



DEMOCRACY'S NEW CHALLENGE

Globalization,
Governance,
and the
Future of
American Federalism

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FOREWORD

Dēmos was founded in 1999 as a national research and advocacy organization to help create a new long-term vision for American society. Our work focuses on two of the most urgent current challenges facing the United States: strengthening democracy and sharing economic opportunity more broadly. Last November, the 2000 election highlighted a number of serious problems in America's democratic system and *Dēmos* has been working collaboratively with reform organizations across the United States to address these problems.

Much of our work concentrates on the States. Over the past year, *Dēmos* has been engaged in a major project to examine the health of democracy at the State level. With the federal government ceding ever more responsibilities to the States through devolution, we have sought to understand how governing decisions are made in State capitals. The majority of our research has looked at the obstacles to full democratic participation and accountable government, as well as policy reforms that can be implemented by the States to enhance democracy. The aftermath of the 2000 election has underscored the importance of democracy work in the States, and many important reform debates are unfolding at the State level. However, we also know that democracy in the States is being affected by powerful 21st century trends. Foremost among these is globalization, which is having a profound impact on the States and on our system of federalism writ large.

In this groundbreaking report, Columbia University professor Mark Gordon grapples with one of

the most important questions facing American democracy: What exactly is globalization and how is it affecting the ability of Americans to govern themselves through traditional civic processes? By focusing on the States and federalism, Professor Gordon looks at the area where our democratic processes are now most in flux as a result of globalization. He unravels the many different dimensions of globalization and addresses the varied ways in which they impact on a wide range of State-level policy decisions—from environmental regulations to community development to tax policy. Professor Gordon's analysis is both nuanced and provocative. He demonstrates that globalization offers both opportunities and challenges for the States. New global interconnections have the potential to strengthen our democratic processes and expand our economic prosperity. At the same time, Professor Gordon paints an alarming picture of how international institutions such as the World Trade Organization could potentially strip democratic powers away from the States and U.S. citizens, ceding these powers to non-elected administrative bodies.

KEY FINDINGS

- Globalization in its current form is a set of economic and political processes shaped by public policy. State governments have an important role to play in both shaping and responding to globalization.
- America's 200-year old debate over federalism and democracy is being fundamentally altered by globalization. Whereas once the debate focused on the balance of power between two tiers of government—federal and State—today that debate must take into account a third set of governing powers at the international level. How America structures its system of federalism will affect the ability of both federal and State policymakers to shape globalization in positive ways.
- Globalization is already having a major impact on democracy and governance in the 50 States. The rules of the World Trade Organization, NAFTA, and other international treaties and agreements are often in direct conflict with laws and policies in effect in the States. Key areas affected include: economic subsidies, environmental policies, and tax policy.
- Challenges to State laws under international trade rules can severely inhibit the freedom of elected State leaders to pass and implement new public policies. Challenges to State laws can be brought by

overseas corporations and foreign governments, but can also potentially be instigated by actors within States or in the Federal government.

- Globalization provides States with new opportunities to generate economic activity. Many governors are leading trade missions abroad and have set up offices that focus on attracting overseas investment or selling State-made products abroad. Globalization also puts a premium on innovative State policies to address economic inequalities, improve education, and build high-tech infrastructure.

- A growing web of global connections among non-governmental organizations presents State-based advocates and activists with new opportunities to attract attention to their cause. New transnational political linkages are also allowing State and local governments to forge relationships with their counterparts overseas.

- State governments have an important role to play in shaping the national debate over globalization. State governments can mitigate certain harsh effects of globalization through public policies that offer greater protection and economic security to workers. The States are important laboratories for experimenting with new ways to create stronger democracy and more broadly shared prosperity in an era of globalization. State leaders can also be a critical voice in debates over international treaties, as well as what policies the federal government should adopt to cope with globalization. In addition, States should not permit the federal government to abdicate its own responsibilities in helping to cushion the negative effects of globalization.

As policymakers at both the federal and State level consider ways to strengthen American democracy in the aftermath of the 2000 election, we hope that reform efforts take into account how globalization is altering the terrain of our political system and posing new, unfamiliar challenges to the ideal of democratic decision-making. This report is intended to help foster a more thoughtful debate about these challenges, as well as to inform new public policy solutions.

Miles Rapoport, President

Dēmos

June 2001

INTRODUCTION

Governors and other State officials have every right to be confused. Proposals made by the new national administration and Congress, as well as a series of recent Supreme Court decisions, speak of devolving more federal power to the States and preserving State flexibility and autonomy. And recent federal legislation, such as welfare reform, has moved in the same direction. However, pressures engendered by the process of globalization, such as strict requirements under the agreements establishing the World Trade Organization, seem to undercut State powers in multiple ways. Thus, while recent Court decisions and national legislation have been effectively dispensing Viagra to the States, recent globalization analyses would have State officials reaching for the Prozac.

This paper explores the differing impacts of globalization on American States and on the overall dynamics of federalism in the United States. While recognizing that it is far too early to predict how globalization may reshape federalism, it finds that globalization provides both new challenges and new opportunities for the States. These challenges and opportunities arise across a vast array of issue areas and situations. For example, a State legislator or Governor considering whether to propose legislation to prohibit Internet service providers from disclosing personal information without permission from customers now must address a new set of concerns. In addition to thinking through the pros and cons of this type of legislation, the State official must also ask: might such a State law violate the developing rules under the General Agreement on Trade in Services, which forms a part of the trade agreements

establishing the World Trade Organization?² Similar types of questions need to be asked regarding environmental regulations, the provision of tax credits or other subsidies to attract business, decisions regarding government procurement, preferences for small businesses or minority contractors, etc. Not only might trade agreements and other provisions of international law affect State policies, they will affect entire State decisionmaking processes as well, as significant State resources are required to develop the expertise to both understand and influence developments beyond State borders.

But globalization does more than limit State flexibility. It also provides new opportunities. States now find themselves in a world where they can be more active in the international arena, can network with others beyond their borders, and can develop infrastructures to tap into tremendous economic opportunities. A wide array of issues in which States previously played only minimal roles—ranging from national trade policy to international privacy regulation—may now become “frontburner” issues for State policymakers. And States may well take the lead in structuring innovative responses to the negative consequences of globalization, dealing with issues such as aggravated economic and social dislocation as well as the public’s sense of loss of community and control.

But can States take such a leadership role in the face of the awesome power of global market forces? Do States have the capacity to withstand these forces and even shape them? The answer is Yes, for several reasons.

First, assertions that globalization is essentially a market-driven phenomenon miss the point. Just because economics has historically been the key arena in which globalization has proceeded furthest does not mean that that outcome was inevitable. In fact, globalization has progressed furthest in the economic realm because of a series of calculated policy decisions undertaken by governments that were designed to accelerate globalization most in the economic realm (rather than in, say, the political realm). Some have even gone so far as to reason from the centrality of economics in the current globalization process to the conclusion that concerns with market efficiency should be the core guiding principle generally in State policies dealing with globalization. While arguments for the primacy of economic efficiency can be made, they must be recognized for what they are: policy arguments, reflecting underlying value preferences, rather than insights into some inevitable process unleashed by globalization.

Second, even though individual States may lack power to shape globalization and deal with its negative consequences, they together have the influence to redirect national policy. Thus, in an ironic twist,

perhaps the most significant new opportunity for States will emerge in an unexpected arena — that of national policymaking. As a result of developments in Washington over the past decade (including substantial devolution of federal authority and the federal government's abdication of its responsibilities to address the negative consequences of globalization), States are now in a unique position to both deal with the consequences of globalization within their borders while also acting as advocates for an enhanced federal role. In this sense States may well play a key role anticipated by the Founders: serving as an institutional base through which the public can act to pressure the federal government to mend its ways.

Globalization, however, impacts not just individual States but also the entire federal relationship. While considered one of the central concepts governing our constitutional structure, the actual term "federalism" does not appear in the Constitution.³ Definitions of federalism have focused on a variety of elements, from the specially protected existence of local units of government to a commitment to decentralized decisionmaking and the avoidance of concentration of power in the national government.⁴ Rather than seeking to resolve this definitional uncertainty, this paper uses federalism as a shorthand term for the relationship between the national government and the States in the United States in which the existence of both is constitutionally guaranteed, in which each is accountable directly to the people, and in which each has distinct powers. In this context, we assume that federalism encompasses no single proper allocation of authority between State and federal governments but rather a continual process of readjustment as circumstances change. Thus, changes in the dynamics of State/federal relations and in the levels' relative responsibilities and authorities will also be referred to as changes in the dynamics of federalism itself.

In terms of this broader view of federalism, globalization introduces a whole series of "shocks" to the existing system. Rather than conceptualizing the relationship as two-tiered (between the federal government and States), we need to add a third tier — that of international forces and regulations.⁵ This changes many of the dynamics between States and the federal government, as the interests of State autonomy and flexibility may now prefer in numerous situations a stronger federal government (for example, to protect States from the imposition of international rules) to a weaker one.

The introduction of an international dimension to federalism also threatens to undercut much of the developing jurisprudence of the Supreme Court in this area. For example, the Court's protection of

State autonomy in its recent jurisprudence may well be on a collision course with previous judicial precedent which enables the federal government, when acting through the treaty power, to take steps that it cannot take when acting through its interstate commerce clause powers. Thus, what States gain in autonomy from the Court's interstate commerce analysis they may lose as a result of its (current) treaty-making power analysis. In this respect, the Court is abandoning the essentially procedural protections of the *Garcia* doctrine⁶ (under which the Court generally upheld federal legislation challenged on federalism grounds on the basis that State interests receive adequate protection through the federal legislative process) in search of more substantive protections at precisely the time that the *Garcia* protections could start to have teeth in protecting States from the reach of international agreements negotiated outside of the regular legislative process.

Ultimately, however, the impact of globalization on federalism remains undetermined because the shape of globalization itself is still unformed. All the talk of inevitability to the contrary, globalization is neither inexorable nor inevitable. And the form of globalization is yet to be determined. Thus, American States in particular and American federalism in general now confront a series of new forces with potentially far-reaching implications. These forces will present both new challenges and new opportunities for State activities on a daily level while also challenging us to rethink on a more conceptual level the dynamics of federalism and how these dynamics may lead to a new stage in federalism jurisprudence.

Part I of the text that follows expands on these points by defining globalization in a way that emphasizes its nature as a continuing process that will be shaped by distinct political and policy preferences. Part II then looks at how globalization will affect States in the context of their policymaking autonomy and flexibility. In this Part the emphasis is on the challenges that globalization introduces. These include new limitations on State policymaking imposed by the United States treaty obligations under the World Trade Organization (WTO), other obligations imposed by international law, the broader treaty process, and customary international law. The discussion centers not just on the direct impact of these obligations on States, but also on how they impact the broader State/federal relationship.

Part II also examines the ways in which globalization presents a challenge for State powers outside the international realm. In particular, globalization threatens to undermine States' ability to raise revenue through taxation; it increases pressures on States to refrain from regulating in areas of tradition-

al State authority; and it puts States in competition with new actors, with each other, and perhaps even with their own cities.

The emphasis in Part III is on the opportunities that globalization presents for States, such as possibilities for increased State involvement in the international arena and new potential avenues for State influence over economic policy, security policy and the local community, as well as the new coalitions that can emerge and the new technologies that can make States more accessible to their citizens. This Part also examines how States can impact globalization, both as advocates for federal policies and as their own globalization laboratories. To do this, States would both respond to globalization (e.g., by dealing with its impact on workers and those in need) and shape globalization (e.g., by developing much-needed globalization infrastructure and by expanding State regulations to protect consumer privacy).

Part IV extends the analysis from globalization's impact on the States directly to globalization's impact more broadly on federalism values. As with the discussion in Parts II and III, globalization unleashes a series of competing forces, some of which may enhance federalism values and some of which may undermine them. This Part considers the federalism values of liberty/democracy, citizen participation, accountability, diversity, and States' roles as laboratories for innovation, suggesting both positive and negative implications of globalization for each.

Part V moves the analysis on to newer ground, tentatively exploring ways in which globalization and federalism may impact each other. Thus, various underlying federalism values may become more prominent (or suggest different policy concerns) in this era of globalization than in previous eras. In fact, federalism values relating to the need for balance and the relative role of economic efficiency as just one of several values, and new applications of federalism values addressing diffusion of power, diversity, and civic Republicanism, may become increasingly powerful lenses through which federalism is viewed in the future and through which globalization is shaped. Finally, this Part looks at several ways in which concepts related to federalism may prove useful in shaping the institutional structures of globalization.

While it is clear that globalization will have an impact on federalism, the form and dimensions of that impact are uncertain. It is this very uncertainty that presents the most significant opportunity: to mold globalization in a way that furthers our most vital national values.

PART I

THE PRESSURES OF GLOBALIZATION

A Governor of an American state would be well within her prerogatives to ask her staff: “What exactly is this globalization that we are all so focused on?” If her staff accurately reflects the disagreements among analysts, some (let’s call them the radical change group) would argue that globalization reflects a fundamental change in the way the entire world operates and that both nationstates and individual American States⁷ have the choice of either joining the parade or getting run over by it. Others (let’s call them the not-so-fast camp) would contend that globalization is neither so radical nor so powerful nor so inevitable.⁸

The Governor would then be justified to follow-up by asking, “Well, what should we do about it?” The radical change group would probably suggest that the State needs to take some rather dramatic actions to adjust to the realities of a globalized world, such as by lowering taxes, decreasing regulation on business so that it can compete internationally, etc. The not-so-fast group would more likely recommend that much of the State’s underlying regulatory structure can remain unaltered, while the Governor might want to focus on a few areas, such as privacy or infrastructure development, in which the impact of globalization might be significant. In short, while the first group would likely see globalization as a new reality requiring dramatic change, the second would likely see it as just one added force or interest to which the Governor needs to react in certain areas.

Unfortunately, both of these answers are flawed and lead to misleading policy conclusions. The

radical change group correctly sees globalization as a significant development but then incorrectly concludes that it is an inexorable force which now greatly hampers the range of policy options available. The not-so-fast camp correctly recognizes that the grand claims about globalization's impact are too far-reaching, but then incorrectly concludes that globalization issues can be safely confined to a specific (often rather narrow) subset of policy concerns. And both groups neglect to tell the Governor that she has a new and particularly important role to play — as someone working to determine the shape of globalization. The first group neglects this because they see globalization as an outside force that cannot be shaped by government; the second group neglects this because they see globalization as a less significant force that does not need to be shaped by government. Both are wrong.

In this Part, we begin to answer the Governor's first question, about describing globalization, in a way that also leads to a more accurate response to the inevitable follow-up question about its policy implications. We do this first by describing what globalization is, and then by considering what it is not. Followers of the radical change group will recognize many of their arguments in the description of what globalization is, but they will resist the placing of these arguments in the broader context in which we see globalization as a process that introduces many new forces and tensions into the system but the outcome of which is still undetermined. Adherents of the not-so-fast model will see many of their concerns reflected in the description of what globalization is not, but they will be surprised to discover that these concerns are used as a reason for the Governor to take a more, rather than less, active role in addressing globalization.

Thus, the discussion that follows is intended to describe globalization (answering the Governor's first question) in a way that does not prejudice the answer to the second question of what to do about it. Instead, this discussion suggests that the Governor has a new role to play not just in responding to the impacts of globalization, but also in shaping the globalization process itself. The discussion in Part I is intended to show that the ultimate impact of globalization on American federalism is not pre-determined, but rather is susceptible to being shaped by innovative State and national policies.

WHAT GLOBALIZATION IS

This paper conceives globalization not as an outcome or a condition, but rather as a process that the world is currently experiencing.

It is not necessarily a new process, as it occurred prior to World War I and at various other points throughout history (one could make arguments about the expansion of the Roman Empire, the spread of Christianity, etc.). However, it has accelerated recently due to a series of political, economic, technological and other factors.

This process is both objective and subjective. It is objective in that it is characterized by a wide range of deepening interactions among different players around the world. And as with any time that there are deepening interactions, new forces and tensions emerge (as they did with interdependence, for example). It is subjective in that it is also characterized by a paradigmatic shift in how these players see the world. That is, what distinguishes our current stage of globalization is that it is causing people to question existing paradigms of how the world is organized. This means that new opportunities and challenges arise, not because of some inexorable force behind globalization, but because people's recognition of this process has made them more open to thinking in new ways about what the future will look like, and what it should look like.

The process of globalization can perhaps be best understood by considering its elements, for while there is significant disagreement on how globalization should be defined, there is a far greater degree of agreement regarding its elements.

In particular, the majority of discussions of globalization link it to four key economic components.⁹ But it is more than just economics, as it encompasses a wide range of political, social and cultural elements as well. Following is a brief description of the major components of the globalization process.

1. ECONOMIC COMPONENTS

a. International Trade

International trade is perhaps the most pervasively mentioned of the economic components of globalization. Interconnectedness through trade has increased tremendously, with the ratio of exports to Gross Domestic Product (GDP) for Organization for Economic Cooperation and Development (OECD) countries rising from 9.5% in 1960 to 20.5% in 1990.¹⁰ By 1995 worldwide trade had exceeded 6 trillion dollars, representing a 14-fold increase over its 1950 level,¹¹ and growing from 7% to 21% of total world income during the postwar era.¹² According to the International Monetary Fund, the volume of world trade since the middle of the 1980s has expanded almost twice as fast as world output.¹³ These

increases in trade flows have also coincided with a general decrease in tariff barriers. While tariffs remain high in some circumstances, average industrial tariffs among developed market economies have been reduced from more than 40% to less than 5%.¹⁴ Not only has trade itself increased dramatically, but so have a number of its specific components. Intrafirm and intra-industry trade, for example, have increased substantially¹⁵ as has trade in services.¹⁶

b. International Capital Flows

Perhaps even more dramatic than the increase in trade flows has been the increase in and integration of international financial flows. The last several decades have witnessed the growth of the Eurodollar market and of massive trading in currency exchange; the emergence of transnational banks and investment companies; the development of a global venture-capital industry; and the introduction of 24-hour global trading in capital and securities markets.¹⁷ Foreign exchange trading in the late 1990s approximated \$1.5 trillion per day, an eightfold increase since 1986 and approximately 60 times the \$25 billion daily level of exports in 1997.¹⁸ A similar meteoric rise has occurred in mutual funds, pension funds, and other investment capital. Together, these totaled \$20 trillion by the middle of the 1990s, 10 times the figure of 1980, the effect of which is compounded by the leveraging of borrowed funds.¹⁹ Among OECD countries, the stock of international bank lending rose from 4% of GDP in 1980 to 44% in 1990,²⁰ while international transactions in bonds and equities among the major developed economies exceeded 100% of GDP in 1995, compared to less than 10% in 1980.²¹

c. Foreign Direct Investment

Foreign direct investment has grown even faster than trade. During the 1980s, measured foreign direct investment flows grew three times faster than trade flows and almost four times faster than output.²² After a large decline in the early 1980s, direct investment flows grew six-fold in the decade after 1986, increasing from \$60 billion to almost \$349 billion per year. Global stock of foreign direct investment rose to \$3.2 trillion, or double their level three years earlier.²³ Foreign direct investment is no longer confined to larger firms, and has also increased considerably in the service sector.²⁴ Throughout much of the 1990s, foreign direct investment outflows from the major industrialized countries rose at about

15% on an annual basis.²⁵

In addition, the politics of foreign direct investment have changed dramatically. What was seen in the 1960s by developing countries as a threatening form of economic imperialism that could be restricted by government policy is now perceived as either a welcomed vote of confidence²⁶ or a necessity that cannot be avoided.

d. Multinational Corporations (MNCs)

The growth of foreign direct investment is related to dramatic changes in a fourth economic component of globalization: the explosive expansion in the reach of MNCs. Most large industrial and financial corporations now hold some of their productive assets abroad. More than a third of the employment and nearly a third of the sales of the world's 68 largest manufacturing corporations in the mid-1980s were accounted for by their foreign subsidiaries.²⁷ For example, a new truck made in Indonesia was reported to use parts from Spain, Japan, India, Thailand, Taiwan and Turkey.²⁸ MNC activities represent an increasing proportion of trade: in 1988, MNCs accounted for more than 80% of US trade.²⁹ The size and economic influence of these entities are huge. According to the United Nations, of the 100 largest economies in the world, 51 are corporations.³⁰ The sales of MNCs as a whole in 1989 amounted to \$4.4 trillion, nearly twice the value of world exports of goods and services.³¹ And the reach of MNCs is increased by the growing network of alliances, joint ventures, and partnerships into which they are entering, expanding their influence even without assuming legal control.³² Some have estimated that there were more than 20,000 corporate alliances formed from 1996 through 1998.³³

While much of the focus on MNCs relates to their size, not all MNCs are large, as most of the estimated 45,000 firms that operate internationally employ less than 250 people. In fact, it is not unusual for service companies with less than 100 employees to operate in 15 or more countries.³⁴ And MNCs can often be found in unexpected industries, from office cleaning, dialysis and freshfood retailing, to real estate, laws, taxis and hairdressing.³⁵

2. ADDITIONAL COMPONENTS:

Beyond the four economic components mentioned above, a wide range of other factors and elements must also be included in descriptions of globalization.

a. Breadth of Impact

Perhaps more important than the size of the above economic components is their breadth. This analysis sees as most important the extent to which the economic factors above operate worldwide, rather than being limited to developed economies. Support for this position is found in the share of world trade among the developing economies, which has increased from 23% in 1985 to 29% a decade later.³⁶ In addition, the last two decades witnessed dramatic increases in foreign direct investment flows to developing countries:

Private capital flows to developing countries rose by one third to a record U.S.\$245 billion in 1996, six times the amount of official development assistance, and over a six-fold increase above the average inflows for 1983-89. Developing countries now account for 37 per cent of investment inflows, up from 30 percent in 1995. These capital flows represented 4.5 percent of developing country GDP, up from only 1 per cent in 1990.³⁷

Jeffrey Sachs has argued that it is the increasing linkages between higher and lower income countries and the extent to which poorer nations have been incorporated into the global system that characterizes the current era of globalization.³⁸

b. Opportunities for Rapid Development/Technology

The globalization process also dramatically increases opportunities for rapid development. This is often related to rapid advances in communication, transportation and other technologies.

Many developing countries will be able to leapfrog entire stages of development into the latest generation of wireless telephony—avoiding the huge costs of building a copper-wire based infrastructure. Today more than 80 per cent of the world's population cannot make a phone call; soon they will have access, not just to leading-edge communications, but to the educational programmes, medical services, and technical information that flow through cyberspace....A level of industrialization that took 150 years to accomplish in Great Britain, or 100 years in the United States, is today capable of being achieved in less than a generation—the most rapid development process in economic history.³⁹

Indeed, the role of technology itself is sometimes identified as a key component of globalization. The internationalization of technology (as companies are exploiting their technological innovations internation-

ally) has been identified as a key piece of evidence supporting the existence of globalization,⁴⁰ and technological change has been seen both as an enabling factor and a pressure for continuing globalization.⁴¹

c. Nongovernmental Organizations (NGOs)

A further element of globalization is the increase in size, influence, and activity of various networks of nongovernmental organizations (NGOs), often referred to in the literature as transadvocacy networks (TANs). Keck and Sikkink (who have looked primarily at TANs focusing on human rights, women's rights, and environmental issues) have defined TANs as networked organizations characterized by voluntary, reciprocal and horizontal patterns of communication and exchange, that are organized to promote causes, principled ideas, and norms, and that often involve individuals advocating policy changes that cannot be easily linked to a rationalist understanding of their "interests".⁴²

What is new about these actors in an era of globalization? First, their number, size and professionalism, and the speed, density and complexity of their international linkages have increased dramatically over the past 30 years.⁴³ Some have estimated that there are now 20,000 transnational NGOs.⁴⁴ Second, they now have the ability, often using new computer technologies, to mobilize information strategically to "help create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organizations and governments."⁴⁵ Thus, Harry M. Cleaver, Jr. has spoken of the Zapatista effect, in which a relatively small group of rebels in Chiapas, Mexico could galvanize international attention and use it to bring outside pressure on the Mexican government to resolve various demands.⁴⁶ P.J. Simmons recently argued that any group with a fax machine and a modem now has the potential to impact public debate.⁴⁷

d. Internet

The Internet itself, which is often seen as the communicative weapon of choice for NGOs, can also be considered an element of globalization in its own right.⁴⁸ Indeed, it is frequently seen as one of the key decentralizing forces of globalization, and as a significant contributor to the spread of information and the growth in power of NGOs. While this paper distinguishes globalization from the Information Revolution – which was brought about by a series of dramatic changes in the extent of new technologies, their speed, the critical mass of changes they introduce, and the changing perceptions they cause⁴⁹ — it is important

to recognize the areas of overlap. As various products of the Information Revolution, such as the Internet, have played such a fundamental role in increasing linkages among players around the world, they are also identified as elements of globalization themselves. As discussed in more detail in Part II, the Internet raises significant new challenges to the ability of American States to tax commerce through the sales tax.

e. Additional Elements

Descriptions of globalization should not be limited to the elements described above as it also includes a broad range of new forces and pressures. These include the growing institutional pressures of supranational organizations⁵⁰ often incorporated through a growing web of treaties and institutions,⁵¹ the privatization of national governance functions,⁵² the development inside nationstates of the mechanisms necessary to accommodate the rights of global capital within their territories,⁵³ a series of cultural flows underpinning the contemporary world-system,⁵⁴ and the ideational pressures that flow from a set of liberal capital ideas.⁵⁵ Stephen Krasner has pointed out that globalization can also include elements as diverse as the legitimization of human rights, the transmission of diseases, the increase in migration, and the universal availability of MTV.⁵⁶

3. GLOBALIZATION AS A SERIES OF FORCES

How then can one conceptualize the globalization process on a broader level? It is a process that introduces (or at least intensifies) a series of forces into both domestic and international politics.

a. Economic Forces

On a microeconomic level, globalization impacts business and other investment decisions, offering both new opportunities and global challenges. On a macroeconomic level, it impacts national decisionmaking processes, again offering both challenges (in terms of controlling footloose MNCs, global capital, etc.) and new opportunities (in terms of further avenues for international economic cooperation, more effective technological methods for tracking international economic interactions, etc.). The globalization process also impacts the relative mobility of capital and labor, as the relatively free flow of capital is not mirrored by an equally free market in labor, thereby increasing political pressures for labor to bear a greater share of the burden.⁵⁷

b. Political Forces

On the macropolitical level, the globalization process has increased the blurring of the line between what is international and what is domestic. This was manifest in the focus of the Structural Impediments Initiative talks between the US and Japan in 1989-1990 on transforming domestic institutions.⁵⁸ It has become even clearer in the recent focus on environmental and labor standards.⁵⁹ The blurring of this line challenges previous claims in international relations theory about different behaviors in the domestic and international spheres,⁶⁰ and has even led John Kline to speak of intermestic issues, which blend international and domestic dimensions.⁶¹

The globalization process also brings both new players and new issues to the policymaking table. These new players (or in some cases old players with new forms of influence) range from NGOs and transnational migrants (which create a new form of transnational grassroots politics),⁶² to more internationally involved unions,⁶³ multinational sports authorities, leading music production companies, transnational law firms, hospital/research centers,⁶⁴ telecommunications companies, the big accounting companies, and others.⁶⁵ The new issues that emerge include new challenges to intellectual property rights and taxation,⁶⁶ privacy, concerns in terms of protecting cultural patrimony from international cultural influences, etc.⁶⁷

In terms of domestic politics, the globalization process impacts the relative power of a wide variety of players, from States and cities, to labor and business. It also puts pressure on domestic institutions and arrangements, raising new concerns about social dislocation,⁶⁸ social cohesion,⁶⁹ and the ability of democratic institutions to respond to these new forces in ways that will protect key concerns about democratic procedures, accountability, etc.

WHAT GLOBALIZATION IS NOT

In determining how globalization will impact American federalism, we need to know what globalization is, but also what it is not. Indeed, the answer to the Governor's second question: "What should we do about it?" is dependent on how well we understand the limits of globalization's impact. Here, we need to recognize several key points. First, while the changes described above are indeed real, they are not necessarily as radical or as far-reaching as many imagine. In fact, we need to admit that the ultimate impact of globalization is very unclear. Second, the globalization process is neither inexorable nor inca-

pable of being shaped. It is not a *deus ex machina* acting through market forces that imposes itself on governments, requiring them to modify policies in directions they would prefer not to go. Rather, these market forces, and globalization itself, are very susceptible to being shaped by government policies.

Thus, Governors need to consider not only how they want to react to the forces of globalization, but also what role they want to play in shaping its further development.

The Limits of Globalization

We can accept the reality of the significant changes described above while still recognizing globalization's limits. While the globalization process is changing the way the world operates, that change is neither as radical, clear, or inevitable as many advocates would like us to accept.

Not So Radical

Despite all the changes in the way the global economy operates, many things have remained the same. For example, even with the dramatic increases in world trade of the past decades, the world economy remains substantially domestically-driven. In the larger national economies, more than 80% of production is for domestic consumption and more than 80% of investment is by domestic investors.⁷⁰ In fact, the share of trade in GDP is still quite small in all but the smallest countries.⁷¹ Furthermore, many countries have been left out of the increased trade flows. Africa south of the Sahara, for example, accounted for only 1% of world trade in the 1990s.⁷² It is also questionable how much actual integration there has been of capital markets, especially in view of the fact that real interest rates even among developed economies differ from country to country, and that the differences between developed and developing economies have grown.⁷³ As Robert Gilpin has argued: "Try telling a Mexican or North African low-skilled laborer that we now live in a global economy in which national boundaries have ceased to be important! In fact, much of the globalization rhetoric is no more than the conceit of a rich and industrialized country."⁷⁴

Regarding finance capital, the number of financial products that are sold in highly integrated world markets is also relatively limited; stock markets are not integrated; and financial regulations, taxation systems, accounting, corporate ownership and other rules differ significantly among national economies.⁷⁵ Furthermore, world foreign direct investment flows are highly concentrated among the

developed economies, and their overall share is rising;⁷⁶ and of the foreign direct investment that went to developing economies, 80% went to just 20 countries, much of it to China.⁷⁷ It is also not clear that MNCs are as footloose and untethered to their home countries as globalization analysts assume. Most MNCs hold most of their assets and employees in their home country, have top management from the home country, engage in most of their research and development there, and face various sunk costs that limit their ability to pick up stakes and move elsewhere.⁷⁸

Not so Clear

The fundamental nature of the changes wrought by globalization are also not as clear as advocates may like to pretend. First, there is little agreement on how each change will play out. For example, while a central tenet of much analysis of globalization has been its role as a decentralizing force, as national powers are devolved to lower levels of government or the private sector,⁷⁹ it can also be seen as a powerful cause and/or enabler of centralization. Saskia Sassen has argued that the electronic networks and other market forces that are often identified as causes of decentralization actually enable new forms of concentration of power. Leading economic sectors that are highly digitalized, she argues, require strategic sites with vast concentrations of infrastructure, tailored labor resources, talent and buildings.⁸⁰ Thus, “[i]t is precisely because of the territorial dispersal facilitated by telecommunications advances that agglomeration of centralizing activities has expanded immensely.”⁸¹

Finally, many broad conclusions regarding globalization’s impact are on shaky ground. As Robert Gilpin has argued, the present and future economic consequences of globalization have been greatly exaggerated, as are its social and political consequences.⁸² There is certainly little reason to assume that globalization will affect all nationstates the same way, as they each have different resources, power, capacities, etc. In fact, one can argue that the United States has actually gained in power and influence due to globalization, while other nations may have lost power and influence. And, much of our analysis of globalization is constrained by a simple fact: the phenomenon is of such recent vintage that it is simply too early to tell what its ultimate, or even intermediate, impact will be. Even changes that have been far easier to identify and define, such as the commercialization of electricity, have taken many decades to affect economic growth and social change to a measurable degree.⁸³ Imagine how different the impact of globalization may appear ten, twenty, or even thirty years from now.

Neither Inexorable nor Inevitable

Globalization is not some inevitable process that cannot be shaped. Rather, it is fundamentally subject to being shaped by the decisions of policymakers in coming years. This simple truth has often remained concealed because both analysts and policymakers have found it in their interests to hide behind globalization as an excuse for their own policy preferences. They have sometimes used globalization as a term to describe what is happening, other times to predict what will happen, and frequently to opine on what should happen.⁸⁴

If you believe that the size of government should be reduced and regulations diminished, you argue globalization. If you want to shift power from the federal government either to the private sector, or to the World Trade Organization, or to State and local governments, you argue globalization. And, if you want to increase the safety net and spend more on worker training, you can argue globalization too.

Ironically, in this way, globalization becomes very much like federalism, in that it becomes a general term which can be used to argue for whatever distribution of powers one prefers.⁸⁵

In order to avoid this fallacy, one must recognize that, as with a balance of power, there is nothing about globalization that is inexorable. Globalization is not something that operates independently on nationstates; rather, it needs the nationstate and national support to exist. For example, global capital needs the nationstate's help in the creation of corporate and financial entities capable of handling tremendous flows of capital; and it needs the nationstate's imprimatur of legitimacy for whatever legal regimes are created.⁸⁶ Globalization needs legal structure to protect private property, to build infrastructure, to shield corporations from having to pay the costs of negative externalities they impose.⁸⁷ And it needs nationstates to ensure peace, to provide the threat of political, economic or military sanctions which help insure the performance of contracts in far-off lands, and to create the structures and underlying agreements and regulations by which the flows of capital, trade, investment, services, and numerous other interactions can occur. As Robert Gilpin has argued, international politics significantly affects the nature and dynamics of the international economy: "despite the huge benefits of free trade and other aspects of the global economy, an open and integrated global economy is neither as extensive and inexorable nor as irreversible as many assume. Global capitalism and economic globalization have rested and must continue to rest on a secure political foundation."⁸⁸

Indeed, not only is globalization dependent on future policy decisions looking forward, much of

globalization has occurred because governments have either wanted it to or permitted it to. As Eric Helleiner explained in his study of the reemergence of global finance, nationstates played a critical role in the process of globalization of finance. They instituted liberalization initiatives to grant more freedom to market operators; they refrained from imposing more effective controls on capital movements; and they decided to work together to prevent major international financial crises.⁸⁹ In fact, much of what is often seen as a diminution of national power can also be interpreted as a case of the nationstate consciously choosing to delegate power.⁹⁰ Even the Mexican peso crisis can be seen as an example not of a loss of sovereignty forced on Mexico by globalization, but rather as the result of a series of discrete and conscious policy decisions of Mexican officials to surrender control and authority to international capital markets because they believed that such a policy would impose domestic macroeconomic rationality and enhance investor confidence.⁹¹ In this regard, globalization sometimes merely becomes the excuse for doing what policymakers want to do anyway. Helleiner has noted, for example, that financial liberalization measures are often justified by invoking external competitive pressures when the real motivation is related to domestic pressures for liberalization, corporate desires to be free of controls, growing ascendancy of neoliberal ideas, etc.⁹² And Ian Clark has argued that “the nationstate is not the passive victim of normative globalization, but is itself one of its progenitors.”⁹³

In short, while we frequently speak of globalization as an independent variable, it is at least as much a dependent variable, shaped by conscious public policy decisions, able to be accelerated or constrained by further decisions.

