

# Rethinking the Dispute Resolution Process: The Application of Federalist Principles to the WTO

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**Abstract:** The global experiment with free trade parallels the American and European experience with economic integration. This paper explores American and European doctrines of federalism, focusing on the techniques developed by the Supreme Court and the Court of Justice of the European Communities (“ECJ) to evaluate local regulations that impact national or Community-wide trade, as they are analogous to WTO judicial review of domestic regulations. It suggests that dispute panels’ interpretation of trade disciplines has not adequately accommodated regulations that pursue non-economic goals, like environmental protection, and concludes that aspects of American and European federalism could be applied to the WTO dispute resolution system to better accommodate domestic regulations that pursue non-economic goals.

## I. Introduction: Why Federalism?

In the globalized trade system, free market ideology dominates the *modus operandi* of the major institutions like the International Monetary Fund, the World Bank, and the World Trade Organization (“WTO”).<sup>1</sup> International trade law seeks to maximize welfare by reducing trade barriers and thereby allowing the principle of comparative advantage to operate on a global scale.<sup>2</sup> The multilateral trading system recognizes that nations may not liberalize trade for

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\*Attorney at Law. Jessyn Schor wishes to express her sincere gratitude to Prof. Frank Garcia of Boston College Law School for his insightful comments and suggestions.

<sup>1</sup> The WTO became operative in 1995 as an institutional replacement for the General Agreement on Tariffs and Trade (GATT). "GATT" refer to the rules of the General Agreement on Tariffs and Trade, which have been in force (with some amendments) since 1948. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. This agreement was incorporated into the General Agreement on Tariffs and Trade 1994 by way of paragraph 1(a) of Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994 [hereinafter WTO Agreement], The Legal Texts: The Results of the Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization as Signed on April 15, 1994 17 (World Trade Organization, 1999).

<sup>2</sup> See Matthew Schaefer, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 CAN.-U.S. L.J. 441, 447 (1997).

domestic political reasons and therefore creates a binding treaty system to ensure that local politics do not undermine the potential welfare maximization of reduced barriers.<sup>3</sup>

These classic justifications for free trade are derived from the efficiency model, which in simplified terms, promotes the maximization of economic welfare by reducing government regulations that interfere with the free market.<sup>4</sup> This model fails to distinguish between regulations that pursue non-economic goals, such as environmental protection, and regulations that are purely protectionist.<sup>5</sup> The efficiency model's shortcomings become apparent in the WTO dispute resolution process. A Member State is allowed to seek redress when it believes that another party has failed to comply with its obligations under the General Agreement on Tariffs and Trade ("GATT").<sup>6</sup> Once a dispute resolution panel is constituted to resolve a conflict, it reviews the disputed regulation. Since the inception of the WTO in 1994, panels have ruled that food safety measures based on the precautionary principle rather than risk-assessment violate WTO law, as do amendments to the Clean Air Act, that regulate refined gasoline and amendments to the Endangered Species Act that regulate shrimp harvesting harmful to sea turtles.

Some argue that through this adjudicative process, the Appellate Body is creating a body of "constitution-type case law,"<sup>7</sup> because the WTO then has the option to declare a Member State in violation of WTO law and authorize an abridgment of trade privileges. It is this generation of constitution-like norms that has aroused much anxiety. Many commentators argue that panels wield far too much power to invalidate, through the abridgment of WTO privileges, domestic

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<sup>3</sup> *Id.* at 448.

<sup>4</sup> Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L., 347, 350-351 (1998).

<sup>5</sup> *Id.* at 351 ("linkage issues – particularly trade and environment and trade and labor issues – involve different sorts of problems, in part because they often present tensions between economic and non-economic values. As linkage disputes multiply, it is becoming increasingly apparent that the efficiency model's welfare maximizing calculus does not adequately account for these non-economic values").

<sup>6</sup> The WTO follows dispute resolution procedures set forth in its "Dispute Settlement Understanding," available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm).

<sup>7</sup> See, e.g., Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Creation as the Engine of Constitutional Development in International Trade*, 12 EUROPEAN J. INT'L LAW 39 (2001).

policy choices that only incidentally impact trade.<sup>8</sup> While these cases draw much popular ire, panel review of domestic legislation is a difficult issue because the process of interpretation is inherently value-based. A court cannot review legislation in terms of a constitution or foundational treaty without making substantive choices among competing values and moral concepts.<sup>9</sup>

If the efficiency model does not adequately account for these non-economic values,<sup>10</sup> and if free trade in fact bestows widespread benefits, then is there a WTO governance structure that compels dispute resolution panels to better accommodate democratic processes? Put another way, is it possible for trade disciplines, which are predicated on constrained state sovereignty, to co-exist with state “police power” to regulate the health and safety of its citizens and environment? Perhaps part of the answer exists in federalism.

At its most basic, federalism combines self rule and shared rule<sup>11</sup> and presumes a partnership in decision-making processes between centralized and decentralized entities.<sup>12</sup> Inherent in federal systems are structural limits to the central power, usually in the form of explicit enumerations in a constitution or foundational treaty. In contrast to states governed primarily by a strong center, federalism creates a framework that legitimizes local action,<sup>13</sup> and in doing so, promotes democracy, accountability, diversity and experimentation as achieved by two power centers.<sup>14</sup>

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<sup>8</sup> See, e.g., Ralph Nader and Lori Wallach, *GATT, NAFTA, and the Subversion of the Democratic Process*, in *THE CASE AGAINST THE GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL* 94 (Jerry Mander and Edward Goldsmith eds., 1996).

<sup>9</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7, at 584 (2d ed. 1988).

<sup>10</sup> See Dunoff, *supra* note 4, at 351.

<sup>11</sup> DANIEL JUDAH ELAZAR, *CONSTITUTIONALIZING GLOBALIZATION* 19 (Rowman & Littlefield Publishers, Inc. 1998).

<sup>12</sup> *INTEGRATION THROUGH LAW*, VOL. I, BOOK 1, 13 (Cappelletti, Secombe & Weiler eds., Walter de Gruyter & Co. 1985).

<sup>13</sup> *Id.* at 14.

<sup>14</sup> Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Takes from American Federalism*, 77 N.Y.U. L. REV. 1612, 1642 (2002) quoting Koen Lenaerts: “[F]ederalism searches for the balance between the desire to create and/or to retain an efficient central authority that can find its origin in historic, social, or other considerations, and the concern of the component entities to keep or gain their autonomy so that they can defend their own interests.”

Despite these aspirations, there exists an often uneasy balance between local and central power in a federal system. This tension is exacerbated by the needs of an internal common market because free trade policies limit the ability of local governments to regulate flow of goods, services, and people.<sup>15</sup> It falls to the judiciary to monitor the conflict between local autonomy and free trade, and quite often, local autonomy loses out.<sup>16</sup> Nonetheless, local autonomy is protected in the federalist framework through a variety of mechanisms, such as enumeration or subsidiarity, which require the judiciary to accommodate some realm of state power.

A loose definition of federalism can include entities other than traditional nation-states, so long as the twin ingredients of unity and a genuine respect for autonomy are in the mixture.<sup>17</sup> Thus, a regional polity like the European Union (“EU”), which struggles to resolve the tension between economic and political integration with autonomy and diversity, can be compared on many levels to a mature federal system like the United States (“U.S.”).<sup>18</sup> Likewise, there is a parallel between both the U.S. and the European systems and the WTO dispute resolution system. The Supreme Court of the United States and the European Court of Justice (“ECJ”) review local regulations that might undermine the internal common market,<sup>19</sup> just as a WTO dispute resolution panel may review domestic regulations of Member States. Federalism, then, especially through the analytical techniques developed by the American and European judiciaries, may provide some guidance in resolving the tension between efficiency model goals and non-economic goals as the global trade system matures and constitutionalizes.

