

# Vanderbilt Journal of Transnational Law

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Volume 31  
Issue 4 *October 1998*

Article 1

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10-1998

## The Globalizing State

Alfred C. Aman, Jr.

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Alfred C. Aman, Jr., *The Globalizing State*, 31 *Vanderbilt Law Review* 769 (2021)  
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# VANDERBILT JOURNAL OF TRANSNATIONAL LAW

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VOLUME 31

OCTOBER 1998

NUMBER 3

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## The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy

*Alfred C. Aman, Jr.\**

### TABLE OF CONTENTS

I.	INTRODUCTION .....	770
II.	FROM STATES TO MARKETS—GLOBALIZATION AND THE POLITICAL ECONOMY.....	780
	A. <i>The Limits of State-Centered Law</i> .....	783
	B. <i>The Limits of Politics</i> .....	787
III.	THE GLOBALIZING STATE .....	791
	A. <i>Global Competition</i> .....	791
	B. <i>The Limits of Competition</i> .....	798
	C. <i>Three Approaches to the Relationship of Globalization to Domestic Law and Politics</i> .....	800
	1. Back to the Future—The Strong State	803

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\* Dean and Professor of Law, Indiana University School of Law—Bloomington. I wish to thank Professors Dan Conkle, Paul Craig, Yvonne Cripps, Jost Delbrück, David Fidler, Rob Fischman, Carol Greenhouse, Jeff Hart, Aseem Prakash, Lauren Robel, Gene Shreve, David Williams, and Elisabeth Zoller for their helpful suggestions and criticisms. I also wish to thank Andrew Straw, 1997, Judy Lawson, 1999, Emily Schabacker, 1999, and Andrea Unzicker, 2000, for their excellent research assistance, and Leslie Jackson for her superb help in preparing multiple drafts of this manuscript.

I also wish to thank Professor Roberto Toniatti, Dean of the Law School at Trento, Italy, for organizing a faculty seminar at which I received many helpful comments. Finally, I wish to thank the Fulbright Commission for providing support for making my leave at Trento possible.

	2.	Reinventing Government—The Efficient State .....	808
	3.	Mixing Public and Private Power—The Globalizing State.....	812
IV.		THE GLOBALIZING STATE, DEMOCRACY, AND THE PUBLIC/PRIVATE DISTINCTION .....	816
	A.	<i>The Public/Private Distinction and Three Types of Regulatory Reform</i> .....	819
	1.	The Market as a Complete Substitute for Regulation—Legislative Change..	820
	2.	The Market as a Regulatory Tool.....	828
	3.	The Market in Partnership with the State—Contracting-Out Public Services.....	831
	B.	<i>Private Prisons and the Global Economy</i> .....	837
	1.	McKnight v. Richardson .....	840
	2.	The Public/Private Mix.....	841
	3.	The Limits of the Market Metaphor..	842
	C.	<i>Implications of the Globalizing State for Public/Private Law</i> .....	845
V.		THE GLOBALIZING STATE AND FEDERALISM .....	848
	A.	<i>A Global Perspective on Federalism</i> .....	849
	1.	The Downward Pull of Globalization.	851
	2.	The Pull from the Top—National and International Pressures .....	852
	3.	Horizontal Forces and the Transnational Corporation .....	853
	4.	Global Citizenship.....	855
	B.	<i>Sovereignty, Federalism, and the Court</i> .....	857
	1.	Sovereignty .....	858
	2.	The Commerce Power .....	865
VI.		CONCLUSION.....	868

## I. INTRODUCTION

The conventional view of law is state-centered.<sup>1</sup> Law is analyzed as the product of state processes as if it reflects only the

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1. See JOHN AUSTIN, JURISPRUDENCE (1911); H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); HANS KELSEN, GENERAL THEORY OF LAW & STATE (Anders Weddberg trans., 1961) (discussing the pure theory of law in which law and the state are the same entities). There is now, however, a growing body of global law, developing largely outside the state. See, e.g., GUNTHER TEUBNER, GLOBAL LAW WITHOUT A STATE (1997). On the concept of global law in general, see ANTHONY GIDDENS, THE CONSEQUENCE OF MODERNITY (1990); Jost Delbrück, *Globalization of*

political and economic forces and conflicts of the jurisdiction in which it is produced.<sup>2</sup> Underlying the evolution of state-centered domestic law, especially public law,<sup>3</sup> is an implicit theory of the role of the state. For most of the nineteenth century, for example, it was assumed, in accord with John Locke, that the state would play a role "limited to the presentation of the rights of its members against infringement by others . . . . It is this and nothing more; a state exceeds its legitimate function if it endeavors to go beyond these limits."<sup>4</sup> The New Deal ushered in another and very different conception of the state, especially at the federal level. It supported a strong national state, one that was expected to intervene in a variety of markets to ensure that they function in a fair and effective manner.<sup>5</sup>

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*Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9 (1993) [hereinafter Delbrück, *Globalization of Law, Politics and Markets*]; Niklas Luhmann, *The World Society as a Social System*, 8 INT'L J. GEN. SYS. 131-38 (discussing the global communication necessary with a self-referential view of social systems).

*Lex Mercatoria* is one of the primary examples of global law. For a history of *lex mercatoria*, see Harold J. Berman, *The Law of International Commercial Transactions (lex mercatoria)*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS: THE LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS (LEX MERCATORIA), Part III, folio 3 (W. S. Surrey & D. Wallace, Jr. eds., 1983); J. H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295-322 (1979); see also YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* (1996) (analyzing commercial arbitrators).

2. Even if law were wholly state-centered, domestic law is not an exact mirror of society; society has too many faces for a single mirror. To the extent law does reflect various economic and political forces in a jurisdiction, law reflects some, but not necessarily all of the multiple perspectives involved, and it reflects them to varying degrees.

Similarly, references to the state are not meant to imply that it is a unified whole or an individual actor. The author uses the term to refer to the various state institutions, decision-making processes, and policy outcomes and their effects, recognizing that these processes and outcomes are not necessarily internally consistent.

3. The author uses the term public law to refer primarily to areas of the law that directly involve the state or concepts of the state. Thus, public law includes constitutional and administrative law, but this term is, of course, a short-hand way of referring to these areas of law. Aspects of public and private law often merge with one another, and the discussion in this article does not mean to imply any rigid distinctions between the two. For examples of how private law can merge or take on public law aspects, see Symposium, *The New Private Law*, 73 DEN. U. L. REV. 993-1279 (1996).

4. See C. HARROW & R. RAWLINGS, *LAW AND ADMINISTRATION* 9-10 (1984). See generally FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944); NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

5. See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 8-24 (1992).

Today, the processes of twentieth century globalization have de-centered the state.<sup>6</sup> Capital moves freely around the world with relatively little direction from states.<sup>7</sup> Internet technologies create global networks without regard to national or internal boundaries.<sup>8</sup> Cultural influences and images flow across state lines without regard to borders.<sup>9</sup> More importantly, many of the problems and actors with which states now deal are not, or not solely, within a state's own territorial boundaries. The state itself is now subject to and affected by the same globalizing forces that are transforming business and other aspects of daily life. The empirical realities of globalization and their effects on the state raise important interpretive questions concerning how we should now think about and assess the law developed by a de-centered state, one that is, in many ways, globalized by the very processes that now affect its constituents.

The primary purpose of this Article is to consider the relationship of globalization to domestic law, a topic that, for the

6. See SASKIA SASSEN, *LOSING CONTROL* 28 (1996) ("Sovereignty and territory . . . remain key features of the international system. But they have been reconstituted and partly displaced onto other institutional arenas outside the state and outside the framework of nationalized territory."); SUSAN STRANGE, *THE RETREAT OF THE STATE—THE DIFFUSION OF POWER IN THE WORLD ECONOMY* 46 (1996) ("[T]he progressive integration of the world economy . . . has shifted the balance of power away from states and toward world markets.") [hereinafter STRANGE, *THE RETREAT OF THE STATE*]; Philip G. Cerny, *What Next for the State?*, in *GLOBALIZATION: THEORY AND PRACTICE* 123 (Eleonore Kofman & Gillian Youngs eds., 1996) ("[I]ncreasing transnational interpenetration has the potential to transform the international system from a true states system into one in which this external bulwark is eroded and eventually undermined.") [hereinafter Cerny, *What Next for the State?*]; see also Philip G. Cerny, *Plurilateralism: Structural Differentiation and Functional Conflict in the Post-Cold War World Order*, 22 *MILLENNIUM: J. INT'L STUD.* 27-51 (1993).

7. See D.M. Andrews, *Capital Mobility and State Autonomy: Toward a Structural Theory of International Monetary Relations*, 38 *INT'L STUD. Q.* 193 (1994). For an analysis of capital mobility and its relationship to labor mobility, see SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL* (1988).

This is not necessarily to argue that the state could not intervene in some manner, if it chose to. For a recent review essay discussing capital mobility, the power of central banks to regulate capital flows, and the extent to which international institutions can affect domestic policies, see David M. Andrews & Thomas D. Willett, *Financial Interdependence and the State: International Monetary Relations at Century's End*, 51 *INT'L ORG.* 479 (1997); see also ERIC HELLEINER, *STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990's* (1991).