GENERAL POLICY IMPLICATIONS

While the remainder of this report will introduce a series of policy implications resulting from globalization’s impact on American federalism, it is important to highlight several implications that underlie much of what follows.

First, since the globalization process is neither inexorable nor inevitable, it is logical to conclude that it can take many forms in the future. One could imagine a form of globalization with much more stringent supranational rules and institutions; or with very different limits and regulations on the operation of MNCs; or with various controls on short-term capital movements; or with far fewer government regulations. Even when the market does push for change, it certainly does not mandate what kind

of change or what sectors government should prefer.⁹⁴ The fact that the ultimate shape of globalization is yet to be determined means that all of our conclusions about its impact on American federalism are, of necessity, extremely tentative.

Second, the globalization process itself does not impose on governments any requirement that market forces and economic interests must trump other values. Too frequently, discussions about globalization have avoided the necessary debate about how global markets should operate to focus instead on how they currently operate. Thus, too often we have accepted the current form of global capitalism as the only possible one and transformed a *laissez-faire* condition into an unavoidable policy prescription.

This delusion has been reinforced by an interesting historical development. Our current stage of globalization was shaped by the policies of the postwar era in which the Western nations, often for political reasons, consciously tried to integrate their economic interactions (as did the Communist world, also for political reasons). Bernard Hoekman and Michael Kostecki have spoken of the previous primacy of foreign policy considerations in maintaining cooperation in trade,⁹⁵ while Robert Gilpin has noted that the evolution of the postwar international economy and the Cold War were intimately joined in every particular.⁹⁶ Thus, it should be no surprise that economic integration has outpaced integration in other areas. But then look what has happened. We see the globalization of the past half-century and assume that economic interactions should be a central organizing factor in that globalization. Why? Because they are the area in which globalization has progressed furthest. Thus, it becomes easy to make the fallacious logical leap to assuming that since this phase of globalization has coincided with dramatic economic integration, economics and concerns about economic efficiency must remain central tenets of the globalization model. As Daniel Elazar has noted,

The new globalization is heavily a product of the new economics, both in terms of the development of global markets and the acceptance by almost the entire world of the critical importance of market economies for economic progress. What this can lead to, and has in some cases, is a view of the world that is overwhelmingly economic. It is held that what is good for finance, trade, or business is what is good for us all under all conditions.⁹⁷

This interpretation, however, forgets that the reason why economic integration has progressed so far is not because it was so centrally important to the West (important though it was), but rather because Western nations were willing to subjugate economic interests to political ones. As John

Attanasio has pointed out in explaining why recognition of decisions of international tribunals in the economic realm has preceded recognition in other areas such as human rights, the latter impacts values more central to a nation's culture or sovereignty than mere utility or efficiency.⁹⁸

Thus, we find ourselves in the strange position of finding economics and concerns for economic efficiency exalted as central organizing principles of globalization, while in fact the reason we have become so integrated economically is because economic concerns are less central to core societal values than other political concerns. This is reflected in the recognition that future steps in integration will be more difficult, in areas such as antitrust policy, investments, etc., precisely because integration in those areas begins to impinge on not just economic concerns but other more central societal values. It is strange indeed that our willingness to subjugate economic to political concerns has now been contorted into an argument that economic efficiency should serve as the guiding principle for government in a globalizing era. Clearly, while the expansion of free markets and increased economic efficiency represent important societal values that American policy should further, they are not the sole values with which we should be concerned.

Finally, the ultimate form of globalization is within government's power to shape. Too often the faulty notion of globalization as inexorable has become an excuse for arguing that there is little that government can (or should) do to shape it or even to shield those injured by it. This occurs partially as a result of an interesting interaction among academia and Washington, in which predictions of the loss of national sovereignty which globalization can cause are then used as an excuse for having government refrain from taking various actions, which is then taken as proof for the initial predictions. In this sense, the notion that the nationstate is losing the ability to manage its macroeconomic policy and to impose various regulations on footloose MNCs becomes justification for deregulation, which is then cited as evidence for the initial premise. In so doing, we have mistaken a self-inflicted wound for an internal hemorrhage. To the contrary, the United States is in a unique position to shape the form and tenor of globalization, as well as its speed.⁹⁹

This means that one of the impacts of globalization on American federalism is to raise a fundamental question: which level of government in our federal system should now be responsible for taking the lead in shaping our national response to globalization? In order to begin to address that issue, we need to look first at how the current globalization process impacts the existing federal relationship,

and how the mix of challenges and opportunities that it creates changes the dynamics of federal/state relations. It is to the new challenges that we turn in Part II.

PART II

GLOBALIZATION'S IMPACT: CHALLENGES FOR THE STATES

What are the ways in which globalization can be expected to present challenges for States in particular and American federalism in general? While we have no crystal ball to foresee how globalization will develop in the future, we can identify a series of specific challenges that the current shape of globalization raises. Here's what we can tell the Governor when she asks: "So how might globalization constrain my behavior as Governor?"

- A whole series of existing State laws, including rules protecting the environment and consumers, the process the State uses to procure government services, and programs providing subsidies for State businesses, may be illegal under new international trade regimes, like the rules of the World Trade Organization.
- State policymaking freedom in realms that have traditionally been clear areas of State authority, like banking, investment services, tourism and insurance regulation, may now be subject to interference through broader federal trade policies.
- The federal government now has new incentives to interfere in State policymaking decision processes as well as a series of new sticks with which to influence those decisions.
- The approaches that the Supreme Court has devised over the past decade to protect State sovereignty

may no longer work to protect State decisionmaking authority from interference by Congress and international trade agreements. Ironically, in the name of more vigilantly protecting States rights, the Supreme Court is currently abandoning the “political process” protections of the *Garcia* doctrine at precisely the time when this doctrine could serve as a bulwark against encroachments on State flexibility by international trade rules and other Congressionally-approved international agreements.

- Even when the federal government devolves power, it may do so in ways that limit State flexibility and influence. This would occur, for example, if the federal government (through privatization or deregulation) cedes significant federal authority to the marketplace, an arena in which States enjoy neither the constitutional protections nor the influence that they wield when decisions continue to be made by the federal government.
- And all this is occurring at a time when the ability of States to maintain control over their sales tax and other revenue sources is constrained by new technologies, their regulatory systems are under pressure from outside competition, and all sorts of new actors are entering the political arena and competing with the States for influence.

The challenges are significant indeed. This Part endeavors to explain how these types of challenges might arise. It starts by looking at the rules of the World Trade Organization (WTO) which could ultimately threaten State flexibility in numerous arenas. However, the WTO, which has already received a great deal of attention, is merely the tip of the iceberg.¹⁰⁰ Thus, this Part also looks at broader developments in federal/State dynamics and the areas of international law, judicial policing of the bounds of federalism, and State and local powers to show that developments below the surface may ultimately have even more significant impacts than the specific rules of any one trade agreement.¹⁰¹ Finally, the discussion will introduce issues arising from changing federal powers which impact States, a discussion which will be developed further in Part III.

Initial Premises

Before embarking on the detailed descriptions that follow, it is important to recognize that even asking the question about how globalization impacts American federalism reflects several unstated premises.

First, it reflects a recognition that one cannot think of international relations and domestic politics as completely separate processes. Indeed, by engaging in this inquiry we have clearly discarded the notion of the unitary nationstate which dominated the international relations literature several decades ago and continues to be prevalent in certain portions of that literature.

Second, our discussion assumes that the relationship between domestic and international levels, and the relationship between the globalization process and the nationstate are dynamic ones. As Ian Clark has argued, while the nationstate is not a prisoner of either national or international forces, neither can it be viewed as being detached from both,¹⁰² and, indeed, each is both shaped and is a shaper of the others and of globalization itself.

Third, our inquiry assumes that there is, in fact, a not insubstantial impact between globalization and federalism. In this sense, this paper fits snugly within a key premise underlying the growing literature on convergence. The convergence literature has focused on the question of whether globalization, in particular, and other international forces more generally are leading to a convergence in the structure and/or functioning of domestic institutions around the globe. Initial theories of convergence predated globalization and argued at various times that nation states would progress through a series of common stages of development,¹⁰³ or that various processes like industrialization or policies like Marxism would lead to convergence,¹⁰⁴ or that trade and the integration of financial markets would equalize costs of production among nation states.¹⁰⁵

The recent focus on globalization has led to a variety of convergence hypotheses. Some argue that globalization will lead to an international system in which each nation operates like a small or medium-sized firm in an ocean of pure and perfect competition.¹⁰⁶ Others argue that the diffusion of markets will enhance both economic efficiency and democracy around the globe,¹⁰⁷ while others posit a series of common adjustments among a mixture of market mechanisms, collective agreements and nationstate regulation.¹⁰⁸ There is a substantial literature, however, which disagrees with these hypotheses, focusing instead on the continued significant differences among different countries regarding economic performance, approaches to regulation, domestic structures, etc.¹⁰⁹ For our purposes, what is most relevant about this debate is not the competing hypotheses, but the fact that both sides in the debate assume that domestic structures (whether they converge or not) will indeed be impacted by outside forces.

Of course, it is one thing to argue that there will be an impact and another to measure it. Barry Friedman has suggested that “as the barriers between countries fall, the lines we have drawn between the national government and the [S]tates will come under increasing strain.”¹¹⁰ Andreas Falke, on the other hand, has taken a far more extreme position, arguing that: “The increasing internationalization of financial markets and investment, and their international regulation point to a future in which it may be difficult, if not impossible, to maintain the autonomy of the [S]tates.”¹¹¹

The discussion that follows argues that while the impact of globalization on federalism will be significant, it need not lead to the kind of dire threat to State autonomy posited by Falke. Globalization presents not just challenges to State autonomy and authority, but also new opportunities for the States as well.

While these new opportunities will be discussed in Part III, this Part looks instead at the challenges that globalization presents for States. The use of the term “challenges” in this Part is intentional, reflecting the conclusion in Part I that there is little about globalization that is inexorable. It should, however, be noted that globalization’s impact on States can range broadly from threats to core State autonomy and sovereignty to limitations on States’ flexibility or their range of policymaking choices. This Part does not prioritize among the potential impacts, nor does it attempt to measure the extent to which each undermines core State authority. Rather, the goal is to provide a broad survey of possible impacts.

International Regimes: The WTO

For an organization still in its infancy, the World Trade Organization has already developed quite a varied reputation. The Uruguay Agreement creating the WTO has been praised for its potential to create jobs, lower tariffs, increase American prosperity, benefit US farmers, and provide new opportunities for American industry.¹¹² Others have seen it as highly restrictive, diminishing America’s liberty and siphoning off its wealth.¹¹³

In fact, it has managed to accumulate enemies both from the left and the right. Patrick Buchanan likened America under the WTO to a “shipwrecked, exhausted Gulliver on the beach of Lilliput . . . to be tied down with threads, strand by strand, until it cannot move when it awakens.”¹¹⁴ Labor unions, who rarely find themselves political bedfellows with Buchanan have agreed, saying that “It’s not just [about] jobs. We’re . . . talking about the loss of sovereignty of the United States.”¹¹⁵

Regardless of one’s ultimate views about the propriety of the WTO as an institution, it is clear that

the creation of the WTO and the rules adopted as a result of the Uruguay Round negotiations which established it present numerous challenges for States. Many State and local laws, from warning labels on food packages to environmental regulations regarding the content of various products to numerous “buy local” requirements, may already fail to comply with WTO rules. In addition, these same rules could dramatically reduce State flexibility in crafting future legislation as well, effectively requiring that virtually every administrative or legislative proposal introduced be analyzed for compliance with a series of technical WTO provisions (such as those requiring the adoption of the least-trade restrictive alternatives possible, the application of risk assessment tests, or a preference for internationally recognized standards, among others). Programs to subsidize local businesses as well as long-accepted government procurement programs would all be impacted by WTO rules. Even the desire of individual States to experiment with different approaches to common problems has already triggered complaints from America’s trading partners that such variation itself does not conform with the new trading regime. These specific problems are further aggravated by the fact that WTO rules may effectively change the dynamics of federal/State relations, providing the federal government with both new incentives to interfere in State decisionmaking processes in previous areas of traditional State authority, and new tools for doing so even more effectively.

The National Governors Association has already expressed concern that to accommodate the needs and desire of international trade partners who would rather deal with one uniform policy governing trade than fifty different [S]tate laws, NAFTA and GATT [which contains many of the Uruguay Round rules] supersede many [S]tate laws. These agreements downgrade the status of [S]tate laws from actions that derive from constitutionally determined power to trade barriers that international agreements can obviate.¹¹⁶

The lengthy section that follows looks in detail at these WTO rules, how they limit State flexibility, and the potential changes in federal/State dynamics they may cause.

Overall WTO Framework and Structure¹¹⁷

1. KEY DOCUMENTS

The World Trade Organization, which was created in 1994 as a result of the completion of the Uruguay Round of talks under the auspices of the General Agreement on Tariffs and Trade (GATT), does not

itself embody substantive rules. It is instead an institutional structure under which agreements are negotiated and implemented.¹¹⁸ The vast majority of the overall substantive requirements are contained in four annexes to the WTO Charter. Annex 1 contains the Multilateral Trade Agreements which impose binding obligations on all members of the WTO.¹¹⁹ Included in this Annex are:

- Annex 1A - containing both the revised GATT agreement (known as GATT 1994) which generally deals with tariffs related to trade in goods, and a series of 12 new agreements reached through the Uruguay Round negotiations. These agreements cover a wide range of issues, including Technical Barriers to Trade; Sanitary and Phytosanitary Measures; Subsidies and Countervailing Measures; and Trade-Related Investment Measures (known as TRIMs).
- Annex 1B - containing the General Agreement on Trade in Services (GATS); and
- Annex 1C - containing the Agreement on Trade-Related Intellectual Property measures (TRIPS).
- Annex 2 contains the Dispute Settlement Understanding (DSU) which establishes a series of dispute settlement rules binding on all WTO members and generally applicable (with some exceptions) to the WTO Charter and the agreements listed in Annexes 1 and 2.¹²⁰ Annex 3 deals with the Trade Policy Review Mechanism which was first established in 1988 and under which the WTO reviews and reports on the overall trade policies of WTO members.¹²¹ Annex 4 contains a series of four optional, or plurilateral agreements, which apply only to members who choose to be bound by them.¹²² The United States has chosen to be bound by three of these four agreements, including the Agreement on Government Procurement (GPA) which is discussed further below.¹²³

2. OVERALL STRUCTURE

The WTO is headed by the Ministerial Conference of all members, which meets at least once every two years.¹²⁴ Below the Ministers are four councils, one of which, the General Council, meets approximately every two months, and has overall supervising authority.¹²⁵ The three other councils each deal with the three major agreements - GATT 1994, GATS, and TRIPS in Annexes 1A, 1B, and 1C, respectively.¹²⁶ The budget for the WTO comes from an assessment imposed on the members, based on the share of each in total trade of all WTO members. In 1995, the nine largest traders contributed approximately two-thirds of the total budget.¹²⁷ Any member nation may withdraw from the treaty upon 6 months notice.¹²⁸

Under the WTO charter, there is a series of complex rules for decisionmaking. The WTO Charter specifies that the earlier practice under GATT of decisionmaking by consensus is to continue to apply to the Ministerial Conference and the General Council. However, it also indicates that when consensus cannot be achieved, decisions will be made on the basis of the majority of votes cast, based on one vote per member.¹²⁹ However, this rule is modified by a series of more specific requirements based on what type of decision is being made. For example, amendments related to general principles (which are discussed further below) must be unanimous, while three-fourths support is required for interpretation of provisions of the agreement and waiver of a member's obligations, and two-thirds for amendments relating to issues other than general principles.¹³⁰ Importantly, adoption of panel reports issued under the DSU can only be blocked by consensus (a significant change from the pre-1994 situation).¹³¹

3. KEY PRINCIPLES

Underlying the specific agreements and documents discussed above are a number of key principles. As Hoekman and Kostecki have noted: "The rules and principles of the WTO constrain the freedom of governments to use specific trade-policy instruments. They influence the balance between interest-groups seeking protection and those favouring open markets in Member countries' domestic political marketplace."¹³²

While several agreements also have their own more specific principles as well (discussed further below regarding specific agreements), four principles apply generally (although with occasional exceptions) across the board.¹³³ These are:

Nondiscrimination - This principle includes two key concepts, most favored nation (MFN) and national treatment. Under MFN, products made in members' own countries must be treated no less favorably at the border than goods originating from any other country. This means that whatever is the most favorable tariff offered to any trading partner for a specific product, that same tariff must be offered to all WTO members. However, both GATT and GATS explicitly allow for preferential trade agreements (e.g., NAFTA) among a subset of members so long as they meet certain requirements.¹³⁴ National treatment requires that foreign goods (once they have satisfied whatever requirements are imposed at the border) must be treated no less favorably in terms of taxes and other similar measures than domestic

goods. In addition, under certain of the agreements, such as GATS, national treatment has an even broader reach as it prohibits any treatment (whether formally identical or not) which “modifies the conditions of competition” in favor of domestic firms.¹³⁵

Reciprocity - Trade liberalization under the WTO framework occurs on a *quid pro quo* basis. This means that new entrants, who get all the benefits of previous negotiating rounds without having had to give anything away, are generally required to offer further concessions to enter into the WTO.

Market access - A series of GATT articles enforce market access through such measures as binding tariffs (i.e., once a country has committed to a certain tariff level through negotiations, it cannot raise tariffs above that level without negotiating compensation with affected countries). In addition, market access is furthered through various transparency requirements imposed on WTO members. They must publish their trade regulations, respond to requests for information by other members, notify the WTO of subsidy practices, etc.

Fair competition - This principle is intended to further the notion of a level playing field, with governments having the right to step in under certain circumstances. For example, governments can intervene under various circumstances to protect domestic industries, safeguard the balance of payments, protect public health, etc. However, government subsidization of exports is generally prohibited and/or subject to being countervailed by importing countries.

The discussion that follows will first examine briefly the general issues in terms of federalism that arise in the context of the WTO regime, and then look at more specific issues raised by several of the specific agreements in the Annexes. In many cases similar concerns arise regarding limits on State flexibility and authority and the increased ability of the federal government to shape and/or limit State policies.

General Issues Raised Under WTO

1. FEDERAL RESPONSIBILITIES TO SEEK STATE CONFORMANCE

The most basic issue impacting federalism arises from the federal government’s responsibilities under the WTO Charter and its accompanying agreements to ensure compliance by the States. Article XXIV,

Paragraph 12 of GATT 1994 is integrated to provide: “Each member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.”¹³⁶

This responsibility is made even more explicit in several of the other agreements. The Agreement on Technical Barriers to Trade (TBT) requires not only that members take reasonable measures to ensure compliance by subnational governments, but also that they “formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 [which encompasses the broad requirements of the agreement] by other than central government bodies” (TBT, Art. 3.5).¹³⁷ Indeed, the statute passed by Congress to implement the Uruguay Round Agreements required the President to “consult with the States for the purpose of achieving conformity of State laws and practices with the Uruguay Round Agreements.”¹³⁸

The above requirements open up a potentially serious conflict between federal and State interests, in which the federal government is in the position of either preempting State law or attempting to get States to modify their laws to conform with these international agreements negotiated and approved solely at the federal level.

Admittedly, there are a series of mitigating factors to consider. The Uruguay Round Agreements are not self-executing, and therefore Congressional approval was required to make their obligations a part of domestic law. Indeed, the Uruguay Agreement Implementing Act passed by Congress created a series of protections for States. For example, the Act states that

No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such law or application invalid.¹³⁹

Various other provisions of the Act establish a Federal-State consultation process, provide for Federal-State cooperation in the event of a WTO dispute, provide various notices to States, and deny private rights of action against States for violation of the Agreements.¹⁴⁰ (These are discussed in more detail in the section below regarding dispute settlement.) Nevertheless, this general requirement for State conformance potentially opens up a Pandora’s box in terms of the dynamics

of the federal-State relationship, generally, and State policymaking flexibility in a federal system in particular.

2. POTENTIAL AREAS OF NONCONFORMANCE

The above concerns would be merely academic if State laws generally conformed with WTO requirements. The problem is significant because numerous State laws may in fact be in violation, and numerous State interests would be implicated by any changes. The nonconforming laws tend to strike at the heart of the types of policy decisions that States use to define some of their most basic beliefs: issues of environmental and consumer protection, set-asides to assist minority or small businesses, efforts to regulate the activities of large financial services institutions such as banks and insurance companies, and decisions about how to structure the raising of revenue through taxes and its expenditure through government procurement policies. There is hardly an existing political sacred cow that does not face at least some risk of being gored by WTO requirements.

However, it should be noted that drawing dire conclusions from any discussion of State laws that may be in violation of various WTO provisions is somewhat premature. Each of the concerns mentioned in the sections that follow reflects merely a possibility of a problem, not a certainty. In fact, there was only one challenge to State laws under the first 30 years of GATT.¹⁴¹ In addition, while it is theoretically possible for the federal government to preempt State non-conformance even without a complaint's having been lodged by a foreign government,¹⁴² the underlying assumption is that such an action by the federal government would be unlikely. Rather, a foreign country would need to be injured enough by the nonconforming State practice to decide to bring a complaint against the United States. (On the other hand, the more aggressive the United States is in bringing complaints against other nations, the greater the chances that they will retaliate with a countercomplaint. In fact, the Beer II complaint,¹⁴³ under which numerous State laws were held illegal under GATT, was brought by Canada in response to a US suit against a Canadian province.¹⁴⁴)

With these caveats, it is appropriate to consider the wide range of States and types of State laws that analysts have identified as being potentially violative of various WTO requirements.¹⁴⁵ Following is a small sample of such laws:¹⁴⁶

Alaska

A person who desires to be on a bidders list must present a valid Alaska business license.

Arizona

Newsprint must include a certain percentage of recycled paper to reduce garbage disposal problems and encourage recycling.

California

Warning labels must be placed on food packages to inform consumers of toxic chemicals in food or other products (Proposition 65).

Air fresheners, floor polishes, hair care products, insect repellents and 23 other consumer products sold in California must have limited amounts of Volatile Organic Compounds (VOC's). VOC's combine with other substances to form urban smog.

Connecticut

Nickel Cadmium batteries must be recycled in order to reduce the amount of toxic heavy metals in the waste stream.

Florida

Containers with detachable "pop-tops" cannot be sold.

To minimize ozone depletion, products made from fully halogenated chlorofluorocarbons (HCFC's) cannot be sold.

Georgia

It is unlawful for the State to purchase beef not raised in the United States.

Illinois

Bidding is not required for the purchase of data processing equipment.

Kansas

The director of purchases may reject a contract or purchase on the basis that a product is manufactured or assembled outside of the US.

Maine

Plastic rings connecting six cans of beer, soda and carbonated soft drinks must be biodegradable to reduce litter and landfill disposal problems. It also eliminates a hazard to wildlife.

Maryland

Phosphate is banned from laundry detergent to protect water quality in the Chesapeake Bay.

Michigan

A deposit on beer and soft drink containers is required, with higher deposits for non-refillable containers.

Nebraska

Sale of non-biodegradable disposable diapers is prohibited to reduce landfill disposal problems.

New Jersey

The sale of wild birds that were not raised in captivity is prohibited. State law regulates the possession, transportation, and sale of certain wild animals to protect endangered species.

New Mexico

Only trucks and cars assembled in North America may be procured.

Ohio

Ohio products are preferred if the price is not "excessive."

Oklahoma

Oklahoma products can benefit from up to a 5% price differential in State procurement.¹⁴⁷

South Dakota

No foreign-raised meat products may be purchased.

Texas

School and commercial buses are required to be fueled by natural gas to reduce emissions that contribute to urban smog.

While the above list contains many possible areas of nonconformance that may remain theoretical, the European Union (EU) has already released a description of a wide range of State laws that they consider to violate various substantive provisions under the WTO agreements, including State environmental standards that exceed federal levels; buy-local, and minority and small-business set-aside laws; State unitary tax laws; and differing State regulations of banking and insurance.¹⁴⁸

Robert Stumberg looked at the impact of various WTO rules on the laws of California and found that 74 laws covering 15 different areas could be in violation. The nonconforming laws ranged from the commercial quality of agriculture and food to energy conservation and from pollution abatement to cor-

porate taxation.¹⁴⁹

Specific Issues Raised under WTO Agreements

In considering potential State law nonconformance, one needs to look at the specific requirements of each of the substantive agreements in the various Annexes. Following is a discussion of a number of major areas under several of these specific agreements in which significant concerns about State nonconformance have been raised.

1. SANITARY AND PHYTOSANITARY MEASURES¹⁵⁰

Do WTO rules permit States to adopt environmental protection laws through referenda? Might any outright ban on a product be challenged? Will States be able to continue to adopt environmental regulations that differ from those of other States? Will States be able to adopt regulations that force the development of new technologies? The answers to these questions are dependent on how one interprets the requirements of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), which relates to requirements to ensure the safety of products for consumption or to safeguard the environment. Generally, it requires that such measures not discriminate among WTO members, not be more trade-restrictive than required to achieve their objectives, and not constitute a disguised restriction on international trade. Furthermore, they must be based on scientific evidence (taking into account international standards), and WTO member countries must accept as equivalent a different measure of a WTO member if that member can demonstrate that its measure achieves the desired level of protection.¹⁵¹ How might State laws violate the requirements of SPS?

First, Article 2 which lays out Basic Rights and Obligations requires members to “ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members.”¹⁵² In addition, Article 3 is intended to “harmonize sanitary and phytosanitary measures on as wide a basis as possible.” It has been argued that these provisions may trigger a situation in which the very divergence among State laws precipitates a challenge.

Second, Article 3 includes a strong preference for members to “base their sanitary or phytosanitary measures on international standards,” noting that members may adopt measures offering a higher level of protection “if there is a scientific justification” or as a result of a risk assessment process. The

risk assessment process, outlined in Article 5, includes consideration of scientific evidence, economic factors, and the objective of minimizing negative trade effects. In addition, Members are required to ensure that their measures are “not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”¹⁵³

Acting together, these requirements can have severe ramifications for State laws. For example, California's Proposition 65, which requires warnings regarding toxic chemicals in consumer products and was adopted as part of a referendum rather than a scientific inquiry, could presumably fail the risk assessment test.¹⁵⁴ Note, however, that there is some disagreement over this conclusion.¹⁵⁵ In addition, the elements of risk assessment leave out consideration of political feasibility, which, may, in fact, be a key State concern in choosing one form of regulation over another. And any outright ban adopted by a State could be challenged on the basis that a somewhat lesser step would achieve the same level of protection while being less “trade-restrictive”.¹⁵⁶ Furthermore, the focus on technical feasibility may make technology-forcing regulations, which can be a key element in States' roles as “laboratories” of innovation, subject to challenge.¹⁵⁷

A further set of potential problems for States arises from consideration of the least-trade restrictive requirement noted above. This requirement is further explained in footnote 3, which states that: “a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.”¹⁵⁸

This raises a particularly troubling point given the wide variety of different State regulations and approaches. Some have argued that under this test, most State regulations will automatically be nonconforming, as another State will have clearly chosen less restrictive alternatives.¹⁵⁹ This is more than an idle concern when one considers the reasoning behind the Beer II decision, which found 60 State beer and wine regulations (out of more than 200 challenged by Canada) to be illegal under GATT. In considering the portion of the challenge relating to 5 States' requirements that alcoholic beverages imported into the State be transported by common carriers authorized by the State while in-State producers could deliver their product in their own vehicles, “the Panel noted that not all fifty States of the United States maintain common carrier requirements. It thus appeared to the Panel that some [S]tates have found alternative, and possibly less trade restrictive, and GATT-consistent, ways of enforcing their tax laws.” (Beer II, Paragraph 5.52)

Thus, the Beer II panel ruled that one State's higher regulatory standards could be found discriminatory and GATT-illegal because another State maintained lower standards.¹⁶⁰

2. TECHNICAL BARRIERS TO TRADE¹⁶¹

Are numerous State laws passed a generation ago illegal under WTO rules for failing to be constantly updated as science progresses? Can different States continue to adopt different policies regarding product certifications and other standards? Are humane animal slaughter regulations inconsistent with WTO requirements? These are some of the issues raised by the potential impact of the requirements under the Agreement on Technical Barriers to Trade (TBT), which aims to ensure that mandatory technical regulations, voluntary standards and testing and certification of products do not constitute unnecessary barriers to trade. The agreement generally requires that these regulations not discriminate and that they not create "unnecessary obstacles to international trade" in that they "shall not be more trade-restrictive than necessary to fulfill a legitimate objective." In this context, legitimate objectives include: national security, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment. Regulations must be changed if "changed circumstances or objectives can be addressed in a less trade-restrictive manner." Members are required to use international standards as the basis for their technical regulations unless such international standards would be "an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."¹⁶²

These provisions raise a series of issues. For example, the considerations of climatic, geographical or technological problems do not include consideration of the fact that the international standard may provide an insufficient level of protection.¹⁶³ And it has been argued that the listing of goals would not include humane animal slaughter laws.¹⁶⁴ The exclusion of political feasibility in considering less-restrictive trade means raises concerns similar to those discussed under SPS above,¹⁶⁵ as does the role of international standards.¹⁶⁶ Furthermore, the requirement that regulations be changed as circumstances or science changes could theoretically impose significant pressures on State restrictions which are not frequently modified. As Robert Stumberg has noted, "Arguably, entire chapters of the [S]tate code that were adopted over a decade ago could be attacked as being based on stale science."¹⁶⁷

The impact of the TBT on States is made more severe, however, by the explicit pressures for har-

monization. In particular, Annex 3-H of the agreement provides that “The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. *They shall also make every effort to achieve a national consensus on the standards they develop.* [emphasis added]”⁶⁸

This means that the emphasis under federalism in favor of experimentation and different State standards is actually contrary to the underlying thrust of TBT.

3. AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM)

The ability of States and localities to structure economic development incentives through tax cuts, grants, loans, or loan guarantees, as well as other provisions to attract and keep businesses may be undercut by the Agreement on Subsidies and Countervailing Measures. SCM regulates the provision of subsidies by governments and the ability of other governments to institute countervailing measures to offset the injury caused by inappropriately subsidized imports. Under the agreement, a subsidy must contain a financial contribution by a government or any public body within the territory of a member which confers a benefit (SCM, Art. 1.1). Financial contributions include items such as grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, and the purchase of goods (SCM, Art. 1.1 (a)(1)). Note that the very definition of a subsidy includes within it contributions not just by the national government but by subnational governments as well. Only specific subsidies, that is, subsidies that are not widely available within an economy, are included (SCM, Art. 2). Nevertheless, included subsidies cover not just subsidies to specific companies or industries, but subsidies that target a specific region, export goods, or goods using domestic inputs.

For these covered subsidies there are three separate categories. First, Article 3 of the SCM outlines prohibited subsidies, which include those based on export performance as well as those contingent on the use of domestic over imported goods. Thus, local content subsidies are prohibited under this section of SCM. A second category relates to actionable subsidies, which are not prohibited but which can be challenged and yield either to a dispute settlement proceeding or a countervailing measure by the adversely affected member (SCM, Articles 5-7). A final category relates to subsidies which cannot be countervailed (SCM, Art. 8). However, the components of this category (basic research, assistance to disadvantaged

regions, and one-time assistance to adapt existing facilities to new environmental regulations) received protection for only 5 years after the entering into force of the WTO Agreement (SCM, Art. 31).

The potential impact of the SCM provisions on States is large. First, State and local subsidies are explicitly covered by the agreement. Second, many States and localities use subsidies, such as tax breaks to specific companies and other techniques to attract business, which could be challenged under the SCM. However, they could only be challenged if another country could demonstrate that it has been injured or seriously prejudiced by the subsidy.¹⁶⁹ The number of potential State laws subject to question is significant. According to a study by Robert Stumberg,¹⁷⁰ programs in California that may fail under the SCM standards include the California Export Finance Program (prohibited); the California Hardwoods Industry Initiative and California Technology Investment Program (subject to countervailing measures); and the California Transportation Research and Innovation Program; the Energy Conservation and Development Program; and increased research activities tax credits (for all of which the 5-year sunset period has expired). Furthermore, California's promotion of various economic activities through tax credits, exemptions, deductions, deferred payments or preferred rates could be at risk "if they somehow work to the advantage of California-based firms in an international context, even if foreign firms also, in theory, qualify for the benefit."¹⁷¹

Finally, the structure and range of various subsidies is one of the ways that States compete with each other in providing different environments for their citizens and businesses. This agreement potentially removes from States and localities a significant tool that they have used to define themselves and their general approach to economic development.

4. AGREEMENT ON GOVERNMENT PROCUREMENT (GPA)

The Agreement on Government Procurement is particularly important in two respects. First, it gets at the heart of how governments choose to spend their resources, calling into question a wide range of buy-local, small business and minority set-asides, veteran and disabled procurement preferences, and other daily practices of the 50 States. Second, the GPA is particularly detailed in terms of the extent and specificity of its requirements.