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<sup>15</sup> Matthew Schaefer, *The “Grey Areas” and “Yellow Zones” of Split Sovereignty Exposed by Globalization: Choosing Among Strategies of Avoidance, Cooperation, and Intrusion to Escape and Era of Misguided “New Federalism,”* 24 CAN.-U.S. L.J. 35, 39 (1998).

<sup>16</sup> 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 9 (Terrance Sandalow & Eric Stein eds., Carendon Press, 1982).

<sup>17</sup> *Id.* at ix.

<sup>18</sup> INTEGRATION THROUGH LAW, BOOK 1, *supra* note 12, at x.

<sup>19</sup> Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review*, 20 MICH. J. INT’L L. 775, 779-780 (1999).

Any direct institutional comparison is difficult, as WTO governance with a weak judicial function<sup>20</sup> and part-time legislative function (when Member States meet to amend the treaty or negotiate new agreements), contrasts sharply with the political and economic cohesion of the U.S. and the increasing integration of the EU.<sup>21</sup> In addition, the American and European models presuppose a strong judiciary with a firm foundation of judicial power.<sup>22</sup> As history shows, the task of defending judicial review is more difficult if the fundamental beliefs and values of the court are not widely shared by the society it serves.<sup>23</sup> In the case of an organization like the WTO, where the jury is still out as to the benefits of globalized free trade, the legitimacy of the dispute resolution process is at risk so long as there is no consensus as to its underlying ideology or whether it should exercise expanded subject matter jurisdiction over trade linkage issues in the first place.<sup>24</sup>

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<sup>20</sup> The WTO dispute resolution process is placed under the supervision of the Dispute Settlement Body. Article 23 of GATT provides that a party may seek redress where it believes another party has failed to carry out its GATT obligations. If the parties cannot settle their differences by consultation, a panel will be established. After the panel has conducted its findings and issued a ruling, the parties may appeal to the appellate body. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. The WTO cannot declare the law of a Member State void, nor can it require a Member State to change its law. It may, however, declare a Member State law in violation of WTO law and authorize an abridgement of trade privileges.

<sup>21</sup> Four institutions govern the Community level of the European Union. The Council consists of representatives of Member governments and serves as an intergovernmental organ; the Commission consists of fourteen members who are appointed by the national governments and serves as the executive body; the European Parliament is composed of representatives directly elected by citizens of Member States; and the European Court of Justice is the judicial organ.

<sup>22</sup> The foundation of judicial power in the US originates in two places. First, Article III of the Constitution gives the Supreme Court original and appellate jurisdiction (Art. III, §2), which may in turn be regulated as "Congress shall provide." Second, the court itself has construed its interpretive power broadly. Based on the premise that the Constitution is the supreme law of the land, the judiciary has interpreted Article III as 1) allowing the Supreme Court to review the validity of actions by a coordinate federal branch; 2) allowing the federal courts to review the action of state government for their constitutional validity; and 3) vesting federal judicial supremacy in interpreting the Constitution. *See, e.g., Marbury v. Madison*, 5 U.S. 137 (1803); *Cooper v. Aaron*, 358 U.S. 1 (1958).

The foundational treaties of the European Union extend the European Court of Justice's jurisdiction under Articles 169 and 170 to cases between two Member States or between the Commission and a Member State over a Member State's failure to fulfill an obligation under the treaty. While the ECJ has never explicitly addressed its own power to review Community and Member State law, it has implicitly reached the conclusion that the Court has, as a matter of Community law, the ultimate say on the reach of Community Law. *See generally* Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403.

<sup>23</sup> TRIBE, *supra* note 9, § 1-8, at 14.

<sup>24</sup> Cass, *supra* note 7, at 39.

Nonetheless, the global experiment with free trade parallels the American and European experience with economic integration: each is based on similar trade disciplines, and each is faced with similar tensions between the values of localism and the needs of a common market, with the judiciary playing a substantial role in resolving those tensions.<sup>25</sup> Accordingly, if we assume that state regulation of the health and safety of citizens is legitimate, federalism provides a doctrinal structure for analyzing the allocation of power between centralized and decentralized entities. To that end, this paper explores the unique role the Supreme Court and the ECJ play in resolving the struggle between central and local power in the American and European common markets.

Part II explores American and European doctrines of federalism, focusing on the techniques developed by the Supreme Court and the ECJ to evaluate local regulations that impact national or Community-wide trade, as they are analogous to WTO judicial review of domestic regulations. Part III looks at how dispute panels' interpretation of trade disciplines have not adequately accommodated regulations that pursue non-economic goals. Part IV explores whether aspects of American and European federalism could be applied to the WTO dispute resolution system to better accommodate domestic regulations that pursue non-economic goals, like environmental protection.

## **II. The Creation of a Common Market in the US and EU**

The global free trade system is constitutionalizing to some degree through judicially created norms.<sup>26</sup> While it is not the purpose of this article to go into depth about the meaning and process of constitutionalization, it is an important concept because it describes the mechanisms that protect the political and economic rights of citizens and the manner in which power is divided between governing institutions.<sup>27</sup> This section reviews the vertical allocation of power in the

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<sup>25</sup> Ernest Ulrich-Petersmann, *Constitutionalization and International Organizations*, 17 NW. J. OF INT'L L. & BUS., 398 (1996-1997).

<sup>26</sup> See, Cass, *supra* note 7, at 72.

<sup>27</sup> *Id.* at 73.

American and European systems and some of the doctrines their judiciaries have developed to reconcile the needs of a free market (e.g., unfettered trade through a lack of state barriers) with the values of a federal system (e.g., self-government and diversity).<sup>28</sup> Because a successful common market requires the subordination of local autonomy, the Supreme Court and the ECJ have nurtured a common market by construing central power generously through principles such as supremacy and implied powers.<sup>29</sup>

#### **A. The American Experience: Structural Enumerations of Power and Theories of Federalism**

Three structural mechanisms allocate power vertically in the American system.<sup>30</sup> First, federal power is limited to those powers enumerated in the Constitution.<sup>31</sup> Second, those powers which are not specifically granted to the federal government are reserved for the states.<sup>32</sup> This includes a general grant of police power, i.e., the power to regulate the health, safety, and general welfare of its citizens. Third, the judiciary reviews whether federal action comports with its enumerated power.<sup>33</sup> A major premise of the Constitution is that states retain substantial autonomy to regulate internal affairs.<sup>34</sup> Nonetheless, American federalism is characterized by a strong central power *vis-à-vis* the Supremacy Clause, the Necessary and Proper Clause, and explicit and implicit Commerce power.

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<sup>28</sup> See, e.g., *Pike v. Bruce Church* 397 US 137, 142 (1970): “[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burdens imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local interest is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interests involved, and on whether it could be promoted as well with lesser impact on interstate activities.”

<sup>29</sup> See generally 1 COURTS & FREE MARKETS, *supra* note 16. In the United States, the progression toward strong central power has not been linear.

<sup>30</sup> The American model also contains a horizontal allocation or “separation” of powers amongst the three federal branches of government.

<sup>31</sup> U.S. CONST. amend. X. In the US, state police power is reserved under the 10<sup>th</sup> Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

<sup>32</sup> *Id.*

<sup>33</sup> *Marbury v. Madison*, *supra* note 22.

<sup>34</sup> THE FEDERALIST No. 51: “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments,” (James Madison) (February 8, 1788).