8. See SASSEN, *LOSING CONTROL*, *supra* note 6, at 21-22; Symposium, Joel P. Trachtman, *Cyberspace and Sovereignty*, 5 *IND. J. GLOBAL LEGAL STUD.* 561 (1998).

9. See generally Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, in *GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY* 295, 295-308 (Mike Featherstone ed., 1990).

most part, has been neglected by the legal literature to date.<sup>10</sup> In so doing, this Article shall develop the concept of the globalizing state, a theory of the state based on states' new roles in furthering global competitiveness, as well as the transformative effects of these new roles on the state itself.<sup>11</sup> This Article refers to globalization as an interpretive approach to issues no longer classifiable—or even understandable—in terms of classic dichotomies of domestic and global, public and private, or federal and state. The integration of local and national economies with the global economy, the changing role of the state, the creation of new mixtures of public and private power, and the increasing importance of denationalized sources of law, have significantly changed the meaning of such concepts as “domestic,” “private,” or “local.” The “local” must now be understood as one modality in a complex global process, rather than a unified place or jurisdiction.

These changes transform conventional debates concerning the market and government's role in the market. What once may have been private now has important public and global dimensions. What once may have been public now employs the private sector in new ways. Several sets of questions thus arise in the context of globalization that are of particular importance to our ability to assess and understand domestic law. First, what theory of the state should guide our analysis of domestic law? Do the processes of globalization and the privatization and deregulation they encourage signal a return to an earlier, more Lockean version of the state or do they signal the need for a new role for the state to play? Is this role to be minimal,<sup>12</sup> facilitative,<sup>13</sup> one of resistance<sup>14</sup> or one which embodies a

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10. For an analysis of the relationship of globalization to international law, see Jost Delbrück, *The Role of the United Nations in Dealing With Global Problems*, 4 IND. J. GLOBAL LEGAL STUD. 277 (1997) [hereinafter *The Role of the United Nations*]. See also Stephan Hobe, *Global Challenges to Statehood*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997). For an analysis of deregulation in the United States as an aspect of the processes of globalization, see AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 5.

11. As we shall see, the globalized state is not a unified entity. It is disaggregated in aspects of its policy-making processes. See, e.g., Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183, 184 (1997); *A Typology of Transjudicial Communication*, 29 RICHMOND L. REV. 99 (1994). It is also increasingly affected by the diverse, global aspirations of its globally-oriented constituents. Indeed, the state itself is subject to the forces of globalization and has been transformed by them. See *infra* text accompanying notes 192-98.

12. See, e.g., NOZICK, *supra* note 4.

13. See *infra* notes 161-91 (discussing the efficient state).

14. See also *'Fast Track' is Derailed*, N.Y. TIMES, Nov. 11, 1997, at A26 (discussing how domestic political resistance can block attempts to facilitate globalization processes and, in particular, processes to encourage free trade). See

collective approach to determining the public interest, globally conceptualized?<sup>15</sup> With regard to this first set of questions, my main argument will be that the state's reactions to globalization are not mere changes in function, but transformations in the nature of the state itself. This transformation requires new understandings of the public role of private markets and the need for states to form new partnerships with private actors. This kind of privatization could have detrimental effects on the norm of democracy if conventional notions of public and private remain in place.

Thus, this Article also considers the role of democracy in a global economy. The democracy question is closely related to issues of the state's role. Globalization greatly affects democratic decision-making values and processes in a number of ways. Political and economic decisions in various parts of the world increasingly have immediate impact on citizens in nations apart or excluded from those decision-making processes.<sup>16</sup> Moreover, the processes of deep integration of various national economies into the global economy often take the form of privatization, deregulation, or some form of harmonization.<sup>17</sup> The end result of many of these processes is to place traditionally public decisions into the hands of the private sector, lessening the public's direct involvement in these matters.<sup>18</sup> Conversely, some issues which have always been private may now have a much greater

*generally* Special Issue: *Globalisation and The Politics of Resistance*, 2 J. POL. ECON. 5-195 (1997).

15. See *infra* notes 192-98.

16. See EVAN LUARD, *THE GLOBALIZATION OF POLITICS: THE CHANGED FOCUS OF POLITICAL ACTION IN THE MODERN WORLD* vi (1990) ("The welfare of ordinary men and women no longer depends primarily on the actions of their own governments. It depends, far more, on actions and decisions reached, far beyond the frontiers of their own state, by other governments, or by international bodies taking decisions collectively.").

17. See Alfred Aman, *Administrative Law For A New Century*, in *THE PROVINCE OF ADMINISTRATIVE LAW 90* (Michael Taggart ed., 1997); see also STEPHAN HAGGARD, *DEVELOPING NATIONS AND THE POLITICS OF GLOBAL INTEGRATION* (1995).

18. This process of moving from the public to the private is one of degree. Deregulation and privatization are not self-defining terms that encompass wholly private processes. They can mean or imply a variety of mixtures of public and private power. See AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5, at 44-47; Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988). Yet, there has been a steady trend throughout the 1980s in particular of greater resort to markets and market approaches. See *generally* *THE PROVINCE OF ADMINISTRATIVE LAW*, *supra* note 17. In addition, as we shall see below, contracting out governmental services to the private sector should not be viewed as fully privatizing the service in question. Yet, such contracts do tend to lessen day-to-day political control and input into the process. See *infra* notes 240-91.

public impact than ever before due to processes of globalization. For example, capital markets can significantly influence public policy.<sup>19</sup>

In analyzing these issues of democracy in a global context, this Article argues that traditional concepts of political representation no longer may be enough to deal with citizens' needs to have input into various decisions that affect their lives on a daily basis. In some cases, the matters involved are global in nature and beyond the political competency of any one jurisdiction. In others, the transnational aspects of the interests involved may be beyond the state's ability to aggregate the interests of its constituents in making public policy. Still, in other situations, market approaches and market solutions to problems may seem more appropriate, presumably eliminating more collectively determined approaches to these questions. As we shall see, however, whether we are dealing with markets or the governmental use of markets, it is important to ensure that such basic public law values as transparency and participation remain intact.

Thus, this Article does not argue that there is no role for states to play; rather, on the domestic level, that role is and must be changing. At the international level, the state's role also remains important, if international solutions to global problems are to develop. Accordingly, this Article also considers the relationship of the state to other states, and, implicitly at least, the roles of competition and cooperation as forms of global governance. For states to play a useful and effective role in providing solutions to transnational problems, they must cooperate with other states, be it informally or through the development of multilateral treaties. Such cooperation is facilitated by the ability of a national government to speak authoritatively on certain issues for the various local political entities that make up the country. Thus, the relationship of federal and state power takes on special importance in global contexts.

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19. See, e.g., SUSAN STRANGE, *CASINO CAPITALISM* (1986) (discussing the effect of the rapid international movement of capital on political and social relations). At the same time, states also try to encourage economic growth through policies such as those used by the U.S. and the international community to bail out Mexico from its economic crisis in 1994. See SASSEN, *LOSING CONTROL*, *supra* note 6, at 22-23; see also RICHARD BARNET & JOHN CAVANAGH, *Electronic Money and the Casino Economy*, in *THE CASE AGAINST THE GLOBAL ECONOMY* 360-73 (Jerry Mander & Edward Goldsmith eds., 1996) (tracing the role of global financial gamblers in the monetary crisis); Michael Schuman, *South Korea Agrees to IMF's Bailout Terms*, *WALL ST. J.*, Dec. 4, 1997, at A14 (discussing IMF's terms attached to the \$55 billion bailout package). See generally Jeffrey A. Frieden, *Capital Politics: Creditors and the International Political Economy*, 8 *J. PUB. POL.* (1988) (discussing the relationship between international capital markets and economic policies).



This is especially true since pulling against cooperative approaches to problems is another dominant characteristic of globalization—increased competition. Competition for jobs, industry, and capital is more intense in a global economy, given the greater number of locations available to investors and the relative statelessness of transnational corporations. Competition for economic prosperity has greatly increased among and within states and these forces often encourage more decentralized and individualized approaches to issues. All of these factors are likely to affect the way domestic decision-makers conceptualize and apply domestic law. At the same time, the manner in which domestic decision-makers decide what once were domestic law issues also will affect the ability of states to cooperate on the global level.

To explore these themes of democracy and the role of the state, and to highlight the importance of a global perspective on domestic law, this Article will focus on two specific areas of domestic law: those that employ some version of the public/private distinction and those that involve issues of federalism. An analysis of these domestic law issues will show that there is now more at stake in decisions involving these doctrines and distinctions than when only national issues predominated in the resolution of such cases.

To carry out this analysis, Part II of this Article begins with some definitional issues and then discusses how power has been shifting steadily from states to markets. In so doing, it will begin with the concept of the globalizing state<sup>20</sup> by showing how the de-centering of the state that results from globalizing forces affects domestic law and politics. The concept of the global state that emerges is one that emphasizes the state's interdependence with other states and non-state actors, its perceived need to be globally competitive, and the fact that it must deal with issues and actors that no longer are centered within any single territory. The global state is not a single, unified entity, but a collection of people and entities with various networks around the world.<sup>21</sup> This sense of the state thus suggests that the state itself is subject to the same

20. The author shall use the terms globalizing state and global state interchangeably. By global or globalizing state the author does not mean one world-wide state. Rather, the terms refer to a state that has and continues to reconfigure and reconceptualize itself to adapt to the processes of globalization. In other words, the term globalizing state is meant to capture an on-going, dynamic set of processes.