Before examining the specific requirements of the GPA, however, it is important to note that this agreement provides a compelling example of the ways in which the States may be increasingly subject to

decisions made by federal fiat (a point further explored in the section on federal/State dynamics). On its face, the GPA, which is a plurilateral agreement, looks like an example of federal/State comity. Its impact on States is not automatic: while the United States has chosen to be bound by its terms, States were made subject to it only if they chose to be, and States could make this decision on an agency by agency basis.¹⁷² As of June 2000, 37 States had agreed to be bound by its terms, including States like California, New York, Texas, Florida and Illinois, accounting for approximately 80% of State procurement.¹⁷³

However, there is another reality here that raises troubling concerns. Yes, the States were able to choose whether they were covered. But that decision was made by Governors acting unilaterally in many cases, rather than through State legislative processes. Yes, States were allowed to make agency-by-agency determinations about whether they would be bound. But a number of Governors who agreed to be bound by the GPA expressly indicated that they did not agree to be bound by its detailed procedural obligations — yet these State reservations were not included by the federal government in the US Annex. Thus, despite the State reservations the US is presumably now internationally obligated to comply with those provisions in the covered States.¹⁷⁴

Under the GPA, States in their government procurement over a certain threshold dollar amount are required to give the products, services and suppliers of other parties treatment “no less favorable” than that accorded to domestic products, services and suppliers.¹⁷⁵ Covered States would also not be able to discriminate against locally-established suppliers on the basis of the country of production of the good or service or on the basis of foreign affiliation or ownership.¹⁷⁶ This means that Buy-American laws would be effectively prohibited.¹⁷⁷ While the wording of this restriction seems to make it possible for States to give more protection to foreign suppliers than to those of other States,¹⁷⁸ it appears that many buy-in-State procurement preferences would be subject to challenge as they would often arbitrarily discriminate against foreign suppliers or products.¹⁷⁹

The GPA provides a detailed set of restrictions on State activities. It prohibits technical specifications that “create unnecessary obstacles to international trade,”¹⁸⁰ and provides detailed tendering requirements (Articles VII – XVI). These requirements include items such as qualification of suppliers (Art. VIII); information required to be included in notices of proposed procurement (Art. IX); selection procedures (Art. X); time-limits (Art. XI); and tender documentation (Art. XII). Generally, the tender procedures require tendering to be competitive, either to all firms or to all pre-qualified firms.¹⁸¹

Mechanisms must also be established to allow awards to be contested by bidders.¹⁸² An examination of State laws related to procurement conducted by James D. Southwick¹⁸³ found multiple cases in which numerous State laws failed to meet the specific requirements of the GPA. For example, Southwick concluded that “No [S]tate’s law precisely mandates all of ...[the] requirements regarding the preparation of specifications. In particular, no [S]tate provides that specifications should be based on international standards, and very few [S]tates indicates that firms with a commercial interest in a procurement should not assist in the preparation of specifications for it.”¹⁸⁴

Southwick also found several States which either encourage or require specifications that discriminate against products manufactured outside the US or expressly allow for specifications that favor particular brand names or manufacturers.¹⁸⁵ Similar findings were made regarding prequalification procedures, notification procedures, etc.

What is perhaps most striking about the GPA is the level of detail required. For example, each notice of proposed procurement is required to contain a precise list of information, including:

- the nature and quantity, including any options for further procurement and, if possible, an estimate of the timing when such options may be exercised; in the case of recurring contracts the nature and quantity and, if possible, an estimate of the timing of the subsequent tender notices for the products or services to be procured;
- the address and final date for submitting an application to be invited to tender or for qualifying for the suppliers’ lists, or for receiving tenders, as well as the language or languages in which they must be submitted;
- the address of the entity awarding the contract and providing any information necessary for obtaining specifications and other documents;
- whether the entity is inviting offers for purchase, lease, rental or hire purchase, or more than one of these methods.¹⁸⁶

There are also detailed requirements for what must be published in a summary notice for each case of intended procurement,¹⁸⁷ regarding permanent lists of qualified suppliers,¹⁸⁸ etc. It is difficult to imagine that any State could meet all these detailed requirements without making at least some modifications to its existing procedures.

It should also be noted that the European Union and Japan brought a complaint in 1997 (since sus-

pended) against the United States, claiming that the Massachusetts law prohibiting contracts with firms doing business with or in Myanmar is in violation of the requirements of the GPA.¹⁸⁹ The Massachusetts law was struck down by the Supreme Court in *Crosby v. National Foreign Trade Council* on other grounds.¹⁹⁰

5. AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMs)

TRIMs deals with a series of policies used by governments to force foreign investors to attain certain performance standards such as local content or export performance requirements. The agreement affirms that GATT rules on national treatment and the prohibition of quantitative restrictions apply to investment policies to the extent trade flows are directly affected. This effectively bans any TRIM which violates these rules. The agreement prohibits not only mandatory measures but also those “with which compliance is necessary to obtain an advantage” such as a tax concession or subsidy. While the agreement clearly reflects its provenance as a compromise between developed and developing economies, it may represent merely a first step toward future action in this area which could impact State investment rules.¹⁹¹

It should be noted in this respect that NAFTA already covers trade in many services and investments.¹⁹² And, if NAFTA is in any way a harbinger of future developments in this area, the impact on States could be traumatic. In fact, Chapter 11 of NAFTA allows private foreign investors themselves to challenge a host government’s investment regulations through a binding arbitration proceeding, the decision of which is automatically enforceable in the domestic courts of the country involved.¹⁹³ The first three claims made under Chapter 11 against the US have targeted State government policies.¹⁹⁴ For example, Methanex Corporation of Vancouver is seeking \$970 million in compensation for costs imposed on it by California’s decision to phase out the use of MTBE (an ingredient of which Methanex provides) by the end of 2002. And a Canadian funeral services company has filed a complaint charging that a provision of Mississippi state law requiring the company, as a condition of appealing an award in a state court lawsuit against the company, to post a bond amounting to 125% of the award forced the company to settle under duress, thereby causing a claimed \$725 million in damages. Should such suits be successful, they would dramatically increase the vulnerability of State policymaking, traditional State tort law, and numerous other areas of State authority to international rulemaking.¹⁹⁵

6. AGREEMENT ON TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Might States be subject in the future not just to rules that require them to refrain from undertaking specific policies but also to internationally-negotiated regimes that actually affirmatively require specific substantive policies? This is the immediate significance of the TRIPS agreement which is unique within the agreements under the WTO in that it requires members to pursue a series of specific, similar policies. In this regard, TRIPS represents an actual move toward greater harmonization.¹⁹⁶ Generally, TRIPS establishes minimum substantive standards of protection (e.g., compliance with the substantive provisions of the Berne Convention); requires members to provide procedures and remedies under domestic law for effective enforcement of intellectual property rights by rightsholders; and extends basic GATT principles such as transparency, national treatment and MFN to the intellectual property arena.¹⁹⁷ The substantive provisions of TRIPS cover seven categories: copyright and related rights; trademarks and service marks; geographical indications; industrial designs; patents; layout designs of integrated circuits; and trade secrets and know-how.¹⁹⁸ While intellectual property clearly falls within the jurisdiction of Congress under Article I, Section 8, Clause 8 of the Constitution, the TRIPS agreement may have potentially significant ramifications for States. First, as noted above, it represents an initial move toward greater substantive harmonization which would have clear implications for State authority if extended in future negotiating rounds to other substantive areas. Second, TRIPS represents an expansion of the GATT framework from items that facilitate free trade to other items. Indeed, on a certain level the protection of intellectual property rights represents a form of permitted monopoly-creation.¹⁹⁹

7. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

GATS represents another extension of the GATT framework from the traditional focus on trade in goods, as it applies MFN treatment to all services but those specifically exempted. The GATT national treatment principle applies only to services specifically listed in the agreement. Generally, GATS introduces market-access obligations under which six kinds of market access restrictions are prohibited. These include restrictions related to the number of service suppliers allowed, the value of transactions or assets, as well as the type of legal entity through which a service supplier is permitted to supply a service (e.g., branches versus subsidiaries for banks).²⁰⁰

For our purposes, GATS is significant for several reasons. First, along with TRIMs, it makes traditional areas of State regulation such as banking, investment services, tourism and insurance subject to federal trade regulations.²⁰¹ Others have argued that the reach of GATS may ultimately cause federal regulations to extend and State regulation to shrink even further, in areas such as telecommunications, accounting, engineering, construction, travel, and the practice of law.²⁰² Second, GATS, together with TRIMs and TRIPS, may represent merely the wedge of a much more detailed series of international agreements on topics from antitrust to consumer safety.²⁰³

As can be seen from the above descriptions, the agreements entered into as Part of the completion of the Uruguay Round and the creation of the WTO present significant challenges for States. Principles such as national treatment and MFN, and concepts such as “least restrictive means”, risk assessment requirements, and preferences for international standards and even harmonization, threaten to internationalize many policy decisions which previously fit squarely within States’ traditional authority. However, the impact of these agreements on States goes beyond the specific substantive requirements and to more general concerns about changes to the dynamics of the federal/State relationship.

WTO Issues Affecting Federal/State Dynamics

Having examined several of the details of the underlying WTO agreements, it is now necessary to step back and consider the manifold ways in which these agreements will impact federal/State dynamics. The agreements described above, while differing in their details, pose together considerable challenges for States and American federalism. The flexibility of States to enact their own standards — different from those of the federal government and from their sister States — may be eroded, as the very differences among the States can serve as the basis for a challenge under the WTO.²⁰⁴ State flexibility to use traditional tools such as tax credits and exemptions, loan guarantees, procurement preference programs and others, has been significantly reduced if not eliminated.²⁰⁵ And States will be required to expend time, money and energy in structuring future legislation in a way to meet WTO guidelines.²⁰⁶

Indeed, the potential expenditures and limits on decisionmaking imposed on the States by these federally initiated and approved agreements are far greater than the *de minimis* impositions on State actions which the Supreme Court has found so unacceptable in the context of its recent federalism decisions.²⁰⁷

Yet the implications are even more far-reaching. The WTO regulations open up an entirely new

arena through which different political actors can pressure States to enact policies to their liking.²⁰⁸ Those who oppose any subsidies to businesses may now be able to use the SCM to pressure legislators to reduce such subsidies. Those who oppose stringent environmental, consumer, or financial regulations may be able to use the entire panoply of WTO agreements as weapons in their own battles. Both the left and the right will be able to take advantage of new avenues for persuasion, while also encountering new vulnerabilities for some of the programs and policy goals they hold most dear.

These agreements can be used not just directly, i.e., by arguing in the policy debate that potential State legislation may contravene WTO rules; they can also be used indirectly, as different interest groups which lose the political battle on the State level appeal either to the federal government or even to overseas governments to challenge the disputed State rule. For example, a business organization that fails to convince a State to refrain from adopting various strict environmental regulations could now, working through its members' foreign subsidiaries, encourage foreign governments to challenge the propriety of those regulations. Having lost in the domestic political process, appeal is now possible through an international process according to rules essentially imposed on the States by their federal government. This new political dynamic also threatens to change the dynamic of federal/State relations as it would be the federal government, rather than the States, which would be able to defend (or choose not to defend) any controverted State regulation. In order to understand how these new political dynamics could play out, we need to examine in some detail the respective federal and State roles in the WTO dispute settlement process.

1. THE DISPUTE SETTLEMENT UNDERSTANDING (DSU)

The DSU establishes a single dispute settlement procedure for almost all of the relevant Uruguay Round agreements (DSU, Article 1). Under the DSU, a dispute is initiated by a WTO member (i.e., a national government) or group of members with a request for consultations (DSU, Articles 3 and 4). If these consultations fail to reach a settlement, a complainant can request the creation of a panel (DSU, Article 6) comprised of three impartial individuals (DSU, Article 8). The panel receives oral and written arguments from the relevant parties (DSU, Article 12) and issues an interim report which is distributed to the members (DSU, Article 15) for adoption by the Dispute Settlement Body (DSB).

Prior to 1994, nationstates were effectively able to block adoption of a report by the DSB as adop-

tion required consensus, and the losing party's voice was sufficient to block that consensus.²⁰⁹ Under the DSU, reports are deemed adopted unless there is a consensus to the contrary, and since the winning party can block such a consensus, adoption of the report is almost axiomatic (DSU, Article 16). However, the losing party does have the option of an appeal to an appellate division of seven individuals (three of whom serve on any one case). The report of the appellate division is considered adopted unless there is a contrary consensus (DSU, Article 17).

Several elements of this process are noteworthy. First, it should be noted that panel members are selected from a group of people having special expertise in trade matters (e.g., persons who have served as a country's representative to GATT or in the Secretariat, those who have served as a senior trade policy official, or those who have taught or published on international law or policy) (DSU, Article 8). Note that these are experts in trade, not in the particular industries affected, and certainly not in American constitutional law and the requirements of federalism.²¹⁰

Second, under Article 22, the losing party is expected to bring the nonconforming measure into compliance or otherwise implement the recommendations of the DSB. Alternatively, the losing party can enter negotiations with the winning party to provide mutually acceptable compensation. Otherwise, the winning party may request authorization from the DSB to suspend the application to the losing party of concessions or other obligations under the covered agreements. While there is an initial presumption in the DSU that the winning party will first seek to impose these sanctions in the same sector as the violation occurred, it may impose sanctions in other sectors (DSU, Art. 22, Paragraph 3(b)) or even under another covered agreement (DSU, Art. 22, Paragraph 3(c)). This means that if a New York State law is challenged and found to be nonconforming, the retaliatory sanctions may barely hurt New York at all, but rather impose costs on California or the nation as a whole.

Third, the dispute resolution process operates according to strict rules of secrecy. Under Appendix 3, Working Procedures, the panel meets in closed session, the documents submitted to it are kept confidential, and the parties to the dispute are only present when invited by the panel. Since the parties to the dispute are member governments (rather than the States whose regulations may be at issue), affected States are only able to follow the proceedings to the extent that the US federal government shares information with them. While the Uruguay Agreement Implementing Act established in federal law²¹¹ a process for federal-State consultation regarding dispute settlement proceedings which is intended to

ensure State involvement in development of the US position at each stage, it is still the federal government that ultimately calls the shots.²¹²

2. Enforcement of Dispute Settlement Decisions

Under US law, the decision of a dispute settlement panel is not self-executing.²¹³ This means that federal action is required to enforce the decision of the DSB. In general, the federal government could at any point enact a federal law, passed by Congress and signed by the President, to preempt a nonconforming State law. However, even in the absence of Congressional action, the executive branch acting through the US Trade Representative (USTR) is empowered to take action to bring the State law into conformance.²¹⁴ Specifically, the US may bring an action in federal court against the State to have the nonconforming law declared invalid.²¹⁵

The Uruguay Agreement Implementing Act does impose several restrictions on the USTR's flexibility in this regard: the US bears the burden of proving that the State law is nonconforming, and the decision of the DSB is accorded no deference by the court in making this determination.²¹⁶ States are further protected by the provision that only the US and no private parties may bring suit against a State on the grounds that the State is not conforming with the provisions of the relevant Uruguay agreements.²¹⁷

3. SPECIFIC APPLICATIONS

While the above procedures appear at first blush both detailed and relatively trivial, taken together they represent a significant potential change in the dynamics of federal/State relations. First, the federal government in general and the USTR in particular now have an additional policy stick to wield over States.²¹⁸ States are now dependent on the federal government to make their case for them in front of the DSB. In this context, it is unlikely that the federal government would allow States to defend their interests before this body in a manner contrary to official US policies.²¹⁹ And the USTR will have an incentive to trade away State rather than federal laws in negotiating with foreign countries.²²⁰ Indeed, even a well-meaning USTR would be in an uncomfortable position as he would have to defend the State law before the DSB knowing that he may have to make the opposite arguments if he loses and then needs to go to federal court to compel State compliance. Thus, Laurence Tribe has argued that the USTR would likely be

inclined not to make the strongest possible arguments before the DSB.²²¹ Furthermore, the executive branch's ability to proceed against the nonconforming State in federal court without Congressional agreement means that the protections that the States enjoy through the Congressional process become irrelevant to the decision.²²² Indeed, the power of the USTR vis a vis the States crops up in many unexpected forms. For example, under GATT, the States were permitted to reserve various tax laws, but such reservation was subject to a decision by the USTR to accept the reservation.²²³

Admittedly, States may also have an additional policy stick, as they can make things difficult for the USTR in other disputes. Texas regulators, for example, spoke to European negotiators about using European certification procedures during the fight between the US and Europe over hormone-related beef.²²⁴ Nevertheless, on balance, it is the federal government and the USTR that can use the dispute process to influence State policies in a way desirable to the federal government.

Second, this newfound power does not come into play merely after initiation of a challenge to a State law under the DSU. As indicated earlier, the federal government probably has the authority to sue States regarding nonconforming State laws even in the absence of a foreign complaint.²²⁵ In addition, the federal government now has a new incentive to intervene in State legislative processes early on. Thus, one could imagine the State Department trying to pressure a State legislature to avoid adopting a tax that could be WTO illegal (or that could merely lead to potential foreign challenges).²²⁶ And the federal government would now have an incentive to pressure States not to engage in experimentation or innovation that could lead to potential challenges.²²⁷ In fact, the federal government can not only identify potentially nonconforming State laws, it also holds within its power the ability to make it more likely that foreign governments will challenge those laws. For example, if the USTR challenges the laws of another nation's subnational governments, it is likely that the defending nation will respond with a countersuit challenging US State laws.²²⁸ Indeed, as noted earlier, it was precisely such a countersuit to a US complaint against Canadian provincial statutes that led to the Beer II complaint.²²⁹ And even if the US does not single out a subnational government, it could be expected that any national target of American complaints would look to throw the "kitchen sink" at the US in terms of potential countersuits, including complaints against State laws.²³⁰ As Robert Stumberg has noted, all kinds of "hostage-taking" scenarios could emerge.

Finally, the dynamics of cross-sectoral sanctions significantly impact State abilities to maintain fed-

eral support for their policies. If a State law is found to be nonconforming, the winning complainant may choose to bring sanctions that target not the nonconforming State but rather other States, such as the home States of key Congressional leaders.²³¹ This means that Congress may face new pressures to compel State compliance, and the issue facing the federal government will cease to be one of protecting State sovereignty and become one rather of choosing among the interests of competing States.²³² Crossover sanctions can also lead to sanctioned businesses lobbying Congress to preempt the State law, again increasing the pressures on the State and requiring increased State expenditure of time, effort, resources, and political chits to maintain the State's policy autonomy.

International Law and American Federalism

The WTO Regime is just the most prominent example of a broader globalization trend impacting the States: the increasingly substantive breadth of international law. States' extensive authority to regulate in numerous traditional areas (such as banking, insurance, financial services, and even solid waste management or hospitals) may now be dramatically restricted not just by WTO regulations but by the broader reach of international law acting through treaties, executive agreements, and the like. An increasing number of areas that were traditionally left to the discretion of the States are now the subject of international treaties and agreements through which the federal government imposes new obligations on the States.

A Governor may say, "Yes, I understand this concern, but can't I rely on the Supreme Court, which has become increasingly vigilant in monitoring federal incursions on State sovereignty, to protect my State's authority?" The answer to this is No, for two different reasons. First, the new encroachments on State flexibility are generally occurring through the treaty process, which is an area where the court has traditionally given the federal government extensive authority to impinge on State flexibility and authority. Thus, in a very practical sense, the Court's approach to treaties and its renewed concern with State sovereignty are on a collision course.

Second, the way in which the Court has chosen to increase its protection of State sovereignty from federal legislative incursions ironically now diminishes the ability of the Court to protect State sovereignty from federal incursions through the treaty process. While this point is developed further below, it is important enough to justify a short explanation here. The Court's recent solicitude for State sovereignty has resulted in the Court's turning away from the *Garcia* decision²³³ which had justified judicial

acceptance of much federal legislation on the theory that State interests were protected through the political process through which that legislation was adopted. Under this *Garcia* approach, the justification for judicial overturning of such legislation would be a process failure (e.g., an individual State was “ganged-up on” or, more broadly, the process was one in which State interests were not reflected in the policymaking process)²³⁴, rather than a judicial concern with the substantive reach of the legislation itself. The Court has more recently effectively rejected the process-based approach in favor of a more searching substantive inquiry into the legislation’s impact on State sovereignty. While this may warm the hearts of many States’ rights enthusiasts, it has a very negative ramification which has gone unremarked. That is, the strongest argument that States may have for overturning various incursions on State authority imposed through treaties and broader international laws may be precisely the process-based approach currently being abandoned by the Supreme Court.²³⁵

Thus, the Court’s effort to protect States from domestic federal legislative incursions is not only on a collision course with its broader treaty-power jurisprudence, but the very way in which the Court is moving to protect States abandons the *Garcia* doctrine at precisely the point when it could start to have real “teeth” as an effective protection for States from internationally-based incursions. This may result in States’ being left even more defenseless against incursions imposed through treaties and the increasing reach of international law.

International Law Generally

According to the Restatement (Third) of the Foreign Relations Law of the United States, sources of international law include customary law, international agreements, and derivation from general principles common to the major legal systems of the world.²³⁶ Under current doctrine, international law is considered “a kind of federal law, and like treaties and other international agreements, it is accorded supremacy of State law by Article VI of the Constitution.”²³⁷ Article VI states that the Constitution, the Laws of the United States, and all treaties made under the Authority of the United States are “the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²³⁸

As Louis Henkin has noted, international law is not only the law of the United States, but it “is to be determined independently by the federal courts, and ultimately by the United States Supreme Court,

with its determination binding on the [S]tate courts; and. . . a determination of international law by a [S]tate court is a federal question subject to review by the Supreme Court.”²³⁹

Indeed, Henkin has argued that international law generally is not merely binding on the US internationally, but also incorporated into US law. Thus, it is “‘self-executing’ and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.”²⁴⁰

1. THE ROLE OF STATES IN FOREIGN AFFAIRS

Not only is international law binding on the States, but States also carry very little weight in the foreign affairs realm. The Constitution grants Congress the power, among others, to regulate commerce with foreign nations (Art. I, section 8, clause 3); to define and punish piracies and felonies committed on the high seas and offenses against the law of nations (section 8, clause 10); to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water (clause 11); and to raise and support armies (clause 12). In addition, the Senate is given the power to ratify treaties and confirm ambassadorial appointments (Art. II, section 2, clause 2).

The President serves as Commander-in-Chief (Art. II, section 2, clause 1), and is granted the power to make treaties and appoint ambassadors (subject to Senate ratification) (section 2, clause 2), and to receive ambassadors (section 3).

In contrast, States are prohibited from entering into treaties, alliances or confederations and from granting letters of marque and reprisal (Art. I, section 10, clause 1). States are also prohibited from, without the consent of Congress, keeping troops or ships of war in time of peace, entering into any agreement or compact with a foreign power, or engaging in war (unless actually invaded or in imminent danger) (Art. II, sec.10, clause 3).

States’ lack of power in foreign affairs has been confirmed by numerous Supreme Court decisions. In *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), the Court suggested that the federal power over foreign affairs was never derived from the States and thus is not limited by the restrictions imposed under the Tenth Amendment.²⁴¹ In *United States v. Belmont*, 301 U.S. 324 (1937), the Court noted that: “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, [S]tate lines disappear. As to such purposes the State of New York does not exist.”²⁴²

States’ essential powerlessness in the area of foreign affairs makes States uniquely vulnerable to

the expansion of international law precipitated by the globalization process.²⁴³

2. GLOBALIZATION, INTERNATIONAL LAW, AND THE STATES

As was clear in the discussion regarding the WTO, globalization has dramatically expanded the types of topics that are covered under international agreements. Thus, the traditional foreign affairs agenda has been supplemented by a series of issues “formerly the concern of domestic governance alone.”²⁴⁴ At the same time, public international law now “frequently regulates both public and private activities that were formerly viewed as domestic concerns....It also regulates issues like environmental protection and family law that in prior times were exclusively governed by domestic law.”²⁴⁵

Indeed, some have suggested that international human rights agreements may lead to challenges to activities that have traditionally been clearly within the State domain, such as corporal punishment in schools and the death penalty.²⁴⁶ With globalization have come other changes as well. For example, domestic law and activities are increasingly seen to have foreign consequences.²⁴⁷ Furthermore, international law has increasingly concerned itself with the actions of private persons and corporations, in addition to governments.²⁴⁸

What does this mean for States? As Barry Friedman has argued: “if the national government’s power in foreign affairs is great, and the area that can be called foreign affairs is endlessly expansive, then [S]tate autonomy is subject to serious compacting by the shrinking boundaries of our global village.”²⁴⁹

Thus, both the Congress and the Executive gain more authority vis a vis the States whether it is due to a diminishing area of domestic legislation that can be considered without concern for foreign relations impacts; an expanding international market that increases pressures for national uniformity; or the overall expansion of foreign affairs and international law in which State powers are not protected.²⁵⁰ Brian Hocking has argued that this can have potentially dire consequences for federalism: “if central government, by virtue of its control over foreign policy, can impinge more and more on the responsibilities of the constituent governments using the argument that the foreign policy agenda has expanded to include a range of issues once assumed to be exclusively domestic in nature, then the logic of a division of powers is endangered.”²⁵¹

The threat to State authority, however, is particularly acute when one examines the changing nature of treaties and their ratification.

Treaties and the States

States operate today in a world that is increasingly connected through a web of treaties. These treaties, as John Yoo has noted, are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient compacts to undertake specific nation-state action.²⁵² Indeed, Abram and Antonia Chayes have argued that while many treaties remain formally between nationstates, they are increasingly intended to regulate individuals' and private entities' activities²⁵³ (and to the extent they regulate public activities, it is sometimes on behalf of private economic interests).²⁵⁴

1. TREATIES' PRIVILEGED POSITION

Treaties occupy a privileged position vis a vis the States, as no treaty has ever been struck down as an infringement on State sovereignty.²⁵⁵ Part of the reason for treaties' privileged position relates to States' lack of power in the realm of foreign affairs generally. However, treaties offer Congress and the Executive a particularly alluring option: the federal government is empowered to take steps through treaties that would otherwise be denied it. This was made clear by the famous case of *Missouri v. Holland*, 252 U.S. 416 (1920). Congress had previously attempted under its domestic lawmaking powers to enact legislation regulating the killing of migratory birds within the United States. This statute was struck down in two lower court decisions as not being within any of Congress's enumerated powers. The US then entered into a treaty with Great Britain, the Migratory Bird Treaty, governing migration of birds between the US and Canada, under which the killing, capture, or selling of certain migratory birds was regulated. When the State of Missouri challenged the treaty and its regulations as impinging on the State's Tenth Amendment rights, the Court upheld the treaty (and implementing legislation), making clear that Congress could enact through its treaty powers regulations that would otherwise be beyond its authority.²⁵⁶

The impact of *Missouri v. Holland* was somewhat limited over the past 50 years as the Court's willingness to expand the realm of federal authority under its domestic powers made it less necessary for the federal government to resort to operating under its treaty powers.²⁵⁷ However, a series of recent federalism decisions threatens to undercut the reach of federal domestic powers, thereby increasing the temptation for the federal government to use its treaty powers even more.²⁵⁸

2. RECENT FEDERALISM DECISIONS

Over the last decade the Supreme Court has issued a series of decisions that restrict the reach of federal powers in two areas. First, the Court has shown far greater willingness than during the previous half century to restrict Congressional powers under the interstate commerce clause. Second, the Court has proven increasingly solicitous of States' rights under the Tenth Amendment as a meaningful restriction on federal legislation. While these decisions have generally been adopted by a highly divided Court with a majority of only 5 votes (so that a single change in Court membership could theoretically reverse the current trend), taken together they represent a significant and potentially major change in the shape of federalism. For our purposes, they both highlight a series of concerns (such as commandeering of State processes, and the role of federalism in insuring accountability) for us to apply more broadly to the globalization process, and establish a reason for the federal government to rely far more extensively on its treaty powers in the future.

The Court's newfound willingness to impose limits on federal action under the interstate commerce clause first gained prominence in 1995 with *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court, for the first time since the New Deal, invalidated a federal statute for exceeding Congress's authority to regulate interstate commerce under Article I, Section 8 of the Constitution. In *Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, under which Congress had made possession of a firearm in a school zone a federal offense. The Court noted that "[t]he Constitution creates a Federal Government of enumerated powers" and held that the interstate commerce clause could not be read so broadly as to grant Congressional power to enact the Act. In so doing, the Court rejected the federal government's contention that possession of a firearm in a school zone may result in violent crime which affects the functioning of the national economy by raising insurance and other costs, by reducing the willingness of individuals to travel to areas within the country perceived as unsafe, and by posing a substantial threat to the educational process which will result in a less productive citizenry. The Court reasoned that under the federal government's theory of the case:

it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate....To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congress-

sional authority under the Commerce Clause to a general police power of the sort retained by the States.²⁵⁹

The Court's continuing adherence to this more restrictive view of federal interstate commerce powers²⁶⁰ was illustrated in its recent decision in *United States v. Morrison*²⁶¹ under which the Court invalidated a portion of the Violence Against Women Act of 1994²⁶² which provided a federal civil remedy for the victims of gender-motivated violence. The relevant section of the Act would have enabled victims of gender-based crimes of violence to sue their attackers in federal court for compensatory and punitive damages, regardless of whether the defendant had been charged, prosecuted, or convicted of the crime in a State court. Unlike the situation in *Lopez*, Congress had explicitly found, based on extensive testimony, that gender-based crimes of violence

have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce...[,] by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products....H.R. Conf. Rep. No. 103-711, p.385 (1994)²⁶³

Applying the framework established in *Lopez*, the Court again found the chain of reasoning linking the harms to their impact on interstate commerce too tenuous, and noted that the government's reasoning if accepted

would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.²⁶⁴

Furthermore, the Court again suggested that this same line of reasoning could be "applied equally as well to family law and other areas of traditional [S]tate regulation, since the aggregate effect of marriage, divorce, and child rearing on the national economy is undoubtedly significant."

In sum, during the past five years, the Court has moved to limit in rather dramatic fashion its previous willingness to read very broadly the extent of Congressional powers under the interstate commerce clause. The impact of these holdings is intensified by a series of other recent decisions in which

the Court has also found renewed bite in the limits on Congressional powers deriving from the Tenth Amendment.²⁶⁵ In *New York v. United States*, 505 U.S. 144 (1992), the Court struck down as a violation of the Tenth Amendment (and exceeding Congressional powers under the interstate commerce clause) a section of the Low-Level Radioactive Waste Policy Amendments Act of 1985 which required States unable by January 1, 1996 to dispose of the low-level radioactive waste generated within their borders to instead take title to and possession of that waste and become liable for all damages waste generators suffer as a result of the State's failure to do so promptly. The Court interpreted this "take-title" provision as offering States the "option" of either regulating pursuant to Congress's direction or taking title to the waste, neither of which the Congress could, according to the Court, require of States directly. The Court found that requiring States to take title and assume liability for the damages

would "commandeer" [S]tate governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and [S]tate governments. On the other hand, the second alternative held out to [S]tate governments - regulating pursuant to Congress' direction - would, standing alone, present a simple command to [S]tate governments to implement legislation enacted by Congress. As we have seen, the Constitution does not empower Congress to subject [S]tate governments to this type of instruction.²⁶⁶

Thus, the Court held that the take-title provision of the Act would commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, a power which Congress does not have. This limitation on Congressional power was grounded in an increasing concern for State sovereignty reflected in the structure of the Constitution, and expressed most directly in the Tenth Amendment which "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."

The extent of the Court's renewed appreciation for the role of the Tenth Amendment as a limitation on overall federal powers was made clear in *Printz v. United States*, 117 S. Ct. 2365 (1997), in which the Court struck down portions of the Brady Handgun Violence Prevention Act which required State and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks. Firearms dealers were required to send certain information about prospective purchasers to the chief law enforcement officer (CLEO) of the purchaser's residence. The

CLEO must then “make a reasonable effort to ascertain within 5 business days” including through “research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General” whether the purchase would violate the law. If the CLEO notifies the dealer that the purchaser is ineligible to receive a handgun, he must, upon request, provide the purchaser with a written statement of the reasons for that determination.

The Court found that requiring State/local officers to perform these tasks on behalf of the federal government was an inappropriate diminution of State sovereignty, as it conscripted State officers directly into implementation of federal law.

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.²⁶⁷

Thus, the Court reaffirmed its willingness to find within the Tenth Amendment and the broad Constitutional structure of which it is a part clear limits on federal authority and renewed solicitude for State sovereignty.

3. IMPLICATIONS OF RECENT FEDERALISM DECISIONS VIS A VIS TREATIES

These recent federalism decisions have several significant ramifications for our inquiry. First, there is the potential that the Court’s approach to treaties and its renewed concern with State sovereignty are on a collision course. Certainly, one can easily distinguish the two lines of cases to avoid such a collision as a doctrinal matter: since the external foreign affairs powers of the United States did not derive initially from the States, they are not among the powers reserved to the States by the Tenth Amendment.²⁶⁸ Nevertheless, on a more practical level, the idea of protecting State sovereignty more vigorously in the face of domestic federal legislation, while continuing to give carte blanche to whatever actions the federal government takes in the expanding realm of foreign affairs, seems to threaten to once again relegate the protection of State sovereignty to a rapidly diminishing arena. Furthermore, the ironic result of such a continued distinction may be to increase the incentives on Congress and the Executive to enact more and more legislation through the guise of their treaty powers.²⁶⁹ This develop-

ment would deny States the greater opportunity for influence that they currently enjoy as players in domestic legislative processes.