The Supremacy Clause of Article VI of the Constitution provides that in the case of conflict between state and federal law, state law must yield to federal law.<sup>35</sup> Disputes arise where it is not clear which level of government should prevail. The Supreme Court has interpreted the Supremacy Clause as applying to congressional action where either its intent is unmistakable or where the “nature of the regulated subject matter permits no other conclusion.”<sup>36</sup> Under the doctrine of implied powers through the Necessary and Proper Clause,<sup>37</sup> the Supreme Court has held that the federal government may validly exercise powers beyond those explicitly listed in the Constitution, so long as that supplemental power does not conflict with specific Constitutional prohibitions.<sup>38</sup>

Congress, under its Article I, §8 Commerce Clause power and implied power, may regulate interstate commerce.<sup>39</sup> The Commerce Clause serves two distinct functions: 1) it acts as a source of congressional authority; and 2) it acts, implicitly, as a limitation on state legislative power,<sup>40</sup> by allowing the Court to review state regulations in the context of congressional silence. A state regulation affecting interstate commerce will be upheld if it is rationally related to a legitimate state end and the regulatory burden imposed on interstate commerce and any discrimination against it are outweighed by the state interest enforcing the regulation.<sup>41</sup> In addition, the Court reviews as suspect any state action which heavily burdens outsiders.<sup>42</sup>

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<sup>35</sup> U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . .”).

<sup>36</sup> *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

<sup>37</sup> U.S. CONST. art. I, § 8, cl. 18 (grants Congress the power “[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof”); *See e.g.*, *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>38</sup> *See generally* TRIBE, *supra* note 9, § 5-3, at 300-05.

<sup>39</sup> U.S. CONST. art. I, § 8, cl. 3 (grants Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

<sup>40</sup> *See generally* *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>41</sup> TRIBE, *supra* note 9, § 6-1, at 402, n. 6.

<sup>42</sup> *See, e.g.*, *South Carolina State Highway Department v. Barnswell*, 303 U.S. 177 (upholding truck regulations that affected in-state and out-of-state shippers alike).

The purpose of the federal Commerce authority was to foster the development of a common market among the states by eradicating internal trade barriers and prohibiting the economic balkanization of the union.<sup>43</sup> Accordingly, the judiciary construed congressional power broadly to shield the market from the “parochial forces of localism.”<sup>44</sup> That said, the early cases rejected an exclusive role for Congress in matters related to trade, leading to difficulty in determining when state action was appropriate and the outer limits of congressional Commerce power. Thus, a complex body of federal doctrine evolved from Commerce and Dormant Commerce power because the principles embodied by an integrated market were at odds with those of local autonomy.

A number of theories describe substantive limits of state and federal power.<sup>45</sup> Two approaches that seek to define the substantive limits of state and federal power are reviewed here: dual federalism and the balancing tests which eventually replaced dual federalism.

### **(1) Dual Federalism**

Dual federalism presupposes that national and local power fall into two mutually exclusive spheres.<sup>46</sup> The Supreme Court experimented with several distinctions in its attempt to define national and local commerce power: interstate commerce vs. internal commerce,<sup>47</sup> federal commerce power vs. legitimate state police power,<sup>48</sup> national power vs. local power,<sup>49</sup> and

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<sup>43</sup> PETER HAY & RONALD D. ROTUNDA, *THE UNITED STATES FEDERAL SYSTEM* 73-74 (Oceana Publications, Inc., 1982).

<sup>44</sup> TRIBE, *supra* note 9, § 6-3, at 404, *citing* The Federalist, Nos. 41, 42 and *Gibbons v. Ogden* (holding that Congress may legislate with respect to all “commerce which concerns States more than one” and that commerce includes all “commercial intercourse.” Thus, a New York state monopoly on steamboat operating licenses conflicted with federal commerce power).

<sup>45</sup> Other theories of American federalism like “cooperative federalism” and “process federalism” will not be discussed here because they focus primarily on the legislative process and as such, are not directly related to an analysis of WTO judicial review.

<sup>46</sup> Young, *supra* note 14, at 1646.

<sup>47</sup> *Gibbons v. Ogden*, *supra* note 40.

<sup>48</sup> *Id.*

<sup>49</sup> See generally *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851).

regulations that “directly” affected the economy vs. regulations that “indirectly affected the economy,”<sup>50</sup>

As the national economy became more integrated, by the mid-20th century it was clear that these distinctions did not work.<sup>51</sup> The Supreme Court had struggled to ascribe finite boundaries to state and federal power,<sup>52</sup> but it was not possible to draw lines around commerce that was truly internal,<sup>53</sup> or commerce that only indirectly affected the economy.<sup>54</sup> For example, the choice of a single farmer to grow wheat for his own consumption might in one sense be driven by the prices of the open market, rendering an exact definition of “indirect” difficult to ascertain.<sup>55</sup>

A second criticism took aim at the legitimacy of the Supreme Court itself. Many argued that the judiciary usurped the role of the legislature by balancing the competing individual and social interests that had already been considered in the legislative process.<sup>56</sup> While Commerce Clause cases turned presumably on structural limits of federal power, in many instances the Court merely scrutinized a legislature’s choice of economic ends and the legislative means selected to reach them.<sup>57</sup> The most infamous reaction to the lack of deference to Congress’s substantive policy choices on the part of the Supreme Court was, of course, President Roosevelt’s “court-packing plan.” Following a number of Supreme Court decisions that invalidated New Deal legislation, the

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<sup>50</sup> *DiSanto v. Pennsylvania*, 273 U.S. 34, 39 (1927) (overruled on other grounds).

<sup>51</sup> *U.S. v. Lopez*, 514 U.S. 549, 605 (1995) (Souter, J., dissenting). A cogent summary of the demise of dual federalism is presented in Justice Steven’s dissent in *Lopez v. US*: “...the period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of “commerce” to invalidate federal social and economic legislation. [citations omitted]. These restrictive views of commerce subject to congressional power complemented the Court’s activism in limiting the enforceable scope of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process. [citations omitted]...The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court’s character for the first third of the century showed itself exacting judicial scrutiny of a legislature’s choice of economic ends and of the legislative means selected to reach them.”

<sup>52</sup> Young, *supra* note 14, at 1664.

<sup>53</sup> *Id.* at 1664-65.

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

<sup>55</sup> See *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

<sup>56</sup> INTEGRATION THROUGH LAW, BOOK 2, *supra* note 11, at 303.

<sup>57</sup> See, e.g., *U.S. v. Lopez*, *supra* note 51, at 605.

Roosevelt administration responded with an ultimately unsuccessful proposal to increase the number of justices who would find New Deal legislation constitutional. The court crisis during the New Deal era illustrates the importance of judicial legitimacy and its relationship to shared societal values.<sup>58</sup> Dual federalism failed in part because the Supreme Court’s “highly formalistic” notion of commerce<sup>59</sup> differed substantially from that of the executive and legislative branches, and of the states themselves. As is the case with other adjudicative bodies, the disconnect between the values of the Supreme Court and the much of American society in the 1930’s over social and economic legislation imperiled its legitimacy.

## (2) Balancing tests

Balancing tests that consider the subject matter of the legislation and assume a general prohibition on discrimination replaced dual federalism.<sup>60</sup> In such balancing tests, the judiciary respects some degree of state autonomy by taking into account the right of state to regulate health and safety under the 10<sup>th</sup> Amendment. For example, a “legitimate purpose analysis” seeks to ensure that the local regulation affecting commerce or the free flow of goods is not protectionist and, importantly, falls clearly within the police power.<sup>61</sup> As another example, a “burdens analysis,” seeks to determine whether the regulation’s impact on commerce is excessive in relation to the benefits derived from the regulatory scheme.<sup>62</sup> In this kind of analysis, there is also a presumption that some realm of state action is legitimate. Finally, a “less restrictive alternative

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<sup>58</sup> Louis Hartz asserts that the task of defending judicial review becomes more difficult as fundamental beliefs and values cease to be widely shared. See *TRIBE*, *supra* note 9, § 1-8 at 14.

<sup>59</sup> *U.S. v. Lopez*, *supra* note 51, at 605.