21. See generally Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 727-31 (1995) (discussing a liberal conception of international law); Slaughter, *The Real New World Order*, *supra* note 11.

globalizing forces as its constituents and that it too has been transforming itself in very significant ways.<sup>22</sup>

Part III will then show how this shift from states to markets and the corresponding changes in law and politics coincide with a political conception of global competition that now gives states some very particular roles to play to maximize their competitiveness. Indeed, the primary national and state political discourses today emphasize competition—competition between and among nation-states, between and among states and localities within those nations, as well as entities that do business in these jurisdictions and the individuals who live there.<sup>23</sup> This emphasis on global competition, however, usually goes well beyond a purely economic conception of competition that distinguishes, for example, competitive markets from monopolistic ones.<sup>24</sup> It also goes beyond well-established notions of individualism and competitive self-reliance that are a basic part of our political culture. It often can involve a political conception of the role of competition in a global economy that, at the extreme, substitutes global economic competition between and among nation-states for war.<sup>25</sup> The primary state weapons in this economic war are those of laissez-faire global capitalism: free markets, low taxes, and minimal regulation.<sup>26</sup> Such an approach to the global economy encourages a domestic politics that also incorporates competition as an ideology, encourages new market approaches at all governmental levels, and views global competition as both a primary tool of governance at the global level and an important motivating factor for market reform at the local level.<sup>27</sup>

With the concept of the globalizing state and the overall context of globalization as our underlying basis for analysis, Parts IV and V then apply this global perspective and theory of the state to domestic law, in particular to recent cases involving the public/private distinction and the doctrine of federalism. How we

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22. See Aman, *Administrative Law For A New Century*, *supra* note 17, at 90-91; PHILIP G. CERNY, *THE CHANGING ARCHITECTURE OF POLITICS* 204-33 (1990).

23. See, e.g., PAUL KRUGMAN, *POP INTERNATIONALISM* 3-25 (1996); see also THE GROUP OF LISBON, *LIMITS TO COMPETITION* xi-xii (1995) (describing the new emerging era of global competition).

24. See THE GROUP OF LISBON, *supra* note 23, at xiii.

25. See, e.g., WILLIAM S. DIETRICH, *IN THE SHADOW OF THE RISING SUN* 6 (1991) ("As Americans have focused on the military cold war with the Soviets, the United States has been losing badly the economic hot war with Japan. Industry after critical industry in the United States has been devastated by the Japanese, as surely as if waves of bombers had come over to destroy our factories."); see also CLYDE V. PRESTOWITZ, JR., *TRADING PLACES* (1988).

26. DIETRICH, *supra* note 25.

27. See generally AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5.

conceptualize what is public or what is private, and, for constitutional purposes, how we determine what is state and what is federal, is crucial to the ability of our legal system to create the legal space necessary to allow new forms of public participation to occur. Parts IV and V thus consider the impact of globalization on democracy and the important role courts and lawmakers generally can play to ensure, to the extent possible, that the norm of democracy is furthered, rather than undermined by the processes of globalization.

Part IV examines the public/private distinction in various contexts. In particular, it examines the legal and market implications of contracting-out basic governmental services and functions. How courts and policymakers define "the public" and "the private" in these contractual partnerships affects the reach of the Constitution and administrative law, thereby directly affecting democratic accountability and public participation in important policy decisions.<sup>28</sup> With regard to the separation of public and private powers, an important question this Article addresses is at what point the invocation of the market becomes more metaphorical than real. A global perspective on such issues underscores the fact that our concepts of the private and the public have now been fundamentally changed by globalization.

There are, of course, institutional limits to what courts can and should do when it comes to modernizing doctrinal approaches to ensure their applicability to current global conditions. Indeed, courts seldom even recognize explicitly the global context in which they are deciding cases involving new mixtures of public and private or federal and state power.<sup>29</sup> Nevertheless, how courts decide issues defining the public and the private greatly affect what roles the global state can play and what protections citizens can anticipate when it comes to the more frequent use of various new mixtures of public and private power. Ultimately, Congress itself may have to legislate in new ways that further define the global state and help create the kinds of multilateral governmental approaches to issues that may be necessary. For example, there may be a need for national minimal standards that private prison providers must meet. The extent of Congress' power to legislate in this way and to experiment legislatively in areas with significant global impact becomes especially important when issues previously

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28. See, e.g., JACK BEERMAN, *THE REACH OF ADMINISTRATIVE LAW IN THE UNITED STATES*; Aman, *Administrative Law For A New Century*, in *THE PROVINCE OF ADMINISTRATIVE LAW*, *supra* note 17, at 171-95, 90-118; see generally Zillah Eisenstein, *Stop Stomping On The Rest of Us: Retrieving Publicness from the Privatization of the Globe*, 4 *IND. J. GLOBAL LEGAL STUD.* 59 (1996).

29. For a recent example of such recognition in the context of federalism, see *Lopez v. U.S.*, 514 U.S. 549, 615 (1995) (Breyer, J., dissenting).

thought of as local, now also have important global dimensions as well.

Part V thus examines recent judicial approaches to federalism from a global perspective. Issues of federalism take on a different character in a global context. The processes of globalization encourage decentralization and competition, not only among industries and firms, but also among and between cities and states as well. The extent to which individual states can cut their costs and maximize their competitiveness greatly affects their citizens' views of autonomy and states' rights, as well as states' ability to compete more effectively in the global economy. Federalism thus also can raise the specter of a "race to the bottom" among various states.<sup>30</sup> This is particularly true because transnational corporations now have the ability to locate almost anywhere in the world. As a result, individual states within the United States are in competition not only with one another, but with states abroad as well. At the same time, problems that transcend the boundaries of any one state create the need for more cooperation among states at the international level. The ability of Congress to seek national solutions to problems can affect the ability of the nation to engage in effective international negotiations and treaties.<sup>31</sup>

This Article concludes that when choices of interpretive approaches to constitutional doctrines exist, those approaches that preserve, increase, or further the flexibility of decision-makers' responses to the global economy should be preferred. Not unlike the New Deal era when the Court had to confront new issues arising from society's political responses to a newly emerging nationally integrated economy, the Court today decides issues against a backdrop of an increasingly integrated global economy. An analysis of the public/private distinction and recent federalism decisions will show that it is important that courts resist constitutional approaches that unnecessarily limit change or new power-sharing approaches to both new and old issues. While it may seem ironic, some of the deferential, constitutional interpretive approaches forged by the Court during the New Deal era may, in fact, be best suited for the political experimentation now necessary, especially if various levels of government and non-state actors are to adapt successfully to the realities of a global economy. This position, however, is not an argument for a return to the New Deal so far as substance is concerned. There is no going back to the nineteenth century or to the state-centric future that courts and

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30. See generally Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 627-34 (1996).

31. See *infra* text accompanying notes 320-25.

law makers have envisioned for the greater part of this nation's history.

## II. FROM STATES TO MARKETS—GLOBALIZATION AND THE POLITICAL ECONOMY

Globalization refers to complex, dynamic legal and social processes that take place within an integrated whole, without regard to geographical boundaries.<sup>32</sup> Globalization thus differs from international activities that occur between and among states, and it differs from multinational activities that occur in more than one nation-state.<sup>33</sup> The area of integration involved might be the entire globe or it might be a region or portions of regions around the world. The major distinguishing characteristic of global activities is that the areas of integration are largely oblivious to state boundaries, and that the processes of globalization usually occur without or with little direct agency of the state.<sup>34</sup> Due to the liberating effects of technology and the

32. See Delbrück, *Globalization of Law, Politics, and Markets*, *supra* note 1, at 9; see also PETER DICKEN, *GLOBAL SHIFT* 1-8 (2d ed. 1992) (analyzing the process of globalization resulting from the interactions between states and corporations); WILLIAM GREIDER, *ONE WORLD, READY OR NOT* (1997); KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY* (1990); SASKIA SASSEN, *CITIES IN A WORLD ECONOMY* (1994); SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (1991) [hereinafter SASSEN, *THE GLOBAL CITY*]; Alfred C. Aman, Jr., *The Earth As Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107 (1993); Alfred C. Aman, Jr., *Introduction to Symposium, The Globalization of Law, Politics and Markets*, 1 IND. J. GLOBAL LEGAL STUD. 1 (1993); Saskia Sassen, *Towards A Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996).

33. See RICHARD O'BRIEN, *GLOBAL FINANCIAL INTEGRATION: THE END OF GEOGRAPHY* 5 (1992) ("A truly global service knows no internal boundaries, can be offered throughout the globe, and pays scant attention to national aspects . . . . The closer we get to a global, integral whole, the closer we get to the end of geography."). This does not mean one world market for everything. O'Brien describes the emergence of separate networks around foreign exchange, securities, debt, investment and financial services, and these networks constitute distinct markets. *Id.* at 32. These ideas are discussed in Robert Latham, *Globalisation and Democratic Provisionism: Re-reading Polanyi*, 2 NEW POL. ECON. 53 (1997).