This concern is heightened in light of the fact that more and more treaties are entering into force without receiving a two-thirds vote from the Senate, which has traditionally been another way that State interests have been protected in the process.²⁷⁰ Both the WTO Agreement and NAFTA were adopted under procedures requiring a majority vote of both houses of Congress, rather than a two-thirds vote in the Senate.²⁷¹ Indeed, not only can treaty adoption bypass the protections for States inherent in the two-thirds Senate approval requirement, it can also bypass Congress altogether, as the Supreme Court has sanctioned the making of Executive Agreements in the foreign affairs realm.²⁷²

One way to deal with this concern may be increasing judicial concern for whether an obligation was imposed as a result of a treaty, a joint resolution, or an executive agreement. Under such a scenario, the Court would be more willing to protect States from the implications of executive agreements which do not have the same process protections as do treaties or joint resolutions.²⁷³

There is, however, a further possible twist here. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court relied on national political processes, rather than active judicial intervention, to protect States from infringements on their sovereignty. The *Garcia* reliance on national political processes did leave room, however, for more active judicial intervention “to compensate for possible failings in the national political process.”²⁷⁴ However, the Court has refrained from defining precisely what would qualify as such as failing. In *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court rejected the argument that Congress’s removal of a federal tax exemption from bearer (as opposed to registered) bonds issued by the States arose from a national political process defect. In rejecting South Carolina’s claim, the Court, while refusing to define what would constitute such a process failing, did note that “South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.”²⁷⁵ Might it be possible that the imposition on the States of a wide range of regulations through reliance on federal Treaty-making powers could rise to the level of a process failure? This would presumably be more likely in the event of Executive Agreements or fast-track consideration of treaties²⁷⁶ (in which States are not protected by the same legislative ability to amend the Treaty).

But it could arise in other ways as well. Consider, for example, the process concerns that arise out

of the GATS (a trade agreement approved by a majority of both houses of Congress under the fast-track process) which includes within itself a built-in authorization for future negotiations on transparency and disciplines on domestic regulation of services (including areas such as solid waste management, hospital services, and others).²⁷⁷ Negotiations on issues of traditional State authority could commence even without explicit Congressional authorization.

This raises the intriguing possibility that the *Garcia* case could actually provide far more effective protection of the States than initially anticipated.²⁷⁸ And it raises the irony that the Court is moving away from the *Garcia* analysis (having effectively overruled it implicitly) at precisely the point when it might become a more powerful tool for judicial intervention. This irony is furthered by the fact that the Court is abandoning the search for procedural rules (which are relatively easy to develop and monitor) for the far more difficult terrain of establishing a series of substantive boundaries for permissible federal legislative actions.

Second, to the extent that commandeering of State processes is a key concern, more and more treaties are imposing increasing obligations on States that far exceed those struck down as inappropriate commandeering under *Printz*. For example, the TBT requires each member to establish an enquiry point and to provide documents on issues including “standards adopted or proposed by central or local government bodies...”²⁷⁹ One would presume that such a requirement may well lead to a requirement on States to provide the central government with this information.²⁸⁰ This would probably require far greater paperwork than was required of the CLEOs in implementing the Brady Act provisions.

The potential commandeering by treaties of State processes is not just limited to paperwork. Under the Vienna Convention on Consular Relations (to which the US is a party), several requirements are imposed on State/local authorities if they arrest a foreign national. These include notification of his consular post, giving the foreign national the right to send a message to his consular post, and a requirement that he be informed of these rights.²⁸¹

Curtis Bradley has identified a broad range of other treaties that may impose burdens on States or remove various policies from their decisionmaking processes, include the Convention on Elimination of All Forms of Discrimination Against Women (signed but not yet ratified by US), which includes provisions addressing discrimination in recreational activities, sports, cultural life, marriage and family life; the Convention on the Rights of the Child (also signed but not yet ratified by the US) which gives children both procedural as well as substantive rights concerning a broad range of issues such as expression,

belief, association, privacy, education, and standard of living; the Hostage Convention, which federalizes kidnappings whenever a foreign citizen is involved; and the Convention on Contracts for the International Sale of Goods which when it applies preempts State law including the Uniform Commercial Code.²⁸² Bradley also notes several treaties in the process of negotiation which could have similar effects, including a treaty to establish uniform standards for the recognition and enforcement of foreign judgments, and the Convention on the Law Applicable to Succession to the Estates of Deceased Persons.²⁸³ He further raises the intriguing possibility that the US could use the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials to adopt precisely the requirements which were struck down in *Printz*.²⁸⁴

As can be seen from the above, the process of globalization may not only impose its own limits on State flexibility, but may also provide an opportunity for the federal government to use treaties to evade increasing judicial protection of States' rights in domestic legislation.

A final irony arises from the fact that taken together the increasing reach of international obligations accepted by the federal government and the Court's concern with commandeering by the federal government may together effectively limit the federal government's ability to devolve power to the States even when it wants to. That is, if the federal government devolves to the States power over a certain area in which there are binding international obligations, the federal government loses the ability to meet those obligations. This could be easily dealt with if the federal government could require various State actions consistent with those obligations, but, given recent Court decisions, such an action could amount to impermissible commandeering. Thus, the only options that the federal government has left are to accept the consequences of violating international commitments, try to buy off the States through incentives, or pre-empt State action through federal legislation. Taking any of these options effectively undercuts the very devolution that the federal government was trying to achieve. Thus, the Court's concern with the consequences of commandeering (together with increasing international obligations) may ultimately limit the ability of the federal government to devolve power to the States across a wide range of policy areas, thereby restricting the very State flexibility it is intended to enhance. A further limitation on State flexibility may arise through the growth of customary international law.

Customary International Law

One final area that needs to be examined briefly when considering the impact of international law on the States is the role of customary international law. Might States be required to undertake or refrain from taking various actions (in areas such as capital punishment, rights to housing, a job, or various other economic, civil or political rights) not because of a treaty but through the development of customary international law itself? Even though treaties or executive agreements may raise serious problems for State flexibility, they both share at least one attribute: at least some elected official in the federal government had to concur in an explicit fashion in order for their provisions to become binding. The same is not true with regard to customary international law. Customary international law is a form of international law that is created not through a specific agreement but rather “results from a general and consistent practice of [nation]states followed by them from a sense of legal obligation.”²⁸⁵ While it is possible for a nationstate to clearly manifest its intent not to be bound by a developing area of customary international law,²⁸⁶ in general, customary international law is developed in a far less defined and explicit fashion than treaty-based law. While there is some debate about what the rule should be,²⁸⁷ under current doctrine customary international law is a part of international law, and “fits comfortably into the phrase ‘the laws of the United States’ for purposes of supremacy to [S]tate law.”²⁸⁸

As with the expansion of the issue areas covered by treaty, customary international law is both being created more quickly and reaching more extensively than was the case in the past. This is partially due to the fact that the common practices of nationstates are more easily ascertainable due to new technologies.²⁸⁹ Also, customary international law is in some ways less tied to direct nationstate practice than previously, as US courts can increasingly rely on United Nations resolutions, declarations, and other various international pronouncements and actions of nationstates acting through international institutions as evidence of customary law.²⁹⁰ The breadth of topics dealt with by the UN and by other international organization’s pronouncements has also expanded over time.

Thus, globalization’s increasing interactions among states, new technologies and increasingly active international organizations may all spur the expansion of customary international law, which could in the future provide one more avenue through which States may lose flexibility and control within the domestic process. Since customary international law is self-executing and therefore does not require Congressional action to be applied under US law,²⁹¹ the threat to States may be even greater. As Curtis Bradley and Jack Goldsmith have argued, the current position of customary international law as

supreme to State law, “posits that unelected federal judges apply customary law made by the world community at the expense of [S]tate prerogatives. In this context, of course, the interests of the [S]tates are neither formally nor effectively represented in the lawmaking process.”²⁹²

While the development of customary international law does not pose as immediate a threat to State flexibility as do treaties or international law more generally, the growth of customary international law as a result of the globalization process represents one more potential impact on American federalism.

Broader Dynamics

Perhaps most important for our purposes is the combined impact of each of the developments discussed above when taken together. In particular, the States are now increasingly at the mercy of the federal government to represent their interests in the international legal arena. Only the federal government can defend them before the DSB; only the federal government can negotiate treaties or help shape international law in its many forms. States need to be concerned about the extent to which their interests may get traded away by the federal government in its treaty and other international negotiations. Might the federal government be willing to impose increasing burdens on States in administering various treaty obligations? Might a liberal or conservative federal administration agree to various substantive international rights that would restrict the ability of States of a different ideological bent to act differently? Might even a well-meaning federal government use the treaty and international lawmaking process, perhaps even unwittingly, to increasingly constrict the areas of State authority?

The fear that State interests may be traded away in treaty negotiations is not unique to the US. In 1989, the German federal government agreed to a guideline of the European Commission and Council of Ministers regulating questions of advertising and sponsorship, protection of minors, and various other items related to television. Bavaria and 8 other Laender claimed before the German Federal Constitutional Court that the federal government should not have agreed to this guideline, and the Court generally agreed that the federal government had violated the principle of “federal-states-friendly” behavior. Interestingly, since this decision, the Basic Law has been amended, with a new Article 23 which gives the German federal government power to transfer sovereign powers by law to Europe with the consent of the Bundesrat (in which Laender are represented). The law related to the implementation of this new Article states that if the matter up for decision is in an area essentially within the legislative powers of

the Laender, then the Bundesrat must not only participate in the process, but its opinion shall prevail.²⁹³

In summary, the international arena has become one more area in which States need to be concerned about protecting their autonomy and flexibility, and in which State/federal relations will both be shaped by and shape the outcome.

STATE AND LOCAL POWERS

The challenges posed by globalization are not limited to international regimes such as the WTO and international law. They also occur closer to home. For example, as already discussed above, States' spending power may be severely constrained by globalization, whether acting through the limitations on State procurement processes of the GPA or the effort by the federal government and our trading partners to limit States' ability to restrict their spending in ways that impact foreign policy goals (i.e., through federal preemption and European challenge to the Massachusetts Burma law discussed above). Indeed, numerous State spending programs (as well as preferences for various groups such as local producers, small businesses, minorities, etc.) may be hampered if not short-circuited by various WTO agreement provisions. Since the background in terms of many of the factual issues as well as underlying dynamics has already been laid above, our discussion of these issues can be relatively brief. In particular, globalization can be expected to have significant impacts on State activities in several areas including taxation, regulation, and competition.

Taxation

States, like governments generally, are dependent on taxation to support their many activities. But taxation goes to the heart of State autonomy as well: States must be able to raise their own revenues if they are to be able to remain independent of effective federal control. This is particularly true given the Supreme Court's determination that while the federal government cannot commandeer State processes, it can give States incentives through federal spending. Thus, while the federal government could not require States to raise their drinking ages to 21, it could condition the receipt of federal highway monies on their having done so.²⁹⁴ While even States with robust independent sources of revenue are unlikely to be able to resist the allure of substantial federal dollars, the absence of State revenue bases makes them all the more vulnerable to federal and other pressures. Furthermore, to the extent that one of the

benefits of federalism is grounded in the ability of States to offer different approaches to general policy issues (including different mixes of spending and taxation), this benefit is undercut if States do not have the resources with which to differentiate themselves from other States. Thus, the effect of globalization on States' ability to raise their own revenues is important to assess. In addition, even if States can collect revenues, their ability to use their revenue-generating systems to further certain policy goals (such as providing incentives for certain types of economic development) may be undercut by WTO rules limiting credits and subsidies.

1. WTO IMPACTS

As has already been shown above, several of the substantive provisions of the WTO agreements may impact State revenues. For example, differences among State taxes may be challenged as potential barriers to trade, especially if taxes in other States are lower for a particular industry or product.²⁹⁵ And the Beer II decision discussed earlier held numerous State alcoholic beverage laws illegal under WTO, including a Minnesota tax preference to microbreweries (even though all microbreweries were eligible).²⁹⁶ Numerous State tax preferences, credits, deductions, etc. may also be invalid under the SCM, and the willingness of the DSB to find tax policies invalid under SCM was recently emphasized by the ruling that the US special tax credit for foreign sales corporations was an inappropriate subsidy.²⁹⁷

2. GENERAL REVENUE IMPACTS

States' ability to generate revenue through taxation are impacted by several further developments related to globalization. To the extent that corporations and MNCs are, through the processes of globalization, made more "footloose", the ability of States to impose taxes on them can be hampered. The easier it is for corporations to leave a State, the more the political pressure grows on States to shift the tax burden toward a less mobile base. Indeed, Dani Rodrik has argued that the distribution of the tax burden has shifted from capital to labor as economic integration has increased.²⁹⁸ The potential loss in revenue to States from this dynamic is compounded by potential losses to the federal government as it faces increased difficulty in taxing entities operating outside its jurisdiction.²⁹⁹

A report by the National Governors Association (NGA) confirmed the impact of these and other developments related to globalization on States' revenue raising:

The increasingly global nature of business, crossing not only [S]tate but also international bor-

ders, presents unique challenges for federal and [S]tate tax writers. Large firms can shift income across these borders for tax purposes, so the taxable income of these enterprises in the United States and within each [S]tate may sum to less than the total accounted for on tax returns. The corporate tax base is becoming increasingly unpredictable, and serious inequities may be introduced between large multistate or multinational firms and smaller in-nationstate businesses. As an increasing number of electronic commerce, technology, health care, natural resources, financial, and telecommunication firms become international, or simply move off shore, the federal government and [S]tates will have to work together to eliminate these inequities.³⁰⁰

In addition, the NGA has noted that some State taxes which were designed for the realities of a manufacturing economy need to be changed to reflect the dynamics of the new economy, and the deregulation of various economic sectors has also impacted certain types of taxes in ways that require them to be updated.³⁰¹

Perhaps the most dramatic and immediate impact on State revenue-raising capacity arises from the growth of commerce on the Internet, which threatens the ability of States to raise sales tax revenue. Currently, forty six States and over 6000 local governments collect sales taxes, which in many States account for over one-third of total State revenues.³⁰² And as *The New York Times* reported in February 2000: “The Internet...is making life increasingly uncomfortable in [S]tate capitols. The biggest source of the unease has been the threat of a punishing loss of [S]tate sales tax revenues as more goods are sold over the Internet, often by far-away companies beyond the reach of [S]tate tax collectors.”

While an Ernst & Young study estimated a loss of only \$170 million in sales tax revenue due to electronic commerce,³⁰³ the National Governor’s Association has estimated that losses could total over \$10 billion per year by 2003 in uncollected State and local sales tax revenues on Internet and mail-order sales.³⁰⁴ The Advisory Commission on Electronic Commerce created by Congress to study the issue was unable to reach a consensus, but a majority of the Commission recommended the continued exemption of Internet sales from State sales taxes until 2006, a policy first established through a temporary three-year moratorium under the Internet Tax Freedom Act. The Commission’s recommendation, however, led to a scathing bipartisan attack by more than two-thirds of the nation’s governors. A joint letter signed by more than 36 governors argued that the Commission’s recommendation “would substantially interfere with [S]tate sovereignty.” The governors wrote:

“The US Constitution was very clear in both ensuring [S]tate sovereignty and creating a critical

balance between federal and [S]tate authority. For well over 200 years the federal government has respected [S]tate sovereignty and has been extremely careful not to interfere with the [S]tates' ability to independently raise revenues. This proposal would dramatically undercut this precedent."³⁰⁵

Finally, it should be recognized that not all predictions need be so dire. There is an argument that globalization can improve States' ability to tax, especially as it may lead to broader international tax cooperation, including the possible establishment of a multilateral tax clearinghouse.³⁰⁶ More extensive cooperation could be used, theoretically, to help States solve the problems of corporations' avoiding taxes in all jurisdictions on many activities (which the unitary tax was intended to address). Indeed, to the extent that globalization will more quickly make available to States new technologies as well as new approaches to taxation from around the world, it is possible that States could have access to new instruments both to improve enforcement and auditing processes, and to more precisely target tax burdens (e.g., through taxing vehicles based on the amount of time spent driving during rush hours, etc.)

And the pressures of globalization could also make it easier for States to reach agreement among themselves (and, perhaps, with the federal government) on improved multistate coordination, building on the experiences of the Multistate Tax Commission and the International Fuel Tax Agreement (which provides a vehicle for apportioning among the States the fuel tax paid by interstate motor carriers).³⁰⁷

Regulation

Many of the impacts of globalization on States' ability to regulate activities within their borders have already been described. For example, just as globalization has led to calls for the federal government to decrease its regulation of different industries, so may it lead to similar calls on the State level. States are particularly vulnerable in areas in which international regimes are becoming increasingly involved. Thus, entire fields such as securities regulation, banking, insurance, investment restrictions on real estate investments, farmland, antitakeover statutes, and antitrust policy are vulnerable.³⁰⁸ Pressures for such a decrease in State regulation may come from international interests, national concerns for uniformity to enhance competitiveness, or as a result of greater influence of MNCs and other nonpublic actors in the political process.³⁰⁹ Indeed, in certain areas, such as security regulation, State regulatory authority has already been limited by globalization and its impact on the relative influence of MNCs,³¹⁰ while Europe can be expected to exert continuing pressure to standardize banking and other regulations.³¹¹

Globalization itself may increase the pressures on Congress to legislate national standards as a way

of making the US more competitive.³¹² While these standards may be imposed through direct federal preemption under domestic legislation, they may also be enshrined in various treaty provisions in which the ability of States to protect themselves is diminished. This is a particular problem with the fast track authorization process for treaties, under which Congress no longer has the ability to protect States through amendments to the bill approving the treaty.³¹³

Furthermore, the dynamics of the regulatory process may be profoundly altered by globalization. Anti-regulatory crusaders can now oppose State-level regulations both through State political processes and through bringing pressure to bear on the international level. If a State wants to regulate your activities in a way you consider inappropriate, you could now argue that the regulation does not conform with various international agreement provisions. If that does not sway the State, how about using your broad international network to get a foreign government to challenge the State's regulation? And if that does not succeed, why not use your national and international influence to try to include in the next round of trade negotiations language or provisions that more directly address your needs? And might the same series of escalating pressures be possible for advocates on the other side of the political spectrum, who wish to oppose specific corporate subsidies?

Competition

1. COMPETITION WITH NON-STATE ACTORS

The ability of States to influence the decisions Congress makes either through treaties or its domestic processes is impacted by globalization in several ways. The increase in the number of MNCs, NGOs and others with access to information and ability to galvanize public support, clearly impacts the ability of States to influence the process. One can argue that State influence will be decreased by the need for States now to compete with many other players and to speak louder in order to be heard. For example, by 1994, there were already 79 European banks with 214 offices in the US, and with lobbying organizations developing substantial political clout.³¹⁴ On the other hand, one could argue that State influence will be increased, as the plethora of players either drowns each other out or makes Congress more attentive to the unique role of States in the process. For example, while it is perhaps counterintuitive, an increase in the number of voices arguing can make Congress more willing to rely on the few voices (such as those of States) which clearly enjoy established political bases. (And the desire to pro-

tect States in the process could be enhanced by any increased judicial concern with policing the functioning of the process itself.) Indeed, one could imagine a situation in which Congresspeople feel a need to show that they are protecting State interests against the pressures of other groups so as to justify their decisions to preempt State interests at other times. Either way, globalization changes the dynamic.

2. COMPETITION WITH OTHER STATES

Not only might States increasingly compete with other players, they may find themselves in increasing competition with each other. Ohmae has argued that increased State competition will result from national efforts to wall the country off from the most powerful engines of growth, thereby leaving States to fight over smaller pieces of the pie.³¹⁵ But even if one assumes that the US remains remarkably open to globalization, State competition can be expected to increase. First, States already compete strenuously with each other to attract foreign direct investment (discussed in more detail in Part III). Second, globalization brings with it significant domestic upheaval and pressures on the well being and security of various groups. In particular cases, this will cause some States to benefit and others to suffer. Third, international agreements that deal with the non-economic aspects of globalization (such as various aspects of human rights) could be similarly divisive, as they may place States that support capital punishment, for example, in opposition to those that do not. Thus, States may find themselves on very different sides of the battlefield when it comes to debates over particular treaty provisions.

3. COMPETITION WITHIN STATES

A further form of increased competition can be expected within States, as globalization impacts internal State dynamics as well. For example, it was Governors, not State legislatures, who made the decision whether to subject their State agencies to the procurement restrictions of the GPA.³¹⁶ And when the USTR established a point of contact for the federal government within each State, that contact was named by State Governors.³¹⁷ One might wonder precisely who within each State should decide whether to fight an effort in federal court to require the State to conform its legislation to WTO standards.

Globalization may also impact the relationship between State governments and the cities within

their territories. There are many possible ways in which this could happen. For example, an exodus of corporations or a shift in production facilities could lead to increasing local or regional unemployment. Or increasing income inequality and social dislocation as a result of economic pressures brought on by globalization could lead to an increased need for State aid to certain localities. Changes in internal State dynamics are not, however, limited to cases in which globalization causes problems; they can also result from globalization successes, such as the emergence of world cities.

A significant amount of attention has been paid recently to the emergence of world cities. World cities are centers of transnational corporate headquarters, and their business services, international finance, transnational institutions, and telecommunications and information processing.³¹⁸ They are seen as representing the fast world that is becoming decoupled from the slow world,³¹⁹ and their defining feature is their functional importance for capital.³²⁰ Within the world cities framework, particular cities are seen to perform different roles, while at the apex are those (based not on size but on function) who perform them all. In short, they are, at least in certain respects, the poster children of a beneficent, dynamic globalism. While everyone has a different list of extant and/or potential world cities, Tokyo, New York and London are generally considered paramount.³²¹ However, a wide range of US cities have been included in various listings, such as Chicago, Dallas, Washington, Atlanta, Hartford, Houston, Los Angeles, Philadelphia, San Francisco, Miami, Seattle, and Boston.³²²

These world cities are seen as global entities that are becoming increasingly unlinked from the regions around them. No longer at the heart of geographically bounded regions, they instead connect remote points of production, consumption and finance.³²³ Their development could impact States in many ways. First, the emergence of an elite level within various States that have interests different from the remainder of the State and often tied closely to those of international actors can change political relationships within the State. Thus, States themselves could experience severe internal conflict between the “globalizing” elite and those whose interests are more locally and territorially defined.³²⁴ Second, the economic dynamics of world cities can be expected to lead to demands for different types of employees, school systems, etc.³²⁵ Third, the emergence of world cities could change the relative power of various cities within the State structure.³²⁶

Fourth, world cities can change relations of the populace to State governments, as increasing portions of the population may see the city as a more important avenue for influence than the State.

This question of identity and attachment also implicates directly one of the assumptions of federalism, i.e., that citizens will have a certain affinity with their State. Finally, the emergence of world cities can change the relationship between the federal government and the States, as the federal government may become more concerned with furthering world city interests than with the interests of the State as a whole.³²⁷ This could create a scenario in which the State is challenged not just by the federal government but is also squeezed between a coalition of the federal government above and the world city below.

Changes in Federal Power Relationships

State powers can also be impacted by a federal government which is shedding powers rather than combining with world cities to exercise them. The potential loss of federal power as a result of globalization may have a range of impacts on States. These impacts are, of course, dependent on the extent to which there really is a decrease in federal power, and perhaps a concomitant increase in power by someone else. Some have argued that a loss of national power can lead to more power for regions and/or States,³²⁸ while others have argued that some national power will evaporate, other national power will shift upward from weaker nations to stronger ones, while other national power will shift sideways to markets and nongovernmental authorities.³²⁹

Several possibilities are worth noting in terms of the federal/State relationship. First, if the national government cedes some power to international organizations, that means that States now need to be engaged in a three-way sharing of power relationship rather than the two-way relationship envisioned under the federal structure of the Constitution.³³⁰ Second, if the national government transfers power to other entities, those other entities will not be subject to the same Tenth Amendment limitations as is the federal government. A transfer of power not only removes the limitations of the Tenth Amendment, it also removes the other constitutional limits placed on purely federal governmental action. Thus, power transferred from the national government to the marketplace, for example, also represents a diminution in the protection granted the States by federal constitutional limits, as the marketplace is not subject to such limits. In fact, one could imagine that States may require increased federal regulation to protect them from the results of privatization of federal functions to non-governmental decisionmakers who do not operate under constitutional requirements to protect State interests.

Finally, if the nationstate abdicates power and responsibilities in certain areas as a result of the pressures of globalization, the States may be left with no one to tame the forces of globalization in ways that protect State interests. As will be seen in Part III, this challenge may also present an opportunity for States as well, as they take steps both to protect themselves and to advocate for a more assertive federal government.

PART III

GLOBALIZATION'S IMPACT: OPPORTUNITIES FOR THE STATES

After the mass of information and challenges presented in Part II, one can easily imagine the Governor throwing up her hands in despair. However, Part II only tells a part of the story, as globalization presents a series of opportunities for States as well. Indeed, one could imagine globalization's leading to a very different conception of State authority than we have traditionally witnessed. Imagine, for example, a world in which States (in addition to national governments) are seen as key players in the politics of trade and foreign investment. Imagine States as the incubators of vital regional hubs for globalized commerce. Imagine States as the providers of the raw materials on which globalization feeds: education, developed infrastructure, transparent regulation. Imagine States as the indispensable buffer between the destructive forces unleashed by globalization and the needs of local communities, in which States take a leading role in establishing and advocating policies to help smooth over the harsh negative consequences in terms of economic dislocation and community upheaval that globalization often leaves in its wake.

Not only can we imagine individual States playing a very different role in a globalizing world, but we can contemplate potential changes to the dynamics of internal State politics as well. While the Governor's questions have been framed in terms of "the State", globalization forces us to think about how different aspects of the State work together. How might these new State roles change the dynamics between the Governor and the State Legislature? How might State policymaking processes be

impacted by newly empowered citizen activists, or strengthened economic actors, each of which can now call on a wide range of international networks and new coalitions to support their policy agendas?

The importance of the new internal State dynamics may, however, be dwarfed by changes in the underlying dynamics of federalism itself, which will, in turn, provide further opportunities for States. For example, federal/State relations may need to be reconceptualized, as we recognize that the health of our federalism is now dependent on developments occurring on three tiers — the State and federal levels, and the international level as well. While a strong federal government has sometimes been seen as a threat to States' rights and authority, the opposite may be true today, as a strong federal government is instead needed to effectively represent State interests in the international arena. Thus, it may now be in the interests of States not merely to argue for devolution of power, but also to argue, at the same time, for a more aggressive federal agenda as well. Indeed, in this era of globalization, a relatively passive federal government may present a far more serious threat to State autonomy than did expanding federal powers during previous phases of American federalism.

Thus, one can imagine American States playing new roles within their own boundaries, in Washington, and in the international arena. Not only might States become laboratories for different approaches to softening globalization's rough edges at home, they might also become advocates for an activist federal agenda that does the same on a national level. We could expect them to become more involved overseas, while working on both State and federal levels at home to protect their interests. They could use new international networks to impact legislation both in Washington and abroad. They could expand the reach of their regulatory efforts to try to address some of the problems faced by populations confronting globalization. And they could do this in a context in which the core challenge in allocating power between the State and federal levels now needs to address a new dimension: how to allocate such power so as to create the best synergies in protecting joint federal/State interests abroad and to enable each level to resist unwanted incursions on its authority from forces beyond national borders.³³¹

This Part addresses these new opportunities for States and American federalism, looking first at the possibilities of greater involvement by States on the international stage, and then at other avenues of influence potentially open to States as a result of globalization. These avenues of influence arise from the impact of globalization on economic policy, security policy, and local community, as well as opportunities for developing new coalitions and using new technologies to strengthen State processes. This

Part will then consider the new opportunity that States face today in correcting the flaws in our current national globalization discourse.

Not only do States have a role to play in dealing with the impact of globalization within their territories, they also have a role to play in serving as advocates for a more sensible national policy. Thus, the agenda of State opportunities is really a two-pronged one: dealing with policymaking opportunities within the State (regarding issues such as infrastructure development and privacy) and using State resources to shape the national agenda as well (especially in terms of addressing the upheaval and dislocation resulting from globalization).

INTERNATIONAL INVOLVEMENT

The role of the State is different in a globalizing world. In fact, numerous States have become increasingly engaged in the world at large, from working to foster trade and attract foreign direct investment, to taking positions on political issues in the global arena. Each of these activities offers States new opportunities to better the lives of State residents, as well as new policy levers through which to define themselves.

New Economic Activities

Both States and localities have become increasingly engaged with the world at large, often seeking to harness the State's own economy to dynamic global developments. As the Advisory Commission on Intergovernmental Relations noted in the mid-1990s,

The United States government alone no longer can shield its [S]tate and local governments as effectively as it could in the past from adverse international forces that open [S]tate and local governments to a global economy that is increasingly competitive, interdependent, technologically interwoven, multicultural, multipolar, and subject to a multitude of influences from national governments, international organizations, transnational corporations, multinational public interest groups, and the nationstate and local governments of many nations. This rapid internationalization is requiring American [S]tate and local governments to revamp as well as develop their own export programs, trade missions, foreign investment programs, cultural exchanges, tourist programs, immigrant services, and other policies toward relevant foreign affairs in response to vital

issues that confront them daily from abroad.³³²

States have responded to these challenges through dramatic expansion in their activities abroad.

1. EXPANDING INVOLVEMENT

Many States and localities initially expanded their engagement abroad through the establishment of sister city relationships, often with localities in countries to which local residents felt either a kinship, religious, or cultural affinity. By the early 1990s almost 1,000 U.S. communities had teamed up with 1850 municipalities in 96 countries through the sister city program.³³³ However, State involvement has quickly moved from the cultural plain to the economic level as States have recognized the impact of globalization on their own economic development.

As Earl Fry noted in 1994, over the previous dozen years, State governments had almost tripled their number of overseas offices for trade, investment, and tourist promotion.³³⁴ By the mid-1990s, there were over 140 offices in dozens of countries;³³⁵ in Europe alone, 30 States had 36 offices (compared to 21 States with 26 offices in 1985). There were 13 separate offices in Brussels, 11 in Frankfurt, 3 in London, and 2 in Dusseldorf.³³⁶ Indeed, more States had offices in Japan than in Washington, D.C.³³⁷ And these offices reflect an increasing willingness to expend State resources on international trade and other issues. As of 1996, collectively States spent more than \$100 million annually on trade development, employing over 900 people, including some 300 individuals staffing their various overseas offices.³³⁸

2. FOCUS ON TRADE

While State interests overseas run the gamut from tourist promotion to cultural exchange, the primary focus of much State involvement has been expanding trade and attracting foreign direct investment. In many cases, this has reflected a growing recognition of the impact of trade on local economies. Between 1990 and 1998, for example, more than 300,000 new jobs were created in the Los Angeles metropolitan area from global trade. And according to reports by the US Department of Commerce, by 1995 firms in 253 selected US Metropolitan Statistical Areas made export sales totaling more than \$467 billion. In 85 of these 253, export sales reached annual amounts of \$1 billion or more.³³⁹

Given the importance of trade, about 40 of the governors lead at least one international trade mission every year.³⁴⁰ The types of trade assistance offered by States have included individual counseling;

seminars, conferences and publications on overseas opportunities; trade-based research matching foreign buyers with in-State firms; foreign trade missions and shows; and export finance assistance.³⁴¹ All 50 State governments provide export assistance to local businesses,³⁴² with numerous States offering varying forms of loan guarantees to companies engaging in export activity.³⁴³

Importantly, this interest in trade has led States to become far more active than previously in a wide range of substantive issues such as foreign market access, subsidy regulations, trade financing agreements, product certification, customs documentation, and others.³⁴⁴ Thus, the mere recognition of the importance of trade to local and regional economies has significantly increased opportunities for State involvement in international issues, as well as domestic processes affecting trade.

3. ATTRACTING INVESTMENT

These programs to export goods abroad have been accompanied by increasing State efforts to attract foreign investment to their own territory. Again, the role of such investment can be significant for State economies. In Ohio, more than 200,000 workers are employed by foreign-owned subsidiaries of British, German and Japanese companies. In Michigan, over 126,000 jobs were created by nearly 1000 foreign-owned companies in the early 1990s.³⁴⁵ The desire to attract foreign investment has led to a range of State programs geared to influencing locational decisions of foreign investors. One survey identified State economic development agencies as the most frequently cited source of assistance for new foreign investors.³⁴⁶

Non-Economic Issues

Not only are States and localities becoming more involved in global economic integration, they are also expanding their portfolio into the political realm of foreign affairs, which was once the sole arena of the national government.

1. EXTENT OF POLITICAL INVOLVEMENT

By the fall of apartheid, over half the States and three times as many localities had established programs to penalize corporate involvement in South Africa.³⁴⁷ More recently, China, Burma, Nigeria, North Korea, Cuba and Switzerland have all found themselves the targets of State and local sanctions, often adopted in the face of State Department criticism.³⁴⁸ While Massachusetts' effort to sanction Burma was recently struck down by

the Supreme Court,³⁴⁹ it based its decision on the narrow ground of federal preemption, leaving open further opportunities for State involvement in the international realm (especially in areas where Congress chooses not to act). And the forces propelling State involvement in this arena, including the politics of new migrants with continuing concern for events in their home countries³⁵⁰ and the rise of NGOs (which has helped redefine foreign policy as not merely the province of nationstates)³⁵¹ can only be expected to intensify. In fact, the federal structure in which States operate serves to increase the pressures for State involvement, as interest groups see that they can use the State level as a stepping-stone for setting the national agenda.³⁵²

2. ASSESSMENT OF STATE INVOLVEMENT

Clearly, there are constitutional limits to what States can do in the international arena.³⁵³ But, within those limits there is substantial room for continued efforts to engage the international economy, advertise the benefits of the State abroad, serve as a voice in the domestic process of national foreign policy-making, and take positions on various high profile international issues.

In support of such efforts, one could point to several benefits. First, the States serve as a democratizing influence in the foreign policy process. This can occur either as a result of the greater remoteness of the federal government from ordinary citizens,³⁵⁴ or due to the erosion by States of the monopolization of the process by foreign policy elites.³⁵⁵ Similarly, if the arena of international negotiations is moving beyond the sole preserve of nationstates, it is increasingly difficult to justify keeping the democratically-elected States out, when a wide variety of non-democratically elected NGOs and MNCs are let in.³⁵⁶ Second, State involvement fits well within States' traditional role of acting to protect their revenue base and to safeguard the interests of those they represent, and the State capacity to act effectively on the international level has increased.³⁵⁷ Third, the Cold War fear that any failure by the United States to present a common front, or that a misstep by a State would lead to serious security repercussions has receded,³⁵⁸ and it is becoming increasingly possible for nationstates to sanction a single US State, rather than the entire country. As Peter Spiro has argued, Mexico threatened to take its business from California, not the US, if Proposition 187 passed; and it is State governors who get attacked from outside the country for permitting various executions.³⁵⁹

There are, however, a series of countervailing arguments. The tremendous State activity in seeking to attract foreign direct investment may ultimately hurt all of the States, as they compete with each other to

offer richer and richer packages to potential investors. Not only might this undercut States' abilities to use their revenue elsewhere, but it pits States against each other, rather than creating a focus on joint problems. Second, State actions do have national and international repercussions. As noted much earlier, Massachusetts' Burma law was the topic of a complaint by the EU and Japan against the United States in the WTO. While Part II discussed the problems that such complaints can cause for State autonomy and flexibility, they also impose limits on national foreign policy flexibility as well. Third, as will be discussed further below, States need a strong national government to protect their interests in an era of globalization. It is not clear that the benefits of intensified involvement in this arena are worth the costs.