<sup>60</sup> 1 *COURTS & FREE MARKETS*, *supra* note 16, at 185; *but cf. U.S. v. Lopez*, *supra* note 51, at 605. It must be noted that dual federalism may not be dead yet. In the *Lopez* and *Morrison* cases the Supreme Court struck down guns in school zone and domestic violence legislation, respectively, because they did not relate to commerce and demonstrates the willingness on the part of some justices to revisit the dual federalism approach.

<sup>61</sup> See, e.g., *Maine v. Taylor*, 477 U.S. 131, 151 (1986). The Supreme Court allowed a state import ban on live baitfish on the grounds that this discriminatory law served a legitimate local purpose in a way that could not “be served as well by available nondiscriminatory means.” The Court was satisfied that Maine had acted legitimately to protect local fish from parasites more prevalent in out of state fish by preventing the accidental introduction of non-native species. The Court accepted the lower court finding that less discriminatory regulatory measures were currently unavailable.

<sup>62</sup> See, e.g., *Pike v. Bruce Church*, 397 US 137, 142 (1970).

analysis,”<sup>63</sup> examines whether an otherwise valid regulation could be achieved by a measure less damaging to free trade than the one adopted, in which case, state action is legitimate.<sup>64</sup>

While balancing tests do not raise the same formalistic difficulties as dual federalism, the capacity of balancing tests to protect state interests is only as good as the weights placed on either side of the scale. Not surprisingly, given the importance of the internal common market, many commentators on both sides of the Atlantic argue that the federal model as implemented historically in both the United States favors centralized power.<sup>65</sup> It is important, however, to appreciate the significance of enumerated state power and the fact that the judiciary has developed a number of ways to accommodate it. For example, the Supreme Court in *Maine v. Taylor* points out that though “the Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce . . . it does not elevate free trade above all other values.”<sup>66</sup> The American constitutional structure based on federal forms forces the judiciary to balance unfettered free trade against local autonomy. Thus, in contrast to the WTO context where the debate is framed as one of free trade values versus local interests, in a federal system the question is not *whether* states can regulate, but when and how much.<sup>67</sup> From a federalism perspective, then, an essential problem with the WTO review process is that the treaty structure, by design, does not adequately protect the right of states to regulate health and safety when such regulations are not discriminatory.<sup>68</sup>

## **B. The European Experience: Constitutionalization and Subsidiarity**

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<sup>63</sup> See, e.g., *C&A Carbone, Inc. v. Town of Clarkstown*, 114 S.Ct. 1677, 1683 (1994).

<sup>64</sup> 1 COURTS & FREE MARKETS, *supra* note 16, at 28.

<sup>65</sup> See, e.g., Young, *supra* note 14, at 1621.

<sup>66</sup> See *Maine v. Taylor*, *supra* note 61, at 151.

<sup>67</sup> *Id.*

<sup>68</sup> WTO Appellate Body Report on United States Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), *available at* <http://www.wto.org>.

A European common market was created to promote economic and later political union after the devastation of World War II.<sup>69</sup> EU federalism is organized around the principle that a Member State or the Community may exercise power based on their respective competences enumerated in the EU foundational treaties.<sup>70</sup> While the treaties specify a number of Member State and Community functions, none address explicitly how to treat a conflict between national and EU laws.<sup>71</sup> The first task, then, of the ECJ was the constitutionalization of Community power;<sup>72</sup> in other words, the iteration of the foundational treaties as “higher law”<sup>73</sup> through judicial review. The ECJ early on construed Community power broadly through a quartet of principles,<sup>74</sup> some of which are recognizable from American jurisprudence. First, the concept of supremacy allows Community action to preempt the field and bar Member State action that could even indirectly conflict with a Community measure.<sup>75</sup> Second, the principle of implied powers

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<sup>69</sup> 1 COURTS & FREE MARKETS, *supra* note 16, at 4.

<sup>70</sup> Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (ECSC Treaty or Treaty of Paris); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 (EEC Treaty or Treaty of Rome); Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506 (advanced economic and monetary integration); Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 (Union Treaty or Maastricht Treaty); Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56 (Treaty of Amsterdam); Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2000, 2000 O.J. (C 80) 1 (Treaty of Nice).

Member State power is reserved under the General Exceptions clause of Article 36 of the Treaty of Rome: “The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological values; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.” Treaty Establishing the European Economic Community, March 25, 1957, art. 36, 298 U.N.T.S. 3.

<sup>71</sup> See generally Weiler, *supra* note 22.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> One of the foundations for ECJ review of Community law lies in that the Community may lack competence to act in a certain area. In the *ERTA* case, the ECJ limited itself to defining the extent of Community competences, and its power over a subject matter within the community purview was exclusive. Accordingly, especially early on, it painted Community powers with a generous brush to foster the fledgling common market at the sacrifice of local concerns. Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, [1971] C.M.L.R. 335 (1971).

<sup>75</sup> In *Costa v. ENEL*, a seminal case on supremacy, the ECJ construed Community powers broadly by holding that community laws would have to trump national laws to undergird the common market edifice. Failure, so posited the ECJ, would risk the whole experiment of a common market: “The transfer by states

enables Community institutions to employ means not specifically provided for in the Treaty when doing so is desirable for accomplishing a stated treaty objective and when adequate means are not otherwise provided.<sup>76</sup> Third, through the concept of direct effect, national courts may be bound to recognize and enforce the rights or obligations placed on individuals by Community law when Community legal norms are clear, precise, and do not require further legislative measures by the Community or Member States.<sup>77</sup> Finally, the concept of direct applicability means that the adoption of legal norms by Community institutions is sufficient to integrate them into the legal regime of a Member State.<sup>78</sup>

Through these principles, the economic integration of Europe bound Member States to processes that amounted to “a radical diminution of political sovereignty,”<sup>79</sup> stoking a backlash

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from their domestic legal systems to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail." *See, e.g.*, Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585, 594, [1964] C.M.L.R. 425, 455 (1964); Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134. 3, [1972] C.M.L.R. 255, 283. 3 (1972).

<sup>76</sup> Article 235 provides: “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.” As the United States Supreme Court did with the Necessary and Proper Clause, the ECJ authorized expansive interpretations on Community competence based on implied powers. In the landmark *ERTA* case, the ECJ held that the grant of internal competence in a given subject matter implies power to make treaties externally concerning that subject. Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, [1971] C.M.L.R. 335 (1971).

<sup>77</sup> Perhaps the most profound difference between the United States and the European Union was that the European Union was founded on international treaties that failed to declare clearly whether Community law would enjoy supremacy among the Member States. This aspect has been especially prominent in the elaboration of the principle of direct effect which gives litigants the right to raise many European Union law issues in national courts. Through this concept, individuals are treated as “guardians” of the legal integrity of Community law and Member States are forced to be accountable for violations of Community law because the locus of litigation is shifted from the ECJ to domestic courts. Thus, Treaty provisions establish that Community legislation bestows enforceable rights and obligations not just on Member States, but on citizens as well. Case 26/62, *Algemene Transport-en Expedite Onderneming van Gend en Loos NV v. Nederlands Administratie der Belastingen*, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963).

<sup>78</sup> Related to the principle of direct effect is the principle of direct applicability. Whatever a state’s ordinary treatment of international agreements might be, Community enactments do not need to be transposed, incorporated, or otherwise formally received into member state law to become the law of the state.

<sup>79</sup> ELAZAR, *supra* note 11, at 17.

against what was perceived as ever-increasing Community power.<sup>80</sup> Consequently, the concept of “subsidiarity” was introduced initially by Denmark and Germany in the 1980s to ensure that Community regulations would not lower their environmental standards.<sup>81</sup> It was applied to Community measures as a whole with the enactment of Article 3b of Maastricht Treaty of 1992.