34. *Id.*; see also STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 3-15 (exploring the phenomenon of the following authority of the state). The state, of course, can and often does facilitate the process of globalization by, for example, providing for property rights and other legal regimes that may encourage economic development. Thus, this is not to argue that states have or can have no role in the processes of globalization. Rather, it is to argue that their role is no longer as central as it once was and, to the extent the state engages in activities that deter globalization, they can often be avoided by multinational actors who simply decide to move aspects of their operations elsewhere or establish parallel,

flow of capital around the world, private decisions involving production, finance, and investment increasingly occur without direct, individual state involvement.<sup>35</sup> Transnational corporations decide where it is most cost-effective to locate various activities in the value chains connected with the production and marketing of goods and services. They may locate research and development in one country, component assembly in another, final assembly in yet another country, and distribution networks in yet another. They also decide how much to customize the globally conceived product for local markets.<sup>36</sup>

The investment necessary to build or expand a manufacturing or distribution facility flows easily across national borders. The financing for this investment is also increasingly created without regard to any single place and by a global financial industry located in various interconnected global cities.<sup>37</sup> Through the General Agreement on Tariffs and Trade (GATT)<sup>38</sup> and other multilateral agreements,<sup>39</sup> trade in goods is also facilitated; a substantial portion of world trade today takes place between and among divisions of the same company doing business in various locations around the globe.<sup>40</sup>

The end result of these new networks of investment, finance, and production is that they help to create relatively integrated markets for their products and they produce new, multiple sets of relationships or economic networks that transcend the geography of states.<sup>41</sup> The same is true if one focuses on global problems such as the global environment. Since some forms of pollution know no boundaries, these issues cannot be solved by one state alone.<sup>42</sup> The politics involved in issues such as global warming,

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if not competing, legal regimes that cater primarily to their interests. *See infra* text accompanying notes 345-48.

35. *See* STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6.

36. *See* DICKEN, *supra* note 32, at 47-59; *see also* ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* (1st ed. 1991).

37. *See* SASSEN, *THE GLOBAL CITY*, *supra* note 32.

38. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

39. *See, e.g.*, North American Free Trade Agreement, Dec. 8, 1992, Canada-Mexico-U.S., 32 I.L.M. 289 [hereinafter NAFTA].

40. *See* STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 48 ("[O]ver a quarter of all worldwide trade is now intra-firm trade . . . . As much as 40 percent of Mexico's trade with the U.S. in the early 1990's, for example, was done by the affiliates of US firms."); *see also* MANUFACTURING MIRACLES: PATHS OF INDUSTRIALIZATION IN LATIN AMERICA AND EAST ASIA (Gary Gereffi & Donald L. Wyman eds., 1990).

41. *Id.*; *see also* DICKEN, *supra* note 32, at 3-5 (discussing the resulting economic interactions).

42. *See* AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5, at 134-36.

ozone depletion, or the destruction of the rainforest cannot help but involve political networks that also transcend states and state institutions.<sup>43</sup>

These factors, of course, do not mean that states are no longer important or do not have influence upon aspects of global business activities or problems. It does mean that the role states play is substantially different than in the past: the global economic opportunities and problems that result from these financial, production, and investment networks are not centered in states or within any one state; nor can problems involving, for example, the environment or public health be solved by one state alone.<sup>44</sup> Any one state's jurisdiction to deal with these issues is limited in such contexts.<sup>45</sup> As a result, new bodies of global and international law are developing to address issues that are neither wholly domestic nor wholly international.<sup>46</sup> The distribution of problems outside any one state heightens the need for states to share or delegate power and responsibility to other states and an increasing number of non-state transnational actors, actors that are more powerful than ever before.<sup>47</sup>

This is especially true of transnational corporations. Their power is not a traditional form of state power derived from control over resources within a geographical territory. Rather, it is a kind of structural political power derived from being an important participant in economic decisions.<sup>48</sup> Transnational corporations can indirectly wield economic power that has very substantial political consequences for individual states and the municipalities within those states. A decision to shift production from one part of the world to another can drastically affect the economy of a particular area. Even the threat to do so can affect local policymakers.<sup>49</sup> Transnational corporations do not dictate public

43. For an example of the transnational politics involved in global warming issues, see GARETH PORTER & JANET WELSH BROWN, *GLOBAL ENVIRONMENTAL POLITICS*, 74-78, 92-103 (1991). See generally RICHARD ELLIOT BENEDICK, *OZONE DIPLOMACY—NEW DIRECTIONS IN SAFEGUARDING THE PLANET* (1991).

44. For an analysis of the global impact of public health problems, see Symposium, *The Public's Health in The Global Era: Challenges, Responses, and Responsibilities*, 5 *IND. J. GLOBAL LEGAL STUD.*, 1, 1-190 (1997).

45. See *id.*

46. See TEUBNER, *supra* note 1; Delbrück, *The Role of the United Nations*, *supra* note 10.

47. See, e.g., STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 91-99 (providing examples of various non-state authorities such as the Mafia).

48. *Id.* at 25. See generally Jeffrey Hart, *Three Approaches to the Measurement of Power in International Relations*, 30 *INT'L ORG.* 289-305 (Spring 1976).

49. *Id.* at 46-54; see also DICKEN, *supra* note 32, at 16-46 (describing the shifting trademap); Rob Norton, *Our Screwed-Up Tax Code*, *FORTUNE*, Sept. 6, 1993, at 34.

policy to the states, but the potential impact of their decisions facilitates the flow of power from states to markets, as do technologies and the integration and interdependence of increasingly global markets. As Susan Strange has noted, the "shift away from states and towards markets is probably the biggest change in the international political economy to take place in the last half of the twentieth century."<sup>50</sup> This shift of power is reflected in the changing role of and impact upon domestic, state-centered law and politics.

#### A. *The Limits of State-Centered Law*

Globalization does not necessarily mean the end or the diminution of law, especially if one takes into account the need for and the creation of new forms of global law.<sup>51</sup> For example, transnational corporations have a distinct need for dispute resolution techniques that are not directly linked to any one country, and elaborate and important arbitration procedures have been developing to meet these needs.<sup>52</sup> Similarly, human rights have been conceptualized in ways that transcend any one state's view of these issues, and local courts have applied the rulings of the European Court of Justice to dramatically change local law.<sup>53</sup> Indeed, in a global world, legal pluralism is increasing, as is the capacity for and the actual growth of various forms of global law.<sup>54</sup>

State-centered law still needs to deal with problems that arise wholly or primarily within its own territories. Criminal law issues, local property rights, zoning laws, and the like, are state-centered, though they are very much affected by the integrated global economy in which they operate. This is particularly true of social and economic regulation, be it health, safety, and the environment, or electric and natural gas rate-making.<sup>55</sup> The failure to understand the links between seemingly local issues and the global economy within which they arise, however, can lead to a mismatch between the conceptualization of regulatory

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50. See STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 43.

51. See, e.g., TEUBNER, *supra* note 1.

52. See generally DEZALAY & GARTH, *supra* note 1.

53. For an analysis of how the European Court of Justice fundamentally affects English constitutional and administrative law, see Yvonne Cripps, *Some Effects of European Law on English Administrative Law*, 2 *IND. J. GLOBAL LEGAL STUD.* 213, 219 (1994).

54. Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in TEUBNER, *supra* note 1, at 3-31.

55. For an analysis of deregulation involving these areas of regulation as part of a larger set of global changes, see AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5, at 42-77.



problems by state-centered politicians and policymakers, and transnational actors, who must take a global perspective on how they operate their businesses and what markets they seek to reach. National and local goals and legal objectives may be at odds with or irrelevant to the demands of a global market and the global competition faced by certain industries.<sup>56</sup> An individual state's reaction to nationally perceived problems cannot create a level playing field for all who do business within its borders, since integrated global markets mean that a variety of other legal regimes are involved in such a company's processes. Cost comparisons must be made among various jurisdictions and the results of these comparisons often drive investment and manufacturing decisions.

More fundamentally, the structural make-up of web-like companies that transcend state, regional, and national boundaries makes a territorially-centered, hierarchical law more problematic than when businesses—even multinational businesses—were focused on a single locale.<sup>57</sup> State-centered law, with its natural hierarchy of authority in the courts, coupled with its conceptual ability to categorize certain issues and problems in ways that create domestic law capable of consistent and fair application, can be at odds with business operations whose territories are unrelated to state borders, as well as the pace of economic and technological change in many global industries. Markets and the flexibility of market responses to problems often seem a more appropriate response to the problems faced by and opportunities presented to business entities that operate globally. This more fluid sense of place arises not only because transnational companies are capable of doing business simultaneously in various states, but because of wholly national entities that seek to export their products to various developing worldwide markets. Since more potential and real marketplaces are involved, more factors affecting economic conditions are in play, necessitating quicker reactions and changes on the part of even those companies whose facilities are located wholly within a particular state, but which seek to sell their products on a global basis.<sup>58</sup>

A number of regulatory reforms have accompanied the structural changes in the industries doing business globally. Privatization, deregulation, and the use of market-oriented regulatory approaches and structures are increasingly common reforms

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56. See REICH, *supra* note 36; see also Esty, *Revitalizing Environmental Federalism*, *supra* note 30, at 587-97.

57. See DICKEN, *supra* note 32, at 189-227 (analyzing the network of transnational corporations); see also REICH, *supra* note 36, at 113.