Future Opportunities

Nevertheless, globalization does present a series of new opportunities for States looking forward.

1. ECONOMIC INFLUENCE

States are important players in the world economically, and they can take advantage of that not just in the realms of trade and investment, but in helping to shape national decisionmaking as well. Seven US States would rank among the top 25 countries in the world in Gross Domestic Product. Even Vermont, which has the smallest of all the State economies, would outrank almost 100 nations.³⁶⁰ California is home to a population greater than that in three-fourths of the countries in Europe, and the annual budgets of California and New York dwarf all but a handful of national government budgets around the world.³⁶¹ Furthermore, States and their localities directly control vast procurement budgets,³⁶² account for 10 percent of all spending in the US, employ one of every 12 workers, and build 20 percent of all the structures.³⁶³ These factors give States a potential heft in influencing both their counterparts abroad and domestic policy here at home.

2. INSTITUTIONAL INVOLVEMENT

There may also be room for increased State involvement institutionally in the foreign policy process. Since 1978, the NGA has had a committee on international trade and foreign relations³⁶⁴ and States have had a formal role (albeit one that may have been less substantive and more of a fig-leaf)³⁶⁵ for giving input into trade agreements since creation of the Intergovernmental Policy Advisory Committee under the 1974 Trade Act.³⁶⁶ Nevertheless, as noted above, with the expansion in the number of topics

and number of players involved in the international arena, it becomes more difficult to justify States' continued level of exclusion. One could imagine more activity by the States in conjunction with the USTR in working to shape negotiating strategy. Such involvement could also take advantage of States' superior knowledge about issues in implementing trade agreements.³⁶⁷ Indeed, under the provisions of the 1972 Water Quality Agreement, the Great Lakes Water Quality Board established to assist the U.S.-Canada International Joint Commission is specifically required to include representatives of State and provincial governments, who have frequently provided needed technical expertise.³⁶⁸ And States certainly need to be involved in developing a national agenda for compensating those who bear the burdens of globalization. Finally, on the institutional level, States could also serve the nation by working with their subnational government counterparts overseas to bring pressures to bear on foreign governments to reach agreements favorable to US States (and the nation as a whole). Indeed, States may prove to be particularly powerful advocates abroad. And they are needed as advocates at home, both to shape humane globalization policies and to generate domestic legitimacy for them.

3. CAPACITY BUILDING

There is also an opportunity, and perhaps a necessity, for States to build their own internal capacity to address globalization issues. States will be developing first hand information about the difficulties of implementing supranational trade agreements on the local level. They can both collect that information and learn from it.³⁶⁹

NEW DYNAMICS OF INFLUENCE

Not only does globalization offer opportunities for States in the international field, the forces unleashed by the globalization process may create dynamics that increase State influence across a range of issues and processes.

New Issue Dynamics

1. ECONOMIC POLICY

As is clear from the discussion in Part I, globalization has particularly impacted the economic sphere. In fact, Ohmae has argued that regionstates, rather than nationstates, are the new natural economic zones. And the size of these economic zones (which Ohmae describes as ranging in population from

not under half a million to no more than 50 million)³⁷⁰ correspond nicely with that of American States. While there is no reason to believe that these regionstate boundaries coincide with existing State boundaries, State economic policy is vital to regional economic development. As the National Governors Association has noted, many of the issues that need to be considered in the context of economic development policy, such as traffic, zoning and land-use, are State responsibilities (although federal cooperation is required regarding transportation), as are the education and many of the training programs that underlie successful economic development.³⁷¹ States also have the ability to develop relationships among localities that can further regional development and to create (and implement) targeted economic development strategies. Furthermore, the emphasis on the role of regions in a globalizing world may lead to enhanced cooperation among States in focusing efforts on regional development that can yield benefits for all. This kind of cooperation could also impact the dynamics of the federal/State relationship, as States may work together to seek additional federal assistance, or to achieve more flexibility from the federal government in spending federal economic development dollars.³⁷² And to the extent that regions are seen as driving forces in economic development, citizens may turn increasingly to States for help in securing their economic futures.

2. SECURITY POLICY

Globalization also helps impact the emerging view of security (although, of course, developments like the end of the Cold War and the preeminent military and political position of the US are more influential determinants). Jessica Mathews has argued that there is a new view of security in which human security is viewed more as emerging from conditions of daily life (such as food, shelter, and employment) than from a country's foreign relations and military strength.³⁷³ If true, this would reflect a new focus on precisely those issues that States often deal with, accompanied by a decrease in importance in the military realm from which States are largely excluded.

3. LOCAL COMMUNITY

To the extent that the forces of globalization not only cause dislocation, but also appear as anonymous, harsh, and destabilizing, the ability of States to enhance community on a local level may become increasingly important. It may be that people will reach more for the certainty and stability that comes

with organized public engagement on a more local level. Not only do States have profound influence over local developments, they also have the capacity to enhance feelings of community, and to bring a sense of order to citizens' daily transactions. Indeed, the States' ability to do so may be enhanced by the potential concentration of certain activities in particular geographic areas, thereby enabling States to effectively regulate a series of transnational activities indirectly.

Networking Opportunities

Globalization may also unleash forces which further strengthen both States' tools of influence and their ties to local citizens.

1. NEW COALITIONS

Globalization provides States with a new opportunity to work together with their subnational counterparts across international borders. Cities and States have already developed a wide range of relationships that cross borders from "sister cities" to the International Union of Local Authorities. Manuel Castells has described how increased integration in Europe has led to the creation by cities and regions across Europe of institutional networks that bypass nationstates. These networks, he contends, constitute a formidable lobby acting simultaneously on European institutions and on their respective national governments.³⁷⁴ One could imagine similar networks among European and American States/provinces/localities. And such State-strengthening coalitions need not only include other subnational governments, they could also be comprised of NGOs and others, especially given the role that States can play in encouraging civil society and in serving as conduits for transnational advocacy group concerns.³⁷⁵ Indeed, a wide range of NGO and advocacy coalition-building opportunities have sprung up on the Internet, from the Institute for Global Communications (IGC)³⁷⁶ on the liberal end of the spectrum to townhall.com³⁷⁷ on the conservative side.

2. NEW TECHNOLOGIES

The new technologies that are emerging with globalization can enhance State influence in numerous ways. They give States access to a broader range of information than has ever been available before, and enable instantaneous communication with their new coalitions. They also raise new policy issues (such

as privacy, discussed below) that demand State responses, and they open up new prospects for enhanced communication between citizens and State governments, thereby improving State accessibility to the public and strengthening mutual ties of loyalty.

STATE OPPORTUNITIES: WEAKNESSES IN THE NATIONAL DISCOURSE

Before considering the series of new issues that States need to address in responding to globalization and shaping its forces, we need to take a slight excursion into an examination of the national response to globalization. As should be evident by the end of this detour, it is impossible to separate the potential agenda of opportunities for States from developments on the national level.

Developments of the Last Quarter Century

It would take far too much space to provide anything more than a cursory overview of the national discourse regarding the role of government and the federal response to globalization over the last 25 years. Thus, this summary is intended merely to highlight a few key points which are relevant to State opportunities.³⁷⁸

1. CITIZEN FRUSTRATION, DEVOLUTION AND REINVENTION

The past quarter century has witnessed increasing public frustration with the national government. A part of this frustration probably grew out of Watergate and a general concern across the political spectrum with the continuing growth in special interest influence in national campaigns and legislative processes since that time. Several elements of this frustration, however, achieved their initial prominence on the conservative side of the political spectrum. One element was concerned that the federal government was not being adequately attentive to furthering conservative goals. While its advocates would have preferred to see the government become more active in instilling conservative goals, at the same time they recognized that the more immediate threat was from an activist federal government that was threatening basic traditional values. Another element focused more on the federal government's general inability to act efficiently and on its bureaucratic approach.

Despite the inconsistencies between these elements (as one favored an activist, albeit conservative, federal government, while the other favored a smaller, less active federal government), both contributed

to a discourse which pushed for devolution of national powers. The rationale most often presented in favor of devolution relied more on the latter element, as it argued that devolution would remove responsibility from a wasteful, ineffective, bureaucratic federal government and devolve it to more accessible, efficient, responsive States. Nevertheless, both elements worked together to push for a smaller federal government.

The response of the Clinton administration to this trend was reinvention, which endeavored to change the operations of the federal government toward greater efficiency. However, in so doing, the Clinton administration accepted efficiency as the pre-eminent goal. As Alfred Aman, Jr. has argued, not only does reinvention assume that producing a government that works better can come solely from structural and procedural changes, its stress on citizens as customers, causes a key notion to get lost, as not all values are capable of being translated into a cost-benefit framework.³⁷⁹ Thus, the focus on government procedure actually ends up having a substantive effect.³⁸⁰

In each of the above cases, there is a suppression of the notion of the national interest. In the instance of devolution, national interest becomes lost in the desire to give more power to States because of their effectiveness, unique needs and circumstances, etc. In the case of reinvention, the concept of a national interest becomes lost under an overriding concern with efficiency.

2. ENTER GLOBALIZATION IN THE POST COLD WAR ERA

The national government's response to globalization after the end of the Cold War contributed to a further focus on efficiency, this time in the form of the expansion of global capitalism as the primary foreign policy goal. This was signified by the establishment early in the Clinton administration of the National Economic Council as the high-level companion of the National Security Council. It was furthered by the Clintonian focus on trade agreements (from NAFTA to Uruguay to the admission of China to the WTO) as the emblematic foreign policy accomplishments of the administration.

Thus, while the concept of national interest was weakened on the domestic level, it reemerged in the guise of trade agreements on the international level. But, an irony exists in that the notion of national interest is at its most tenuous when it comes to trade. Thus, Paul Krugman has asserted that competitiveness is at best a meaningless word when it comes to national economies, and Willy De Clercq has argued that you simply cannot think of exports as good and imports as bad, as that is mistaking a

country for a private enterprise.³⁸¹ Robert Reich has made a similar point in the context of foreign direct investment, asserting that American interests are served better by foreign-owned companies that employ American citizens than by American-owned companies expanding overseas.³⁸² A further irony emerges when one considers that the rhetoric of national interest is used to justify moves in trade, where the notion of national interest is problematic; while the rhetoric of State differences is used to justify devolution of power domestically, in cases where the concept of a national interest would be much easier to justify.

In any event, the focus on trade further facilitated the ability of essentially market-based approaches to dominate the domestic discourse.³⁸³ And this dynamic is compounded by the fact that the arena in which integration has proceeded the furthest in the past half century among the developed economies is in economics. This has led to a continuing identification of economics not just as the initial arena of extensive globalization in this era, but as the driving arena. And the argument has gone further, as economic principles are increasingly seen as the values that should be at the core of globalization. One possible response would be to argue that the fact that globalization has been most pervasive in the economic realm is a mere accident of history. Yet there is a stronger response: economic globalization occurred first because the Western governments wanted it to. And why did they want it to? Because during the Cold War, and under the leadership of the United States, they were willing to subjugate their economic competition in the service of broader political goals (such as maintaining the unity of the Western Alliance). Thus, a further irony emerges: the fact that economic integration is the poster child of globalization facilitates the argument that economic principles should drive globalization. Yet the historic reality is the opposite, as economic globalization occurred to such an extent only because economic values were subordinated to broader political values.

3. FURTHER WEAKENING ON THE FEDERAL LEVEL

Our form of globalization, however, has negative consequences, as well as positive ones. It brings with it extreme upheaval, dislocation, and instability. It threatens people's jobs and livelihoods (even while it may be giving others new employment opportunities). Increased capital mobility shifts additional burdens onto labor.³⁸⁴ As Dani Rodrik has explained, "reduced barriers to trade and investment accentuate the asymmetry between groups that can cross international borders...and those that cannot."³⁸⁵

Furthermore, “trade impinges on domestic society in ways that can conflict with long-standing social contracts to protect citizens from the relentlessness of the free market.”³⁸⁶ Indeed, globalization can threaten more jobs than it creates, increase economic inequality, and erect new and rigid class barriers.³⁸⁷

This does not occur in a vacuum. At the same time, our form of globalization with its emphasis on economic efficiency undermines the willingness of government to assert public values contrary to those of the market, just as globalization lessens the willingness of internationally mobile groups to cooperate in resolving disagreements.³⁸⁸ Thus, Rodrik points out the “double blow” that globalization delivers to social cohesion: “first by exacerbating conflict over fundamental beliefs regarding social organization and second by weakening the forces that would normally militate for the resolution of these conflicts through national debate and deliberation.”³⁸⁹

Even George Soros has argued “that the untrammelled intensification of laissez-faire capitalism and the spread of market values into all areas of life is endangering our open and democratic society.”³⁹⁰

And where has the federal government been during this tremendous upheaval? Rather than working to defend the public from the blows of globalization, our government has served as at least a cheerleader, if not its quarterback. What this has caused, as Castells insightfully notes, is an added attack from the left on the federal government (as an inadequate bulwark against the rough edges of globalization) to the attack from the right.³⁹¹ Thus, the federal government is weakened even more, as now both ends of the political spectrum see it as inattentive to their needs.

This has been furthered by several dynamics. First, when the federal government has launched initiatives, they have tended to focus on relatively trivial matters (such as V-chip and school uniforms, traditionally within the authority of the States), which further underscores the notion that the federal government cannot deal with the broader issues of globalization.³⁹² Second, a vicious cycle emerges in which the recognition of a federal policy of deference to market values makes it more difficult to mobilize opinion for change, which then further reinforces the largely market-oriented approach.³⁹³ Third, the sense of frustration by the public in their inability to influence these dynamics is enhanced by the notion that globalization is just a further capture of the federal government by powerful special interests. This is reinforced by the notion that globalization arguably heightens the influence of money in politics, further feeding into the initial sense of dissatisfaction with the governmental process.

IMPACT ON STATES

The above developments have significant ramifications for States, both as the recipients of many devolved federal responsibilities and as the victims of the abdication of federal obligations to address the negative implications of globalization.

1. THE NEW FEDERALISM

Given the devolution of power to States and the receding nature of federal activism, why shouldn't States just claim victory? After all, if one believes that one of the threats to federalism has come from the gradual accretion of powers by the federal government, the developments above could be seen as positive, at least from the perspective of States. But the opposite is true. First, a vibrant federalism assumes, and indeed requires, two strong levels of government, each in a certain tension with each other. There is no single allocation of powers between State and federal levels that is correct; and certainly none that could be considered final, as our federal structure anticipates a dynamic and developing relationship that reflects changing societal pressures, changing notions of governments' roles, etc. Thus, a federal government in the process of shedding responsibility as part of a more fundamental undercutting of basic notions of a common national interest represents no boon to federalism, but instead a threat.

Second, even if the gradual expansion of federal powers since the New Deal argued now for a swing of the pendulum back toward the States, the process of globalization fundamentally changes the dynamic. With globalization, federalism needs to be played on three dimensions, rather than the simpler federal/State dynamic of the past. And in this three-tiered relationship, States need a strong federal government not just because federalism demands two strong levels in a certain tension, but also because without a strong federal government, the States are uniquely vulnerable to being crushed under the weight of the third supranational level. While States may be able to play a more active role in the international arena, State activism is no replacement for federal power. In short, States need a strong federal government to protect their interests in international negotiations.

This is the flip side of the concern in Part II. Previously, we discussed the problems that can arise when the federal government uses the international level as a way to evade the structural limits on federal powers. But even worse than that is a situation in which the federal government is unable to defend

State interests and protect State needs in international negotiations. What will keep foreign nations from objecting to State nonconformance with the WTO? A strong federal government that can retaliate effectively. It represents no increase in State autonomy for a State to feel pressure to change its tax structure because that's what the WTO or the market requires. Indeed, Andreas Falke has argued that the domestic structures of the US have long been shielded by the hegemonic position of the US in the international system.³⁹⁴ In this sense, for the federal government to abstain from exercising power that is needed to protect the States is not devolution, but rather abandonment.

Indeed the threat of abdication of federal power to the States is even worse than stated above. For the failure of the federal government to take a leading role in addressing the dark underside of globalization (i.e., the unemployment and other social dislocation that it causes), undercuts not only the legitimacy of the federal government but of States as well. Here the national discourse on devolution becomes enfeebling, rather than empowering, for the States. If State residents are concerned with globalization and its negative consequences, they need to know what level of government to turn to. In fact, it is the federal government that can most effectively deal with these broader redistributive issues, but it is to the States that they are now forced to turn. Thus, States may be put in the unenviable position of having to step in to address the negative consequences of globalization, while lacking the tools to do so. Thus, federal abdication leads ultimately to a weakening of the States and their legitimacy as well.

Does this argument imply that a powerful national government (supported by economic heft and geographic power) fighting for American interests on the international stage is incompatible with devolution and decentralization internally? No. First, the core argument here is that the federal government has used devolution as a semantic fig leaf to conceal what is, in fact, more akin to abandonment. Devolved federal power is of less use if States do not have the ability to protect their new power from incursions from abroad. Since the States do not have sufficient power in the foreign policymaking process to protect themselves, the benefit of the devolution is far less than meets the eye. Second, one could imagine partnerships in which States receive devolved power from the federal government while the latter actively works both to protect State interests in the international arena and to use national policy to protect States from the aspects of globalization which they themselves cannot address on their own. That is not what the federal government has chosen to do to date. Indeed, one can question how far it is even possible for the federal government to both effectively devolve power and protect States on

the international level, as devolved power will lead to a wide range of diverse State policies and interests. Which of these interests is the federal government then to choose to protect internationally?

There does seem to be an effective limit to federal devolution in a globalizing world. This limit is not automatic but rather is an unintended result of the Supreme Court's federalism decisions restricting federal commandeering of State governmental processes, as it hampers the federal government's ability to ensure compliance with international obligations. Without the ability to commandeer State processes, the federal government is limited in its ability to both devolve power to States and ensure that States comply with international obligations.

2. STATE OPPORTUNITIES

So, what can States do to address this situation? Indeed, they face a unique opportunity to act. Perhaps most importantly, they can become centers for pressuring the federal government to address in a comprehensive fashion the problems of globalization in a way that will further domestic legitimacy. States are uniquely positioned to do so. They and their leaders enjoy significant access to the media, a key lever. (As Castells has argued, outside the media sphere, there is only political marginality.³⁹⁵) And States have the ability to create a series of coalitions that cut across different cleavages within society. States have ceased to be (if they ever were) the homogeneous collection of residents sharing common positions on key issues that the Founders initially contemplated. Instead, they have become geographic entities that encompass a broad spectrum of different views. Therein lies their strength, their unique ability to develop broad-based coalitions, and their capacity to galvanize large segments of the nation.³⁹⁶ In short, States can act precisely as the Founders intended the federal system to operate. They can work to define issues and interests. They can respond to abuses (or in this manifestation, abdication) by the federal government by building a State-based coalition to reshape the national agenda, and to insist that the federal government play the active role the States need to cushion their citizens from the negative consequences of globalization. In so doing, they will strengthen attachment to the States while also bolstering the federal government as a needed bulwark for addressing the challenges that globalization ushers to the fore. And the US is uniquely positioned to address these challenges domestically while shaping a more humane globalization internationally, since such a disproportionate share of the engines of globalization lie within our borders.

STATE OPPORTUNITIES: SHAPING THE NATIONAL DISCOURSE

States face thus a two-pronged set of opportunities brought about by globalization: one, to become persuasive advocates for a more expansive and nuanced federal approach to globalization; second, to address within their own borders some of globalization's more immediate impacts (while awaiting a more aggressive federal response). In this second area States would once again become laboratories of experimentation in the sense that Brandeis intended: they could experiment on the State level with a series of approaches that could then be more effectively implemented nationwide.

Laboratories on Responding to Globalization

States will, of necessity, have to deal with some of the negative consequences that arise in globalization's wake. They will have to deal with the clash between the interests of global elites in world cities and the interests of those left behind both in those same cities and beyond.³⁹⁷ They will need to deal with the impact that globalization has on areas States normally regulate, such as the employment relationship and the social bargain under which workers receive steady increases in wages and benefits in exchange for labor peace.³⁹⁸ Thus, States can become laboratories for experimentation in job retraining, in portable pensions,³⁹⁹ in different approaches to including the more vulnerable among us in the dynamic opportunities of globalization, and in providing social protection for the economically weak.⁴⁰⁰ They can experiment with ways to have the winners in the globalization race help compensate those on the losing end.⁴⁰¹ And they can experiment in ways to exalt community, to enhance people's roles as citizens rather than subordinating it to their role as consumers. Markets are not neutral, but rather embody the values of society,⁴⁰² and States can play a leading role in defining what those values are.

Laboratories on Shaping Globalization

States can also take steps which will help shape globalization in the future and its impact on their own residents.

1. ASSESSMENT

States can undertake efforts to determine ways in which globalization may impact their residents, their economy, and their communities. What opportunities might globalization offer? But they need to go

beyond a static analysis, and ask themselves as well about what shape globalization should take in the future. What changes would best strengthen the State? What developments could tap into existing State resources or potential? Such an assessment would then lead toward a plan in which State activity was geared not just to reacting to globalization, but toward acting on it as well.

2. INFRASTRUCTURE DEVELOPMENT

Globalization requires an infrastructure to thrive. And States must determine where to locate that infrastructure. New York City has the largest concentration of fiber optic cable-served buildings in the world, but only one of them is in Harlem.⁴⁹³ Half of all US internet hosts are located in the 5 States of California, Massachusetts, New York, Texas, and Virginia, within which they are again concentrated in a small number of regions. Five large metropolitan regions account for approximately one-third of the Internet hosts in the nation.⁴⁹⁴

Already, efforts to attract investments have led States and localities to develop other forms of infrastructure as well, geared toward specific markets. This has led to a series of second, more targeted, Silicon Valleys, including Minnesota's medical alley; Corning, New York's ceramics corridor; Orlando's laser lane; Philadelphia's medical mile; and Austin's silicon hills.⁴⁹⁵ It is for States to determine and to build the infrastructure of globalization.

3. NEW REGULATORY ACTIVITIES

States now also face the possibility of regulating a series of new activities. How should they deal with the concentrations of capital caused by globalization? How should they handle consumer protection when dealing with on-line purchases? How can they encourage new production processes to develop in environmentally friendly ways? What role is there for State regulation of activities that were previously federal, but have now been devolved to the private sector?

The pressures of globalization may also lead to development of new regulatory hybrids. The National Governors Association has developed a number of options along these lines including:

- federal/State standards, in which the federal government would establish national minimums, which the States could then exceed;

- multistate agreements, in which the federal government would provide financial or other incentives to encourage States or regions to enter into regulatory compacts; and

- multifunctional and multijurisdictional standards, in which State and local governments may jointly agree on a plan that is negotiated with several federal agencies. Under this approach, which could, for example, combine regulations dealing with transportation, environmental, and open space goals, relevant regulatory standards from all three levels of government would be included in the negotiated plan.⁴⁰⁶

Perhaps the area in which a new model of State regulatory attention is required most urgently is in the area of privacy, which is discussed in more detail below.

4. PRIVACY

The issue of privacy has taken on a new dimension with the developments of the last ten years. With the dramatic explosion of Internet use, as well as the ability to transfer data without regard to national borders, personal information on millions of Americans is now easily available at the click of a computer mouse. While this issue, like many others, would be most effectively handled on a federal level, lack of federal action provides an opportunity for States to fill the breach. And even if the federal government does act, there may be significant room for States to establish their own regulatory regimes to provide enhanced protections for their own residents, especially regarding the use of available data by the State itself and its public agencies.

The amount of information available on any given individual is phenomenal and “as reading and writing, health care and shopping, and sex and gossip increasingly take place in cyberspace, it is suddenly dawning on us that the most intimate details of our life are being monitored, searched, recorded and stored.”⁴⁰⁷ The amount of personal, seemingly private information that companies or malefactors can accumulate on individuals is staggering. This information ranges from the mundane — such as name, address, and telephone number — to downright invasive. By simply knowing how to navigate the Internet, someone could find an individual’s medical records, credit card numbers, social security number, the value of any property owned, stock holdings, former addresses, birth date, websites visited (and how long a particular person stayed there), and an absolute mountain of other information. With

all of this within reach, advertising companies finally have the names, addresses, and interests of people they want to target.

How does this information get compiled? The case of DoubleClick, Inc. provides an example of one of many possibilities. DoubleClick, the Internet's largest advertising company, compiled detailed information on the browsing habits of web users through the use of "cookies", files which can be placed on unsuspecting users' hard drives and which track their web activities. Thus, DoubleClick could actually track every website visited by a particular user. In November of 1999, DoubleClick purchased Abacus Direct, a database of names, addresses and information about the offline buying habits of 90 million households which had been compiled from the nation's large direct mail catalogs and retailers. As Jeffrey Rosen reported in *The New York Times Magazine*: "In January, DoubleClick began compiling profiles linking individuals' actual names and addresses to Abacus's detailed records of their online and off-line purchases. Suddenly, shopping that once seemed anonymous was being archived in personally identifiable dossiers."⁴⁰⁸

Many other possible invasions of privacy, from sharing of credit card and medical information to cases of stealing personal identities over the web have led to increasing consumer concern. A recent report indicated that 92% of consumers surveyed said that they were concerned about the misuse of their personal information online, while a full 67% described themselves as "very concerned".⁴⁰⁹

While the federal government could step in to address this concern, so far it has failed to do so. In fact, the Clinton Administration has actively worked to oppose the application of the more stringent European Union privacy rules to American businesses. Under the European rules, personal data may generally only be processed "if the data subject has unambiguously given his consent."⁴¹⁰ The data subject also enjoys a right of easy access to the data "without constraint at reasonable intervals and without excessive delay or expense"⁴¹¹; and the data can only be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed."⁴¹² Article 25 of the Directive limits the ability to transfer personal data outside of the EU unless the country to which it is transferred provides "an adequate level of protection."⁴¹³

Despite a proposal by the Federal Trade Commission for legislation to protect consumer privacy on the Internet, as well as the introduction of legislation in both houses of Congress, federal action has not

been forthcoming. In fact, a recent article reported that “there is no expectation that Congress will act any time soon.”⁴⁴⁴

In the absence of federal action, the room — and the need — for State initiative has expanded.⁴⁴⁵ In California, legislation passed in October 2000 which prohibits Internet service providers from disclosing personal information without permission from customers, and creates an office of “Privacy Ombudsman” to investigate the unlawful release of personal information by a commercial or governmental entity. In addition, businesses must now “destroy consumer records containing personal information by shredding them, erasing them or making them unreadable.”⁴⁴⁶ If businesses do not comply, then consumers can file civil lawsuits against the company.

In New York, proposals have been made to establish an opt-out system for unsolicited marketing and disclose to consumers that they have the right to restrict unsolicited advertisements. Other proposals would restrict the collection, disclosure and dissemination of personal information acquired by a provider of online computer services in order to ensure the privacy of subscriber information; authorize a cause of action to enjoin unwanted solicitation; and regulate the collection, use or disclosure of information by telecommunications carriers.⁴⁴⁷

In Massachusetts, Lieutenant Governor Jane Swift issued an executive order to protect the privacy of personal information gathered by State agencies. The order called for every agency within the Executive Department to review how personal information is collected and how that information is used, and instructed these agencies to “ensure that only the minimum quantity of personal information necessary for the agency to perform its functions is collected.”⁴⁴⁸

Also in Massachusetts, legislation was recently proposed to provide consumers with some of the most comprehensive privacy protection in the nation. The Celluci-Swift bill would require data collectors to provide consumer access to any data that has been collected on that individual, to notify consumers whenever that information is sold, and to prohibit retailers or merchants from requiring consumers to provide a social security number to complete a transaction. In addition, retailers and credit card issuers would no longer be permitted to collect or sell personal information without consent from the consumer (so-called “opt-in” consent) and consumers would have the option to more easily “opt-out” of lists maintained by direct marketers. The bill would also restrict cable television companies from selling or disseminating viewing records and prevent Internet service providers from selling or sharing

their customer's personal information and/or browsing records without the customer's express consent. Furthermore, information-gathering agencies would no longer be permitted to hire inmates for data processing, and people on the sex offender registry would be forbidden from processing personal data.⁴¹⁹ The Massachusetts legislation establishes both civil and criminal penalties for violations of any of the provisions and also allows aggrieved consumers to sue for damages, court costs and attorney's fees.

Privacy provides a perfect example of a new issue created by the forces of globalization in which aggressive State action is warranted. In this case, the lack of a federal response opens a broad opportunity for States to address the issue in a way consistent with their own values.

CONCLUSION

While States face many challenges from globalization, they also face opportunities as well. Some of these opportunities involve activities within States; some require States to become more active on the national and international levels. Yet each shapes the agenda for States in the future. In considering their own approaches to globalization, States need also to examine the ways in which globalization affects the underlying values of federalism, which are discussed in Part IV.

PART IV

GLOBALIZATION'S IMPACT: FEDERALISM VALUES

In Parts II and III, we answered the Governor's direct question about the impact of globalization on American federalism and the States. We found that there are a series of challenges that globalization presents to States, but we also discovered a range of opportunities for States as well. Clearly, the restrictions on State autonomy, flexibility, and areas of authority, as well as the new opportunities, have the potential to impact the underlying strength of federalism itself. But American federalism can be impacted in other ways as well. Parts IV and V begin to sketch out some of the "deeper" ways in which federalism might be affected, first by looking at how globalization could impact what discussions today consider to be federalism's underlying values, and then by wondering in Part V how our very definition of those values might be changed by globalization.

The discussion that follows is, by necessity, somewhat imprecise. As has already been noted, federalism is a notoriously slippery concept.⁴²⁰ On the public policy side, federalism has been used as a rationale for increasing funding to States and municipalities (during the Nixon administration), as well as for decreasing such funding (during the Reagan administration). While Nixon used federalism to support a proposed restructuring of the welfare system in which the federal government played the central role; Reagan used it as a rationale to propose a "swap" in which the federal government would take over administration of Medicaid in exchange for which States would assume responsibility for 40 aid programs, including Aid to Families with Dependent Children. And federalism was also used as the

justification for the more recent, and actually enacted, welfare reform, which shifted numerous responsibilities to the States, while eliminating a series of entitlements and both deleting and imposing a range of federal rules.

A similar imprecision has arisen in the constitutional discussion about federalism, in which the Supreme Court in a matter of decades has moved from prohibiting Congress from enacting statutes that “directly displace the [S]tates’ freedom to structure integral operations in areas of traditional governmental functions”⁴²¹ to an abandonment of the traditional governmental functions test altogether, leaving States to the protections of “the national political process”⁴²² and then back to more active judicial oversight through the concern with commandeering we have already discussed.

Given this imprecision on both the policy and the constitutional side, it should come as no surprise that there has also been disagreement about the values underlying federalism. Larry Kramer has perceptively observed that federalism has been claimed to improve government or impede progress, enhance freedom or permit racism, foster participatory democracy or entrench local elites, facilitate diversity or create races to the bottom, protect individual liberty or encourage tyranny, and promote fiscal responsibility or lead to pressures to expand government.⁴²³ And Barry Friedman has argued that despite frequent invocations of various reasons for supporting federalism, little attempt has been made to measure their actual worth.⁴²⁴ In fact, he has claimed that we do not value federalism because we have not devoted enough attention to understanding how a federal system actually furthers values we hold dear.⁴²⁵

The discussion that follows should be seen, therefore, as an initial attempt to assess potential impacts of globalization on five different values that have frequently been attributed to federalism (federalism’s role in protecting liberty and democracy, citizen participation, accountability, maximizing choice and diversity, and serving as laboratories for innovation). These are certainly not the only values underlying federalism, and as will be discussed in Part V, they may not even be the most relevant federalism values for an era of globalization. However, they have widely characterized analyses of federalism to date. A few further caveats are in order. First, one should not confuse the effort to identify federalism values with an argument that federalism should only be protected on account of these values. As Justice O’Connor has argued, from the constitutional perspective: “Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred

system of government, but of understanding and applying the framework set forth in the Constitution.”⁴²⁶ Second, as in other contexts, the ultimate impact of globalization on federalism values is far from clear. Some aspects of globalization have positive ramifications for federalism values, while other aspects may have negative implications for the same values. Rather than attempting to measure the relative weight of these conflicting forces, we will merely outline the arguments on each side.⁴²⁷

LIBERTY AND DEMOCRACY

Perhaps the most frequently cited value furthered by federalism is that of liberty, along with the related value of democracy. Indeed, federalism’s role in securing liberty has been recognized by Supreme Court Justices on both sides of the recent 5-4 decisions. In *Printz*, for example, Justice Scalia, writing for the majority, commented that the separation of the government into a State and federal sphere, “is one of the Constitution’s structural protections of liberty.”⁴²⁸ And three Justices on the dissenting side of the Court’s decision in *New York* similarly recognized that “the entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals.”⁴²⁹ This protection arises from the diffusion of power within and among the different levels of government, which creates, Madison argued in Federalist 51, “a double security” to the rights of the people. “The different governments will control each other, at the same time that each will be controlled by itself.”⁴³⁰ The forces unleashed by globalization can be seen as having both positive and negative implications for liberty and democracy.

Positive Implications

1. DIFFUSION OF POWER

To the extent that liberty is protected by a diffusion of power, one could argue that globalization will further that diffusion in multiple ways. As we have already seen, globalization empowers new players in the public arena, may lead to the transfer of power from national governments to the marketplace or to international organizations, and, some have argued, is a force for deconcentration generally through the replacement of hierarchical systems with more diffuse networks.⁴³¹ These can all contribute to the healthy diffusion of power which federalism seeks to secure. According to this analysis, the introduction of the WTO and other supranational organizations can be seen as a salutary devel-

opment. After all, if liberty is best protected by having multiple layers of government which both keep each other in check and give people different avenues through which to appeal, then adding an international layer may provide even greater security for liberty. If ambition countering ambition is good on two levels, maybe it is even better on three. If one is concerned that the federal government has been getting too strong vis a vis the States, then the potential loss of national sovereignty and the fact that federal strength can now be cabined by international forces and organizations, would both be seen as positive developments.

