalization challenges the world's legal cultures to find ways to work together. No longer can national legal professions and judiciaries, not even those of the United States, isolate themselves from the influences of the laws of other nations and supranational tribunals. Nonetheless, these legal cultures present a nearly infinite variety of legal philosophies and approaches. The task then is to understand and then meld these legal cultures, including those other than the transatlantic cultures on which this article will concentrate. That concentration serves simply to illustrate the value of judicial dialogue in coming to grips with legal multiculturalism, not an assertion of transatlantic superiority. A dialogue among supranational tribunals will be essential in the evolution of a global legal culture.

A similar task confronts those of us who have made a career of studying U.S. administrative law. U.S. administrative programs present a nearly infinite diversity. For an administrative law scholar, it is strangely familiar ground to work with various legal "cultures," most of which are convinced of their own validity, even superiority. In the U.S. administrative process, substantive laws vary from security regulation to welfare, education to criminal justice. Here we concentrate on the U.S. Supreme Court's treatment of diverse administrative procedures. In the U.S. administrative system, procedural alternatives may vary from some type of adjudication or to something similar to legislation; they may be carried out through a range of participation modes from a replication of an Anglo-American trial to no external participation in any form. In sum, diversity is the essential condition of administrative law, and the dialogue between administrative and conventional tribunals under this condition offers valuable experience in evolving principles within the cacophony of world legal cultures.

I assert below that judicial exchange rather than dominance has inherent advantages as a technique for evolving a global legal culture. For insight into the global task, I look first at an internecine struggle within the continental system. For further background, I describe how the U.S. Supreme Court has accommodated deviations from the basic legal model

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in U.S. administrative law as well as other internal U.S. legal systems. The supranational tribunals in the European setting and U.S. Supreme Court have shown the capacity to engage in dialogues over diverse legal philosophies. These experiences demonstrate the advantages of a mix of judicial institutions, both equal and hierarchical, and in the resolution of conflict, even regarding fundamental principles, by judicial dialogue rather than hierarchical command. Transferred to the global regime, these experiences suggest that the key is an openness to multiculturalism and to the value of full participation by all legal cultures in the evolution of a global legal culture.

I. AN INTERNECINE STRUGGLE IN THE CONTINENTAL LEGAL SYSTEM

In an article published in the *Michigan Journal of International Law*, I used an idealized and homogenized version of the civil law system, mostly French but with some reference to German, in contrast with the U.S. version of a common law system.¹ I sought to begin to “envision” a global legal culture which early on at least seems likely to be dominated by a clash between these two transatlantic legal cultures. I hope that this somewhat superficial version of the continental legal culture was adequate for that discussion but I realize that it did not do justice to that rich legal tradition. Two cases, one from the European Court of Human Rights (ECtHR) and the other from the European Court of Justice (ECJ), express the diversity within the continental or civil law legal culture. To a common lawyer, these cases seem an internecine struggle over legal principles and legal philosophies. Nonetheless, this struggle between the two highest and, most importantly, equal tribunals in a partially unified supranational system provides lessons for the global community.

In the first case, *Vermeulen v. Belgium*, the ECtHR struck down a classic civil law process as practiced in Belgium.² A dissenting judge observed that the process was “an old tradition in the legal systems of continental Europe . . . the institution goes back to the time when the codes were compiled *and is closely bound up with the idea underlying them.*”³ That is, as seems true to an outsider, the challenge in this case strikes at a fundamental notion of the civil law legal culture, the advantages of a collegial judiciary. So we have high tension. This supranational tribunal rejected a

1. Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. OF INT’L L. 1 (2003).

2. *Vermeulen v. Belgium*, (2001) 32 E.H.R.R. 15.

3. *Id.* at ¶ O-11 (joint dissenting opinion of Judges Gölcüklü, Matscher, and Pettiti) (emphasis added).

long-established national procedure, a procedure firmly entrenched in the continental system. More interesting, perhaps, is that a largely continental court is rejecting that philosophy, a philosophy many of the judges no doubt grew up with.

Vermeulen began as a very mundane bankruptcy proceeding in Belgium courts. On an application from the department of the *procureur du Roi*, a Belgian Commercial Court judged *Vermeulen* bankrupt and declared his company insolvent. *Vermeulen* did not make an appearance because he was in Ghent Prison for forgery and fraud.⁴ The Court of Appeals determined on the merits to uphold the judgment.⁵ *Vermeulen* took the matter to the Court of Cassation, which has the power to quash a ruling if it finds an error of law.⁶ The *avocat general* (a member of the *procureur general's* department) made an oral submission and subsequently took part in the court's deliberation. The *avocat general* advised that the challenge was admissible but unfounded. The Court of Cassation dismissed the challenge.⁷

Vermeulen then filed an application with the European Human Rights Commission ("Commission") charging the Belgium courts had violated the European Convention on Human Rights ("Convention"). He asserted that the Commercial Court should have given him an adversarial hearing and Court of Cassation should not have permitted a representative of "State Counsel's Office," the *avocat general*, to make a presentation to which he could not respond and to participate in its deliberations.⁸ While these challenges are to some extent intertwined, the focus here is on the intervention by the *avocat general*. Although *avocats general* are part of the *procureur general's* department, they are separated from the other functions of the department. Their participation is well-established in the civil law system and has ancient roots. Nonetheless, the Commission found the proceedings infringed on *Vermeulen's* procedural rights.

The Commission expressed the opinion that Belgium had violated Article 6(1) of the Convention. That Article provides "In the determination of his civil rights and obligations . . . everyone is entitled to a fair

4. *Id.* at ¶ 10.

5. *Id.* at ¶ 12.

6. This court is the supreme court of the Belgium system. It may review questions of law only. If the court finds an error of law, it quashes (hence "cassations" from to break) the decision. In that case, it assigns the case to a court of the rank of the court which rendered the original decision and that court corrects the prior decision. See Jean Laenens & George Van Mellaert, *The Judicial System and Procedure*, in INTRODUCTION TO BELGIAN LAW 106 (Hubert Bocken & Walter De Bondt eds., 2001).

7. *Vermeulen*, *supra* note 2, at ¶ 13.

8. *Id.* at ¶ 23.

and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁹

This language can hardly be said to expressly prohibit a process associated with a traditional, even system-wide, legal culture. Nonetheless, the Commission noted that it had rejected participation by the prosecutor’s office in criminal proceedings in opposition to traditional Belgium practice.¹⁰ The question of whether the government could assist a court as a third party in a civil proceeding seemed to Belgium still an open question. Belgium argued the value of *avocats’ general* participation in avoiding discrepancies arising in the case law and in the bilingual environment, Dutch and French, of Belgium law.¹¹ Vermeulen urged that the process infringed on his rights of defense and the “principle of equality of arms.”¹² The Commission did not question the honesty and the objectivity of the *avocat general* but nonetheless disapproved of this age-old form of participation.