58. See *id.*

throughout the West.<sup>59</sup> Not unlike corporations, states also have been reconceptualizing and reconfiguring themselves in light of the structural changes occurring in the global economy. The end result has been an increase in both market forms and regulatory structures, as well as an increasing recognition of the cost of national regulation and its impact on the growth of the global economy.<sup>60</sup>

There are many reasons why this turn to the market has occurred. In addition to the pace of change, the limits of a state's regulatory jurisdiction, and the nature of transnational actors and global markets, substantive changes in technology often have rendered the primary economic rationale for state intervention in some areas, such as communications, obsolete.<sup>61</sup> What once might have justified regulation in radio and television technologies, for example, given the limited range of frequencies available, does not apply to cyberspace and the Internet, where competition and multiple voices and points of view are possible.<sup>62</sup> Similarly, cable television, satellite capabilities and other technological changes have made deregulation of portions of the communications industry entirely plausible, if not necessary. This is not to say that the new, more market-oriented role of the state is permanent or that new reasons for regulation will not emerge. The process of change from regulation to deregulation focuses on regulatory rationales based on market failures no longer applicable to some of today's technologies; however, new regulatory rationales may emerge, such as undue concentration of media power.<sup>63</sup> Nevertheless, the global nature of technologies such as the Internet, coupled with an almost infinite number of users, will undoubtedly necessitate different forms as well as different rationales for any state involvement, if it is to occur.

Quite apart from the fact that certain kinds of business operations do not adhere to state boundaries as they once did, other kinds of human concerns are clearly beyond the

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59. See AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5; Alfred Aman, *A Global Perspective On Current Regulatory Reform: Rejection, Relocation, or Reinvention?*, 2 *IND. J. OF GLOBAL LEGAL STUD.* 429 (1995).

60. *Id.*; see also STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 81. *But see STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION* (Robert Boyer & Daniel Drache eds., 1996) (arguing that states can still assert their power effectively).

61. See, e.g., FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 11 (1997).

62. See *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2344 (1997) (“[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a “scarce” expressive commodity.”). *Id.*

63. See Victoria A. Ramundo, *The Convergence of Telecommunications Technology and Providers: The Evolving State Role in Telecommunications Regulation*, 6 *ALB. L.J. SCI. & TECH.* 35 (1996).

organization of our national economies and are not susceptible to regulation by any one state. Environmental problems, for example, know no particular bounds, as most pollution travels freely across state and national borders.<sup>64</sup> Problems such as acid rain, greenhouse gases, ozone depletion, and the like, require multiple parties to agree before law may provide any effective solutions.<sup>65</sup> In short, a state cannot exercise effective authority alone when the problems it is trying to solve or the actors it wishes to regulate are not centered within the state's borders. To the extent that these issues are state-based, such a location usually is only temporary and easily shifted. Thus, the decrease in state-centered regulatory power is a result that flows primarily from the nature of global problems, the global reach of the technologies involved, and the relative mobility and freedom of the transnational actors to which the law would apply.<sup>66</sup>

This does not mean that states cannot continue to act as they have in the past; however, while it may be possible to draft a law that seeks, for example, to regulate the flow of capital into or out of a country, it would be very difficult to enforce it. This is particularly true given the use of the Internet in such capital transactions.<sup>67</sup> Even where a national law can be passed that applies to global industries, i.e., a domestic law that seeks to punish foreign firms that manufacture their goods with child labor, the protectionism such a law would provide local industry will trigger its own international legal, economic, and political difficulties.<sup>68</sup> The integration of markets, the economic appeal of entry into new markets, as well as limitations created by GATT,<sup>69</sup> often militate in favor of minimal regulation, especially when it

64. See Symposium, *Above the Boundaries Ozone Depletion, Equity, and Climate Change*, 15 LAW & POL'Y 1, 1-74 (1993); see also ALEXANDRE CHARLES KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* (1991).

65. See AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5, at 134-36; see also LYNTON K. CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS* (2d ed. 1990).

66. See generally SASSEN, *LOSING CONTROL*, *supra* note 6, at 98.

67. See Sarah Jane Hughes, *A Call for International Legal Standards For Emerging Retail Electronic Payment Systems*, 15 ANN. REV. BANKING L. 197 (1996). See also Bill Maurer, *Cyberspatial Sovereignities: Offshore Finance, Digital Cash, and the Limits of Liberalism*, 5 IND. J. GLOBAL LEGAL STUD. 493 (1998).

68. See Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 403 (1995) (discussing problems of enforcing child labor standards through the GATT).

69. See, e.g., General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1618 (the process/product distinction in the tuna/dolphin case).

comes to the processes by which goods are made elsewhere in the world.<sup>70</sup>

Of course, such jurisdictional, technological, and political limitations do not apply to all domestic laws. Yet, as we shall see below, the momentum of the global economy and the newly found power of a number of non-state actors help to construct what we shall call the global state, a state whose actions stem increasingly from the various economical and political pressures of global competition and help to further the very processes with which it is coping. Though there are many ways to conceive of the state's role in the context of global competition, the choices involved are not infinite. The structural changes in the global economy limit the practical range of options available to a state.

Moreover, apart from the precise nature of the legal issues in question, global competition itself imposes additional limits on state-centered law that arise from limitations placed on domestic politics. Despite the global nature of the forces that create and limit the choices a state can make, domestic politics often ignore the larger, global dimension in which "local" issues are debated. When it comes to the kinds of domestic politics that are emerging in the global era, the capacity for distinguishing between purely domestic or global situations seems limited. The interconnections and interdependence fostered by the global economy may create a level of complexity that encourages a one-size-fits-all political mentality and discourse. That mentality is increasingly keyed to a conception of global competition that is often oblivious to its limits, and encourages domestic politics that usually are, at best, skeptical of attempts by states to intervene in markets. These domestic attitudes often seem to advocate a kind of global laissez-faire approach to a variety of issues,<sup>71</sup> as if we are returning to a simpler, pre-New Deal age. As we shall see,<sup>72</sup> this mindset is deceptive, and can further a conception of the state that is more like a return to the past than the creation of new approaches appropriate for an interconnected global economy.

### B. *The Limits of Politics*

The boundaries that surround national and state politics create the possibility of zero-sum games with political consequences that can be imposed by local electorates. If a majority believes that the increase in costs generated by certain basic labor and safety

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70. *See id.*

71. For various critiques of the use of the market as a substitute for government, see THE GROUP OF LISBON, *supra* note 23, at 49-75; STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION, *supra* note 60; *see, e.g.*, ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS 328-61 (1997).

72. *See infra* text accompanying notes 135-46, 192-98.

guarantees are in accord with our national sense of who we are as a people, laws will be passed that may increase costs but mitigate risks for workers, or seek to redistribute wealth in politically acceptable and accountable ways. The superimposition of global networks onto these local political debates often changes the power relationships involved. This can occur indirectly when states go ahead and regulate in traditional ways, only to discover that they bear the political costs of any plant closures or loss of jobs that may result.<sup>73</sup> More directly, an informal bargaining relationship may occur before such regulation is passed, resulting in a state decision to abstain from regulating in the first place. For example, at the local governmental level, discussions concerning tax relief and other economic incentives available often determine whether a corporation will decide to locate a facility in that locality.<sup>74</sup> In addition, the rapid ways in which capital investment moves from country to country— analogized to a form of Casino Capitalism<sup>75</sup>—may make governments rethink decisions that are perceived to raise costs on important transnational actors before those decisions are applied. Indeed, transnational corporations can bring jobs and capital investment to a particular country and a region and city within that country. They also can remove them.<sup>76</sup> These non-state actors represent important interest groups that affect state policies, but they also provide an economic and political backdrop to the domestic debates that occur between pro and anti-governmental approaches to problems.<sup>77</sup>

The ability of transnational actors to avoid the consequences of perceived negative regulatory decisions by focusing their manufacturing or production activities elsewhere adds a very practical dimension to any political debate on the role of government. The relevant body politic for transnational corporations is a large one. It need not be the same body politic for all of its functions—manufacturing, fabrication, distribution, or sales. Depending upon the industry involved,<sup>78</sup> all of these functions can and often do occur with varying degrees of intensity in different parts of the world.<sup>79</sup>

73. See JUNE C. NASH, *FROM TANKTOWN TO HIGH-TECH: THE CLASH OF COMMUNITY AND INDUSTRIAL CYCLES* (1989); see generally DANI RODRIK, *HAS GLOBALIZATION GONE TOO FAR?* (Inst. Of Economics, Wash. D.C., 1997).

74. See generally ROBERT PERRUCCI, *JAPANESE AUTO TRANSPLANTS IN THE HEARTLAND: CORPORATISM AND COMMUNITY* (1994).

75. See STRANGE, *CASINO CAPITALISM*, *supra* note 19, at 1-3.

76. See, e.g., *IMF Moves To Diminish Surprise Element of Crisis*, N.Y. TIMES, Apr. 23, 1996, at 6; 1996 WL 7503351 (discussing the Mexican bail out).