Article 3b provides that:

the Community shall take action . . . only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and therefore by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>82</sup>

In theory, subsidiarity limits Community power by allowing it to act in those areas in which it has no exclusive power if the Member States cannot sufficiently achieve the objectives themselves.<sup>83</sup> Concurrently, Member States retain legislative prerogatives even in Community matters if they can achieve regulatory objectives as effectively as the Community itself. Moreover, the Community legislative bodies are to operate under the principle of proportionality, which means that Community regulation or directives should not go beyond what is necessary to achieve the objectives of the EU.<sup>84</sup>

Philosophically, subsidiarity rests on the idea that action should be taken at the lowest level of government at which a particular objective can be achieved.<sup>85</sup> It assumes that there is a connection between “lower” levels of government and democracy, liberty, flexibility, and political, social, and cultural diversity. In addition, it respects the internal allocations of power

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<sup>80</sup> See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 362-63 (1994).

<sup>81</sup> Single European Act [SEA], I Treaties Establishing the European Communities 1005 (Office for Official Publications of the European Communities, 1987).

<sup>82</sup> The final paragraph of the new Article 3b reads: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." This paragraph expresses what is commonly known as the principle of proportionality. 1 C.M.L.R. 719, TEU art. G(5), adding a new Article 3b to the Treaty Establishing the European Economic Community [EC Treaty]. EC Treaty art. 3b (as amended 1992).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Bermann, *supra* note 80, at 343.

within Member States themselves.<sup>86</sup> In effect, subsidiarity envisions a “poly-centered” power structure.<sup>87</sup>

While the most important exercise of subsidiarity is in the legislative realm, the judiciary plays an important interpretive role by determining whether and to what extent subsidiarity will limit governance by the Community.<sup>88</sup> Professor George A. Bermann has argued that the Community should not implement subsidiarity as a substantive legal principle (i.e., one that describes the allocation of substantive authority between the Community and Member States); instead, the ECJ should implement subsidiarity as a procedural legal principle that directs the legislative institutions of the Community to analyze the legislation through the lens of subsidiarity, before concluding that action at the Community level, rather than at the Member State level, is warranted.<sup>89</sup> Specifically, he posits that the ECJ should insist that Community institutions first inquire into the ability of Member States to achieve a particular objective and then to explain why Community action is necessary.<sup>90</sup> By ensuring that institutions ask and answer the right questions, the ECJ enforces a procedural mandate, and may avoid the difficulties that the United States Supreme Court experienced with dual federalism.<sup>91</sup>

Subsidiarity, as a procedural inquiry, may provide a solution to some of the problems associated with WTO judicial review. For example, an issue implicit in WTO jurisprudence is whether the Appellate Body should defer to the substantive policy choices of domestic legislatures in cases where non-economic regulations impact trade. Subsidiarity could provide a philosophical basis as a means of first determining whether a dispute resolution panel has the

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<sup>86</sup> *Id.* at 350.

<sup>87</sup> THE EUROPEAN COURTS AND THE NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE 372 (J.H.H. Weiler et. al. eds., Hart Publishing, 1997): “The new reformed discussion [about constitutionalization]...recognizes and at times suggests a different, “horizontal”, “poly-centered” “infranational” image of the European polity and its constitutional framework.”

<sup>88</sup> *Id.*

<sup>89</sup> Bermann, *supra* note 80, at 391.

<sup>90</sup> *Id.*

<sup>91</sup> *See generally id.* at 416-27.

institutional competence or “subject matter jurisdiction”<sup>92</sup> to adjudicate environmental and health regulations that use trade restrictive measures to achieve non-economic goals.<sup>93</sup> This idea will be explored further in Part IV of this article.

### III. Applying federalism doctrines to WTO judicial review

The previous discussion of American and European federalism addresses: 1) the conflict created by multiple power centers; 2) the clash of values underlying local autonomy and internal common markets; and 3) the effect these tensions have on the legitimacy of the judiciary. Part III of this paper proposes that the WTO dispute resolution process encounters these same dilemmas.

By way of introduction to three well-known cases, it must first be pointed out that domestic environmental regulations may clash with a number of trade disciplines in the GATT/WTO system.<sup>94</sup> GATT Article I (most-favored-nation treatment),<sup>95</sup> GATT Article III (national treatment),<sup>96</sup> and GATT Article XI (elimination of quantitative restrictions).<sup>97</sup> While some degree

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<sup>92</sup> Cass, *supra* note 7, at 51-52.

<sup>93</sup> Dunoff, *supra* note 4, at 351.

<sup>94</sup> Steve Charnovitz, *The Law of Environmental “PPM’s” in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT’L L. 59, 63 (2002).

<sup>95</sup> GATT Article I (General Most-Favored-Nation Treatment) provides in part: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” The Most Favored Nation Treatment provision means that a WTO Member government cannot discriminate by treating the product of one WTO Member country better than the like product of another member country. The decision as to whether two products are “like” will often determine the outcome of a case because Article I does not prohibit differential treatment of unlike products. GATT, *supra* note 1, art. I ¶ 1.

<sup>96</sup> GATT Article III contains disciplines on domestic taxation and regulation. Under Article III:2, imported products may not be subject to taxes of any kind in excess of those applied to like domestic products: “The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.” Under Article III:4, imported products must be accorded treatment no less favorable than that accorded to like products of national origin. It provides: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.” GATT, *supra* note 1, art. III.

<sup>97</sup> GATT Article XI prohibits import and export bans and quotas. It provides in part: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or

of environmental regulation is permitted through the Article XX general exceptions<sup>98</sup> and the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”),<sup>99</sup> the treaty system is predicated on laissez-faire principles that eschew state regulations. The following cases illustrate how the Appellate Body’s interpretation of trade disciplines has failed to accommodate regulations that pursue non-economic goals such as food safety, air quality, and endangered species protection;<sup>100</sup> the difficulty of allocating power vertically in the globalized trading system; and how constitution-like norms generated in the WTO adjudicative process can undermine its legitimacy.

#### **A. The Beef Hormone Case**

The Beef Hormone Case was the first SPS dispute to come before a WTO panel.<sup>101</sup> The case involved complaints by the Canadian and U.S. governments about an EU import ban on meat produced from animals fattened with growth hormones. The EU had invoked the precautionary principle<sup>102</sup> as justification for its decision to regulate genetically modified organisms (“GMO’s”)

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export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” GATT, *supra* note 1, art. XI ¶ 1.

<sup>98</sup> GATT Article XX provides general exceptions to GATT trade disciplines, and requires that measures not be applied in a manner that constitutes either 1) arbitrary or unjustifiable discrimination between countries where the same conditions prevail; and 2) a disguised restriction on international trade. In addition, measures must also be “necessary” to protect human, animal or plant life or health and “relate” to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. GATT, *supra* note 1, art. XX.

<sup>99</sup> The Agreement on the Application of Sanitary and Phytosanitary Measures provides that regulations related to food safety and animal and plant health should be applied only to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions are present. *See* The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), *available at* [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm).

<sup>100</sup> “...linkage issues – particularly trade and environment and trade and labor issues – involve different sorts of problems, in part because they often present tensions between economic and non-economic values. As linkage disputes multiply, it is becoming increasingly apparent that the efficiency model’s welfare maximizing calculus does not adequately account for these non-economic values.” Dunoff, *supra* note 4, at 351.

<sup>101</sup> *See* WTO Report of the Panel: EC Measures Concerning Meat And Meat Products (Hormones), 1997 WL 569984 (Aug. 18, 1997).