2. MORE EMPOWERED ACTORS

Related to the diffusion of power is the emergence of additional empowered actors which bring new ways to pressure governments to protect liberty. If originally federalism was intended to protect liberty by guaranteeing a second governmental level with which to challenge encroachments of the first, then perhaps enabling even nongovernmental players to both gain power and challenge the power of governments is a positive move. One could point to the growth of civil society within the United States, the increasing ability of community and other groups to use the Internet to access information that gives them additional weapons to use in trying to impact governmental policies, and the fact that citizen coalitions can now be created more easily around the nation (rather than being effectively limited to discrete geographic areas) all as evidence that more empowered actors can help protect liberty. The same argument would apply to the growth of transnational advocacy networks and NGOs, as they now provide a new way to bring pressure on governments to protect liberty. Rather than having to rely on finding like-minded individuals domestically, one can now use the collective power of networks of individuals around the world. And this international coalition can not only pressure our domestic government directly to protect liberty, they can also bring pressure on their own home governments, which can in turn pressure our own.⁴³² Furthermore, the growth of international law and its expansion into areas of human rights can also be seen as an added bulwark of liberty, as can the increased involvement by State and local governments in the foreign relations realm, as discussed in Part III.

One should not necessarily assume, however, that citizen group power will now trump other interests' power. Rather, the growth of networks and coalitions can enhance the power of interests across the spectrum.

3. EXPORT OF DEMOCRACY

Globalization (at least in its current form) can also be seen as a premiere avenue for the spread of democratic ideas around the world. This can occur in several ways, from market pressures for the stability that comes with the rule of law, to the difficulties governments face in maintaining closed societies while promoting open economies, to the simple fact that US preeminence in the globalization process augurs well for the expansion of key US principles. While the federal structure was created to protect liberty at home, not with the intention of exporting it abroad, the spread of democracy does have beneficial domestic repercussions. One could argue that the expansion of democracy abroad helps secure it at home, as it makes it even easier to create new international networks to pressure our home government to protect domestic liberty. Additionally, the more democracy becomes the accepted political system on a global scale, the more difficult it would be to subvert it at home. And the very success in exporting one of America's key concepts abroad can further stabilize the legitimacy of our democratic regime at home. Perhaps the argument that the Founders would have found the most convincing (but which today is of little concern) is that the export of democracy will lead to a diminished focus on military security, thereby enabling a reduction in the size of the standing army.

Negative Implications

1. DECREASING POWER OF STATES

In our federal structure, the States are viewed as the predominant actors in balancing federal powers. It is to the States that citizens would look to stop federal encroachments on liberty. While it is true that a plethora of actors to balance federal encroachments may be better, it may also be worse. One of the most effective strategies is to divide and conquer, and what better way to insure unlimited federal government than to divide the remaining power among many opposing institutions? In fact, many of the private actors within States may have amounts of power similar to the level of States themselves.⁴³³ This could well undercut the ability of States to oppose federal restrictions on liberty. And the other limitations on State powers discussed above, from the strictures of the WTO regime to increased competition among States and within their borders, may all sap the ability of States to perform one of their key functions in our federalist system: countering federal threats to liberty.

State powers may also be limited in more indirect fashions. For example, as production becomes more decentralized, the popular base needed in order to cause change presumably becomes larger as

well. This may lead to a situation in which States are no longer large enough to oppose abuses, but must instead rely on bringing outside pressures to bear in order to be effective.⁴³⁴ And the potential schism between States as a whole and the world cities that are located within their territories, may sap State powers to present a united front to federal threats.

2. CONSENSUS BASED STRUCTURE OF THE INTERNATIONAL SYSTEM

While this is discussed in more detail in Part V, it can be argued that the current structure of the international system undercuts liberty. That is, the system is based on achieving consensus; indeed, it has no real institutional framework for a continuing opposition. As Susan Strange has argued, to make authority acceptable, effective and respected, a combination of forces is required to check arbitrary uses of power.⁴³⁵ To the extent that this is lacking on the international level, it can be seen as a potential threat to liberty at home, as it undercuts the very notion that institutionalized competing forces are needed to protect liberty.

3. CHALLENGES TO DOMESTIC SYSTEM LEGITIMACY

The forces of globalization can also be seen as undercutting much of the support for democracy at home. And to the extent that democratic processes lose their legitimacy, the threat of encroachments on liberty by way of demagogues or reactions to public upheaval increases. Thus, the impact of globalization on the legitimacy of the democratic system, on its ability to respond to the needs of a diverse population, to cushion the losses of segments of the population, and to reassure all that the winners played fairly, all represent potential threats to American liberty as well. The concerns expressed in Part III regarding the backlash to globalization would be prominent here, as would the potential losses of tax revenues that can undercut the ability of governments to ameliorate losses due to globalization. As Dani Rodrik has insightfully noted, it is in those Scandinavian nations that the economy is most open to the forces of globalization that governments have been forced to step in actively to insulate their publics from the disruptions caused by that openness.⁴³⁶

4. CHALLENGES TO PUBLIC GOVERNANCE GENERALLY

Globalization also brings with it increased pressures to remove various responsibilities from the pub-

lic realm and transfer them to the marketplace or elsewhere. Some have argued that this is at the essence of our form of globalization.⁴³⁷ With this pressure comes a set of further challenges to the federalism value of liberty. First, this transfer of power from the public realm can undercut the ability of public actors such as States to play the roles they were assigned by federalism. It can also limit the protections of the States under federalism, since the Tenth Amendment acts as a limit on federal actions, not presumably on those devolved to the private sector. Second, such a transfer of power can also lull the public into a false sense of security that government institutions cannot threaten liberty. In fact, one could argue that it is precisely those governmental institutions whose continued effectiveness are threatened that may be most tempted to lash out in ways that attack current liberty protections. Third, the increased power of the market threatens to subvert democratically determined policies. If the public sees that current institutional frameworks are unable to protect them adequately from the vicissitudes of the market, and that the impact of decisions arrived at through the democratic process are undercut by anonymous market forces, then the ability of government on any level to respond to threats to liberty is diminished.

This is not just a problem with transfers of power to the marketplace. The same can be said of the growing power of other entities with nonegalitarian structures, such as transnational advocacy networks,⁴³⁸ NGOs, etc. As P.J. Simmons has argued, not only are NGOs decidedly undemocratic and unaccountable to the people they claim to represent, they also can lapse into old-fashioned interest group politics that can produce gridlock on a global scale.⁴³⁹ And the transfer of power to international regimes is also suspect, as international standards get adopted by nonrepresentative bodies,⁴⁴⁰ and as customary international law gets created through nondemocratic processes.⁴⁴¹ Finally, the transfer of power to the WTO also enables corporations that are too weak to challenge State or national laws domestically to do an end-run around the process by having their foreign subsidiaries get their own governments to bring the US before an international tribunal.⁴⁴²

CITIZEN PARTICIPATION

Meaningful citizen participation has been generally recognized as a value furthered by federalism. As Justice O'Connor noted nearly 20 years ago: "federalism enhances the opportunity of all citizens to participate in representative government."⁴⁴³ Indeed, the Founders' assumptions about government were

permeated with the notion of Civic Republicanism,⁴⁴⁴ which focused on citizen participation not just as an instrumental value, but as a good in and of itself. The federal structure, with its robust State governments engaged in determining policies important to citizens' daily lives and easily accessible to those citizens, was intended to serve as a further bulwark for encouraging citizen participation. Indeed, the notion of citizen participation⁴⁴⁵ served as an essential premise regarding how the governmental framework would work.

Positive Implications

1. ABILITY TO PARTICIPATE: INFORMATION, TIME, GEOGRAPHY

Globalization can enhance not just the quantity but also the quality of citizen participation. It can provide far greater access to information that was once the monopoly of those in power, and it can enable citizens to participate in ways that were not possible before. Indeed, electronic means can expand participation dramatically, and can also help citizens move from merely reacting to governmental proposals as voters toward becoming active participants in public deliberations themselves.⁴⁴⁶

To the extent that globalization increases efficiency and productivity, it can also free up citizens' time to engage in participation. A citizen constantly struggling to put food on the table is less able to spend weekday evenings contemplating issues related to the public good. If globalization and its concomitant forces enhance economic security, if they improve access to education, they may improve citizen participation indirectly as well.

Globalization and the technological changes which have accompanied it also hold out the potential to override some of the geographic limitations on citizen participation. Theoretically, using various electronic means, it should be just as easy for citizens far on the outskirts of town to participate actively in community deliberations as for those in townhouses on the central square. And when one considers the size of States such as California, Texas or NY, the impact becomes even greater, allowing more effective participation by greater portions of the population.

2. COALITION BUILDING

Globalization can also enable citizens to develop new coalitions which both increase their impact and offer more ways to lure fellow citizens into participation. Citizen participation, thus, can include not

just petitioning the government or speaking out at a hearing, but also engaging in electronic chats, attending conferences of NGOs, etc. And as existing groups become more effective at harnessing the forces of globalization,⁴⁴⁷ their very successes may encourage more citizens into the process — either acting through interest groups or on their own.

In addition, globalization strengthens the possibilities of developing communities of interest that are not tied to geography. This actually presents a situation in which the desires of States may conflict with the interests of citizen participation generally. From the perspective of States, citizen participation that crosses State (and even national) boundaries can be disempowering, as it decreases the centrality of States in the process and undercuts the notion of a joint State interest. For citizen participation as a value, however, such a development may enhance opportunities to become engaged.

3. UNDERCUTTING OF ELITES

In an indirect manner, globalization can enhance citizen participation by undercutting the entrenched powers of both local and national elites. As the public arena is seen as more open, and as old-boy networks become less important as avenues to influence, robust citizen participation should benefit. Thus, State and local participation in foreign policy which democratizes the foreign policy process may bring this benefit, as could even the upheaval and social dislocation caused by globalization. That is, globalization causes not only problems for those left out, it can also shift power from the barons of the old economy to the upstarts of the new. While the Founders perceived citizen participation as a very elite process, globalization may help democratize the process further.

Negative Implications

1. INTERNATIONAL REGIMES AND THE LIMITS OF PARTICIPATION

New international regimes such as the WTO undercut citizen participation in numerous ways. The rules of the WTO, such as those requiring scientific risk assessments to support various environmental regulations, remove policymaking from the public and place it in the hands of technical experts. The dispute settlement procedures also not only limit transparency to the public, but also make clear that it is technical experts who should be making these decisions by serving on dispute panels. And the almost invisible International Organization for Standardization sets international criteria not only for

mundane technical issues such as screw sizes but also regarding environmental production and product safety controls.⁴⁴⁸ These are just symptomatic of an overall approach which sees policymaking as a job for professionals. Indeed, citizens are to the WTO, as States were to the foreign affairs realm previously, irrelevant. They exist for the WTO only to the extent that their national governments choose to reflect their views in its policies.

Of course, even if international regimes were open to the notion of citizen participation it becomes exceedingly difficult to conceive how one could structure such participation meaningfully. If it is difficult to enable millions in a State to participate, how can one imagine a system in which billions are given a true opportunity for participation? Such participation would more likely emerge as a fig leaf rather than as a meaningful part of the process.

2. NONDEMOCRATIC PARTICIPATION

Perhaps because of the immense expanse of the international arena and the implausibility of achieving meaningful participation by individuals, citizen participation in this stage of globalization has become increasingly mediated through groups. In this sense, the effort to get all stakeholders to the table represents merely a return to interest group pluralism, rather than an avenue for robust participation. Furthermore, as noted above, NGOs and other such groups can bring many of the negative attributes of other special interests. And, indeed, Peter Spiro has argued that "Armed with the leverage of large memberships, and knowing that those members are likely to be a docile herd, NGO leaders have emerged as a class of modern day, nonterritorial potentates, a position rather like that commanded by medieval bishops."⁴⁴⁹

Here again representation is often confused with participation. In addition, the role of groups also gives one pause in considering the extent to which globalization has made it easier for factions to dominate public discourse. The fear of control by factions was one of the rationales used by Madison to justify the shifting of powers from the States to the new Constitution. After all, a diverse, heterogeneous national government was less likely to be captured by factions than was a smaller State government.⁴⁵⁰ It is not at all clear that the same reasoning would apply to the shift of power from the national to international level. In fact, the plethora of international institutions (often comprising only the interest groups directly affected) whose standards are then imposed on democratic governments through WTO

rules, raises concern that the international arena, as currently structured, may be particularly susceptible to capture by factions. This again reduces the ability of citizens to participate meaningfully, or to even have a voice, in the process.

3. LACK OF DELIBERATION

Citizen participation was intended to be more than just voting, or merely speaking out. There was also to be an element of deliberation, of consideration of opposing viewpoints, and of persuasion. This underlying principle of deliberation (which of course applies to representative government as well) may be undercut by the pressures of globalization. For example, globalization and its focus on economics, has highlighted people's roles as consumers over their roles as deliberative citizens. Even NGOs have discovered that they can effectively use consumer preferences to constrain corporate or nationstate behavior, such as through the use of boycotts.⁴⁵¹ As people are identified increasingly through their roles as consumers, rather than citizens, one of the core values on which citizen participation itself stands is undercut. Furthermore, the ability of some players to get many bites at the policymaking apple (e.g., if you lose on the State or national level, you can still try to influence foreign governments, international players, or to build international coalitions) undercuts the role of persuasion in the process. The issue becomes one less of convincing others that your position is correct, than of finding a forum at the appropriate level in which your interests are likely to prevail.

ACCOUNTABILITY

The precise meaning of accountability as a federalism value is unclear. On the one hand, accountability can mean that the public is aware of which government officials to hold responsible for various policies and has the power to hold their feet to the fire, generally by voting them out of office. In this sense, one could argue that the division of powers between federal and State governments in our federalist structure can only blur accountability. What could be clearer than just having one level of government: the public would always know that that level was the one to be held accountable. On the other hand, accountability can also mean availability to the public, responsiveness to the public's questions and concerns.⁴⁵² In this second sense of responsiveness, one can argue that the existence of State governments furthers accountability for two reasons. First, they provide a further avenue for citizens to seek redress

of grievances; and, second, they are presumably closer to the people and therefore more accessible (although the enormous size of various States and their State legislative districts may call this assumption into question).

When the Court talks about accountability it seems to be discussing it in the first sense. This can be seen in the concern with accountability expressed by Justice O'Connor in the Court's opinion in *New York v. United States*. O'Connor noted that when the federal government exercises its powers to preempt a State law, it is clear to the public that it is the federal government taking the action and which should be held accountable for it. On the other hand, O'Connor argued:

where the Federal Government directs the States to regulate, it may be [S]tate officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected [S]tate officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.⁴⁵³

Thus, the Court has assumed a role in policing accountability; that is, in insuring that politicians on all levels are not allowed to blur the lines of responsibility for policy decisions. Since the clearest accountability would exist in a unitary system, the Court seems to be arguing more that accountability is necessary for federalism to function appropriately, than that accountability is one of the key values that federalism furthers. Thus, it is necessary to consider the extent to which globalization may affect accountability in both the Court's sense and in terms of responsiveness.

Positive Implications

1. **HEIGHTENED POLITICAL INVOLVEMENT AND INFORMATION: ACCOUNTABILITY IN THE COURT'S SENSE**
Globalization and the new pressures that it brings to the functioning of government can heighten accountability by increasing the visibility of various issues. For example, the wave of international protests from NGOs concerning the ill-fated Multilateral Agreement on Investment (MAI) had the effect of elevating MAI questions from the level of civil servants to the ministerial level. Thus, accountability was enhanced as a key issue came to the attention of higher level officials who could be held more directly responsible through elections.⁴⁵⁴ And the increased visibility of the issue generally enhanced the flow of information to citizens regarding which officials to hold accountable. In this

sense, any increase in transparency brought about by globalization enhances accountability as well.⁴⁵⁵

Heightened Accessibility: Accountability in Terms of Responsiveness

Globalization can also enhance accountability by making officials more responsive to the electorate. Here again, the increased transparency that comes with enhanced information flow and access to information can play a key role in making elected officials responsive to their constituents. In addition, a number of technological developments, such as the rise of the Internet, greater use of e-mail, etc., can make it both easier for citizens to contact their representatives and to track their activities, votes, etc. And the ability to create broad-based coalitions can also be used to break open otherwise nonaccountable elite cliques that may control or disproportionately influence policymaking in a particular area.

Negative Implications

1. ACCOUNTABILITY IN THE COURT'S SENSE: LESS STATE DECISIONMAKING AUTHORITY

As has already been discussed earlier, numerous State laws may be impacted or even overridden by decisions made by nonaccountable, unelected supranational officials. In addition, the precise accountability problem that the Court feared in *New York*, in which the State's policymaking processes are commandeered by another level of government, becomes even more acute when one considers the ability of the WTO to impose various rules that will pressure State governments to change their existing environmental, consumer safety, or other standards. Should the public hold the State officials who propose the new conforming legislation accountable? Or is it the fault of the federal government (both executive and legislative) for agreeing to the WTO rules in the first place? Or is it the fault of the USTR for bringing suit in federal court to compel State compliance? Or is it the fault of the Dispute Settlement Body on the supranational level? Accountability becomes even more blurred if State officials shape prospective legislation so as to conform to WTO standards. In this case, they are not being forced directly by higher powers to conform; yet, on the other hand, it is the threat of that future compulsion which is causing them to preemptively shape their own law in a conforming fashion. And State officials may also just use international pressures as an excuse for enacting policies that they would favor in any event.

Accountability concerns are heightened further by the lack of transparency in the DSU, the fact that globalization may increase the power of the executive vis a vis the legislature (given the President's

broad foreign affairs power and the ability to enter into executive agreements), and the lack of democratic accountability by international standards setters.⁴⁵⁶ And whom should voters hold accountable for developments in customary international law?

2. ACCOUNTABILITY IN THE COURT'S SENSE: LESS FEDERAL DECISIONMAKING AUTHORITY

Similar concerns can be expressed on the federal level, as the federal government may be required to pass legislation to conform to international obligations. This could be expected to increase proportionately with the level of integration. In Europe, for example, "Member State officials regularly implement policies they had little or no role in making."⁴⁵⁷ To what extent will federal processes be commandeered? In this regard, one can at least argue that the federal government played a role in creating the obligations in the first place. But what if they were imposed through executive agreement? Or by two-thirds of the Senate but no voice in the House? There may be a further issue of accountability when federal (or theoretically State) officials take credit for passing certain legislation which they were required to do by international obligations. Interestingly, the European Court of Justice has ruled that a Member State acts illegally when it incorporates directly applicable [European] Community law in such a way as to conceal its Community origins and character.⁴⁵⁸

3. ACCOUNTABILITY IN THE COURT'S SENSE: LESS GOVERNMENTAL DECISIONMAKING AUTHORITY

Democratic accountability on both State and federal levels is also affected by the shift of governmental responsibilities to corporations, NGOs, and the marketplace in general. In this circumstance, should the government be held accountable for allowing the shift in power? Or is accountability to the citizens replaced by accountability to consumers? Or does accountability simply vanish amidst the invisible hand movements of an active marketplace?

4. ACCOUNTABILITY IN THE SENSE OF RESPONSIVENESS

Many of the above concerns also relate to accountability in the second sense, as States and State officials may be less responsive to constituent needs since their hands are tied by higher levels of government or international agreements. Furthermore, an explosion in electronic communications and interactions with citizens could effectively overwhelm State representative processes; and the ability of citi-

zens to express their opinions directly on a wide range of issues, which could lead to increased devolution of power from representative institutions to the people themselves, could undercut democratic accountability in a fundamental sense. If everyone is responsible for decisions made by the public acting as a whole (such as through initiatives and other forms of direct democracy), then no single individual or institution can be held accountable.

MAXIMIZING CHOICE/DIVERSITY

There is another way in which federalism enables the government to respond to citizens' wishes, and that is through the ability of States, through their different policy choices and tax and spending decisions, to differentiate themselves. This has several benefits. First, it can maximize overall utility, in the sense that citizens who want more services and higher taxes can move to States that offer such a mix of goods, while those who want a different combination can move elsewhere. The theoretical outcome is an increase in utility for all, as more citizens are happier than would be the case if a single national standard were imposed by the majority on the minority. Second, the prospect that States will compete for the affections of a mobile citizenry raises the chances that they will seek to be more responsive in the first place to the expressed desires of their residents.⁴⁵⁹ Third, the very option of exit by a citizen increases liberty generally and further pressures States not to encroach on citizens' liberties. While one can legitimately take issue with a number of the assumptions underlying the above contentions (e.g., do citizens really move because of different State policies or do they move for reasons of employment, climate, closeness to family, etc.?), it is nevertheless important that globalization may impact this dynamic.

Positive Implications

1. INCREASED MOBILITY

Globalization can be expected to increase citizens' mobility in various ways. It may lead to increased immigration (thereby adding an international element to mobility and competition for citizens), and it may well make it easier for citizens to choose to relocate for quality of life reasons. For example, to the extent that globalization enables citizens to telecommute over long distances, the location of their jobs may cease to be such a determining factor in their decisions regarding where to live. (Of course, to the

extent that one adopts Saskia Sassen's view of the concentrating effects of globalization, the opposite may be the case.) And the general mobility of labor and the growth of international job opportunities, may simply give people increased employment options unhindered by geographic boundaries.

2. INCREASED INFORMATION AND VOICE

Globalization may also make it easier for States to compete (and for individuals to respond to that competition) by increasing the flow of information. Citizens may become more aware of different options regarding different places to live. States may use new media to advertise their policies in an effort to lure desired residents. And citizens may have a greater opportunity to give voice to their reasons for leaving (or coming), sharing their views with a wider audience, which may then convince others to make similar moves, etc.

Negative Implications

1. INTERNATIONAL STANDARDS AND DIMINISHED DIVERSITY

As was discussed in the section regarding the WTO, there are significant pressures for harmonization among different State rules. To the extent that States are forced to all conform to supranational standards, their ability to differentiate themselves lessens. Thus, globalization effectively removes a series of policy areas from the arena in which States can compete with each other, and in which citizens can enjoy the choice that comes with diversity.

2. CONVERGENCE

While diversity can be limited by international standards, or even by a broader harmonization of approaches, there is also the possibility that globalization will lead to greater convergence among differing systems on a more fundamental level. While, as discussed earlier, the evidence indicates that there are significant barriers to convergence among different nationstates, the same barriers to convergence may not exist among States themselves. Thus, the pressures of globalization may lead not just to diminished diversity caused by the imposition of international rules, they could also initiate dynamics which lead to a more fundamental convergence in States' approaches to different policy issues. This would represent a significant loss to the diversity that federalism brings.

LABORATORIES

A final underlying value that States and federalism further is the innovation and experimentation that comes with States' roles as laboratories. This was expressed most succinctly in a famous dissenting opinion by Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) in which he said: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁴⁶⁰

While the concept of States as laboratories has received broad recognition and acceptance, it can actually mean two very different things. In both cases, it assumes that States will use their freedom and autonomy to develop different approaches, different combinations of services and taxes, and different styles of government management. The question is what happens next. In order for this benefit of federalism to be distinct from the more general notion of diversity, one model assumes that other States will then learn from their neighbors' experimentation and adopt the things that work. There is an interesting internal tension within this model, as often the reason why States are given flexibility to experiment is because they each face different needs and different circumstances. Thus, national level experimentation would not be suitable to the particularities of the local situation. However, at the same time, this model assumes that State needs and circumstances are not so different as to prevent them from usefully adopting (or at least adapting) their sister States' experiences to fit their own situation. A second model of what happens assumes that the knowledge gained from State experimentation will serve to inform policymaking on the national level.⁴⁶¹ Thus, while the initial experimentation may enhance diversity, it will ultimately decrease diversity as it becomes the basis for adoption on the national level of whatever approach works best.

Depending on the model adopted, the ultimate impacts of globalization would differ, as, for example, a weakening of States' roles as laboratories might be seen as generally diminishing innovation on the State level or impacting innovation on the federal level as well.

Positive Implications

Globalization could impact States' roles as laboratories in a number of positive directions. First, to the extent that it brings new issues to the public agenda, it expands the realm of possible areas in which

States can experiment. Second, if globalization leads to greater efficiencies, it could provide funds for even more experimentation. And if globalization subjects States to a range of similar pressures, it could make the experiments in each State more relevant for adoption in others. Indeed, experiments are probably most useful when there is agreement on the general policy direction desired, but uncertainty about the best way to get there.⁴⁶² Finally, globalization can increase the flow of information both among States and even with subnational governments abroad.

Negative Implications

Globalization can also severely hinder States in their roles as laboratories. As has been mentioned above, the pressures for international standards and harmonization undercut the role of States as laboratories, as does the requirement that national governments ensure State law conformity.⁴⁶³ And State experimentation would only increase the diversity which US trading partners have already argued could represent inappropriate barriers to trade.⁴⁶⁴ In addition, the focus of WTO rules on scientific evidence limits the ability of States to experiment with various technology-pushing regulations.⁴⁶⁵

While the impact of globalization on federalism values is far from clear, it may well be far-reaching. Thus, not only will globalization impact federalism by impacting the States themselves, it also carries significant implications for the broader values underlying federalism and the ability of federal structures to continue to support these values. However, the effect of globalization may be more extensive still, as it is possible that the pressures of globalization will serve as a catalyst for reconsideration and redefinition of federalism values. Thus, we now turn to considering two final issues in the relationship between federalism and globalization: the extent to which globalization will reshape federalism values, and, finally, a few thoughts on the extent to which federalism may shape globalization in turn.

PART V

GLOBALIZATION AND FEDERALISM: IMPACTS ON EACH OTHER

Our analysis so far has looked at globalization and its impact on States and federalism values, as both exist today. However, if we are truly to explore globalization's impact on federalism, we must consider at least another level: how globalization and federalism may shape each other moving forward. As Ian Clark has argued on the level of the nationstate, there is a mutually constitutive relationship between globalization and the nationstate, within which change occurs in both.⁴⁶⁶ We must look at the relationship between globalization and federalism in an equally dynamic way. Certainly, each will change and shape the other. This is perhaps more relevant for US federalism than for other nations' domestic structures, as the US can be expected to play the major role in shaping globalization in the future.

What does this type of analysis yield? As an initial matter, we must be honest about the tentative nature of our inquiry. It is difficult enough to peer into a crystal ball regarding the forces of today's globalization and their impact on federalism; trying to look at the dynamic between the two moving forward is an even more daunting, and ultimately impossible, task. Nevertheless the fact that the possibilities are so daunting may in fact be liberating, as we are free to think broadly -- and prescriptively.

Thinking in this manner raises difficult questions. We have discussed federalism values in terms of the role that federalism has played in the past and the way that its values have been filtered through the American experience of the past two centuries. Might not the American experience of the 21st century lead to a further reconfiguration of federalism values? Might not certain values implicit in federalism that

have remained relatively unremarkable become more prominent when confronting the new experiences associated with globalization? And might others already described in Part IV take on new meaning in the context of globalization? Among these potentially newly emphasized values might be included the need for balance, a more contextualized view of the importance of efficiency, and new applications of enduring federalism concerns regarding diffusion of power, the role of diversity, and civic Republicanism. Similarly, how might federalism itself and the way it structures American thinking impact our own efforts to shape globalization? While we can anticipate that globalization will shape America's efforts at structuring federalism, it is also possible that concepts related to federalism (such as the ability of local majorities to resist the will of the national majority; and the need for ambition to counteract ambition) may prove useful in future efforts to structure institutional responses to globalization. What follows is no more than an early effort to spur discussion in this area.

NEW FEDERALISM VALUES

The Stages of Federalism

John Attanasio has argued that there have been several stages of American federalism, starting with a federalism comprised of powerful States and a relatively weak government, which was replaced after the Civil War by a judicial stage in which the courts mediated a dramatic shift in power from the States to the federal level over a period of 100 years. After the New Deal, the courts withdrew significantly from the process, allowing much of the relationship to be resolved through the political process. Now, Attanasio claims, we are moving into a fourth stage in which the courts do not limit themselves to constraining the power of the States but also are willing to constrain the power of the national government.⁴⁶⁷ While Attanasio's analysis is grounded in the domestic American experience, Aman extends it by looking at the impact of globalization. "[I]n a global economy," he argues, "power arrangements should be more fluid, and multigovernmental approaches often may be necessary in which the degrees of [S]tate, federal, and international power may change over time."⁴⁶⁸ How then might federalism values be reanalyzed in the context of globalization? Since federalism and its values can be expected to remain as imprecise concepts during the next era as they have been in the past, it must be admitted that certain federalism values could be used to argue in favor of globalization, while others could be used to oppose it. The discussion that follows adopts neither of these points of view, but rather exam-

ines how federalism values may be referred to in shaping a somewhat more humane, more public-regarding globalization.

Federalism Values for the Next Stage

1. THE ROLE OF BALANCE

Our current discourse on globalization seems to have forgotten a key value underlying federalism, the notion of balance. Some of the argument surrounding globalization is made in stark terms. Power should be devolved to the lowest level possible.⁴⁶⁹ The nationstate has become a bit player.⁴⁷⁰ Power should be devolved to the marketplace to ensure efficiency.⁴⁷¹ While all of these statements may be true in part, they ignore a key insight of federalism. Our federalism did not create a structure in which the allocation of power between the States and the federal government was static for all time. Rather, the relationship has been one of shifting balance. Indeed, the whole notion of federalism assumes that at no point will one or the other level gain too controlling a hand.

This insight may be useful in bringing new nuance to our shaping of globalization. Of course, there is an important role for the market, as there is for the nationstate and the States. Yet, we need to insure that each can do what it does best, without undercutting the ability of the other to further its own goals. Thus, the marketplace's ability to achieve efficient allocation of resources is an important goal, but not one to be pursued blindly or in isolation. And the nationstate's ability to establish public-regarding goals also needs to be constrained by the disciplining strictures of the marketplace. As in federalism, neither can operate without the other. And perhaps they both operate best when in a constructive tension with each other.

2. THE RELATIVE IMPORTANCE OF EFFICIENCY

Related to the notion of balance, the concern with efficiency needs to be seen as one goal rather than the goal. As I have described already in Part I, the focus on economics as a core principle of globalization reflects a flawed reading of the process of globalization: economics globalized first not because it was so central, but because it could be subordinated to more important political goals. Federalism adds another layer to this analysis. Certainly, efficiency is one of the concerns of federalism. States in competition with each other to attract populations can be expected to become more efficient. States may be able to operate in some cases more efficiently than the national government. And the very idea that different State policy approaches will

maximize utility for the greatest number of people, is also closely related to the cost-benefit analysis approach that often underlies efficiency calculations. Nonetheless, at its core, federalism also reminds us that efficiency is not the sole value. It is more efficient for an economy to operate based on standardized national rules than on diverse State-based ones. Indeed, the very tension between the federal and State governments that the federal structure creates is intended to be inefficient. It is intended to make it more difficult for either level of government to implement fully its agenda. Federalism recognizes that this inefficiency plays a role in securing liberty. A similar recognition may be important in shaping the dynamics of globalization as well.

3. DIFFUSION OF POWER

Federalism was also intended to protect against an undue concentration of power on either level of government, as such diffusion of power operates to protect liberty. Might globalization be informed by an expansion of this insight into concentrations of power outside of government as well?⁴⁷² The devolution of power from the public to the private sector causes pause, especially if that power is concentrated in the hands of a few rather than being widely dispersed. To the extent that federalism was an attempt to prevent the concentration of power in a single public set of hands, so too may it remind us to avoid the concentration of power in a few private hands. Indeed might this require us to examine more closely the other prong of the Tenth Amendment — the reservation of powers to the people? Theoretically, that could inform an inquiry into the extent to which various powers were intended to remain in the hands of the people (either individually or acting through their governments) rather than in the hands of the few (whether they be in government or in the private sector). Might future analysis of the Tenth Amendment provide a framework not just for protecting the autonomy of the States from the federal government, but also for protecting the autonomy of the people? Or do all Tenth Amendment protections stop when power is transferred from the public to the private sector? Indeed, in this inquiry one can look not just to the Tenth Amendment but to one of the core insights of the federalism analysis: the conviction that sovereignty ultimately resides in the hands of the people.⁴⁷³

4. BENEFITS OF DIVERSITY

As was already discussed in Part IV, one of the underlying values of federalism relates to the benefits of diversity. This could provide a particularly timely reminder in assessing the extent to which conver-

gence of rules and systems globally is desirable. To what extent is convergence in the non-economic realms either possible or desirable? Surely, there is room for certain universal norms (e.g., in the realm of human rights), but do we also need to carve out (perhaps explicitly as a matter of policy) a set of areas in which diversity will be not just tolerated but actually encouraged?

5. CIVIC REPUBLICANISM

Central to the Founders' notion of civic republicanism was the belief that there is a common good. As has been discussed in Part III, the dilution of the notion of national interest has weakened that assumption. And the continuing reference to the will of the market as central to defining our common interest also undercuts the notion that there is a public good on the State and local level as well. Here the federalism value of civic republicanism has a large role to play. It can remind us that the public good is more than the aggregate of private interests.⁴⁷⁴ It can remind us that the hyperpluralism that the Internet and other technological developments encourage may go too far in undercutting the notion of public deliberation that was so central to the way in which the Founders hoped to discover that public good. It can remind us that there is a value in participation, and that there may be fundamental problems with the development of a virtuality that transforms humans not just into consumers, but into spectators.⁴⁷⁵

STRUCTURING GLOBALIZATION

Given the dynamic nature of the federalism/globalization relationship, it is sometimes difficult to separate the basic arguments about what is shaping which. This is reflected in the discussion above, in which the exploration into new values of federalism that may become relevant in the era of globalization also suggested new ways to shape the globalization process. There remain but a few final points to make on the potential impact of federalism on globalization.