Belgium thought it had provided “a fair and public hearing . . . by an independent and impartial tribunal” according to its national law as it had done for generations. The Commission disabused it of that notion holding it to a “law” superior to its own law and legal tradition. It found that the process “violated the safeguards inherent in the concept of a fair trial”¹³ and hence violated the Convention.¹⁴ Several members of the Commission dissented. Mr. Conforti argued that the *avocat general* served as “*super partes*” responsible for ensuring that justice is done.¹⁵ Mr. Barreto advised that the Commission look behind appearances. The *avocat general* was not Vermeulen’s adversary but participated in objective terms and “should be considered as assistant and adviser to the court, and defender of public order.”¹⁶ Although the fears of partiality might be justified in a criminal proceeding, they were unfounded in a civil suit in which the government was not a party. Therefore, he urged, the continued use of the *avocat general* as an advisor to a court did not constitute an infringement of the principle of equality of arms in a civil proceeding.¹⁷

9. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221, 228.

10. *Vermeulen*, *supra* note 3, at ¶ C50 (referring to the Court’s decision in *Borgers v. Belgium*, 214 Eur. Ct. H.R. (ser. A) at 21 (1995)).

11. *Id.* at ¶¶ C37 and C38.

12. *Id.* at ¶ C33 (quoting *Borgers*, 214 Eur. Ct. H.R. (ser. A) at 21).

13. *Id.* at ¶ C51.

14. *Id.* at ¶ C55.

15. *Id.* at ¶ CO-12.

16. *Id.* at ¶ CO-II3.

17. *Id.*

The ECtHR agreed with the Commission's conclusions. It as well refused to accept the distinction between criminal and civil proceedings. "[T]he nature of the function . . . does not vary according as the case is a civil or a criminal one."¹⁸ In both types of cases, the *procureur general* is found to act with "the strictest objectivity" and "independence and impartiality."¹⁹ Still, the *avocat general's* submissions influence the national court. Even comments filed by an independent participant infringe on the party's right to reply. This infringement is "aggravated" by the *avocat general's* participation in the deliberations.²⁰

Four judges dissented. Judge Gölcüklü, following his observations above as to the national tradition, asserted that "the European Court must make sure that it does not, through excessive formalism, overturn such traditions."²¹ More starkly, he accused this European court, doing business in the heartland of the civil law, of not understanding that system:

[T]o see the *procureur general*, when he acts in civil proceedings, as an adversary of either of the parties is to misunderstand the nature of the institution, since his role—of what one might call an *amicus curiae*—is solely that of a neutral and objective guardian of the lawfulness of the proceedings and of the uniformity and consistency of the case law.²²

Thereupon, he inquired into the derivation of the Court's normative judgment. He suggested that, absent clear normative command, a supranational court should give deference to the national legal cultures, especially to national laws "well received by legal practitioners."²³ Although this process has been abandoned in many countries, the burden is on the Court to show that its decision will "lead to better, real protection."²⁴

Judge Van Compernelle likewise may be seen as challenging the source of the Court's rejection of a well-established process. This judge found it "to be wrong to apply the adversarial principle to the intervention of an independent member of the national legal service."²⁵ This process "corresponds to the procedure applicable in several international courts."²⁶ The Court, in this judge's mind, relied on principles grounded

18. *Id.* at ¶ 29.

19. *Id.* at ¶ 30.

20. *Id.* at ¶ 34. While Article 50 allows the Court to order damages against the national government, the damages were not proven in this case and hence the court assessed costs only.

21. *Id.* at ¶ O-12.

22. *Id.*

23. *Id.*

24. *Id.* at O-13.

25. *Id.* at ¶ O-II3.

26. *Id.*

on notions insufficient to overcome appropriate deference to national authority over their legal systems, in conflict with widespread traditions, and contrary to accepted international practice.

One of the international tribunals referred to explicitly by the dissent is the ECJ. The ECJ has much the same judicial officers as the Belgium judiciary. Like Belgium courts, judge reporters assist the ECJ.²⁷ Their job is to prepare the preliminary record and the report for the hearing.²⁸ Judge-Reporters are judges on the court and their participation was not questioned in *Vermeulen*. Regardless, the reporter was heard before Vermeulen's lawyer and hence he presumably had the opportunity to respond.²⁹ The ECJ also uses "advocates general;" it is to be "assisted by" these advocates general.³⁰ They were modeled after the "Government Commissioners" of the French Council of State.³¹ While the name is the same as the official in *Vermeulen*, the ECJ's advocates general do not come from the bureaucracy but are appointed as part of the Court, under the same qualifications and standards of conduct. However, like the Belgium advocate general, the advice of the ECJ's advocate general is not subject to reply.

The ECJ's advocate general scheme was similarly attacked in *Emesa Sugar (Free Zone) NV v. Aruba*.³² The case was brought before the ECJ itself rather than the ECtHR; hence, not surprisingly, Emesa was less successful than Vermeulen. The case involved a reference to the validity of a Council decision.³³ Emesa sought leave to submit written observations on the advocate general's opinion. It relied on the *Vermeulen* decision of the ECtHR,³⁴ contending that even though the Treaty does not provide for comment, the ECtHR ruling should be followed so that Convention Article 6(1) establishes a fundamental right to comment.

27. KOEN LENAERTS & DIRK ARTS, *PROCEDURAL LAW OF THE EUROPEAN UNION* 7 (Robert Bray ed., 1999) ("The primary responsibility for decision-making within the Court lies with the Judge-Rapporteur . . .").

28. Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, art. 10(2), 1991 O.J. (L 176) 7, 10.

29. *Vermeulen*, *supra* note 3, at ¶ 13.

30. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, art. 222, O.J. (C 325) 33 (2002) [hereinafter EC TREATY] ("The Court of Justice shall be assisted by . . . Advocates-General.").

31. The Council of State has administrative as well as judicial functions. *See* L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 72-73 (5th ed. 2000).

32. Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, 2000 E.C.R. I-665 (2000).

33. *See* EC TREATY, art. 234 ("Where . . . a question [involving the Treaty or other EU laws] is raised before any court or tribunal of a Member State, that court or tribunal may . . . request the Court of Justice to give a ruling thereon.").

34. While the ECJ does not ignore the ECtHR, it does not feel bound. However, the ECJ usually follows the ECtHR's lead on human rights questions.

The ECJ began its reasoning with a hortatory-sounding, but actually very practical, defining statement:

“[F]undamental rights form an integral part of the general principles of law For that purpose, the Court *draws inspiration* from the constitutional traditions common to the Member States and from the *guidelines* supplied by international treaties for the protection of human rights. . . . The Convention has special significance in that respect.”³⁵

It noted that the “principles” of the Convention were “incorporated” in Article 6(2) of the Treaty of European Union.³⁶ However, the status and role of the advocates general was established by the Treaty governing the ECJ. Under that law, they are appointed in the same way as the judges, equal in rank and protected from removal under the same principles. Moreover, they are not “subject to any authority, in contrast” to “certain member states,” e.g., Belgium.