<sup>102</sup> Principle 15 of the Rio Declaration on Environment and Development is a widely accepted elaboration of the precautionary principle: “In order to protect the environment, the precautionary approach shall be

in food, even in the face of scientific uncertainty as to GMO's actual harm to human health. The Appellate Body held that a European Commission food safety measure violated the SPS Agreement because it was not based on risk assessment.<sup>103</sup>

A key issue before the Appellate Body was whether deference should be given to the EU's regulatory determination. The European Commission argued that the panel should have accorded it deference because it had a right to establish its own environmental and public health standards, under the Treaty of Rome, which states that Community environmental policy should be "based on the precautionary principle."<sup>104</sup> The Appellate Body concluded that no deference was required, pointing to the directive in the Dispute Settlement Understanding that panels make an "objective assessment of the facts," and that deference to a policy choice based on the precautionary principle would be incompatible with this responsibility.

One criticism of this outcome is that the dispute resolution panel did not defer to the EU's policy to use the precautionary principle, instead of risk assessment, as a basis for evaluating food safety. As the European Commission argued, the judgment of what is an acceptable level of risk for society is a political responsibility, not a judicial one.<sup>105</sup> In this way, the Beef Hormone case demonstrates how 'trade and...problems' implicate overlapping vertical allocations of power in

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widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." At its core, the precautionary principle reflects the recognition that scientific certainty often comes too late to design effective legal and policy judgments for preventing many potential environmental threats. Thus, in the case of scientific uncertainty, the precautionary principle advocates anticipatory actions to avoid environmental harm before it occurs. Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874 (1992).

<sup>103</sup> On the ECJ's incorporation of the precautionary principle: "At an early state the Court incorporated the precautionary principle into its case law on domestic safeguard measures in fields such as health protection or protection of the environment...the acceptance of a high level of domestic protection despite the disrupting effects on the common or internal market is particularly important under the precautionary principle. The Court leaves the Member States with significant discretion regarding the measures to be chosen, the evaluation of environmental risks, and the level of protection desired. [Most cases that have been struck down involved discriminatory measures or measures that could not be justified.] To find the balance between the precautionary principle and the interest in market integration is a particularly difficult task." Weiler, *supra* note 87, at 235.

<sup>104</sup> See WTO Report of the Panel: EC Measures Concerning Meat and Meat Products (Hormones), *supra* note 101.

<sup>105</sup> INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 408 (David Hunter et. al. eds., Foundation Press, 2d ed. 2002), citing *Communication from the Commission on the Precautionary Principle*.

that the jurisdiction of the dispute resolution panel and the European Commission collided when health policy decisions impacted EU trade obligations.<sup>106</sup> In the case of competing institutions, a trade panel vs. a regional legislative body, the question remains as to which institution should prevail in the application of controversial non-economic policies.

### **B. The Reformulated Gas Case**

The Reformulated Gas Case related to the Clean Air Act of 1990 ("CAA") and to the regulation enacted by the United States' Environmental Protection Agency ("EPA") pursuant to the CAA to control pollution caused by the combustion of gasoline manufactured in or imported into the United States.<sup>107</sup> The CAA established two gasoline programs to ensure that pollution from gasoline combustion did not exceed 1990 levels and that pollutants in major population centers were reduced.

The EPA adopted guidelines, which relied heavily on the use of 1990 baselines as a means of determining compliance with the CAA requirements. Specifically, any domestic refiner which was in operation for at least six months in 1990 had to establish an individual baseline representing the quality of gasoline produced by that refiner in 1990. The guidelines provided three methods to establish baselines, each slightly different for domestic refiners, blenders, and importers of foreign gasoline.<sup>108</sup> The guidelines did not provide individual baselines for foreign

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<sup>106</sup> Joel P. Trachtman, *Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity*, EUR. J. INT'L L. 9, 34 (1998).

<sup>107</sup> Report of the Appellate Body Concerning United States Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 21-22 (Apr. 29, 1996), available at <http://www.wto.org>.

<sup>108</sup> From the report of the Appellate Body: "Under Method 1, the domestic refiner must use the quality data and volume records of its 1990 gasoline. If Method 1 data is not available, the domestic refiner must use its 1990 gasoline blend stock quality data and 1990 blend stock production records (Method 2). In the event that Method 2 data is not available, the domestic refiner must establish an individual 1990 baseline on the basis of its post-1990 gasoline blend stock and/or gasoline quality data modeled in the light of refinery changes to show 1990 gasoline composition (Method 3). Domestic refiners that were in operation for at least six months in 1990 are not permitted to forego their individual baseline and use the statutory baseline established by the EPA. However, domestic refiners that commenced operations after 1990, or operated for less than six months during 1990, are required to use the statutory baseline established by the EPA. Blenders are required to establish an individual baseline representing the quality of their 1990 gasoline using Method 1 above. Failing this, they must use the statutory baseline established by the EPA. Blenders may not apply an individual baseline using Methods 2 or 3. Importers of foreign gasoline are required to establish an individual baseline in respect of gasoline imported by them during 1990, using Method 1. Like

refiners, although the possible use of individual baselines for foreign refiners was examined by the EPA while drafting the guidelines. The proposal, however, never entered into force, as the United States Congress reduced implementation funding.<sup>109</sup>

After the dispute resolution panel ruled against the EPA regulation, the US appealed. The WTO Appellate Body concluded that EPA guidelines were not consistent with Article III ¶ 4 of the GATT. It found that imported and domestic gasoline were “like products” under Article III ¶ 4 and that imported gasoline was not being treated as favorably as domestic gasoline. The Appellate Body also chastised the US for not pursuing cooperative arrangements with the governments of Venezuela and Brazil and accounting only for costs to domestic refineries, not foreign refineries. Thus, while the regulation complied with the terms of Article XX (g) in that the rules related to the conservation of an exhaustible natural resource, it did not justify protection afforded by Article XX because, as the Appellate Body saw it, alternative measures to implement the CAA existed.

This decision is perhaps more difficult to criticize than the Beef Hormone case because the EPA’s regulations were facially discriminatory in that domestic refiners and foreign refiners were, after all, held to different standards. But this case also raises several issues about the proper relationship between a trade dispute body and a domestic environmental regulatory agency. For instance, was it appropriate for the Appellate Body to second-guess the EPA’s findings about the agency’s ability to assess the reliability of foreign data, especially in the context of Congressional cutbacks to its budget? Moreover, did the Appellate Body rightly conclude that the EPA should have undertaken unwieldy multilateral negotiations to achieve a domestic, non-economic goal? Here, if the concept of subsidiarity were applied, it might lead us to the conclusion that the EPA

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blenders, importers become subject to the statutory baseline if, as anticipated by the EPA, the data necessary for Method 1 is unavailable.” *Id.*

<sup>109</sup> The May 1994 proposal provided for limited use by importers of individual baselines established for foreign refineries in order to demonstrate that gasoline produced at that foreign refinery complied with the reformulated (but not conventional) gasoline standards. The individual baselines would be determined using Methods 1, 2 or 3, as for domestic refineries under the Gasoline Rule. However, the use of individual baselines in such cases would be conditioned and limited in a number of ways. *Id.*

as the “lower,” and therefore more democratic, body might have been the better institution for making this decision. Until these institutional conflicts are resolved, the Appellate Body risks its legitimacy by extending its jurisdiction to issues that may very well “lie beyond its institutional competence.”<sup>110</sup>

### C. The Shrimp/Turtle Case

In the Shrimp/Turtle Case, two separate challenges were brought against a 1989 amendment to the Endangered Species Act, known as Section 609, which required foreign nations to certify that their shrimp fisheries did not threaten endangered sea turtles as a prerequisite for access to the U.S. market.<sup>111</sup> In practice, Section 609 prohibited the harvesting of shrimp by both domestic and foreign fleets without the use of turtle-excluder devices (TEDs) on trawl nets in regions with threatened or endangered turtle populations.<sup>112</sup> Under the original guidelines, the practice of the State Department was to certify countries only after they had shown that they required the use of TEDs.<sup>113</sup>

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<sup>110</sup> David M. Driesen, *What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279, 312-313 (2001).

<sup>111</sup> WTO Appellate Body Report on United States Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), *available at* <http://www.wto.org>.