77. See STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 94-98.

78. See DICKEN, *supra* note 32, at 231-382 (analyzing the globalization of specific industries).

79. See *id.*

To a lesser extent, the same is true for individual citizens who seek to do business abroad,<sup>80</sup> who work for transnational corporations or industries in global competition,<sup>81</sup> or who conceptualize problems such as the environment in ways that necessitate involvement with transnational networks of concerned citizens.<sup>82</sup> These individuals' concept of global markets or global problems broadens the relevant political communities to which they relate and with whom they must deal. In solving political problems such as the environment, they may have to unite political communities that extend over many states.<sup>83</sup> The end result is a body politic that is extended, and a diffusion of political power that coincides with an increase in the number of global actors and networks involved, as well as in the complexities of political coordination necessary for significant political change to occur. This is not necessarily the case in all industries or with all regulatory problems, but the shift in focus from state-centered approaches to problems to the more diffuse, global perspectives of transnational non-state actors increasingly contributes to a conception of the role of the state in a global economy that defers to markets and emphasizes a competitive model of global capitalism across the regulatory board.<sup>84</sup>

The creation of the politics necessary today to place global issues on any legislative agenda or, indeed, in the public's consciousness, is a complex task. Such efforts often involve networks of individuals that extend beyond local boundaries, and the use of media. For example, when media stories of sweat shop labor threatened to tarnish the reputations of certain companies

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80. See Jim Carlton, *Think Big*, WALL ST. J., June 17, 1996, at 27.

81. See, e.g., Helena Norberg-Hodge, *Shifting Direction: From Global Dependence to Local Interdependence*, in THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 19 (arguing that the effect of globalization has been to weaken the economies of small agricultural communities); see also David Morris, *Communities: Building Authority, Responsibility and Capacity*, in THE CASE AGAINST THE GLOBAL ECONOMY, *supra* note 19.

82. See *supra* note 43.

83. Coordinating the politics of such issues across borders is difficult in itself, but transnational politics also involves more actors than ever before. States are by no means the only players. Political networks that extend across borders increasingly are formed and facilitated by non-governmental organizations including, of course, transnational corporations, but also public interest groups such as Greenpeace and Amnesty International. Indeed, the significance of a variety of other non-state actors whose conceptions of problems are not limited by geographical boundaries adds to the complexity of local and national politics. See Wendy Schoener, Note, *Non-Governmental Organizations and Global Activism: Legal and Informal Approaches*, 4 IND. J. GLOBAL LEGAL STUD. 537 (1997).

84. See GREIDER, *supra* note 32, at 11-26; STRANGE, THE RETREAT OF THE STATE, *supra* note 6, at 3-16. But see STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION, *supra* note 60.

(such as Nike) and certain individuals (such as Kathy Lee Gifford), some informal steps were taken by these entities to try to meet the criticisms involved.<sup>85</sup> Indeed, the diffuse nature of the politics involved in such issues gives rise to alternatives to state-oriented solutions to such problems, such as voluntary corporate codes.<sup>86</sup>

In sum, structural changes in the global economy give rise to significant changes in law and politics. As one commentator has noted: “[I]n the age of the networks, the relationship of the citizens to the body politic is in competition with the infinity of connections they establish outside it. So politics, far from being the organizing principle of life in society, appears a secondary activity, if not an artificial construct poorly suited to the resolution of the practical problems of the modern world.”<sup>87</sup> This change in politics thus fosters a fragmentation of power that ultimately affects not only how particular decisions are made, but the ability of some decisions to influence others.<sup>88</sup>

Just as the community is no longer “contained” in the region, which is no longer “contained” in the nation-state, the lesser decision cannot be deduced from the greater. The crisis of the spatial perception of power is thus felt in the formation of decisions. These, rather than being taken in linear fashion, which locks each entity into a precise competence, are fragmented, and the traditional political debate, a debate about principles and general ideas, an ideological debate, a debate over how society is to be organized, fades away, or rather crumbles, a reflection of the breakup of the decision process itself, and of its professionalization.<sup>89</sup>

The de-centering of politics that results thus makes it difficult to mobilize opinion in ways that lead to effective political change. Such limits on state-centered law and politics do not mean the state has no role to play, but these limitations further encourage an approach to the global economy that is largely market-oriented, with the state’s role focused increasingly and primarily on how best to create, attract, and retain the economic investment necessary to ensure prosperity for its inhabitants. This, in turn, requires states to create the currency necessary to compete effectively. Privatization, lower taxes, and less regulation are the most common sources of this currency, but they should not be the only purpose of the global state. Indeed, another

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85. See Charles S. Clark, *Sweatshops and Use of Child Labor are Under Fire from Activists All Over the World*, DET. NEWS, Aug. 26, 1996, at A6.

86. See, e.g., Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT’L L. J. 1963 (1996).

87. JEAN-MARIE GUÉHENNO, *THE END OF THE NATION-STATE* 19 (Victoria Elliott trans., 1995).

88. See *id.* at 20.

89. See *id.*

important role that the state will play involves the creation of the structure and incentives necessary to balance global competition with global cooperation, particularly in those areas that markets alone cannot govern.<sup>90</sup>

### III. THE GLOBALIZING STATE

The changes in the global economy described in Part II are fundamental, and predominantly structural in nature. The new limits on law and politics are not simply the product of new political tastes or trends. They are the result of a new kind of complexity in the interplay of various legal jurisdictions: the broadening of economic and political networks, a technology-driven capacity for rapid change and response to change, and an increasingly large number of powerful non-state actors who, in large part, derive their power from an ability to operate simultaneously in a number of jurisdictions and to conceptualize problems and opportunities without regard to state or national boundaries. The changing nature of the individuals and entities that make up the state also contributes to the state's new role.

What role can and should the state play? What theory of the state underlies this role and how is that theory related to practice in domestic law and politics? This section shall examine these questions. I will argue that the rhetoric of global competition provides states with what appears to be a wholly domestic agenda, but one that masks fundamental changes in the underlying theory of the state driving that rhetoric and the realities of global competition. I will then argue that different conceptions of the state might be consistent with its actions, but that these theories of the state have very different implications for the role of law.

#### A. *Global Competition*

William Croskey, a leading Constitutional law scholar in the 1940s and 1950s, argued for a conception of the Commerce Clause in his seminal treatise on Constitutional law, that, taken to its logical conclusion, applied to commerce among human beings who happened to live in states.<sup>91</sup> Thus, movement of goods between states was not necessary for him to conclude

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90. For a discussion of various alternatives and supplements to market approaches, see THE GROUP OF LISBON, *supra* note 23, at 107-40.

91. See WILLIAM WINSLOW CROSKEY, 1 POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 93 (1953).



interstate commerce was involved. Impact on human beings who lived in states was enough. This broad reading accorded with the powers of the national government as he perceived them and the "eighteenth century passion for uniform private law in the field of commerce."<sup>92</sup> In today's world of increasingly integrated global markets, it is also logical to think of nation-states as territories in which commerce occurs between the human beings who happen to live there. Of course, a state has a number of functions that ensure that this kind of economic activity can occur, as well as duties that go beyond ensuring the financial well-being of its residents. Safety, health, education, and basic human rights are also functions of the state and they are not unrelated to the goal of economic prosperity.<sup>93</sup>

The global economy interacts with the way the state functions today, placing a premium on markets, and organizing economic life in ways that do not adhere to the geographic boundaries of existing states. With the demise of the Cold War, the idea of states as self-contained units establishing a balance of power is less useful when it comes to the fluidity of borders and the increasing irrelevance of territory per se in determining who is and who is not successful in the global economy.<sup>94</sup> One important way of both emphasizing the new, more market-oriented, aspects of the global economy without giving up the rhetoric and concept of a strong state is to conceptualize its role as leading the fight for prosperity in the global economy. For some, the appropriate political rhetoric is one which describes the state as, in effect, a combatant in a new war, a war for markets and jobs.<sup>95</sup> Thus, one way states distinguish themselves from the structural economic power of transnational corporations, while adopting policies that are largely in sync with transnational corporations' global economic conception of the world, is to adopt a state-centered model of law based on global competition. States thus remain important players because their actions can help determine the extent to which economic prosperity occurs within their own borders.

Accordingly, the global political economy has spawned a competitiveness that is, at the extremes, comparable to *laissez-*

92. *Id.* at 82.

93. *See generally* Jean Dr ze & Amartya Sen, INDIA ECONOMIC DEVELOPMENT AND SOCIAL OPPORTUNITY 13-16 (1995).

94. *See generally* JOSEPH A. CAMILLERI & JIM FALK, THE END OF SOVEREIGNTY?, 166-67 (1992); *see also* STRANGE, THE RETREAT OF THE STATE, *supra* note 6, at 21-23.

95. *See generally* JOHN LEWIS GADDIS, WE NOW KNOW: RETHINKING COLD WAR HISTORY (1997).

faire capitalism of the nineteenth and early twentieth centuries.<sup>96</sup> Rather than seem overwhelmed by the power of worldwide markets, the state seeks to use these market forces to maximize the economic prosperity of its own citizens. In so doing, it furthers a model of globalization that is focused on individualism, a liberal conception of the economy, a limited conception of the role of the state, self-reliance, and competitiveness.<sup>97</sup>

Market values can, of course, be tempered by government (as they have been on the national level since the New Deal) but the realities of global competition and the de-centered aspects of the state described above accentuate these values.<sup>98</sup> The end result of the development of this type of global capitalism is one that encourages rhetoric that pits country against country, state against state, and firm against firm, in the quest for economic dominance and prosperity.<sup>99</sup> This sense of competition and the desire to dominate world markets so as to increase jobs and prosperity within the territory of a particular state has led to a political conception of the state centered around its need to participate effectively in the global competition that characterizes our world today.<sup>100</sup>

Not only does this often yield investment-friendly regulatory and tax policies, but it also pressures states to maximize their own efficiency and effectiveness.<sup>101</sup> More than simple corporate mimicry is involved, though the ability of the state to speak the language of cost containment, downsizing, and re-engineering in today's world

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96. See, e.g., GREIDER, *supra* note 32, at 172-73.