[The advocate general’s opinion] is not . . . an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which derives its authority from that of the Procureur Général’s department [as in *Vermeulen*]. Rather, it constitutes the individual reasoned opinion, expressed in open court, of *a member of the Court of Justice itself*.³⁷

The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it.³⁸

Thus, the Court found the ECtHR precedent inapplicable.³⁹ It determined that, while such consideration “cannot justify infringing a fundamental right,” practical considerations argue against allowing reply.⁴⁰

The commentator criticized this decision: “No-one denies that the advocates general are independent and impartial. But that is not the point. *Emesa*’s central claim was that it should have the opportunity to

35. *Emesa*, *supra* note 32, at ¶ 8 (emphasis added).

36. *Id.* at ¶ 9 (referring to The Treaty of European Union, known popularly as the “Maastricht Treaty”).

37. *Id.* at ¶ 14 (emphasis added) (internal quotation marks omitted).

38. *Id.* at ¶ 15.

39. *Id.* at ¶ 16.

40. *Id.* at ¶ 18. The Court noted that it might permit reopening if the final decision requires comment but not in the case of *Emesa Sugar*.

comment on *all* observations filed. The ECJ failed to address this."⁴¹ However, it seems to an outsider that the Court did address that contention.⁴² The Court took the view that the advocates general are part of the Court, as the commentator concedes, distinguishable from the Belgium department, and hence their comments should no more be subject to comment than those of the other judges.⁴³

Regardless of the contrasting outcomes from these two supranational tribunals, the ECJ and the ECtHR engaged in a beneficial dialogue on a this fundamental legal issue. That is, European supranational tribunals were, in a sense, reasoning together to evolve a European legal culture. They seem capable, here and in other instances, of doing so in the free-flowing environment of competing traditions and where the development of a European law compels the evolution of uniform principles.⁴⁴

II. INTERNECINE STRUGGLE IN THE U.S. COMMON LAW SYSTEM

Any observation that the continental legal culture is at war with itself may seem like the jading of an innocent who has begun to understand that the continental system is in fact diverse and dynamic. I have for

41. Rick Lawson, *Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, Order of the Court of Justice of 4 February 2000*, nyr, *Full Court*, 37 COMMON MKT. L. REV. 983, 988 (2000).

42. Lawson observed that "[f]or all fairness it should be noted . . . that *Emesa*, to the extent that it deviates from the Strasbourg case law, is an exceptional case. In recent years the ECJ has been increasingly prepared to refer to the jurisprudence of the European Court of Human Rights." *Id.* This tendency could signal a convergence of views on many fundamental rights principles in supranational European law. If ever ratified, the European Constitution Treaty will impose a new human rights regime on Europe. Still, fundamental questions are debatable even within this identifiable legal culture.

43. Like members of U.S. collegial courts, ECJ judges discuss cases among themselves, apparently with no argument that those discussions should be available for comment. BROWN & KENNEDY, *supra* note 31, at 65. Conventional U.S. courts are not without their parallels to the ECJ situation. While nothing in the United States matches the advocate general, the Solicitor General sometimes files what amounts to advice. The Solicitor General is an office of the Justice Department, part of the cabinet, often an advocate, and in no stretch of a U.S. lawyer's mind a part of the judiciary. When the Solicitor General appears in an advisory role, he does so as "amicus," like the Belgium *avocat general*. His briefs are subject to comment and certainly he does not participate in deliberation. So the ECtHR's perspective seems confirmed in the U.S. legal culture. But ECJ advocates general do more than just assist; they are part of the judiciary. There is no similar judicial officer in the United States, although judges do consult, without opportunity for comment, with law clerks as well other judges.

44. Robert Harmsen, *National Responsibility for European Community Acts Under the European Convention on Human Rights: Recasting the Accession Debate*, 7 Eur. Pub. L. 625, 640 (2001) (considering the real significance of *Emesa* as "offer[ing] telling testimony to the growing intensity of the interconnections between the Strasbourg and the Luxembourg Courts").

years, however, dealt with a similar internecine struggle within the U.S. common law. Our administrative law constantly struggles against the confines of its common law norms. Directly comparable to the above European conflict are various questions about the essential nature of a “fair hearing” in U.S. administrative adjudications. These adjudications are conducted by means of a nearly infinite variety of processes.⁴⁵ Thus, U.S. administrative law necessarily resists the persistent efforts to force the administrative process, including administrative adjudications, into a single model and has generally sought to escape the gravitational pull of the common law tradition. In doing so, it sometimes finds support from other legal cultures and sometimes from pragmatic notions; hence it shares with the emerging global legal culture both a drive for eclecticism and an indeterminate tradition. The judicial dialogue generated around various administrative law issues then adds another body of experience for understanding the evolution of a global system from diverse legal cultures.

In its conventional judiciary, the U.S. law reveres a notion of pure adversariness reminiscent of that guiding the *Vermeulen* decision. This vision is concentrated on conventional, or “Article III” federal judges. Even in the federal system, this vision is incomplete.⁴⁶ Most U.S. adjudications take place in administrative schemes. Resnik counted 862 conventional federal judges but some 1370 “administrative law judges” (ALJs) in 2002.⁴⁷ Even these numbers greatly understate the contrast. There are at least three times as many other types of officials running administrative adjudications as there are ALJs, a relatively formal type of administrative judge.⁴⁸ Moreover, in a number of cases, administrative

45. E.g., Richard Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 6 (1987) (finding that federal agencies alone employ some 280 different rules of evidence).

46. Judicial design varies greatly even among U.S. conventional judges. Conventional federal judges are appointed by the President with the advice and consent of the Senate and have “life tenure” under the Constitution. U.S. CONST. art. III, § 1. In the states, however, the nature of even the conventional judiciary is quite different with about 87% of the judges elected usually for a term of years. NATIONAL CENTER FOR STATE COURTS, STATEMENT OF THE NATIONAL SUMMIT ON IMPROVING JUDICIAL SELECTION 7 (2002).

47. Judith Resnik, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One’s Anomalous Character*, 71 GEO. WASH. L. REV. 798, 807 (2003). Conventional federal judges serve under Article III of the U.S. Constitution which vests the “judicial Power of the United States.” U.S. CONST. art. III, § 1. From the very beginning of the country, however, Congress has created “tribunals” under Article I, § 8, known as “Article I” or “legislative” courts. Federal administrative adjudicative bodies find their constitutional authority from Article I but are not usually called Article I courts.