<sup>112</sup> Section 609(b)(2) provides that the import prohibition on shrimp does not apply to harvesting nations that are “certified” according to criteria set by the United States. The Revised Guidelines set forth the criteria for certification. The stated goal of the programme set out in the Revised Guidelines is the same as that set out in the programme of the original guidelines, namely, to protect endangered sea turtle populations from further decline by reducing their incidental mortality in commercial shrimp trawling. A central element of the United States program is that commercial shrimp trawlers are required to use Turtle Excluder Devices (“TEDs”) approved in accordance with standards established by the United States National Marine Fisheries Service. Where the government of a harvesting country seeks certification on the basis of having adopted a programme that is based on TEDs, certification will be granted if this government’s programme includes a requirement that commercial shrimp trawlers use TEDs that are “comparable in effectiveness” to those used in the United States, and a credible enforcement effort that includes monitoring for compliance. WTO Appellate Body Report on United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia – AB-2001-4 (Oct. 22, 2001), *available at* <http://www.wto.org>.

<sup>113</sup> Under the Revised Guidelines, countries may apply for certification even if they do not require the use of TEDs. In such cases, a harvesting country has to demonstrate that it has implemented, and is enforcing, a “comparably effective” regulatory programme to protect sea turtles without the use of TEDs. The Department of State is required “to take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources.” *Id.*

Malaysia, along with three other countries, challenged the measure, arguing that it violated U.S. obligations under the GATT. The complainants were successful at the panel level, and the U.S. responded by appealing the case to the Appellate Body. The Appellate Body concluded that Section 609 was provisionally justified under Article XX(g) because the means were rationally related to the ends. However, the U.S. regulation failed to satisfy the Chapeau requirements of Article XX because it was unjustifiable discriminatory. The Appellate Body criticized the “coercive” effects of the TED policy on other governments; to access the U.S. market, a GATT right, governments would have to adopt “essentially the same” policy as that enacted by Congress.<sup>114</sup> It also chastised the U.S. for negotiating seriously with some Members that export shrimp to the U.S., but not others.

The Shrimp/Turtle decision implicitly relied upon an anti-coercion concept of free trade, which posits that trade should not be impeded by efforts to enforce even non-discriminatory environmental law (or other non-economic goals) against non-complying nations.<sup>115</sup> To comply with the WTO decision, the State Department had to revise its regulation to accord more due process and provide more flexibility to foreign governments by permitting shrimp imports so long as the shrimp were harvested under conditions that did not adversely affect sea turtles. While the US was able to achieve sea turtle protection and comply with its trade obligations, this case illustrates how free trade values guide panel interpretation. A policy choice that applied equally to domestic fleets and foreign fleets was considered “unjustifiably discriminatory” because it was “coercive,” not because it was actually discriminatory. In the American federal system, while local aims are often suppressed so that goods, services, and people may move freely, free market values do not solely determine the outcome in Dormant Commerce Clause cases in part because of enumerated state power.<sup>116</sup> If greater weight were given to the right of states to regulate health

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<sup>114</sup> While the statute contained some degree of flexibility, the regulatory guidelines promulgated by the Department of State undermined that flexibility with the requirement of TEDs.

<sup>115</sup> Driesen, *supra* note 110, at 285.

<sup>116</sup> See *Maine v. Taylor*, *supra* note 61, at 151.

and safety, the Appellate Body might interpret “discriminatory” differently, taking into account both non-economic values and an anti-coercive notion of free trade. Likewise, the exceptions in the Chapeau might be enhanced if the treaty structure included a more explicit reservation of Member State power to regulate health, safety, and the environment.

#### **IV. Towards a solution**

The WTO dispute resolution process is a dynamic force in the constitutionalization of trade law. The Appellate Body has generated constitutional norms and structures, in terms of institutional competence and the application of health policies that impact trade (the Beef Hormone case), and the extent to which free market values should determine the outcome in trade and environment cases (the Shrimp/Turtle case).<sup>117</sup> Some have argued that judicial norm generation has undermined the democratic legitimacy of the dispute resolution process because there is not consensus that efficiency model should guide adjudication of regulations that serve non-economic purposes.<sup>118</sup> Regarding institutional competence, it is not clear that a dispute resolution panel or the Appellate Body is the proper venue for resolving thorny domestic policy issues, such as the use of the precautionary principle by the European Union.

As the dispute resolution process matures, we need a constitutional theory that balances economic, political, and human rights.<sup>119</sup> The question Part IV attempts to address is whether the application of federal principles, like subsidiarity and enumeration, would allow the dispute resolution process to better accommodate democratic processes and non-economic values. Federalist principles could imbue democratic values into the dispute resolution process by allowing Member States to retain legislative prerogatives when certain criteria are met without undermining the collective action benefits of liberalized trade.

##### **A. The Application of Subsidiarity**

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<sup>117</sup> See generally, Cass, *supra* note 7.

<sup>118</sup> *Id.*

<sup>119</sup> Mark Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167, 169 (2001).

The democratic legitimacy of the dispute resolution process in part has to do with the extent to which a norm is based on fundamental principles or values of a given society.<sup>120</sup> Mark Krajewski proposes that a norm is legitimate if it is “set up in democratic decision-making process and if it meets fundamental societal values such as individual rights or collective goods.”<sup>121</sup> In addition, a system’s institutions must exercise power that is “appropriate to its institutional character.”<sup>122</sup> Thus, the judiciary in a mature federal system like the US would clearly have the authority to adjudicate the validity of a state health policy that impacts interstate trade because it is established that the judiciary’s proper role is to resolve the tension between localism and free trade. The judiciary as arbitrator of values, however, is problematic in the context of the WTO. The process of judicial norm-creation puts the legitimacy of the judiciary at risk unless a strong foundation in judicial power exists. Going back to the application of the precautionary principle, itself a lightning rod of controversy,<sup>123</sup> it could be argued that the Appellate Body does not have the strong foundation in judicial power required to adjudicate such a contentious issue.

The concept of subsidiarity, which assumes that governments derive their legitimacy from “democratic decision-making by the people and their freely elected representatives,”<sup>124</sup> could provide a doctrinal basis for evaluating when a domestic institution ought to retain the prerogative to make innovative non-economic policy decisions. For example, the dispute resolution system could incorporate procedural subsidiarity to analyze whether the Appellate Body has the institutional competence to rule on a trade linkage issue by evaluating whether a non-economic regulation was promulgated for “legitimate” reasons (i.e., non-protectionist). Legitimacy might be determined by looking at whether the regulation is a national measure that reflects a deeply

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Driesen, *supra* note 110, at 313.

<sup>123</sup> See Hunter, *supra* note 105, at 408. For example, Exxon Mobile placed an ad in the New York Times characterizing the precautionary principle as “protectionist” and “used to block beneficial innovations,” available at <http://www.exxonmobil.com/Files/Corporate/001102.pdf>.

<sup>124</sup> Ulrich-Petersmann, *supra* note 25, at 406.

embedded value;<sup>125</sup> the regulation is applied even-handedly towards foreign and domestic actors; the regulatory agency considered a variety of policy tools; or whether the regulatory agency attempted to work with foreign countries to create a solution.<sup>126</sup> If conditions such as these are not met, the Appellate Body would then have subject matter jurisdiction, and could rule on the substance of the regulation. Conversely, even if a regulatory goal could be achieved by a measure less damaging to free trade than the one adopted, the panel would defer to the domestic regulatory agency so long as the agency made a “good faith effort” to comply with procedural restraints.