97. *Id.* at 369-70. Many argue that this model is peculiarly American. See, e.g., Martin Shapiro, *The Globalization of Law*, 1 *IND. J. GLOBAL LEGAL STUD.* 37 (1993). Others note that this model is more common to global capitalism in general. *But see* GUEHENNO, *supra* note 87, at 30-31, ("Certainly, the United States pushes to the limit the logic of the confirmation of interests in which the idea of a general good is dissolved . . . . But the extreme case can help to shed light on the average situation, and the American crisis is an indication of our future."). *Id.*

98. See, e.g., GREIDER, *supra* note 32, at 35-38.

99. *Id.* See also PAUL KRUGMAN, *supra* note 23, at 15-21.

100. See Cerny, *What Next for the State?*, *supra* note 6, at 132-33 ("The main focus of the competition state in the world . . . is the promotion of economic activities, whether at home or abroad, which will make firms and sectors located within the territory of the state *competitive in international markets.*"); see also *A Competitive Strategy for America, Second Report To The President and Congress, Competitiveness Policy Council*, Washington, D.C., at 79 (March 1993).

101. See generally Aman, *Administrative Law For A New Century*, *supra* note 17; see also Symposium, *Privatization: The Global Scale-Back of Government Involvement in National Economies*, 48 *ADMIN. L. REV.* 435 (1996) (surveying the theory, practice, and potential of privatization of the world's economics); JANE KELSEY, *ECONOMIC FUNDAMENTALISM* (1995) (analyzing the shift to corporatist approaches in New Zealand).

undoubtedly adds to its political legitimacy.<sup>102</sup> More importantly, the very policies a state employs to lower costs (to attract investment to its territory) necessitates new, cost-effective regulatory techniques of its own. But even beyond such economic necessities and the resulting cost-based regulatory reform, the fundamental nature of the state itself is changing. Many citizens who happen to reside within a particular state's borders have choices to move about, and they can and do exercise these choices. Those that do not have such choices may not fully or even partially identify with the state for their economic livelihood, especially if they work for global companies or are in a business that is in global competition.<sup>103</sup> The question of who makes up the state and which interests matter, and how these issues affect the ability of a state to act in any particular focused way, is a much more open question when the "war" involved is neither cold nor hot, but economic.<sup>104</sup>

Has it not always been thus? Yes and no. Yes, in the sense that economic prosperity has always been important, but no in the sense that global competition has never been so fierce or structured in such borderless ways.<sup>105</sup> The kinds of Cold War activities that gave states their official meaning and provided a certain kind of national unity no longer exist to the same degree.<sup>106</sup> Yet this does not mean the state is withering away, nor does it mean that the state is simply the sum total of the preferences of its many global and local inhabitants at any given time.<sup>107</sup> Although the state reflects a more diverse, less centered source of power, it remains an important means of maintaining a public component in policymaking decisions. The extent to which a state's power can be used to further a collectively derived public interest goal has been a major issue in modern public law debates.<sup>108</sup> The need to achieve a global conception of the public interest is even more difficult, but this is the challenge of the state and transnational politics. The diffuse nature of the issues

102. For a discussion of how state regulatory approaches often borrow from private forms and structures, see Aman, *The Earth As Eggshell Victim*, *supra* note 32, at 2118; see also Aman, *Administrative Law For A New Century*, *supra* note 17, at 90-91.

103. See generally GUEHENNO, *supra* note 87, at 23.

104. See *supra* note 36, at 301-15 (asking the question "who is us?" in light of an increasingly denationalized global economy).

105. *Id.* at 119-35; see also, DICKEN, *supra* note 32, at 13-14.

106. *Id.*

107. The state, despite its diversity, has a distinct role to play. See, e.g., BRINGING THE STATE BACK IN (Peter B. Evans et al. eds., 1985); STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION, *supra* note 60. But see PETER SELF, GOVERNMENT BY THE MARKET 4-20 (1993).

108. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

involved and the difficulty of creating the politics necessary to create a global conception of the public interest facilitates the ability of essentially market approaches to dominate domestic and global discourses.

In response, a more corporatist role for states may be emerging as states try to do more than simply reflect the sum total of the preferences of their inhabitants, and instead seek to assert their view of the public interest. Such an approach sees the state's role as something more than a neutral arbiter of the interest group politics that predominate a pluralistic conception of the state. It also differs from more public choice conceptions of the state, where it is assumed that certain, dominant interests will exercise more control over the state than the more neutral, pluralistic conception envisages. Indeed, for public choice theorists, the idea of the existence of a collective public interest is undermined. A corporatist approach is not as democratic in its approach as other forms of interest group behavior, but it does posit the existence of a public interest, one which the state tries to further. In this way the state is, in a sense, just another actor (though obviously a very powerful one) but not nearly as independent as the pluralists or republicans might imagine; nor as susceptible to capture or manipulation as the public choice theorists might assume.<sup>109</sup>

The changes in the state thus far range from structural economic changes in the way non-state and state actors operate, to political changes in the way the role of the state is conceptualized. The end result of these changes is enormous competition between, within, and among states for investment, and a regulatory language and approach that, in many ways, has become corporatized itself, if not privatized. A common way for government at federal, state, and local levels to conceptualize itself is as something akin to a corporate entity that provides services to its customer/citizens and attracts jobs and capital to its locale.<sup>110</sup> It is as if the state itself is an individual or a transnational corporation locked in competition with other individuals or transnational corporations for success in a series of zero-sum political and economic games. When Toyota chooses one country over another for the location of its plant, or one state over another and one locale within that state as opposed to another, there is essentially a multiplier effect when it comes to the various competitions that take place between governmental

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109. For a discussion of corporatist theory, see P. P. CRAIG, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA* 148-53 (1990). See also A. CAWSON, *CORPORATISM AND POLITICAL THEORY* 22-46 (1986).

110. See PERRUCCI, *supra* note 74, at 81.

entities to attract prosperity to their respective territorial space. There are strong pressures on each level of government to assist in this competition that are bottom-up in their impact. That is to say, even if federal regulations subject all states to the same federal costs (a level playing field), that does not necessarily mean that some states or local units do not believe that they could be more "efficient," and therefore competitive, given the chance to do so.

The welfare reform debate in the United States is a case in point. One of the cost considerations driving welfare reform from a state perspective was the desire on the part of states to control their own costs and make their own determinations of how best to distribute federal and state funds in order to deal with those who could not compete effectively in the global economy.<sup>111</sup> Their belief in their own management skills and decisions created a corresponding belief in their ability to lower welfare costs in their states, thereby increasing their own productivity.<sup>112</sup> Thus, states in global competition are not content to have a level playing field when it comes to welfare costs, if they believe they can cut those costs, achieve their goals, and thereby out-compete other states in attracting foreign investment. Indeed, all such common expenditures among states become the source of currency with which they can compete against each other.

The pressures from below state governments are even greater. Since municipalities within a state wish to compete effectively for investment in their own communities, they too want their state to have rules and regulations that are more cost-effective than those imposed on nearby communities in neighboring states. If a state wishes to be successful, it must help its own local communities to attract jobs to their cities. Since it is at the local level that the end result of this competition is finally realized—for example, a plant or facility may or may not be built—it is not surprising that the competition at the local level might be particularly fierce and a relatively pure corporatist approach to decision-making increasingly common.<sup>113</sup>

The competitive philosophy so prevalent in the ways that all levels of governments now seek to compete for jobs and investment within their own territories is a derivative of the competition that

111. See, e.g., Robert Pear, *Federal, State Officials Spar Over Welfare Spending*, L.A. DAILY NEWS, Dec. 26, 1996, at N22.

112. *Id.*

113. See PERRUCCI, *supra* note 74, at 1-20 (describing and analyzing the competition among various Midwestern states for Japanese auto plants, and noting that a kind of corporatism characterized the decision-making processes at the state and local levels that led to the financial incentives necessary to attract this investment).

occurs among transnational corporations at the global level. That competition usually is characterized as fierce.<sup>114</sup> In response, states have adopted not only the dominant rhetoric of the private sector, but often many of the private sector's structures, goals, and means of operation as well.<sup>115</sup> Increasingly, governments at all levels play the game as if they were transnational corporations. Such an approach can yield a conception of government that is so market driven as to raise significant concerns about important non-market values, such as those embodied in certain provisions of the U.S. Constitution, as well as the limits of the market metaphor when it comes to governmental decision-making and the role of individual citizens. As we shall see, if privatization of persons means the deprivation of constitutional rights of prisoners,<sup>116</sup> or if contracting-out snow removal or garbage collection<sup>117</sup> means that politics is viewed as separate and distinct from administration, democracy and constitutional rights will suffer. There are, in effect, limits to the sources of currency available to states for competing effectively in the global economy.