48. John H. Frye III, *Survey of Non-ALJ Hearings Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992). Increasingly “administrative law judge (ALJ)” has been adopted as a generic term for administrative presiding officials. The federal system separates ALJs who have special protection from other presiding officials hired by agencies having no

adjudications dwarf the cases decided by conventional judges. For example, Social Security judges alone decide some 500,000 cases a year.

The rise of the administrative state forced variations in traditional common law adjudicative procedures in the administrative process. The U.S. administrative process began with the first Congress but undeniably became the focus of attention within the legal community in the 1930s, during the New Deal. At that point, government became a major player in the legal process. Conventional lawyers and many academics condemned the administrative process and sought to reign it in, which meant in the adjudicative context making it like the traditional Anglo-American judicial process. The American Bar Association, through Harvard law professor Roscoe Pound, charged that it was "marxist."⁴⁹ In short, the U.S. legal community has for generations objected to "compromise" of traditional procedures embodied in the administrative process.

The legislative result of the conflict, the federal Administrative Procedure Act (APA),⁵⁰ was largely conservative, adopting a modified version of the conventional judicial process. Nonetheless, the victory of tradition was more apparent than real. The Supreme Court has consistently accepted tailoring of administrative procedures to meet decisionmaking needs. The evolution of due process jurisprudence in "mass justice" programs (welfare), requiring resolution of millions of individual disputes a year, provides an example of the dialogue that has allowed due process jurisprudence to accommodate diverse adjudicative problems. Justice Brennan in the classic *Goldberg v. Kelly*, although greatly expanding the coverage of due process protection, set an inflexible to the point of dysfunctional procedural norm.⁵¹ This formalistic, tradition-bound norm was strongly criticized.⁵² The Court almost immediately began to heed this criticism and develop a due process

more than the usual civil service protection. PAUL VERKUIL ET AL., *THE FEDERAL ADMINISTRATIVE JUDICIARY* 7 (1992). States do not adopt this distinction and their law may employ any of a number of terms. All these administrative presiding officials might be lumped together simply as "administrative judges."

49. "The ABA Report in 1939 . . . , which was produced by Roscoe Pound, . . . [condemned] the 'Marxist ideas' (and that's a quote) of [key architects of the administrative process] . . ." K.C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 512 (1986) (statement of Paul Verkuil). Interestingly, Dean Pound is the author of ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1963).

50. 5 U.S.C. §§ 554, 556-57 (1966).

51. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

52. E.g., Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (setting the foundation for analysis of various procedural elements that guided a new due process law).

jurisprudence more amendable to the needs of modern administrative adjudications.⁵³

In the end the Supreme Court adopted a balancing approach which permitted a plethora of different administrative adjudicative processes,⁵⁴ and that approach has ruled since. This balance was to include the interests of the individual, the possibility of improving the process, and the interests of the government. Weighing individual interests against governmental interests has rarely been determinative because both individuals as a class and the government (community) want fair and accurate decisions.⁵⁵ Thus, proposed procedures must be shown to improve the administrative decision.⁵⁶ In sum, the Supreme Court's constitutional procedural jurisprudence has been extremely flexible and has incorporated a wide range of factors, including community values and usefulness.

This jurisprudence has allowed both conceptions of adversariness also at work in the two European cases. Belgium and the ECJ take a traditional but at base pragmatic view within the continental adjudicative decision-making strategy. Under that strategy, the courts are the center of the process and hence the system should provide them with sufficient support and assistance. The *avocat general* improves judicial decision-making and leads to more consistent decisions. The ECtHR took an approach that relies on advocates to assure fair and competent decision-making, and hence it focused on whether the process interfered with advocates' efforts to represent their clients. U.S. administrative law recognizes the advantages of both advocacy and active judicial participation. It might favor one or the other strategy depending on the needs of a specific adjudicative task, but often a particular adjudicative process will rely on judges as the primary guarantors of fair and accurate decisions.⁵⁷

53. See *Goss v. Lopez*, 419 U.S. 565 (1975) (requiring little more than a meeting with the principle as "some kind of hearing" in public school suspensions).

54. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

55. Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 *Hous. L. Rev.* 635, 659 (2000).

56. Nonetheless, tradition might remain a factor, among others. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 *Chi. L. Rev.* 28, 54 (1976) (noting that tradition deserves attention for the practical reason that a procedural element has withstood the test of time).

57. Alternatives to adversarial processes constantly struggle against "natural" forces tending toward the lawyer-oriented model. A similar evolutionary bias can be seen in mixed cultures, civil and common law. VERNON VALENTINE PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 63 (2001) ("At first glance the procedural style of the mixed jurisdictions resembles so much the common law that there seems to be no remaining trace of the past." But he notes that this is something of an overstatement.). I am inclined to think it is the force of personality of the lawyers who have the most to gain from the adversarial model. That has been the case in U.S. administrative law. Perhaps, this observation

The ECJ advocate general is an expression of that strategy in European adjudication. That official is indisputably part of the ECJ and has no attachment to any administrative institution of the EU. The effort to transport the ECtHR's case offends a fundamental principle of judicial cooperation and checks built into the civil law judicial strategy. This is not just a historical norm; there are undeniable benefits to this system. Assuring the best possible judging, rather than advocacy, is a systemic imperative. Integrity is assured by the checks and balances within the judiciary. U.S. administrative law has arrived at a similar strategy in many instances, probably not through borrowing but based on procedural needs. Because many administrative adjudicative programs likewise depend on the judge, many schemes focus on improving the judging rather than the advocacy. For example, three administrative law scholars have recommended that Social Security Administration judges, handling benefits programs, be given advisors in lieu of reforms based on adding adversariness.⁵⁸ This recommendation can be seen as the product of a dialogue between the scholars and courts.⁵⁹ This dialogue generated procedural alternatives of traditional adversarial individual dispute resolution. The solution recognized that sound adjudicative decisions, not just fair play, "equality of arms," was the ultimate goal.⁶⁰ The Supreme Court has been receptive to this strategy where appropriate.⁶¹

The Supreme Court has also accepted written "hearings" in the administrative context contrary to our procedural tradition. The Court has

represents too much of a public choice, rational maximizer model. Maybe people are more satisfied with the adversarial system. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 40 (1975) (finding that everyone, even those from civil law legal cultures, prefers the adversary process).

58. In a study commissioned by the Social Security Advisory Board, three administrative law scholars concluded:

Given the potential downsides of experimenting with the adversary process in this setting and our judgment that such a step would fail to advance the crucial need to improve the record development process, we conclude that the best SSA "representative" would be non-adversarial—a person who could help provide the ALJ with a timely and complete record for decision while not triggering a host of collateral issues.

Frank S. Bloch et al., *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 *CARDOZO L. REV.* 1, 58–59 (2003).

59. *Salling v. Bowen*, 641 F. Supp. 1046, 1062 (W.D. Va. 1986) ("Has the quality of the hearing dispositions improved [from injecting adversariness]? The answer . . . has to be a resounding no.").