Impact Through the United States

Federalism will shape globalization at least in part because federalism will shape the way the United States responds to globalization. As a key player in pushing globalization forward, the American domestic structure is more important than may be the internal structures of other nations. And, as Aman has argued, the relationship of federal and State power takes on special importance in global con-

texts.⁴⁷⁶ Thus, federalism will at least be relevant in that it will directly impact the positions the United States adopts.

Role of Federalism Concepts

1. CURRENT USE OF FEDERALISM CONCEPTS

Certain federalism concepts have already found their way into the structure of international institutions. For example, the supermajority or even consensus requirements that permeate the WTO Treaty⁴⁷⁷ reflect the federalism concern that majorities should not always be able to impose their will on minorities (as State majorities can pass important statewide legislation even if it is opposed by national majorities). Similar protections can be found in the European Union's effort to permit qualified majority voting on some issues, while keeping a unanimity requirement for others.⁴⁷⁸ However, one could also argue that the focus on supermajority provisions is a misleading application of federalism. The American federal structure protects State majorities, which may be a minority on the national level, against the imposition of national majority rule on State issues. But it also enables national majorities to override State majorities on a wide range of issues. Thus, our federalism attempts to avoid majority domination in certain areas while making majority rule possible in others. One could argue that the current WTO arrangement, for example, prevents majority domination, but also has no provision for majority rule, thereby adopting a procedure of federalism while ignoring its essence.

2. FUTURE USES OF FEDERALISM CONCEPTS

Federalism concepts may be relevant in a broader sense. In this analysis, it is important to recognize that there is no need to see institutions like the WTO as more than transitional. Perhaps the WTO will become just one of many international institutions, each with different jurisdictions, potentially competing competencies, etc. Or perhaps the world, unhappy with the restrictions imposed by the WTO, will pull back. Or perhaps the WTO structure will prove to be just the Articles of Confederation to a future broader Constitution. In this context it is interesting to consider that the WTO changes the baseline against which arguments for world governance are made. Previously, the alternative to world governance was the continued supremacy of nationstates which were far better able to protect democratic values than was world governance. If the baseline for comparison becomes institutions like the WTO,

then moves toward world governance could theoretically be structured to introduce more democracy into the system rather than less. This is not to imply that world governance is desirable. Rather it points out another danger with those arguments that undercut the notion of a national interest and see in globalization inexorable forces toward unhampered market supremacy and diminution of national sovereignty. Such arguments may unwittingly be helping to structure the debate in a way that favors world governance, as they make the default position in the absence of world governance not robust and democratic nationstates, but rather secretive WTO-type institutions.⁴⁷⁹

In the broader post-WTO (or at least WTO-plus) context, federalism approaches may be useful.⁴⁸⁰ For example, Michael Glennon has argued that the theory that Madison sketched out regarding the management of power within a nationstate in Federalist Paper 10, “applies with equal force to the management of power among [nation]states.”⁴⁸¹ Thus, he argues, that structures are needed in which the seeking by a nationstate of its own interest furthers rather than undercuts the global interest.⁴⁸² One could go further and suggest the need for a variety of institutions that would compete with each other, such that the ambitions of one counters the ambitions of the other. This would introduce some of the elements of negarchy (the power to negate, limit or constrain authority) that Susan Strange sees as missing in the international arena in which global governance lacks an organized institutional opposition.⁴⁸³ Or one could imagine a system in which international-level negotiation reflects a more deliberative process, or in which sovereignty ultimately resides in the people.

CONCLUSION

The above thoughts are meant to be thought provoking, but they also are meant to underline the fact that globalization is a reality that is susceptible to being shaped. Like federalism, it can be used to produce both good outcomes and bad ones. And it requires a nuanced approach, in which State responsibilities are protected, the concept of the public good and national interest are strengthened, and the federal government acts aggressively to reap the benefits of globalization while also cushioning society from its negative consequences. As with federalism, there is a need to balance a series of values, both public and private. And there exists an ever-changing series of challenges and opportunities for each level of government to confront. Woodrow Wilson once said of federalism: “it is a question of growth, and every new successive stage of our political and economic development gives it a new aspect, makes it a new question.”⁴⁸⁴ Such is the case with federalism today, and such is the case with globalization as well, in which our generation shares with the Founders 200 years ago a rare opportunity: to shape a system that furthers democracy, liberty, and the public good.

ENDNOTES

1 • I would like to thank Robert Stumberg of the Harrison Institute for Public Law at Georgetown University for his tremendous assistance, insights and detailed comments on an earlier draft of this paper. His recommendations are reflected throughout this paper in a way that footnotes cannot adequately reflect. David Callahan of Demos also provided very helpful comments and thoughts throughout the process. I am also indebted to Richard Nelson, my colleague at Columbia, who took the time to read and comment on an early draft of this paper. In addition, Andrew Zielinski, a Masters of Public Administration graduate (May, 2001) of Columbia's School of International and Public Affairs, provided extremely capable research assistance for the project as a whole, and was primarily responsible for the research on the section on privacy.

2 • Bob Stumberg, *Memorandum to Mark Gordon: Comments on the Impact of Globalization on [American] Federalism*, November 24, 2000.

3 • K.C. Wheare, *Federal Government* (Greenwood Press, 4th edition, 1980; 1st edition, 1946), p.1.

4 • John Dilulio, Jr. & Donald Kettl, *Fine Print: The Contract with America, Devolution and the Administrative Realities of American Federalism*, (The Brookings Institution's Center for Public Management, CPM 95-1, Mar. 1, 1995), 1; Richard Briffault, *Federalism and Health Care Reform: Is Half a Loaf Really Worse than None?*, 21 *Hastings Const. L.Q.* 611, 614 (1994).

5 • Although on a practical level the federal relationship is already three-tiered (including federal, State and local governments), as a constitutional matter local governments remain mere creatures of the State without independent constitutional authority.

6 • *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

7 • In the context of this paper, the term "State" refers to one of the 50 US States, while "nationstate" is used to identify a country.

8 • Of course these models are in a sense simplistic, as they represent extremes while many commentators are at various points along the spectrum. However, the important point is that both views often lead to a faulty policy conclusion — that working to shape globalization is either not worth its while because it is either unimportant/unnecessary or impossible.

9 • This reflects the centrality of economics to most of the discussion on globalization. As will be argued later in this Part and in Part III, this centrality of economics as a key component of globalization has unfortunately (and I think unwittingly) contributed to a mistaken focus in the public policy arena on market efficiency as the core organizing principle of globalization.

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11 • Renato Ruggiero, “Whither the Trade System Next?” in *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, Jagdish Bhagwati and Mathias Hirsch, eds., (University of Michigan Press, Ann Arbor) 1998, p. 127. (Hereinafter “Whither the Trade System Next?”)

12 • Robert Gilpin, *The Challenge of Global Capitalism*, (Princeton University Press) 2000, p. 2. (Hereinafter *The Challenge of Global Capitalism*)

13 • Peter D. Sutherland, “Globalisation and the Uruguay Round,” in *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, Jagdish Bhagwati and Mathias Hirsch, eds., (University of Michigan Press, Ann Arbor) 1998, p. 144. (Hereinafter “Globalisation and the Uruguay Round”)

14 • Ruggiero, “Whither the Trade System Next?” p. 127.

15 • Ostry, “Policy Approaches to System Friction: Convergence Plus,” p. 336.

16 • Bernard Hoekman and Michael Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* (Oxford University Press) 1995, p. 127. (Hereinafter *The Political Economy of the World Trading System*)

17 • Paul L. Knox and Peter J. Taylor, *World Cities in a World-System*, (Cambridge University Press, Cambridge) 1995, p. 5. (Hereinafter *World Cities in a World-System*)

18 • Gilpin, *The Challenge of Global Capitalism*, p. 22.

19 • *Ibid.*, p. 22.

20 • Wade, “Globalization and Its Limits,” p. 64.

21 • Sutherland, “Globalisation and the Uruguay Round,” p. 144.

22 • Wade, “Globalization and Its Limits,” p. 63.

23 • Ruggiero, “Whither the Trade System Next?” p. 127.

24 • Sutherland, “Globalisation and the Uruguay Round,” p. 144.

- 25 • Gilpin, *The Challenge of Global Capitalism*, p. 24.
- 26 • Ruggiero, "Whither the Trade System Next?" p. 127.
- 27 • Wade, "Globalization and Its Limits," p. 63.
- 28 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p.217.
- 29 • Ostry, "Policy Approaches to System Friction: Convergence Plus," p. 336.
- 30 • Jay Mazur, "Labor's New Internationalism," *Foreign Affairs*, Vol. 79, Number 1, Jan/Feb 2000, p.80. (Hereinafter "Labor's New Internationalism")
- 31 • Ostry, "Policy Approaches to System Friction: Convergence Plus," p. 336.
- 32 • John Stopford, "Multinational Corporation," *Foreign Policy*, Winter 1998-99, p. 18. (Hereinafter "Multinational Corporation")
- 33 • Gilpin, *The Challenge of Global Capitalism*, p.170.
- 34 • Stopford, "Multinational Corporation," p. 14.
- 35 • *Ibid.*, p. 15-17.
- 36 • Sutherland, "Globalisation and the Uruguay Round," p. 144.
- 37 • Ruggiero, "Whither the Trade System Next?" p. 128.
- 38 • Jeffrey Sachs, "International Economics: Unlocking the Mysteries of Globalization," *Foreign Policy*, Spring 1998, p. 98. (Hereinafter "International Economics")
- 39 • Ruggiero, "Whither the Trade System Next?" pp. 130-31.
- 40 • Wade, "Globalization and Its Limits," p. 65.
- 41 • Ostry, "Policy Approaches to System Friction: Convergence Plus," p. 336.
- 42 • Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders*, (Cornell University Press, Ithaca, NY) 1998, p. 8. (Hereinafter *Activists Beyond Borders*)
- 43 • *Ibid.*, p. 10.
- 44 • Stephen J. Kobrin, "The MAI and the Clash of Globalizations," *Foreign Policy*, Fall 1998, p. 108.
- 45 • Keck and Sikkink, *Activists Beyond Borders*, p. 2.
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48 • Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, (Cambridge Studies in International Relations), December 1996, p. xiii. (Hereinafter, Strange, *The Diffusion of the State*)

49 • Mark C. Gordon, Gordon Goldstein, and John Hall, "Wealth, Power, and the Information Revolution: A Review Essay," Council On Foreign Relations, 1999. (Hereinafter "Wealth, Power, and the Information Revolution")

50 • Vivien A. Schmidt, "Convergent Pressures, Divergent Responses: France, Great Britain, and Germany Between Globalization and Europeanization," p. 174. (Hereinafter "Convergent Pressures, Divergent Responses")

51 • Sachs, "International Economics," pp. 98-99.

52 • Saskia Sassen, "Embedding the Global in the National: Implications for the Role of the State," in *States and Sovereignty in the Global Economy*, David A. Smith, Dorothy J. Solinger and Steven C. Topik, eds., (Routledge, 1999), pp. 159. (Hereinafter "Embedding the Global in the National")

53 • *Ibid.*, p. 159.

54 • Knox and Taylor, *World Cities in a World-System*, p. 6.

55 • Vivien A. Schmidt, "Convergent pressures, divergent responses," p. 173.

56 • Stephen D. Krasner, "Globalization and Sovereignty," p. 34 in *States and Sovereignty in the Global Economy*, David A. Smith, Dorothy J. Solinger and Steven C. Topik, eds., (Routledge, 1999). (Hereinafter "Globalization and Sovereignty")

57 • Dani Rodrik, *Has Globalization Gone Too Far?* (Institute for International Economics, Washington, D.C., 1997), p. 11-14, 54, 55. (Hereinafter *Has Globalization Gone Too Far?*)

58 • Suzanne Berger in *National Diversity and Global Capitalism*, Suzanne Berger and Ronald Dore, eds., (Cornell University Press, Ithaca) 1996, p. 15. (Hereinafter *National Diversity and Global Capitalism*)

59 • *Ibid.*

60 • Ian Clark, *Globalization and International Relations Theory*, November 1999, p. 16. (Hereinafter, Clark, *Globalization and International Relations Theory*)

61 • Jong S. Jun and Deil S. Wright, eds., *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States*, (Georgetown University Press, Washington, D.C.) 1996, p. 329.

62 • Michael Peter Smith, "The disappearance of world cities and the globalization of local politics," p. 249 in *World Cities in a World-System*, Paul L. Knox and Peter J. Taylor, eds., (Cambridge University Press, Cambridge, 1995).

63 • Mazur, "Labor's New Internationalism," p. 86.

- 64 • Strange, *The Retreat of the State*, pp.97-98.
- 65 • Strange, *The Retreat of the State*.
- 66 • Gordon, Goldstein, and Hall, "Wealth, Power, and the Information Revolution."
- 67 • Anthony DePalma, "19 Nations See U.S. As Threat to Cultures," *The New York Times*, July 1, 1998, p. C1.
- 68 • Sutherland, "Globalisation and the Uruguay Round," p. 132; Robert Gilpin, *The Challenge of Global Capitalism*, p. 4.
- 69 • Rodrik, *Has Globalization Gone Too Far?*, p.70.
- 70 • Wade, "Globalization and Its Limits," p. 61.
- 71 • *Ibid.*, p. 66; Robert Gilpin, *The Challenge of Global Capitalism*, pp. 294-95.
- 72 • Robert Gilpin, *The Challenge of Global Capitalism*, p. 21.
- 73 • Berger, *National Diversity and Global Capitalism*, p.8.
- 74 • Robert Gilpin, *The Challenge of Global Capitalism*, p. 295.
- 75 • Wade, "Globalization and Its Limits," p.73-74.
- 76 • *Ibid.*, p. 70.
- 77 • Mazur, "Labor's New Internationalism," p. 81.
- 78 • Wade, "Globalization and Its Limits," p. 79; Stopford, "Multinational Corporation," p. 12.
- 79 • Strange, *The Retreat of the State*, p.4.
- 80 • Sassen, "Embedding the Global in the National," p. 178.
- 81 • *Ibid.*, p. 180.
- 82 • Robert Gilpin, *The Challenge of Global Capitalism*, p.299.
- 83 • *Ibid.*, p. 31.
- 84 • In this sense, globalization now serves the role that balance of power played in previous centuries as illuminated by Ernest Haas's classic article ("The Balance of Power: Prescription, Concept, or Propaganda," *World Politics*, Vol. 5, July 1953, p. 442.) on that subject in the 1950s. Haas identified how the term "balance of power" was used: sometimes as a description of the international system; other times as a prediction of the shape that the international system was destined to assume; as a policy that should be followed by policymakers; etc. Gordon, Goldstein, and Hall, "Wealth, Power,

and the Information Revolution,” p. 16.

85 • For further discussion on the different policies federalism has been used to justify, see Part II.

86 • Smith, Solinger and Toik, *States and Sovereignty*, p. 13.

87 • Immanuel Wallerstein, “States? Sovereignty? The dilemmas of capitalists in an age of transition,” p. 25 in *States and Sovereignty in the Global Economy*, David A. Smith, Dorothy J. Solinger and Steven C. Topik, eds., (Routledge, 1999).

88 • Robert Gilpin, *The Challenge of Global Capitalism*, p. 13.

89 • Helleiner, *States and the Reemergence of Global Finance*, p.8.

90 • Clark, *Globalization and International Relations Theory*, p. 86.

91 • Manuel Pastor, “Globalization, sovereignty and policy choice: Lessons from the Mexican peso crisis,” in *States and Sovereignty in the Global Economy*, David A. Smith, Dorothy J. Solinger and Steven C. Topik, eds., (Routledge) 1999, p.210.

92 • Helleiner, “Sovereignty, Territoriality, and the Globalization of Finance,” p. 143.

93 • Clark, *Globalization and International Relations Theory*, p. 145.

94 • Berger, *National Diversity and Global Capitalism*, p. 20.

95 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 11.

96 • Gilpin, *The Challenge of Global Capitalism*, p. 53.

97 • Daniel J. Elazar, “The State System + Globalization (Economic Plus Human Rights) = Federalism (State Federations Plus Regional Confederations),” 40 *South Texas Law Review* 555, Summer 1999, p. 564. (Hereinafter “The State System + Globalization.”)

98 • John B. Attanasio, “Rapporteur’s Overview and Conclusions: Of Sovereignty, Globalization and Courts,” 28 *New York University Journal of International Law and Politics* 1 (Fall 1995-Winter 1996), p. 29.

99 • Gordon, Goldstein, and Hall, “Wealth, Power, and the Information Revolution.”

100 • Space does not permit a similar analysis of the requirements of NAFTA or various bilateral trade agreements, as well as possible provisions of a potential Free Trade Agreement of the Americas. It should be understood, however, that they would raise even further, and sometimes even more troubling, challenges for American States and federalism.

101 • While our discussion generally will refer to State and local powers as one (since constitutionally local governments are a creation of the States and since a limitation imposed by globalization on local control is also, thus, a limit on State flexibility), a later part of the analysis will introduce the possibility that State and local interests may actually compete.

- 102 • Clark, *Globalization and International Relations Theory*, p. 16.
- 103 • Berger, *National Diversity and Global Capitalism*, p. 2.
- 104 • Gilpin, *The Challenge of Global Capitalism*, p. 320.
- 105 • Berger, *National Diversity and Global Capitalism*, p. 5.
- 106 • Robert Boyer, “The Convergency Hypothesis Revisited: Globalization but Still the Century of Nations?” in *National Diversity and Global Capitalism*, Suzanne Berger and Ronald Dore, eds., (Cornell University Press, Ithaca) 1996, p. 30. (Hereinafter, “The Convergency Hypothesis Revisited”)
- 107 • *Ibid.*, p. 31.
- 108 • *Ibid.*, pp. 32-3.
- 109 • For a good discussion of the evidence in opposition to convergence theories, see Suzanne Berger and Ronald Dore, ed., *National Diversity and Global Capitalism* (Cornell University Press, Ithaca) 1996.
- 110 • Barry Friedman, “Federalism’s Future in the Global Village,” 47 *Vanderbilt Law Review* 1441 (October 1994), p. 1442. (Hereinafter “Federalism’s Future in the Global Village”)
- 111 • Andreas Falke, “The Impact of the International System on Domestic Structure: The Case of American Federalism,” 39 *Amerikastudien* 371, Number 3, 1994, p. 372. (Hereinafter “The Impact of the International System on Domestic Structure”) Falke has pointed out that Switzerland was forced to sacrifice the independence of its subgovernments, the cantons, when agreeing to join the European Economic Space, p. 373.
- 112 • “Prepared Statement of Ambassador Michael Kantor,” *Hearings before the Committee on Commerce, Science and Transportation, United States Senate*, 103rd Cong., 2nd Session, S.2467, GATT Implementing Legislation, October 5, 1994, p. 38-9 (Hereinafter “Prepared Statement of Ambassador Michael Kantor,” Hearings); and David E. Sanger, “Senate Approves Pact to Ease Trade Curbs; A Victory for Clinton,” *The New York Times*, December 2, 1994.
- 113 • Patrick J. Buchanan, *The Great Betrayal*, PJB Enterprises, Inc, 1998, p. 107.
- 114 • *Ibid.*, p. 107.
- 115 • Randolph Heaster, “Job Fears Pit Labor Against Trade Accord,” *Kansas City Star*, November 19, 1994.
- 116 • Raymond C. Scheppach and Frank Shafroth, “Governance in the New Economy,” National Governors Association, 2000, p. 33. (Hereinafter “Governance in the New Economy”)
- 117 • This discussion of the WTO framework and structure is summarized from Hoekman and Kostecki, *The Political Economy of the World Trading System*; and from John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Chatham House Papers, Royal Institute of International Affairs) 1998. (Hereinafter *The World Trade Organization*)

118 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 1.

119 • The WTO was officially established by the Agreement Establishing the World Trade Organization, a short document (referred to as the WTO Charter), which served as the leading portion of the massive treaty that emerged from the Uruguay Round. Jackson, *The World Trade Organization*, pp.36, 38-39.

120 • *Ibid.*, pp. 39-40.

121 • *Ibid.*, p. 40.

122 • *Ibid.*, p. 40.

123 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 277. The other agreements in this Annex include the Agreement on Civil Aircraft, the International Bovine Meat Agreement, and the International Dairy Arrangement, all but the last of which the US has agreed to be bound by. However, in September 1997, the International Meat Council and the International Dairy Council agreed to terminate, respectively, the WTO International Bovine Meat Agreement and the WTO International Dairy Agreement, "Signatories Terminate WTO Plurilateral Agreements on Meat and Dairy Products," WTO Press/78, September 30, 1997.

124 • *Ibid.*, p. 37.

125 • Jackson, *The World Trade Organization*, p. 41.

126 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 38.

127 • *Ibid.*

128 • John H. Jackson, "The Uruguay Round Results and National Sovereignty," in *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, Jagdish Bhagwati and Mathias Hirsch, eds., (University of Michigan Press, Ann Arbor) 1998, p. 298.

129 • Jackson, *The World Trade Organization*, p. 43.

130 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 40.

131 • *Ibid.*, p. 46.

132 • *Ibid.*, p. 23.

133 • The description of these principles is taken from Hoekman and Kostecki, *The Political Economy of the World Trading System*, pp. 23-32.

134 • *Ibid.*, p. 218.

135 • GATS Art. XVII p. 3. Stumberg, Memorandum to Mark Gordon, November 24, 2000.

136 • Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Para.13; Robert Stumberg, “WTO Impact on State Law: California,” Working Paper, Center for Policy Alternatives, September 24, 1994, p. 8. (Hereinafter “WTO Impact on State Law: California”)

137 • See also Article 13 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

138 • The implementing legislation for the Uruguay Round Trade Agreements are codified at 19 U.S.C. Section 3501 et. seq. The quoted portion is from 19 U.S.C. Section 3512(b)(1)(A). Hereinafter, the Uruguay Agreement Implementing Act.

139 • 19 U.S.C. Section 3512(b)(2)(A).

140 • 19 U.S.C. Section 3512.

141 • “Prepared Statement of Ambassador Michael Kantor,” *Hearings*, p.41

142 • Joseph A. Wilson, “Section 102 of the Uruguay Round Agreements Act: ‘Preserving’ State Sovereignty,” 6 *Minnesota Journal of Global Trade* 401, Winter 1997, p. 420-21. (Hereinafter “Section 102 of the Uruguay Round Agreements Act”)

143 • Decisions and Reports, United States, “Measures Affecting Alcoholic and Malt Beverages,” in General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, (Geneva: Contracting Parties to the General Agreement on Tariffs and Trade, 1952-1969), Vol. 4, pp. 206-299.

144 • Stumberg, “WTO Impact on State Law: California,” p. 5.

145 • Violations related to government procurement raise relatively less serious federalism questions, as each State was given the option of which of its activities, if any, should be subject to the Agreement on Government Procurement (GPA) substantive requirements. But, see footnote 174 and related text.

146 • This list was compiled from the following four articles: “GATT Double Jeopardy,” Sierra Club, February 1994; James D. Southwick, “Binding the States: A Survey of State Law Conformance with the Standards of the GATT Procurement Code,” 13 *University of Pennsylvania Journal of International Business Law* 1, 1992. (Hereinafter “Binding the States”); Robert Stumberg, “Working Paper on WTO Impact on State Law: California,” Center for Policy Alternatives, September, 1994; and Carolina Coll and Robert Stumberg, “The Need for Legislative Oversight: California Governance in the Global Economy,” March, 2000. (Hereinafter “The Need for Legislative Oversight”)

147 • Southwick, “Binding the States,” p. 76.

148 • “Report on United States Barriers to Trade and Investment,” European Commission, Brussels, August, 1999.

149 • Stumberg, “WTO Impact on State Law: California.”

150 • Except where otherwise noted, quoted passages in this section are taken directly from the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).

151 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 117-120.

152 • SPS, Art. 2, Paragraph 3.

153 • SPS, Art. 5, Paragraph 6.

154 • “Prepared Statement of Lori Wallach,” *Hearings*, p. 226.

155 • Compare, e.g. “Prepared Statement of Mark Silbergeld, Director, Washington Office, Consumers Union,” *Hearings before the Committee on Commerce, Science and Transportation, United States Senate*, 103rd Cong., 2nd Session, S.2467,

GATT Implementing Legislation, October 17, 1994, p. 204 with Robert Stumberg, “Working Paper on WTO Impact on State Law: California,” Center for Policy Alternatives, September, 1994, pp. 7-8.

156 • “Prepared Statement of Lori Wallach,” *Hearings*, p. 228.

157 • *Ibid.*, p. 229.

158 • SPS, Article 5, Paragraph 6, note 3.

159 • *Ibid.*, p. 231.

160 • “Prepared Statement of Professor Laurence H. Tribe, Professor, Harvard University Law School,” *Hearings before the Committee on Commerce, Science and Transportation, United States Senate*, 103rd Cong., 2nd Session, S.2467, GATT Implementing Legislation, October 18, 1994, p. 306-7. (Hereinafter “Prepared Statement of Professor Laurence H. Tribe,” *Hearings*)

161 • Except where otherwise noted, quoted passages in this section are taken directly from the Agreement on Technical Barriers to Trade.

162 • TBT, Art. 2.4.

163 • “Prepared Statement of Lori Wallach,” *Hearings*, p. 224.

164 • *Ibid.*, pp. 227-28.

165 • “Prepared Statement of Professor Laurence H. Tribe,” *Hearings*, p. 306.

166 • “Prepared Statement of Lori Wallach,” *Hearings*, p. 224.

167 • Stumberg, “WTO Impact on State Law: California,” p. 11. Similar problems could arise under SPS. See SPS Article 2, Paragraph 2 and Article 5, Paragraph 7, as described by Stumberg.

168 • TBT, Annex 3-H.

169 • “Comments of Fred C. Bergsten, Director, Institute for International Economics,” *Hearings before the Committee on Commerce, Science and Transportation, United States Senate*, 103rd Cong., 2nd Session, S.2467, GATT Implementing Legislation, October 13, 1994, p. 138. SCM does, however, establish a subcategory of actionable subsidies with respect to which a rebuttal presumption of serious prejudice exists.

In this case, the subsidizing member would have the burden of proving that serious prejudice had not occurred (SCM, Art. 6).

170 • Coll and Stumberg, “The Need for Legislative Oversight.”

171 • *Ibid.*, p. 5.

172 • Stumberg, “WTO Impact on State Law: California,” p. 16.

173 • Charles Tiefer, “Free Trade Agreements and the New Federalism,” 7 *Minnesota Journal of Global Trade* 45, Winter 1998, p. 61. (Hereinafter “Free Trade Agreements and the New Federalism”)

174 • I am indebted to Robert Stumberg for pointing out to me how the appearance of State flexibility was in fact undercut in reality. Stumberg, Memorandum to Mark Gordon, November 24, 2000.

175 • GPA, Art. III, Paragraph 1.

176 • GPA, Art. III, Paragraph 2.

177 • James D. Southwick, “Binding the States,” p. 73.

178 • Tiefer, “Free Trade Agreements and the New Federalism,” p. 66.

179 • Southwick, “Binding the States,” p. 77

180 • GPA, Art. VI, Paragraph 1.

181 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 123.

182 • *Ibid.*

183 • While Southwick’s study dealt with the GATT Procurement Code of the early 1990s, the provisions in the post-1994 GPA are substantially the same with respect to those items for which Southwick’s work is cited here.

184 • Southwick, “Binding the States,” p. 84

185 • *Ibid.*, pp. 86-87.

186 • GPA, Art. IX, Paragraph 6.

187 • GPA, Art. IX, Paragraph 8.

188 • GPA, Art. IX, Paragraph 6.

189 • The complaint was filed as WT/DS88/1-GPA/D2/1 and WT/DS88/2; WT/DS95/1-GPA/D3/1 and WT/DS95/2.

- 190 • *Crosby v. National Foreign Trade Council*, 530 U.S. 363; 120 S.Ct. 2288; 147 L.Ed.2nd 352; 68 USLW 4545 (2000).
- 191 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, pp. 120-21.
- 192 • Conrad Weiler, "GATT, NAFTA and State and Local Powers," in 20 *Intergovernmental Perspective*, Fall 1993-Winter 1994, Number 1, p. 38.
- 193 • Joseph A. McKinney, *Created from NAFTA: The Structure, Function, and Significance of the Treaty's Related Institutions*, M.E. Sharpe, Inc., 2000, p. 223. (Hereinafter *Created from NAFTA*)
- 194 • Stumberg, "Memorandum to Mark Gordon," November 24, 2000.
- 195 • McKinney, *Created from NAFTA*, pp. 229-230.
- 196 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 144.
- 197 • *Ibid.*, p. 153.
- 198 • B.K. Zutshi, "Bringing TRIPS into the Multilateral Trading System," in *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, Jagdish Bhagwati and Mathias Hirsch, eds., (University of Michigan Press, Ann Arbor) 1998, pp. 38-9.
- 199 • *Ibid.*, p. 43.
- 200 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p. 31.
- 201 • Julie Long, "Ratcheting Up Federalism: A Supremacy Clause Analysis of NAFTA and the Uruguay Round Agreements," 80 *Minnesota Law Review* 231, November 1995, pp. 251-52. (Hereinafter "Ratcheting Up Federalism")
- 202 • Friedman, "Federalism's Future in the Global Village," p. 1458.
- 203 • W. Bowman Cutter, Joan Spero, and Laura D'Andrea Tyson, "Campaign 2000: New World, New Deal: A Democratic Approach to Globalization," *Foreign Affairs*, Vol. 79, Number 2, March/April 2000, p.91.
- 204 • As noted earlier, this is not an idle concern, as the Beer II panel adopted this reasoning in its ruling, and the European Union has taken a similar position. And, in fact, a number of States did actually change their alcoholic beverage laws under pressure from the federal government after the decision in Beer II. Wilson, "Section 102 of the Uruguay Round Agreements Act," p. 412.
- 205 • Prepared Statement of Professor Laurence H. Tribe," *Hearings*, p. 306.
- 206 • Stumberg, "WTO Impact on State Law: California," p. 4.
- 207 • Of course, the Court was concerned less with the relative impacts on State flexibility than with the constitutional differences between indirectly imposed costs and direct federal mandates. See, for example, *Printz v. United States*, 117

S.Ct. 2365 (1997) which found unconstitutional a federally-imposed requirement that local law enforcement officers perform background checks on gun purchasers. This is discussed in further detail in the section on federalism that follows later in this Part.

208 • Former Delaware Governor Pierre DuPont has painted a grim picture of the dire limitations that could be imposed on State flexibility: “To enact a law requiring recycling or a carcinogen-labeling law for food products, Delaware would have to notify the US government, provide foreign GATT contracting parties with an opportunity to object, have the federal government consider these foreign objections without its being required to consult Delaware, and sit back while the federal government confidentially negotiates any such objections with the objecting party (again, without Delaware’s participation).” Pete Du Pont, “Epilogue: Federalism in the Twenty-First Century: Will States Exist?” 16 *Harvard Journal of Law and Public Policy* 137, 1993, pp. 143-4. While one could argue that some of DuPont’s concerns about consultation were mitigated by the consultation provisions of the Uruguay Agreement Implementing Act, 19 U.S.C. Section 3512, the thrust of his core worry remains.

209 • Jackson, *The World Trade Organization*, p. 76.

210 • Stumberg, “WTO Impact on State Law: California,” p. 3.

211 • 19 U.S.C. Section 3512(b)(1)(C).

212 • Under the Statement of Administrative Action submitted by the Clinton Administration to Congress, the Administration made further representations regarding their intent to include State representatives as Part of the official US delegation for relevant DSU proceedings and to permit such representatives to make presentations to the appellate body when appropriate. “Prepared Statement of Professor Laurence H. Tribe,” *Hearings*, p. 304.

213 • Jackson, “The Uruguay Round Results and National Sovereignty,” p. 299.

214 • “Prepared Statement of Professor Laurence H. Tribe,” *Hearings*, p. 293.

215 • 19 U.S.C. Section 3512(b)(2)(A).

216 • 19 U.S.C. Section 3512(b)(2)(B).

217 • 19 U.S.C. Section 3512(c).

218 • “Prepared Statement of Professor Laurence H. Tribe,” *Hearings*, pp. 303, 308.

219 • *Ibid.*, p. 305.

220 • *Ibid.*, p. 308.

221 • *Ibid.*

222 • Enid F. Beaumont, “Domestic Consequences of Internationalization,” in *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States*, Jong S. Jun and Deil S.

Wright, eds., (Georgetown University Press, Washington, D.C.) 1996, p. 385. (Hereinafter "Domestic Consequences of Internationalization")

223 • *Ibid.*, pp. 376-77.

224 • John M. Kline, "State and Local Boundary-Spanning Strategies in the United States: Political, Economic, and Cultural Transgovernmental Interactions," in *Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States*, Jong S. Jun and Deil S. Wright, eds., (Georgetown University Press, Washington, D.C.) 1996, p. 340.

225 • Wilson, "Section 102 of the Uruguay Round Agreements Act," pp. 421-2.

226 • "Statement of Ralph Nader, Consumer Advocate, Public Citizen," *Hearings before the Committee on Commerce, Science and Transportation, United States Senate, 103rd Cong., 2nd Session, S.2467, GATT Implementing Legislation, October 18, 1994*, p. 354. (Hereinafter "Statement of Ralph Nader," Hearings)

227 • "Prepared Statement of Professor Laurence H. Tribe," *Hearings*, p. 308.

228 • Beaumont, "Domestic Consequences of Internationalization," p. 382. The Uruguay Agreement Implementing Act imposed an obligation on the USTR to consult with the States before filing a complaint against the subnational government of another country. 19 U.S.C. Section 3512(b)(1)(D). This responded to a request by Governors Ann Richards and Tommy Thompson in a letter to the USTR on April 5, 1994. Beaumont, "Domestic Consequences of Internationalization," p. 382.

229 • Stumberg, "WTO Impact on State Law: California," p. 5.

230 • *Ibid.*

231 • "Prepared Statement of Professor Laurence H. Tribe," *Hearings*, p. 304.

232 • Wilson, "Section 102 of the Uruguay Round Agreements Act," p. 426.

233 • *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

234 • *South Carolina v. Baker*, 485 U.S. 505 (1988).