### **B. The Application of Enumeration**

While the principles of subsidiarity could provide a basis for resolving the institutional competence of the Appellate Body in trade linkage cases, American federal principles like police power could be embedded in the WTO treaty structure to compel dispute panels to distinguish between regulations that pursue non-economic goals and those that are purely protectionist. In theory, the exceptions laid out in Article XX provide plenty of room for Member States to regulate the environment, but as has been shown, these exceptions are applied narrowly and the Appellate Body has used laissez faire concepts to determine whether non-economic regulations comply with trade obligations. In contrast, federal mechanisms, like the enumeration of state power, compel the American judiciary to at least consider state autonomy. The concept of enumeration, then, might be a starting point for addressing the laissez faire or anti-coercion models of free trade that constrain the application of Article XX.

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Though the Commerce Clause significantly limits the ability of states to regulate or “otherwise burden” interstate commerce, states nonetheless retain broad regulatory authority to

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<sup>125</sup>To determine whether the country is pursuing a legitimate non-economic goal, I have borrowed from Professor Atik’s formulation to determine when regulations actually mask beggar-thy-neighbor national policies that impose harm unrepresented foreign nationals. Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT’L ECON. L. 229, 234 (1998) (discussing democracy being used to mask “beggar-thy-neighbor” national policies).

<sup>126</sup> This final query reflects the political reality that a domestic regulatory agency simply may not have the resources to engage in multilateral negotiations with other countries.

protect the health and safety of their citizens through the Tenth Amendment.<sup>127</sup> In the face of judicial zeal for strong central powers through a common market, the only explicit checks in the American and European systems are those embedded in the federal structure.

As we learned with American experience, the solution is not to draw lines around regulations as “trade-related” or “not trade-related.” Rather, judicial balancing tests that take into account the enumeration of state power through the 10<sup>th</sup> amendment address both the line-drawing problem and the clash of underlying values between an internal common market and local autonomy. The balancing test employed in *Maine v. Taylor* - whether there was a legitimate local purpose that could not be adequately served by non-discriminatory means - may provide an equilibrium:

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to “place itself in a position of economic isolation,” . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, “apart from their origin, to treat [out-of-state baitfish] differently[.]”

Under this approach, to determine whether a domestic regulation constituted a “arbitrary or unjustifiable discrimination” or a “disguised restriction” a dispute resolution panel might read the Chapeau of Article XX more generously so long as a legitimate local purpose existed that could not be adequately served by non-discriminatory means.

## **V. Conclusion**

The GATT and the dispute settlement process seek to remedy the collective action problems endemic to trade.<sup>128</sup> Indeed, the point of the dispute settlement process is to keep members faithful to the agreement and to prohibit members from applying the agreement in ways that are

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<sup>127</sup> See *Maine v. Taylor*, *supra* note 61, at 151.

<sup>128</sup> Stephen P. Croley and John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 210 1996.

advantageous to them.<sup>129</sup> Respecting the political preferences and judgments of GATT/WTO constituencies argues against, not in favor of, local autonomy.<sup>130</sup>

It is no accident, then, that courts construe central power broadly in the context of common markets. Accordingly, is it possible to craft a federalist approach that protects local interests and protects a common market from the “parochial forces of localism” at the same time? The justifications for those federal approaches that favor localism may cripple the free trade system: the assumptions underlying subsidiarity, such as respect for governance at a “lower” level because it is presumably more democratic and accountable, highlights the very problems the dispute resolution process was set up to remedy. The lack of panel members’ accountability to democratic processes is a strength because they can render decisions that are less fettered by the political machinations of Member States.

Moreover, a reservation of state police power is no talisman against encroaching central power. Balancing tests are problematic because flexibility is only as good as the weights on either side of the scale. As it has been shown, the Supreme Court has not shied away from construing federal power broadly, despite the 10<sup>th</sup> Amendment.

While the federal model is not without flaws, its failings should not obscure the legitimacy of state action to protect the health and safety of its citizens. We must create a dispute resolution process - indeed, a whole trade regime - that at the very least does not abridge political and social rights. It is not, however, enough to point out that some deference to national government decisions is a legitimate policy value.<sup>131</sup> The dispute resolution process needs to be changed to better accommodate democratic processes and the legitimacy of non-economic values.

While a nuanced, case-by-case approach to ‘trade and...problems’ is infinitely preferable to an approach that is rule-bound and rigidly doctrinaire, panels have repeatedly put forth interpretations that favor reduced barriers, and will likely continue to do so, so long as the scale is

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Croley and Jackson, *supra* note 128, at 212.

tipped towards trade.<sup>132</sup> Professor Dunoff points out that “[t]he relationships among the competing values implicated in the various linkage issues are simply too complex to collapse into a model where one or a few values are prioritized as fundamental.”<sup>133</sup> If this is true, the ideal is not rigid adherence to a particular doctrine but the creation of a dispute resolution process and structural rules where multiple values such as democratic processes, localism, and free trade are considered.

Local autonomy provides many benefits: it acts a counterweight to the concentration of central power that may threaten political liberty, it offers a greater opportunity for political participation and a greater responsiveness to diverse values, cultures, and needs.<sup>134</sup> But it is true, too, that federalism is a fluid structure - - depending on the cause du jour, advocates of a strong central power may on another day prefer state autonomy. As Professor Jeffrey Atik points out, in the US it has not always been clear that “the local is more democratic than the national.”<sup>135</sup> Indeed, there are other benefits to reigning in locally asserted interests. Some policies are pursued most effectively through a strong centralization – free trade being one of them, but also national environmental standards.<sup>136</sup> Nonetheless, federalism addresses the WTO’s “democracy

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<sup>132</sup> The WTO’s Committee on Trade and the Environment clearly favors interpretations skewed towards unfettered trade as evidenced this analysis of the “products vs. process” problem available on their website: “Measures applied to the *processes* used to make an internationally traded product cause more problems. They could even be illegal under WTO rules. Why are *processes* more problematic? The measures would still be applied to products (e.g. an environmental tax on an imported product) but it is not always easy to determine exactly what processes were used to make the products. In addition, the environmental implications of a particular process can vary from place to place, from country to country — for example, whether a particular resource such as water is scarce; or whether a particular location is already heavily polluted and therefore ill-placed to absorb and degrade additional pollution. *Another way of expressing this: products are ‘objective’, processes are ‘subjective’ (for the various reasons described above). The WTO is based on rules, and therefore promotes ‘objectivity’ in trading schemes in order to ensure that the rules are as clear-cut as possible*” (emphasis added), available at [http://www.wto.org/english/tratop\\_e/envir\\_e/cte03\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/cte03_e.htm).

<sup>133</sup> Dunoff, *supra* note 4, at 386.

<sup>134</sup> COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA 23 (Mark Tushnet ed., Greenwood Press, 1990).

<sup>135</sup> Atik, *Identifying Antidemocratic Outcomes*, *supra* note 125, at 246.

<sup>136</sup> For example, the National Conference of State Legislatures believes that federal minimum standards are essential to protecting people from the effects of the interstate migration of pollutants. See 2003 – 2004 policy position on environmental federalism, available at <http://www.ncsl.org/statefed/environ.htm#federalism>.

deficit” because it is a governance structure that is predicated on the protection of democratic participation through smaller units of government.

The democratic legitimacy of the dispute resolution process and the WTO as an institution is one of the fundamental issues arising from these “trade and...” cases, fueling the anti-globalization movement and the continued domestic distrust of liberalized trade in many countries. The common argument is that the dispute resolution process lacks democratic legitimacy because the decision-makers are not elected nor are they selected in a legislative process.<sup>137</sup> The WTO is only a trade organization, but we cannot separate international trade from questions of environmental protection, labor practices, or fairness. Last year’s breakdown of talks in Cancun over agricultural subsidies highlights the importance of access and equity. Until we are willing to address the inequities of the post-colonial system head on, it is incumbent upon us to mend a dispute resolution process that undercuts democratic processes and does not account for values beyond those of the efficiency model.

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<sup>137</sup> Driesen, *supra* note 110, at 316.