60. Many times equality of arms is unrealistic in administrative programs. The citizen has few resources and the system must be trusted not just to give adequate opportunity. Indeed, in mass justice systems the government cannot practicably be well represented, or as in SSA, represented at all.

61. *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

recognized that the subject matter of administrative proceedings often requires expertise that cannot adequately be utilized through the methods of trial. It is willing to concede that written processes may be simply more efficient in some administrative contexts. Indeed, the Court may be seen as going out of its way to accommodate this choice by an agency even when an oral hearing seems required by statute.⁶²

The Court permits a variety of often nontraditional approaches to the admissibility of evidence in administrative adjudications. In general, evidence is admitted for what it is worth and the administrative judge is expected to weigh the reliability and probity of the evidence.⁶³ In contrast, the common law has strong rules of evidence because it is based on the mechanics of the jury trial. Administrative law, in which the judges are the finders of fact and not just referees, has a general principle against strict rules of evidence. Those schemes relying on an active judicial role in assuring an adequate record are directly contrary to permissible judicial behavior by conventional judges.⁶⁴

Consistent with reliance on adjudicators rather than advocacy, administrative law employs specialized tribunals; indeed, the administrative process is designed to facilitate such tribunals. The Court recognizes that certain areas at least should be judged by experts. For some reason, Article III is generally implemented through regional "inferior" courts rather than allocating judicial duties according to specialization like many continental systems.⁶⁵ The constitutional language does not require it and the regional division is apparently traditional. Nonetheless, the idea of specialized courts does not set well with conventional U.S. legal thinkers.⁶⁶ The Supreme Court, however, has not balked at the choice of specialized tribunals in the administrative context.⁶⁷

Judicial acceptance of diversity in the administrative process might be contrasted with the ECtHR's approach in *Vermeulen*. The principles expressed in *Vermeulen* would be analyzed in the U.S. common law legal culture in slightly different terms and again find some contrast

62. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

63. *Richardson v. Perales*, 402 U.S. 389, 400 (1971).

64. ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(6) cmt. (2000) ("A judge must not independently investigate facts in a case and must consider only the evidence presented."). JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 172 (3d ed. 2000) ("Unlike the European system, in which judges have the primary responsibility for the development of litigative facts, American judges are generally permitted only to consider the evidence and testimony that is produced by counsel.").

65. The Federal Circuit is the only Article III court with jurisdiction defined by specialty areas. 28 U.S.C. § 1295 (1982).

66. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

67. *E.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

between the constraints on the conventional judiciary and on administrative adjudicators. It is likely then that a common lawyer would consider whether the advocate general's advice was an illegal "ex parte communication." Such off-the-record communications are beyond doubt a violation of fundamental common law principles.⁶⁸ Administrative law, on the other hand, takes a much more flexible view of ex parte communication. It may permit such communication with non-litigants.⁶⁹ And it may permit communication between the adjudicators and the others in the agency.⁷⁰ There is no uniformity here; many administrative adjudicative schemes have stricter rules and the treatment of these issues varies greatly among administrative processes. Again, administrative law in general engages in a much more flexible and nontraditional analysis of this constraint than is present in the conventional U.S. judiciary. Yet, it has remained in place for generations without being questioned by the Supreme Court.

In another sense, U.S. administrative law embodies a notion diverse both from the common law tradition and among adjudicative schemes. In the civil law, prosecutors are judges, they are trained with judges, and they consider themselves judges. Even in *Vermeulen*, the Court conceded that the prosecutors were impartial and trying to give objective advice. In the common law, prosecutors are the most antagonistic of litigants; common lawyers would be offended beyond speech at the Belgium process. Indeed, a U.S. lawyer would feel faint in reading dissenting Judge Gölcüklü's statement: "[The prosecutor's office] is solely that of a neutral and objective guardian of the lawfulness of the proceedings"⁷¹ While there may be a sense that prosecutors in the United States serve the public, in an individual dispute they are considered the least

68. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) ("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding"); Canon 3B(7)(b) ("A judge may obtain the advice of a disinterested expert on the law . . . if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."); JEFFREY SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 173 (3d ed. 2000) ("While judges may, under certain circumstances, obtain advice concerning the law from disinterested legal experts, the exception does not extend to experts in other areas.").

69. The federal APA prohibits ex parte contacts with "interested persons" only. 5 U.S.C. § 557(d) ("no *interested* person") (emphasis added). This prohibition is limited still further because it only covers those administrative adjudications termed "formal" or trial-like. A vast majority of adjudications do not fall into this category. CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE, § 6.12 (2d ed. 1997).

70. *White v. Ind. Parole Bd.*, 266 F.3d 759, 766 (7th Cir. 2001) ("[N]on-record discussions between an agency's decisionmakers and members of the agency's staff are common and proper.").

71. *Vermeulen*, *supra* note 2, at ¶ O-12.

neutral and objective of advocates. U.S. lawyers could not even contemplate a world in which prosecutors participated in the judging.

Despite this visceral repulsion of prosecutor involvement, U.S. administrative process often combines functions. The same agency that "prosecutes," say for security or consumer fraud, also decides.⁷² Administrative law accepts this combination for much the same reason as Belgium/civil law; it recognizes the advantages of allowing the administrative decisionmakers to tap the support and expertise of their professional staff. Like Belgium, the prosecutorial staff is administratively separated from the adjudicators but are still housed in the same agency.⁷³ Moreover, the agency head in many schemes ultimately resolves the case it decided to prosecute.⁷⁴ While these decisions are almost always subject to independent judicial review, that review is very limited.⁷⁵

This deviation from the common law tradition is far from universal in the administrative process, however. Seemingly for similar reasons to those motivating the ECtHR, Congress established administrative schemes that separated the prosecuting agency from the adjudicating agency. These "split enforcement" schemes were intended to separate structurally the law enforcers from the adjudicators.⁷⁶ Another kind of "coordinate" structure is taking over state administrative adjudications. About half the states now have "central panels" or "central hearing offices."⁷⁷ This structure separates the administrative judges from the

72. The U.S. Securities and Exchange Commission and the Federal Trade Commission respectively.

73. 5 U.S.C. § 554(d) ("An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that case or a factually related case, participate or advise in the decision . . . except as witness or counsel in public proceedings.")

74. Combination of prosecution-type functions and decisionmaking does not by itself violate procedural due process. *Withrow v. Larkin*, 421 U.S. 35 (1975); see also *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (explaining that the fact that decisionmakers were hired by an organization that had a stake in the outcome did not demonstrate bias unless actual bias is shown)

75. KOCH, *supra* note 69, ¶ 10 (1997).

76. See Daniel Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 971 (1991) ("When these [administrative] tasks raise numerous policy issues [in adjudication] . . . , then the alternative [split-function] structure is optimal."). Experience has not been so kind. Sidney A. Shapiro & Thomas McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 62 (1989) ("[The Occupational Safety and Health Review Commission] is the creature of a failed experiment with the split enforcement model."); Peter Strauss, *Rules, Adjudication, and Other Sources of Law in an Executive Department: Reflections of the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974) (expressing a similar negative reaction to the actual results of the split-function model in mining).