235 • Admittedly, one could argue that the Court's substantive approach will ultimately prove to be an *addition* to procedural protections rather than a replacement.

236 • *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, American Law Institute Publishers, 1990, Section 102. (Hereinafter *RESTATEMENT (THIRD)*)

237 • *Ibid.*, Introductory Note to Chapter 2.

238 • U.S. Constitution, Article VI, clause 2.

239 • Louis Henkin, "International Law as Law in the United States," 82 *Michigan Law Review* 1555 (1984), p. 1559. (Hereinafter "International Law as Law in the United States")

240 • *Ibid.*, p. 1561.

241 • Harold Hongju Koh, "Commentary: Is International Law Really State Law," 111 *Harvard Law Review* 1824 (1998), p. 1846; (Hereinafter "Commentary: Is International Law Really State Law") Friedman, "Federalism's Future in the Global Village," p. 1467.

242 • 301 U.S. at 331-2, quoted in Friedman, "Federalism's Future in the Global Village," p. 1467.

243 • One way to address this is for States to become more actively involved in congressional and executive deliberations on foreign affairs matters (see, for example, Robert Stumberg, "Balancing Democracy and Trade: Roles for State and Local Government in the Global Trade Debate," September 2000 Workplan, Harrison Institute for Public Law, Georgetown University Law Center). However, this does not come without costs, both in terms of State expenditure of money (to develop the necessary expertise and to devote the time and resources necessary to influence the process) and in terms of States'

being forced to use up political "chits" with Congress on these issues that might better be spent on other topics of concern.

244 • Jack L. Goldsmith, "Federal Courts, Foreign Affairs and Federalism," 83 *Virginia Law Review* 1617 (November 1997), p. 1671. (Hereinafter "Federal Courts, Foreign Affairs and Federalism")

245 • *Ibid.*, p. 1672.

246 • Friedman, "Federalism's Future in the Global Village," p. 1465.

247 • Goldsmith, "Federal Courts, Foreign Affairs and Federalism," p. 1672.

248 • Phillip R. Trimble, "Globalization, International Institutions and the Erosion of National Sovereignty and Democracy," 95 *Michigan Law Review* 1944 (May 1997), p. 1946.

249 • Friedman, "Federalism's Future in the Global Village," p. 1471.

250 • *Ibid.*, p. 1472.

251 • Brian Hocking, ed., *Foreign Relations and Federal States* (Leicester University Press, London) 1993, p. 3. (Hereinafter *Foreign Relations and Federal States*)

252 • John C. Yoo, "Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding," 99 *Columbia Law Review* 1955 (December 1999), pp. 1956-58.

253 • *Ibid.*, p. 1958; Paul B. Stephan, "The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order," 70 *University of Colorado Law Review* 1555 (1999), p. 1563.

254 • Stumberg, *Memorandum to Mark Gordon*, November 24, 2000.

255 • Thomas Healy, "Notes: Is *Missouri v. Holland* Still Good Law? Federalism and the Treaty Power," 98 *Columbia Law Review* 1726 (November 1998), p. 1727. (Hereinafter "Notes")

256 • Other federal systems also have given national governments greater power when operating through treaties under their foreign affairs power than when acting in the domestic sphere. In Australia's Tasmania Dams Case, the Australian High Court held that under the national government's external affairs power, the government could carry out treaty obligations by means of domestic legislation regardless of the subject matter of the treaty, i.e., without regard to limitations on the national government's powers when acting purely in the domestic sphere. Cited in Friedman, "Federalism's Future in the Global Village," p. 1475.

257 • Laurence H. Tribe, *American Constitutional Law*, Third ed., Foundation Press, New York 2000, p. 646.

258 • Healy, "Notes," p. 1733.

259 • 514 U.S. at 564, 567.

260 • The Court also found that the section's civil remedy was not a valid exercise of Congress's remedial power under Section 5 of the Fourteenth Amendment.

261 • *United States v. Morrison*, 529 U.S. 598, (2000).

262 • The portion of the Act struck down was section 40302 of 108 Stat. 1941-1942, codified at 42 USC section 13981.

263 • *United States v. Morrison*, 529 U.S. at 634, (2000) (Souter, dissenting); see also 529 U.S. at 615 (Renquist, majority opinion).

264 • *Ibid*, p.615.

265 • This renewed solicitousness for State sovereignty has extended as well to cases arising under the Eleventh Amendment, see, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

266 • 505 U.S. at 175-6.

267 • 117 S. Ct. at 2384.

268 • Koh, "Commentary: Is International Law Really State Law," p. 1848. A debate has begun within the academic literature regarding whether this doctrinal distinction continues to make sense. See, for example, the disagreement between Curtis Bradley, "The Treaty Power and American Federalism," 98 *Columbia Law Review* 390, (November 1998), (arguing that if federalism is to be the subject of judicial protection, there is no justification for giving the treaty power special immunity from such protection), and Healy ("Notes"), (arguing that the Court should not apply its new federalism concerns to the treaty power).

269 • Healy, "Notes," p. 1733

270 • For excellent examples of both sides of the debate regarding when treaties require a two-thirds vote, see Bruce

Ackerman and David Golove, "Is NAFTA Constitutional," 108 *Harvard Law Review* 4 (February 1995) as well as Bruce Ackerman's testimony at the GATT Implementing Legislation Hearings before the Committee on Commerce, Science and Transportation on October 18, 1994, p. 312-317 (arguing that the WTO Agreement did not require approval by two-thirds of the Senate), and Laurence Tribe's testimony at the same hearings on the same day ("Prepared Statement of Laurence Tribe," *Hearings*) (arguing that approval by two-thirds of the Senate was required).

271 • While the Senate vote of 76-24 for the WTO Treaty exceeded the two-thirds that would have otherwise been required, the Senate vote for NAFTA of 61-38 did not (Ackerman and Golove, "Is NAFTA Constitutional," p. 918). One could also argue that even though two-thirds of the Senate did approve the WTO Treaty, the dynamics of the debate, and the willingness of Senators to oppose the Treaty publicly, were influenced by the recognition that only a majority vote was required.

272 • Friedman, "Federalism's Future in the Global Village," p. 1473. Friedman also notes the irony of the Court's becoming more protective of State sovereignty in the context of domestic legislation, that has both houses of Congress involved, than in foreign policy areas, where the Executive can act unilaterally (p. 1474).

273 • Might the Court then find greater process protections for States in joint resolutions (requiring the same kind of two-house majority as does other federal legislation) or in treaties (requiring a two-thirds vote of the portion of the legislature structured so as to reflect representation of each individual State)?

274 • 469 U.S. at 554.

275 • 485 U.S. at 512, 513.

276 • "Comments of Senator Ted Stevens, Alaska," *Hearings before the Committee on Commerce, Science and Transportation, United States Senate*, 103rd Cong., 2nd Session, S.2467, GATT Implementing Legislation, October 18, 1994, at p. 332. (Hereinafter "Comments of Senator Ted Stevens," *Hearings*)

277 • I am indebted to Robert Stumberg for pointing out this excellent example to me. Stumberg, *Memorandum to Mark Gordon*, November 24, 2000.

278 • The insight that the *Garcia* case may actually provide a potential avenue for judicial intervention was noted by Andrzej Rapaczynski in his classic article "From Sovereignty to Process: The Jurisprudence of Federalism After *Garcia*," 1985 *Supreme Court Review* 341, pp. 363-368.

279 • Hoekman and Kostecki, *The Political Economy of the World Trading System*, p.116.

280 • Although, admittedly, it could also be accomplished through a mere "request."

281 • Healy, "Notes," p. 1743-6. Healy also notes that since the Convention was self-executing, these requirements were imposed upon ratification of the treaty.

282 • Bradley, "The Treaty Power and American Federalism," pp. 406-7.

283 • *Ibid.*

284 • *Ibid.*, p. 409.

285 • *RESTATEMENT (THIRD)*, Section 102 (2).

286 • *RESTATEMENT (THIRD)*, Section 102, Comment d.

287 • Compare, for example, Koh "Commentary: Is International Law Really State Law," (arguing that customary international law should be part of federal common law and supreme to State law) to Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 *Harvard Law Review*, 815 (1997), (arguing that the modern position which sees all customary international law as preempting State law should be reconsidered).

288 • Henkin, "International Law as Law in the United States," p. 1566

289 • *RESTATEMENT (THIRD)*, Section 102, Reporters' Notes 2.

290 • *Ibid.*; Bradley and Goldsmith, "Customary International Law as Federal Common Law," p. 839.

291 • Customary international law is incorporated into US law as of the time it matures into international law. *RESTATEMENT (THIRD)*, Introductory note to chapter 2.

292 • Bradley and Goldsmith, "Customary International Law as Federal Common Law," p. 868.

293 • John Attanasio, "Foreword: Stages of Federalism," 42 *St. Louis University Law Journal* 485 (Spring 1998), pp. 523-26.

294 • *South Dakota v. Dole*, 483 U.S. 203 (1987).

295 • Beaumont, "Domestic Consequences of Internationalization," p. 376.

296 • *Ibid.*

297 • "United States – Tax Treatment for 'Foreign Sales Corporations,' Report of the Panel," World Trade Organization, WT/DS108/R, October 8, 1999.

298 • Rodrik, *Has Globalization Gone Too Far?*, p. 55.

299 • Castells, *The Information Age*, p. 246.

300 • Scheppach and Shafroth, "Governance in the New Economy," p. 33.

301 • *Ibid.*

302 • Hughes, Hubbard & Reed LLP, "Electronic Commerce Advisory: New Developments in State Taxation of Sales Over the Internet," November, 1999.

303 • Richard W. Stevenson, "States Chasing Sales Tax Down the Internet Highway," *The New York Times*, June 27, 1999, Section 3, p.4:4.

304 • NGA Fact Sheet, "Sales Tax and the Internet-Myths and Facts," downloaded on June 15, 2000 from

www.nga.org/Internet/Facts.asp.

- 305 • David Cay Johnston, "Governors Criticize Internet Tax Panel," *The New York Times*, April 12, 2000, p. C6.
- 306 • Cutter, Spero, and Tyson, "Campaign 2000: New World, New Deal," p. 96.
- 307 • Scheppach and Shafroth, "Governance in the New Economy," pp. 36-7.
- 308 • Friedman, "Federalism's Future in the Global Village," p. 1449, 1450; Falke, "The Impact of the International System," p. 375.
- 309 • *Ibid.*
- 310 • *Ibid.*, p. 1450.
- 311 • Falke, "The Impact of the International System," p. 380.
- 312 • Friedman, "Federalism's Future in the Global Village," p. 1472.
- 313 • "Comments of Senator Ted Stevens," *Hearings*, p. 332.
- 314 • Falke, "The Impact of the International System."
- 315 • Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (The Free Press, New York) 1995, p.60. (Hereinafter, *The End of the Nation State*)
- 316 • Stumberg, "WTO Impact on State Law: California," p. 16; Beaumont, "Domestic Consequences of Internationalization," p. 378.
- 317 • Beaumont, "Domestic Consequences of Internationalization," p. 382.
- 318 • Knox, in Knox and Taylor, *World Cities in a World-System*, p. 6.
- 319 • *Ibid.*, p. 14.
- 320 • Donald Lyons and Scott Salmon, "World cities, multinational corporations, and urban hierarchy: the case of the United States," in *World Cities in a World-System*, p. 99.
- 321 • Knox, in Knox and Taylor, *World Cities in a World-System*, p. 10.
- 322 • *Ibid.*; John Friedmann, "Where we stand: a decade of world city research," in *World Cities in a World-System*, p. 24. Another listing classified cities according to transnational business (measured by the number of global Fortune 500 headquarters in each metropolitan area), international affairs (measured by the number of NGOs and intergovernmental agencies located in each metropolitan area), and cultural centrality (measured by the ratio of the city's population to that of the largest or next largest city in the nation), p. 10 (Knox).
- 323 • K. Anthony Appiah, Foreword, in *Globalization and Its Discontents*, Saskia Sassen, (The New Press, New York) 1998.

(Hereinafter Appiah in *Globalization and Its Discontents*)

324 • Friedmann, "Where we stand," p. 26.

325 • Robert A. Beauregard, "Theorizing the global-local connection," p. 236 in *World Cities in a World-System*. (Hereinafter "Theorizing the global-local connection")

326 • There is some disagreement about whether the process will ultimately help older cities or newer ones. Compare, for example, Appiah (*Globalization and Its Discontents*, p. xii) and Dennis A. Rondinelli, James H. Johnson, Jr., and John D. Kasarda, "The Changing Forces of Urban Economic Development: Globalization and City Competitiveness in the 21st Century," in *Cityscape: A Journal of Policy Development and Research*, Vol. 3, Number 3 (US Department of Housing and Urban Development, the Office of Policy Development and Research), 1998, p. 83. (Hereinafter "The Changing Forces of Urban Economic Development")

327 • Indeed, it has been argued that the growth of world cities is the result of national policies of financial deregulation, selective trade reforms, less restrictive labor markets, and heavy subsidies for telematics and for science and technology with commercial potential. Knox, in Knox and Taylor, *World Cities in a World-System*, p. 7.

328 • Ohmae, *The End of the Nation State*, p. 9.

329 • Strange, *The Retreat of the State*, p. 189.

330 • Long, "Ratcheting Up Federalism," p. 233. Admittedly, there is also a dynamic of power sharing between States and localities, but as a constitutional matter that is purely at the whim of the State.

331 • In this context, globalization may require a rethinking of our most fundamental concepts of power allocation. Indeed, the newfound complexity of a world in which federalism concerns need to consider not just the dynamics of federal/State relations but also the dynamics of global/federal/State relations may provide important insights into how to answer questions about the proper allocations of authority among the different levels of government and other enduring questions of American federalism.

332 • "State and Local Governments in International Affairs: ACIR Findings and Recommendations," in 20 *Intergovernmental Perspective*, Fall 1993-Winter 1994, number 1, p. 33.

333 • Earl H. Fry, "The U.S. States and foreign economic policy: federalism in the 'new world order,'" in *Foreign Relations and Federal States*, Brian Hocking, ed., (Leicester University Press, London) 1993, p. 125. (Hereinafter "The U.S. States and foreign economic policy")

334 • Earl H. Fry, "Sovereignty and Federalism: U.S. and Canadian Perspectives: Challenges to Sovereignty and Governance," 20 *Canada-United States Law Journal* 303, 1994, p. 309. (Hereinafter "Sovereignty and Federalism")

335 • Laurence J. Aurbach, "Federalism in the Global Millennium," 26 *The Urban Lawyer* 235, number 2, Spring 1994, p. 242. (Hereinafter "Federalism in the Global Millennium")

336 • Jerry Levine with Fabienne Vandenbrande, "American State Offices in Europe: Activities and Connections," 20 *Intergovernmental Perspective* 43, Fall 1993-Winter 1994, number 1, p. 43.

- 337 • Aurbach, “Federalism in the Global Millennium,” p. 242.
- 338 • Jun and Wright, *Globalization and Decentralization*, p. 332.
- 339 • Rondinelli, Johnson, and Kasarda, “The Changing Forces of Urban Economic Development,” p. 72.
- 340 • Fry, “Sovereignty and Federalism,” p. 309.
- 341 • Jun and Wright, *Globalization and Decentralization*, p. 333.
- 342 • Fry, “Sovereignty and Federalism,” p. 309.
- 343 • Fry, “Sovereignty and Federalism,” p. 309; Jun and Wright, *Globalization and Decentralization*, p. 333.
- 344 • Jun and Wright, *Globalization and Decentralization*, p. 333.
- 345 • Rondinelli, Johnson, and Kasarda, “The Changing Forces of Urban Economic Development,” p. 72.
- 346 • Jun and Wright, *Globalization and Decentralization*, p. 334.
- 347 • *Ibid.*, p. 338.
- 348 • Brannon P. Denning and Jack H. McCall, “States’ Rights and Foreign Policy: Some Things Should be Left to Washington,” *Foreign Affairs*, Vol. 79, number 1, Jan/Feb 2000, p.9. (Hereinafter “States’ Rights and Foreign Policy”)
- 349 • The Court held that the State act was preempted by federal legislation, as it served as an obstacle to the accomplishment of Congress’s full objectives under the federal statute. Specifically, the Court found that the Massachusetts law undermined the federal statute’s “delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing comprehensive, multilateral strategy towards Burma.” *Crosby v. National Foreign Trade Council*, No. 99-474. Decided by the Supreme Court on June 19, 2000.
- 350 • Michael Peter Smith, “The disappearance of world cities and the globalization of local politics,” in Paul L. Knox and Peter J. Taylor, *World Cities in a World-System* (Cambridge University Press, Cambridge) 1995, pp. 251-2.
- 351 • Denning and McCall, “States’ Rights and Foreign Policy,” p. 12.
- 352 • John M. Kline, “Managing intergovernmental tensions: shaping a nationstate and local role in U.S. foreign relations,” in *Foreign Relations and Federal States*, Brian Hocking, ed., (Leicester University Press, London) 1993, p. 113. (Hereinafter “Managing intergovernmental tensions”); Brian Hocking, *Localizing Foreign Policy: Non-Central Governments and Multilayered Diplomacy*, (The MacMillan Press, Ltd., England, published in the U.S. by St. Martin’s Press, New York) 1993, p. 23.
- 353 • These include the prohibitions on States’ making treaties and engaging in war, as well as limitations on States’ entering compacts, laying imposts or duties on imports or exports, and burdening interstate or foreign commerce without

Congressional consent. It is also generally accepted that they cannot exchange ambassadors, engage generally in relations with other governments, nor negotiate with them on matters of our nation's foreign policy. Richard B. Bilder, "The Role of States and Cities in Foreign Relations," 83 *The American Journal of International Law* 821, October 1989, p. 824.

354 • *Ibid.*, pp. 828-9.

355 • John Kincaid, "Consumerism versus citizenship: is there wiggle room for local regulation in the global economy?" in *Foreign Relations and Federal States*, Brian Hocking, ed., (Leicester University Press, London) 1993, p. 27.

356 • Joel P. Trachtman, "Nonactor States in U.S. Foreign Relations?: The Massachusetts Burma Law," 92 *American Society of International Law – Proceedings*, 1998, p. 350.

357 • Fry, "U.S. States and Foreign Economic Policy," p. 128.

358 • Peter J. Spiro, "Foreign Relations Federalism," 70 *University of Colorado Law Review* 1223, 1999, p. 1261. (Hereinafter "Foreign Relations Federalism")

359 • *Ibid.*, pp. 1261-3.

360 • *Ibid.*, p. 1249.

361 • Fry, "U.S. States and Foreign Economic Policy," p. 128.

362 • Spiro, "Foreign Relations Federalism," p. 1249.

363 • Fry, "U.S. States and Foreign Economic Policy," p. 124.

364 • Kline, "Managing intergovernmental tensions," p. 335.

365 • Stumberg, *Memorandum to Mark Gordon*, November 24, 2000.

366 • Matthew Schaefer, "Note on State Involvement in Trade Negotiations, the Development of Trade Agreement Implementing Legislation, and the Administration of Trade Agreements (January 18, 1994)," in *Legal Problems of International Economic Relations*, John H. Jackson, et. al., (3rd ed., 1995), p. 180.

367 • Coll and Stumberg, "The Need for Legislative Oversight," p. 9.

368 • Remarks by Richard B. Bilder, "Political Subdivisions as Non-State Actors," 92 *American Society of International Law – Proceedings*, 1998, pp. 343-44.

369 • Coll and Stumberg, "The Need for Legislative Oversight," p. 9.

370 • Ohmae, *The End of the Nation State*, p.89.

371 • Scheppach and Shafroth, "Governance in the New Economy," p. 25.

372 • *Ibid.*, p. 24.

- 373 • Ruggiero, "Whither the Trade System Next?" p. 132.
- 374 • Castells, *The Information Age*, p. 272.
- 375 • Keck and Sikkink, *Activists Beyond Borders*, p. 12.
- 376 • The stated mission of IGC is to advance the work of progressive organizations and individuals for peace, justice, economic opportunity, human rights, democracy and environmental sustainability through strategic use of online technologies (www.igc.org).
- 377 • Townhall.com describe themselves on their website as "the first truly interactive community on the Internet to bring Internet users, conservative public policy organizations, congressional staff, and political activists together under the broad umbrella of 'conservative' thoughts, ideas and actions." Their stated aim is to help the conservative community in its "fight against those who would sacrifice the individual and freedom for political gain and big government."
- 378 • Much of the discussion that follows in this section is a personal adaptation by the author of an argument made by Dan Balz and Ronald Brownstein as related and modified by Castells (in *The Information Age*), together with an argument made by Alfred Aman, Jr., related to reinvention and globalization. While my argument goes beyond what they have individually advanced, it does grow out of their thinking in a way more extensive than an occasional footnote can reflect.
- 379 • Aman, "The Globalizing State," p. 800.
- 380 • *Ibid.*, p. 808.
- 381 • Willy DeClerq, "The End of History for Free Trade," in *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, Jagdish Bhagwati and Mathias Hirsch, eds., (University of Michigan Press, Ann Arbor) 1998, p. 212.
- 382 • Robert B. Reich, "Who is Us?" *Harvard Business Review*, January-February 1990.
- 383 • Aman, "The Globalizing State," p. 794.
- 384 • Rodrik, *Has Globalization Gone Too Far?*, p. 55.
- 385 • *Ibid.*, p. 4.
- 386 • *Ibid.*, p. 36.
- 387 • Arthur Schlesinger, Jr., "Has Democracy a Future?" *Foreign Affairs* 76, Number 5, September/October 1997, p. 6. Note that Schlesinger was referring specifically here to the computer revolution that has accompanied and propelled globalization. (Hereinafter "Has Democracy a Future?")
- 388 • Rodrik, *Has Globalization Gone Too Far?*, p. 70.
- 389 • *Ibid.*
- 390 • Schlesinger, "Has Democracy a Future?", p. 8.

391 • Castells, *The Information Age*, p. 294.

392 • Strange, *The Retreat of the State*, p. 5.

393 • Aman, "The Globalizing State," p. 788.

394 • Falke, "The Impact of the International System," p. 386. One can argue that the federal government can still be strong on the international level, while remaining less active domestically. But, the federal government will cease to be powerful internationally, if its support and legitimacy is undermined at home, as a key to strength internationally is the ability to manage constituencies domestically. Brian Hocking, *Localizing Foreign Policy: Non-Central Governments and Multilayered Diplomacy*, (The MacMillan Press, Ltd., England, published in the U.S. by St. Martin's Press, New York) 1993, p. 204. Furthermore, if there is no common conception of the national interest, national foreign policy is enfeebled, as is domestic policy. And if there is anything that globalization has emphasized, it is that the line between the domestic and the international is increasingly porous.

395 • Castells, *The Information Age*, pp. 311-12.

396 • This is a point that I developed in more detail in "Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court," *Yale Law & Policy Review/Yale Journal on Regulation Symposium: Constructing a New Federalism* 187 (1996), pp. 190-224.

397 • Friedmann, "Where we stand," p. 26.

398 • Rodrik, *Has Globalization Gone Too Far?*, pp.4,5.

399 • Haass and Litan, "Globalization and Its Discontents," p. 6.

400 • Gilpin, *The Challenge of Global Capitalism*, p. 4.

401 • Rodrik, *Has Globalization Gone Too Far?*, pp.73.

402 • Gilpin, *The Challenge of Global Capitalism*, p. 50.

403 • Saskia Sassen, *Globalization and Its Discontents* (The New Press, New York, 1998), p. 182.

404 • Mitchell L. Moss, "Technology and Cities," *Cityscape: A Journal of Policy Development and Research*, Vol. 3, Number 3, US Department of Housing and Urban Development, the Office of Policy Development and Research, 1998, p. 116.

405 • Rondinelli, Johnson, and Kasarda, "The Changing Forces of Urban Economic Development," p. 82.

406 • Scheppach and Shafroth, "Governance in the New Economy," pp. 41-42.

407 • Jeffrey Rosen, "The Eroded Self," *New York Times Magazine*, April 30, 2000, p. 46.

408 • *Ibid.*

409 • Federal Trade Commission, “Privacy Online: Fair Information Practices in the Electronic Marketplace,” A Report to Congress, May 2000.

410 • Article 7(a) of Directive 95/46/EC of the European Parliament and Council of Ministers.

411 • *Ibid.*, Article 12(a).

412 • *Ibid.*, Article 6(e).

413 • *Ibid.*, Article 25.1.

414 • Stephen Labaton, “White House Agency Splits on Internet Privacy,” *The New York Times*, May 23, 2000.

415 • Robert Stumberg has pointed out, however, that various kinds of State privacy regulations could ultimately violate requirements of GATS, depending on how its rules are developed in ongoing negotiations. Stumberg, *Memorandum to Mark Gordon*, November 24, 2000.

416 • “Governor Davis Delivers Landmark Legislation To Strengthen Consumer Protection,” State of California Department of Consumer Affairs, News Release, October 30, 2000.

417 • Glenn R. Simpson, “E-Commerce Firms Start to Rethink Opposition to Privacy Regulation as Abuses, Anger Rise,” *The Wall Street Journal*, January 6, 2000, p. A24.

418 • The Commonwealth of Massachusetts, “Executive Order No. 412 to Protect the Privacy of Personal Information,” Jane Swift, Acting Governor, June 23, 1999.

419 • “An Act Relative to a Consumer’s Right to Privacy,” The Commonwealth of Massachusetts, June 23, 1999.

420 • In discussing this and other points in this section, I have drawn on my previous work in this area, specifically, “Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court,” *Yale Law & Policy Review/Yale Journal on Regulation Symposium: Constructing a New Federalism* 187 (1996)

421 • *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), in which the Court held invalid the 1974 amendments to the Fair Labor Standards Act which extended minimum wage and maximum hour provisions to almost all employees of States and their political subdivisions. The Court held that Congress had exceeded its authority under the interstate commerce clause in attempting “to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments,” which served to impair the States’ ability to function effectively in a federal system. 426 U.S. at 852.

422 • *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in which the Court overturned *National League of Cities*, holding valid the application of the Fair Labor Standards Act’s minimum wage and overtime requirements to San Antonio’s public mass transit system (and thereby other State and local employees). In justifying its decision not to invalidate a Congressionally enacted statute that some argued impinged on States’ sovereignty, the Court reasoned that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the

structure of the Federal Government itself," 469 U.S. at 550.

423 • Larry Kramer, "Understanding Federalism," 47 *Vanderbilt Law Review* 1485 (1994).

424 • Barry Friedman, "Valuing Federalism," 82 *Minnesota Law Review* 317, December 1997, p. 322.

425 • *Ibid.*, p. 412.

426 • *New York v. United States*, 505 U.S. at 157.

427 • Since so much about globalization's future direction is unknown, there is a further imprecision to speculating about its impacts. If the fact that a particular development occurs could have positive implications for a specific federalism value, then the possibility that it might not occur may be said to have a negative implication for the same value. In the interests of brevity, possible developments are only mentioned once, rather than on both sides of the point/counterpoint.

428 • 117 S. Ct. at 2378.

429 • 505 U.S. at 206 (White, J. dissenting relevant Part).

430 • James Madison, "Federalist Paper Number 51," in *The Federalist Papers*, Clinton Rossiter, ed., (The New American Library of World Literature) 1961.

431 • Gordon, Goldstein, and Hall, "Wealth, Power, and the Information Revolution."

432 • Keck and Sikkink refer to this process as the boomerang effect (in which people in country A who fail to convince their own government, create an international coalition of others who pressure their governments to, in turn, pressure the government of country A) in *Activists Beyond Borders*, p. 13.

433 • Aman, "The Globalizing State," p. 860.

434 • Beaugregard, "Theorizing the global-local connection," p. 232.

435 • Strange, *The Retreat of the State*, p. 198.

436 • Rodrik, *Has Globalization Gone Too Far?*, p.6.

437 • Saskia Sassen, "Embedding the Global in the National," p. 159.

438 • Keck and Sikkink, *Activists Beyond Borders*, p. 207.

439 • Simmons, "Learning to Live with NGO's," p. 83.

440 • Sierra Club, "GATT Double Jeopardy," p. 11; Jessica T. Mathews, "Power Shift," *Foreign Affairs*, Volume 76, number 1, Jan/Feb 1997, p. 65.

441 • Bradley and Goldsmith, "Customary International Law as Federal Common Law," p. 868; but see Koh,

(“Commentary: Is International Law Really State Law,” pp. 1852-1854) for an opposing view.

442 • “Statement of Ralph Nader,” *Hearings*, pp. 354-5.

443 • *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 789 (1982)(O’Connor, J., dissenting).

444 • Mark Tushnet, “Federalism and the Traditions of American Political Theory,” 19 *Georgia Law Review* 981 (1985).

445 • One might add, of course, that while the Founders’ notion of citizen participation was deep, it was also narrow: as many were excluded from the role of citizen.

446 • Castells, *The Information Age*, p. 350.

447 • See, for example, the ability of the unions to use an international coalition to pressure the United Parcel Service in contract negotiations, Mazur, “Labor’s New Internationalism,” pp. 87-88.

448 • Peter J. Spiro, “New Global Potentates: Nongovernmental Organizations and the ‘Unregulated’ Marketplace,” 18 *Cardozo Law Review* 957, December, 1996, p. 967.

449 • *Ibid.*, p. 963.

450 • James Madison, “Federalist Paper Number 10,” in *The Federalist Papers*, Clinton Rossiter, ed., (The New American Library of World Literature) 1961.

451 • Spiro, “Foreign Relations Federalism,” p. 959.

452 • Friedman, “Valuing Federalism,” p. 389.

453 • 505 U.S. at 169.

454 • Kobrin, “The MAI and the Clash of Globalizations,” p. 99.

455 • It is, however, not clear that globalization will be so transparent. In fact, MAI became a cause célèbre among activists only when internal negotiating documents were leaked. Stumberg, *Memorandum to Mark Gordon*, November 24, 2000.

456 • Friedman, “Federalism’s Future in the Global Village,” p. 1476.

457 • George A. Bermann, “Taking Subsidiarity Seriously: Federalism in the European Community and the United States,” 94 *Columbia Law Review* 331, March 1994, p. 400.

458 • *Ibid.*, p. 349, footnote 56.

459 • It should be noted that the impact of competition among the States is one of the many ways that judicial and policy debates about federalism share drastically different underlying premises. While the Court sees competition as a good thing, as States are trying to attract citizens, much of the policy debate has seen competition as a bad thing, worrying that

States will engage in a race to the bottom to lower benefits and services. While the Court focuses on the residents that States want to attract, the policy debate focuses on the residents that States want to keep out. For more on this and other distinctions between judicial and policy approaches to federalism, see my article ("Differing Paradigms"), especially footnote 6, p. 189.

460 • 285 U.S. at 311.

461 • This is the approach implied by the Brandeis dissent, which spoke of State experimentation in the context of economic regulations to deal with the Depression, clearly an area in which State successes could then shape the *national* response. 285 U.S. at 306-311.

462 • Edward L. Rubin and Malcolm Feeley, "Federalism: Some Notes on a National Neurosis," 41 *UCLA Law Review* 903 (1994), p. 924.

463 • "Statement of Laurence Tribe," *Hearings*, p. 308.

464 • *Ibid.*, p. 307.

465 • "Statement of Ralph Nader," *Hearings*, p. 368.

466 • Clark, *Globalization and International Relations Theory*, p. 5.

467 • John Attanasio, "Foreword: Stages of Federalism," 42 *St. Louis University Law Journal* 485, (Spring 1998).

468 • Aman, "The Globalizing State," p. 864.

469 • Admittedly, while this is essentially the argument of subsidiarity that has been made in Europe (W. Gary Vause, "The Subsidiarity Principle in European Union Law – American Federalism Compared," 27 *Case Western Reserve Journal of International Law* 61, Winter 1995), the argument is at odds with the reality of increasing centralized concentration of power in Europe.

470 • Ohmae, *The End of the Nation State*, p. 12.

471 • John O. McGinnis, "The Decline of the Western Nation State and the Rise of the Regime of International Federalism," 18 *Cardozo Law Review* 903, (December 1996).

472 • Aman, "The Globalizing State," p. 785.

473 • James Madison, "Federalist Paper Number 51," in *The Federalist Papers*, Clinton Rossiter, ed., (The New American Library of World Literature) 1961.

474 • Jeffrey E. Garten, *A Cold Peace: America, Japan, Germany, and the Struggle for Supremacy*, The Twentieth Century Fund, 1992, p. 234.

475 • Elazar, "The State System + Globalization," p. 564.

476 • Aman, "The Globalizing State," p. 775.

477 • According to John Jackson, these include supermajority provisions in Article X - amending the WTO and subsidiary agreements; Article IX:2 - adopting a formal "interpretation"; Article IX:3 and 4 - adopting waivers; Article X:9 - adding plurilateral agreements to Annex 4; and Article X:8 - changing the DSU in Annex 2. John H. Jackson, "The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results," 36 *Columbia Journal of Transnational Law* 157 (1997), p. 174.

478 • George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," 94 *Columbia Law Review* 331 (March 1994), p. 353.

479 • This would be a particular concern if NGO and corporate preferences converge due to different assumptions. For example, NGOs see world governance as a way to share monitoring costs and offer the prospect of a global New Deal, while corporations see it as a way to both control NGOs and establish globally harmonized standards. Peter J. Spiro, "New Global Potentates: Nongovernmental Organizations and the 'Unregulated Marketplace,'" 18 *Cardozo Law Review* 957 (December 1996), p. 968.

480 • Castells disagrees with the notion that the American approach could be a model for world federalists, as he sees it as too historically specific (Castells, *The Information Age*, p. 268). My argument is not for the use of the American model (as I do not propose world governance), but rather for using American federalism values and concepts in shaping whatever supranational institutions are formed.

481 • Michael J. Glennon, "A Madisonian Perspective on International Institutions: Overcommitment, Undercommitment, and Getting It Right," 70 *University of Colorado Law Review* 1589, 1999, p. 1589.

482 • *Ibid.*, p. 1590-1.

483 • Strange, *The Retreat of the State*, p. 198.

484 • Woodrow Wilson, *Constitutional Government in the United States* (Columbia University Press, NY) p. 173 (1961, First edition 1908).