77. Flanagan identified twenty-five states and at least three major cities. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and*

prosecuting agency. Again, this judicial design is not without criticism and the experience with it might inform such judges as that of the ECtHR in *Vermeulen*. Here, I offer this as another example of the diversity brought to U.S. law by the administrative process, diversity often at odds with fundamental and traditional concepts. The Supreme Court has shown the ability to make the necessary law to accommodate these coordinate administrative schemes.⁷⁸

In substantive law as well, the administrative process tends to be less common law-like. A dominant characteristic of the common law is that judges evolve the law.⁷⁹ Yet, in many states, administrative adjudicators may not strike out to make new policy through a common law-like case-by-case process but the agency must make a general rule first.⁸⁰ The motivation is probably different from that driving a similar constraint under civil law doctrine. The continental motivation was to prevent the judiciary from taking the law-making function from the democratic institutions. It expresses a distrust of courts that, though often expressed, has not taken hold in the U.S. common law. Required rulemaking challenges the fundamental fairness of the common law process. It seems, often intuitively, that applying law for the first time in an adjudication is fundamentally unfair. Therefore, state legislatures and courts have denied this form of judicial lawmaking by agency adjudicators and require instead that they state the law before they apply it in adjudication. These schemes can best be seen as a fundamental break from the common law philosophy.

However, many states permit administrative adjudicators to evolve the law through the adjudicative process, and the federal law has rejected the notion of required rulemaking altogether. For generations, the Supreme Court has allowed agencies to evolve the law in adjudications in the same way as common law courts.⁸¹

Similarly, the federal courts have allowed administrative adjudicators considerable flexibility in applying administrative case holdings.

Their Impact on State ALJ Authority and Standards of Agency Review, 54 ADMIN. L. REV. 1357, 1357–58 (2002); see also John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 440 (2001).

78. See, e.g., *Martin v. Occupational Safety & Health Regulatory Comm'n*, 499 U.S. 144 (1991).

79. HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 163–64 (William N. Eskridge & Philip P. Frickey eds., 1994) (“The body of decisional law announced by the courts in the disposition of these [individual] problems tends always to be the initial and continues to be the underlying body of law governing society.”).

80. See, e.g., Model State Admin. Procedure Act § 2–104 (1981).

81. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Stare decisis is not the rule in administrative adjudications and agency adjudicators may deviate from precedent if they find the need to do so.⁸² On the other hand, administrative judges may be under a greater duty to follow statutory or regulatory language much like the continental system. In the administrative context, both agencies and courts must stick to clear language.⁸³ In the administrative context also, administrative judges must follow clear expression in policy statements by the agency. In general, administrative judges are controlled by statute and agency rules and may, like civil judges, “deviate” only in the sense of interpretation of ambiguous language. Still, the Court has required the adjudicators to make their own judgment in the interest of fairness.⁸⁴

All this is to show that in the bosom of the U.S. common law system is an alternative view or rather a plethora of alternative views. In this way, the U.S. legal scene reflects the global legal culture. These “lapses” cause significant tension between the conventional view and the “deviations” administrative law is willing to accept. Yet, for generations U.S. courts have recognized the need for flexibility and tailoring. In the context of the administrative process, the Supreme Court has accepted these compromises of fundamental and traditional norms.

In addition to the administrative context, the Supreme Court has accepted diversity among the states and has been somewhat protective of state sovereignty. Recent cases, for example, have required Congress to assure that any imposition on the states is “proportionate” and “congruent.”⁸⁵ More to the point, the Court has read the Eleventh Amendment to the U.S. Constitution as a guarantee of state sovereignty, not just a limitation on the “judicial Power of the United States.” While this somewhat parallels European subsidiarity, it might evidence a greater judicial

82. E.g., *Texas v. United States*, 866 F.2d 1546, 1556–57 (5th Cir. 1989) (“An agency . . . is not bound by the shackles of *stare decisis* to follow blindly the interpretations that it, or the court of appeals, have adopted in the past.”); *S. Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 102 (1st Cir. 2002) (citing *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991), and *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), for the proposition that an agency may refine, reformulate, or even reverse its precedent based on new insights, changed circumstances, and a desire to correct a mistake). Of course, *stare decisis* is not so strong in conventional judicial proceedings as tradition would demand. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”).

83. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978).

84. Cf. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

85. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress may not impose its view of establishment of religion so as to prevent state regulations); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (establishing limit on the power to enforce rights of older workers against the states); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (preventing imposition of federal protection for the disabled against a state).

openness to regional diversity. To a large extent, subsidiary has been forced on the ECJ by treaty and the Court has not interpreted that requirement with sensitivity to state sovereignty. In *Vermeulen*, the ECtHR demonstrates even less sensitivity to state sovereignty and comes off as closed-minded to cultural diversity. In contrast, the Supreme Court has always had a vision of the states as embodiments of local solutions and laboratories for experimentation.

Similarly, in direct contrast to *Vermeulen*, the Supreme Court has shown substantial deference to state procedural choices. The *Parratt* line of cases, for example, subordinates federal procedural due process to state procedures.⁸⁶ Indeed, in *Parratt* itself, the Supreme Court found a federal procedural due process interest but ruled that the state remedies were adequate to vindicate that interest. The *Mathews* balance, discussed above, permits states considerable freedom in designing their procedures. The Court has even taken a flexible view of the jury requirement, though there is nothing more symbolic of the common law. While enforcing the fundamental requirement, the Court has accepted state deviations in implementation.⁸⁷

This is not to assert the superiority of the Supreme Court. In fact, many U.S. commentators vigorously criticized the Supreme Court's recent concessions to state sovereignty, particularly as to rights. Rather, such opinions show a willingness to engage in a dialogue *within* the U.S. federal system. Like the European courts, the Supreme Court has been very accustomed to borrowing from the states. Because of the above selected European cases and the U.S. administrative law examples, the discussion has focused substantially on process. But U.S. courts also interact on substantive law. U.S. courts are accustomed to looking to courts outside their jurisdictions, both vertically and horizontally, for ideas and even authority in the dynamic of their judicial law-making. Federal courts have a tradition and sophisticated jurisprudence of borrowing from state law. Federal courts borrow in the development of federal common law or to answer questions left by state statutes. In diversity cases, they must apply state law; in doing so they might "predict"

86. *Parratt v. Taylor*, 451 U.S. 527 (1981) (holding that the negligent loss of a prisoner's property could be vindicated through a state tort action); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding state tort remedy sufficient where a prison guard maliciously destroyed property).

87. *E.g.*, *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (recognizing authority in the states to decide on the size of their juries within the limits of general practice among the states) ("We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."); *Carter v. Jury Comm'n*, 396 U.S. 320, 332 (1970) ("It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifications for their jurors.").

that the state law is ripe for change and, as if a state court, look to other jurisdictions for guidance.⁸⁸ State courts borrow regularly from the laws of other states and the federal system. While the U.S. Supreme Court might be “regarded by many foreign judges and lawyers as resolutely parochial,”⁸⁹ within its borders it is accustomed to substantial diversity. U.S. judges and practitioners have valuable experience in the jurisprudence of borrowing and merging legal doctrine.

III. JUDICIAL DIALOGUE IN THE ERA OF FRAGMENTATION

Many are alarmed at the fragmentation among supranational bodies, including supranational tribunals.⁹⁰ Yet, the experiences related above indicate that there is much to be gained by exchange among a variety of tribunals, both horizontal and vertical. Those experiences demonstrate the importance of flexibility and eclecticism for a vital legal culture. They show the potential for judicial exchange in assuring participation and acceptance in the evolution of a legal regime.

In the end, the important point is that courts, especially in confederations of diverse legal cultures, must be sensitive to all those cultures. This may not now be the philosophy of the global tribunals. Anghie, for example, observed:

[T]he International Court of Justice may theoretically draw upon ‘the general principles of law recognized by civilized nations,’

88. The Court has even permitted federal agency adjudicators to apply the traditional law of the states. *E.g.*, *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

89. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1117 (2000). However, several justices seem to find value in the work of other legal cultures, including Justices Breyer and O’Connor and Chief Justice Rehnquist, and Justices Stevens and Kennedy are among those who have recently cited foreign decisions in support of their opinions. Nonetheless, there is a conflict over whether it is proper for U.S. courts to cite or even refer to non-U.S. authority or experience. Some Supreme Court justices, for example, have criticized their colleagues for doing so. In this Congress, some fifty members sponsored a non-binding resolution that expresses the sense of Congress that judicial decisions should not be based on foreign laws or court decisions. Tom Curry, *A Flap over Foreign Matter at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC, at <http://www.msnbc.msn.com/id/4506232> (Mar. 11, 2004). However, the founding generation did not take this view. The drafters of the Constitution relied on the president of a French court, Baron Montesquieu, for the fundamental principles of the structure of U.S. government. *See, e.g., No. 47: The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*, in *THE FEDERALIST PAPERS* 268 (Clinton Rossiter ed., Mentor 1999) (1788). This French jurist is cited as authority consistently throughout our constitutional cases.

90. *E.g.*, Gerhard Hafner, *Pros and Cons from the Fragmentation of International Law*, 25 MICH. J. INT’L L. 849 (2004) (reflecting the concerns of the UN’s International Law Commission).

where 'civilized' must now be understood to mean all nations. But an examination of the recent jurisprudence of the Court suggests that little effort has been made to draw upon the legal traditions and systems of non-Western people in the administration of international justice. International law remains emphatically European in this respect, regardless of its supposed receptivity to other legal thinking.⁹¹

This instinct must change and will change. First, this chauvinism will no doubt create a tension with those from other legal cultures. Pragmatically, this tension will interfere with the evolution of a workable legal culture. Second, and more generally, this notion narrows the sources of ideas. There are ideas in many legal cultures that have potential value for the world. Supranational tribunals must engage in the business of tapping the wisdom of all the world's legal cultures, not in the search for the superior one.

Unity imposed through a judicial hierarchy will create friction within the global community. If the *Vermeulen* judges may be criticized for not understanding the philosophies of the continental system, how much more vulnerable will, say, transatlantic judges be to charges that they do not understand Asian, Islamic, customary and other well-established and rich legal cultures when they venture to compress the world's jurisprudential bounty into a uniform legal vision. For example, these legal traditions and many others who have joined and will join the global legal community might take a very different view of what constitutes a "fair hearing." Conceding that Asian traditions embody a great diversity of legal philosophies and strategies, they generally exult social engines promoting community harmony as opposed to the western commitment to individual competition evidenced in the *Vermeulen* opinion.⁹² Islamic legal systems are also extremely diverse, but we might

91. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 76 (1999) (citation omitted). The Statute of the International Court of Justice states, *inter alia*:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

....

c. the general principles of law recognized by civilized nations;"

Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060 3 Bevans 1179, available at <http://www.icj-cij.org> (last visited May 10, 2004).

92. Dal Pont, for example, observed that "[t]he adversarial notion inherent in litigation creates conflicts, a phenomenon inconsistent with the Japanese quest for harmony." Gino Dal Pont, *The Social Status of the Legal Professions in Japan and the United States: A Structural and Cultural Analysis*, 72 U. DET. MERCY L. REV. 291, 317 (1995). Similarly, Mo observed: "The Chinese are well-known for their preference of non-judicial means of dispute resolution to court proceedings. This attitude has its historical and cultural bases." John S. Mo, *Alterna-*

conceive that the representatives of the transatlantic tradition will question the opportunity for a "fair hearing" in proceedings before a Kadi, a prevalent group of judges, which lacks the opportunity to examine witnesses and in which the witnesses are credited according to strict rules.⁹³ Coming to grips with customary legal cultures is even more problematic because their philosophies may not even be translatable into transatlantic legal concepts.⁹⁴ The essentialized characterizations of all three of these jurisprudential groups, while not capturing the richness of these legal traditions, shows a diversity in the conceptualizing of our example question, "fair hearing," sufficient to caution against a precipitous movement toward a universal global legal vision without full participation by *all* of its constituent members. Judicial dialogue should be a crucial vehicle for that participation.

A dialogue among equal tribunals, as we see in the *Vermeulen* exchange, assures careful evolution of a global legal culture. It can assure that various legal cultures have "their day in court" so to speak. That does not mean there will not be convergence through judicial dialogue. The European dialogue, for example, may ultimately confirm the judgment of the *Vermeulen* majority. Indeed, as one of the dissenting judges observed, the challenged process was already disappearing among continental national systems. The ECJ may even concede that its advocate general's opinions, though easily distinguishable from the Belgium advocate general, should be available to the parties for comment. The lesson, however, is that a *horizontal* judicial dialogue assures that the society is ready for this step.

The U.S. experience demonstrates at least equal importance of a *vertical* dialogue. As with the evolving global legal culture, the U.S. experience demonstrates the value of an open-minded approach throughout any judicial hierarchy. Unlike the *Vermeulen* majority, the U.S. Supreme Court has been open to deviations, even somewhat

tive Dispute Resolution, in INTRODUCTION TO CHINESE LAW 367 (Wang Chenguang & Zhang Xianchu eds., 1997). Hence some 70% of Chinese civil disputes are settled by mediation. ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 114 (1998).

93. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 195 (1982). "The emphasis of the Islamic law of procedure lies not so much on arriving at the truth as on applying certain formal rules There is no examination of the witnesses, or of the likelihood of their testimony being true." *Id.* Rather, the judgment is based on either a set of presumptions or the application of formalistic rules. *Id.*

94. For example, Indian Tribal courts adjudicate under a strongly non-adversarial system. Robert Yazzie, "Life Comes from It": Navajo Justice Concepts, 24 N.M. L. REV. 175, 183 (1994) ("There are no fixed rules of procedure or evidence to limit or control the process. Formal rules are unnecessary. Free communication without rules encourages people to talk with each other to reach a consensus. Truth is largely irrelevant because the focus of the gathering is to discuss a problem.").

fundamental deviations, from the single notion of a “fair hearing.” Several examples are given above in which it has tolerated these deviations in the federal system itself in the proceedings of lower administrative tribunals. Also it has been open to variation in the states. Perhaps even more to the point, it has honored customary approaches in Indian tribal dispute resolution.⁹⁵ We see that in a hierarchical relationship the key is a willingness to value variety.

So as not to appear too chauvinistic: the so-called *Solange* series of cases demonstrates a very fruitful vertical dialogue in European law.⁹⁶ In those cases, the German Constitutional Court seems to have increased the ECJ’s sensitivity to the EU’s responsibility regarding human rights.⁹⁷ The first case began in the late 1960s when a German court in a reference to the ECJ noted a conflict between the German Basic Law and compliance with European law.⁹⁸ In *Internationale Handelsgesellschaft*, the ECJ took a decidedly supreme tack and responded: “[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.”⁹⁹ It argued that EU law prevails even in the face of allegations of violations of fundamental human rights protected by a national constitution.¹⁰⁰ Nonetheless, the German Constitutional Court continued to assert that EU law could not take precedence over fundamental rights guaranteed by Germany’s Basic Law. In the end, however, the German Constitutional Court softened its own assertion of authority

95. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (“Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”) (citation omitted).

96. See Mark Killian Brewer, Note, *The European Union and Legitimacy: Time for a European Constitution*, 34 CORNELL INT’L L.J. 555 (2001), and the cases and authorities cited therein. “Solange” means “as long as.”

97. These opinions give the impression that the German Constitutional Court does not see its relationship with the ECJ as vertical, reminiscent of the Virginia Supreme Court in the formative years of U.S. constitutional jurisprudence. See *Cohens v. Virginia*, 19 U.S. 264 (1821).

98. Article 234 (ex Article 177) of the Consolidated EU Treaty authorizes any “court or tribunal of a Member State” to request that the ECJ “give preliminary rulings” on interpretations of EU law and on the validity of acts of EU institutions. EC TREATY, art. 234. Its purpose is to foster cooperation between the national courts and the ECJ. LENAERTS & ARTS, *supra* note 27, at 18–19.

99. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134.

100. *Id.* at 1133–39.

but only because it was convinced that sufficient steps were being taken to protect fundamental human rights through EU law.¹⁰¹

The value of both horizontal and vertical judicial dialogue goes beyond tolerance. These dialogues can also help the emerging global legal culture in capturing the wisdom of a new variety of legal thinking. In order to do so, a deep understanding of the bedrock philosophies and strategies is essential. Building them into the system is not anthropology or concession to diversity but working, operational legal development. As the global tribunals confront various legal conflicts, they must make the legal multiculturalism work. For these tribunals, it is not theory.

The advantage of judicial dialogue then is that courts must decide. Legislators and the legislative-like activity of formulating the international agreements may avoid tough issues and the "political" dangers of implementation. Judicial decisionmakers must resolve actual controversies. A court cannot put off finding some basis on which to decide because the legislative direction is not adequate. As those of us from common law cultures know, this process results in some false starts, mistakes, and plain unfairness to individual litigants. In systemic terms, however, it fosters borrowing and applied thinking in the simple interest of resolution. On balance, much is gained.

That leads then to the inscrutable question: where will these judges find their principles? Where does a supranational tribunal get the foundation for its evaluation of the array of solutions offered by the world's legal cultures? This question should give us all pause as we enter the inevitable search for a global legal culture and the potential overshadowing of our own legal cultures.

It could be said that no legal culture can complain about the rejection of its principles if it has consciously become a member of the international club. In light of this philosophy, we pretend that tribunals will engage in interpretation. Yet, we know the fluidity of interpretation.¹⁰² To pick on the *Vermeulen* judges yet again for an example, the human rights treaty did not compel its rejection of Belgium's longstanding tradition. The ECtHR claimed to interpret Article 6(1) of the Human Rights Convention. That Article provides: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing with a reasonable time by an independent and impartial tribunal established by law." This language does not prohibit the Belgium process, though a majority of judges claimed it did. Supranational tribunals will engage in

101. BROWN & KENNEDY, *supra* note 31, at 362; see also BERNARD RUDDEN, BASIC COMMUNITY CASES 67-68 (1987).

102. See generally INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil McCormick & Roberts S. Summers eds., 1991) (providing a study of the various approaches to interpretation around the world).

similar "interpretations" because international documents will often offer no more guidance. Such interpretative enterprises will themselves raise the question of the source of guiding principles.

We can pretty much dismiss the resort to universal principles. Both the common law and the civil law were based on "natural law." But today we cannot accept that we can find universal principles that will dictate the functioning law. Similarly, tradition will not get us far because the global culture will include so many, somewhat inconsistent, legal traditions. Nonetheless, judicial thinking can benefit from the variety of rich legal philosophy and jurisprudence from the various legal cultures. While not necessarily limited in application to supranational tribunals, most of the dialogue can be expected to take place in such forums given their nature and the nature of the conflicts they must resolve. The resolution of disputes presents the opportunity for the invocation of these traditions and philosophies, and judicial treatment in individual disputes can lead to the evolution of new principles.

Pragmatic values, for example the realities of effective decisionmaking in determining the scope of a "fair hearing," would be another source of global law. The central U.S. procedural due process case has focused even our constitutional examination of procedural norms on effectiveness. That justification was rejected by the *Vermeulen* majority; the argument that the Belgium judges benefited from the advocate general's advice did not persuade the majority. To be fair, the line between pragmatism and expedience is often difficult to draw and even more difficult to justify. The balance between the norm of fairness and the drive for effectiveness often proves elusive.

Norms are hard to settle on and hence the global legal culture must be a work in process despite our desire for stability and uniformity. The process of judicial exchange among a variety of tribunals, the justification of judicial positions, and the advocacy that drives judicial resolution offers a formidable vehicle whereby the global society can come to grips with the cacophony of legal cultures. It can bring about some consensus, intellectual and elite consensus at least, rather than settling for dominance.