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114. As noted in *THE GROUP OF LISBON*, *supra* note 23, at xiii:

Competing in the global economy—characterized today by the emergence of new competitors, especially from South and Southeast Asia—has become the everyday slogan of multinational corporation advertisers, business school managers, trendy economists, and political leaders. People are told that a new global economy is in the making, the main players being North American, Western European, and Japanese-based multinational corporations. Through localization and transplants of production facilities and fierce competition—or alternatively, via strong alliances to enable more successful competition at the world level—the global networks of multinational corporations are reshaping the sectoral and territorial configuration of the world economy, from the automobile industry to telecommunications, electronics to pharmaceuticals, textiles to civilian air transport. The new global economy looks like a battle among economic giants where no rest or compassion is allowed the fighters. The globalization of the economy seems an inexorable process enabling world networks of financial and industrial firms to amass an unparalleled power of decision-making and influence over the destiny of millions of people throughout the world.

115. See Cerny, *What Next for the State?*, *supra* note 6, at 124 (“[W]hile the state has always been to some extent a promoter of market forces, state structures today are being transformed into more and more market-oriented and even market-based organizations themselves.”). For a discussion of how the state has turned to the private sector for structural and procedural examples of administration, see Aman, *A Global Perspective On Regulatory Reform*, *supra* note 59. See also *infra* text accompanying notes 161-91.

116. See *infra* notes 261-62 and accompanying text.

117. See *infra* text accompanying notes 252-54.

### B. *The Limits of Competition*

There are many forms which a competitive model of global capitalism may take, many of which are more cooperative than a simple laissez-faire model might predict.<sup>118</sup> Moreover, there are degrees to which the state can respond to the rhetoric of global competition, particularly since not all industries within a state are in global competition to the same extent and the state itself is not akin to a unified corporate entity. The state need not and should not see itself only in terms that might be appropriate for transnational corporations. This is because effective global governance requires more than only competition among individuals and firms. At the state level,

the pursuit of competition in search of profit as the single legitimate overarching concern of firms is unjustified as the main motivation for private and public choices in a world of increasingly global processes, problems, and interdependence. Competition among firms alone cannot handle long-term world problems efficiently. The market cannot properly discount the future: it is naturally shortsighted. Putting together thousands of myopic organizations does not enable them, individually or collectively, to see the reality and acquire a sense of direction, or to provide governance, order, and security. The same applies to competition among nations, which, in excess, inevitably leads to a rat-race mentality and global economic wars and hinders the ability of policymakers to address national and global priorities.<sup>119</sup>

The rhetoric of competition and the market metaphor can, at times, dictate governmental responses that are wholly in tune with the rhetoric of the market and global competition, but nonetheless inappropriate. For example, there are many policy choices that are said to be required by global competition, when, in fact, they may not be. The issues are much more complex, as Professor Krugman has argued:

Most people who use the term "competitiveness" do so without a second thought. It seems obvious to them that the analogy between a country and a corporation is reasonable and that to ask whether the United States is competitive in the world market is no different in principle from asking whether General Motors is competitive in the North American minivan market.

In fact, however, trying to define the competitiveness of a nation is much more problematic than defining that of a corporation. The bottom line for a corporation is literally its bottom line: if a corporation cannot afford to pay its workers, suppliers, and bondholders, it will go out of business. So when we say that a corporation is uncompetitive, we mean that its market position is

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118. THE GROUP OF LISBON, *supra* note 23, at 121-40.

119. *Id.* at xvi-xvii.

unsustainable—that unless it improves its performance, it will cease to exist. Countries, on the other hand, do not go out of business. They may be happy or unhappy with their economic performance, but they have no well-defined bottom line. As a result, the concept of national competitiveness is elusive.<sup>120</sup>

Moreover, there are obvious limits to other metaphors spawned by global competitiveness, particularly when they are applied to citizens.<sup>121</sup> The role of citizen-as-customer, for example, is a passive one. It assumes too bright a line between what government does and who the government is.<sup>122</sup> Citizens-as-owners is often a more appropriate analogy.<sup>123</sup> The citizen/customer metaphor, however, also implies that citizen/customers have a choice when it comes to, for example, certain municipal services.<sup>124</sup> This usually is not the case, and citizens must accept a certain provider for at least the duration of the contract involved. Moreover, the citizen-as-customer metaphor has implications for the way we think about the service performed by private providers.<sup>125</sup> It suggests that there is a bright line between the service provided and policymaking, as if all of the policy is made when government decides to contract out a certain service.<sup>126</sup> In reality, the public's role or interest in the activities contracted out does not end at the delegation stage—i.e., the point at which the contract is signed. How a service provider goes about the job involves any number of policy choices over which there often is no public input. By privatizing the concept of citizenship, the implicit assumption of most such reforms is that citizens will know if they like the service they are getting, but they are not expected to be players in the fundamental policy decisions that determine whether, how, and to whom those services should be dispensed.<sup>127</sup>

As we shall see below, one of the major concerns with privatization and globalization is that issues that once were public and subject to democratic decision-making processes are, once privatized, removed from public view. The lack of democracy or democratic outlets built into such decision-making structures

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120. KRUGMAN, *supra* note 23, at 5-6.

121. See generally HINDY LAUER SCHACHTER, *REINVENTING GOVERNMENT OR REINVENTING OURSELVES* (1997).

122. *Id.* at 7-8.

123. *Id.* at 9.

124. For an analysis of how markets for municipal services differ from other markets for goods, see IAN HARDEN, *THE CONTRACTING STATE* (1992).

125. *Id.* at 1-6; see also Marc Aronson, *A Public Lawyer's Responses To Privatisation and Outsourcing*, in *THE PROVINCE OF ADMINISTRATIVE LAW*, *supra* note 17, at 40.

126. *Id.* at 43.

127. *Id.*



may create incentives on the part of the state to choose metaphors such as citizens-as-customers and thereby legitimate state activities and decisions without public input and with increasingly narrow, market justifications. Indeed, though there are clear limits when it comes to the ways in which the paradigm of global competition applies to states, the market, competition-based metaphor itself can mask a variety of assumptions concerning both the role of the state and the role that public law can play in various regulatory contexts. Because familiar political debates involving the appropriate role of government vis-à-vis the market easily can fit within the rhetoric of global competition, it is easy simply to assume that market approaches are better than regulatory approaches or that the pendulum is simply swinging in the direction of less government for the time being. This kind of rhetoric makes it easy to lose sight of the fact that significant structural changes in the ability of the state to act effectively are at work, changes that necessitate new conceptualizations of the role of law and of politics, not simply the adoption of global competition as a metaphor. Because the way that the state reacts to globalization is capable of various interpretations, some of which simply reinforce the politics of the past, it is useful to examine three of these basic interpretations of the state's domestic reactions to the global economy, two of which draw heavily on previous conceptions of the state and public law and one of which points in a new direction.

### C. *Three Approaches to the Relationship of Globalization to Domestic Law and Politics*

The global economy encourages a politics of competitiveness that is both real and, at times, excessive. The values of competition resonate with certain fundamental values such as liberty and individualism and they can lend credibility to traditional domestic arguments that have long been part of the political debates over the appropriate roles of government vis-à-vis the market, especially the federal government.<sup>128</sup> For analytical

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128. See, e.g., Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 *et seq.* (1996) (emphasizing a minimalist role for the federal government in economic areas); see Unfunded Mandate Reform Act of 1995, 2 U.S.C.A. § 1501 (1997) (ending the imposition of Federal mandate without adequate funding on state's local governments); Risk Assessment and Cost-Benefit Analysis Act of 1995, H.R. 690, 104th Cong., (1995) (attempting to create an Office of Risk Assessment and Cost Benefit Analysis in federal agencies); Private Property Protection Act of 1995, H.R. 925, 104th Cong., (1995) (asserting that "no law or agency action should limit the use of privately owned property so as to diminish its value").

purposes, it is helpful to differentiate among three approaches to domestic law reform and politics, recognizing, of course, that such categories are never totally pure; they overlap in many ways, but they also represent significantly different starting points for analysis.

One approach derives from the conception of a strong state, capable of imposing its will at home and, if necessary, abroad. A common version of this approach seeks to revive laissez-faire capitalism in the context of global capitalism, by linking domestic economic reform with economic approaches that dominate at the global level. To this end, strong state laissez-faire proponents emphasize the importance of low taxes and minimal regulation.<sup>129</sup> This approach sometimes coincides with libertarian approaches to constitutional issues, such as the takings clause of the Fifth Amendment, or other constitutional interpretive approaches that substantially limit the regulatory powers of government, especially the federal government.<sup>130</sup> Alternatively, other strong state regulators believe it is possible to maintain and improve upon current regulatory structures and approaches to achieve domestic goals.<sup>131</sup>

A second approach represents the state as the object of "reinvention." The reinvention of government movement<sup>132</sup> seeks to streamline government to make it more competitive and efficient. As different as the more market-oriented discourse sounds when it comes to discussing citizens as customers, there is also an implied status quo aspect to this approach to

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129. *Id.*

130. See H.R. 925 § 3(a), which was the most prohibitive of the legislative proposals dealing with the compensation of property rights. It required that the federal government:

compensate an owner of property whose use of any portion of that property has been limited by an agency action, under a specified regulatory law, that diminishes the fair market value of that portion by 20 percent or more. The amount of the compensation shall equal the diminution in value that resulted from the agency action.

H.R. 925 § 3(a).

131. See, e.g., Mark A. Hoffman, *Nader Faults EPA as Lax on Enforcement*, BUS. INS., May 1, 1995, at 46-47.

132. A prime example is Vice President Al Gore, *From Red Tape to Results: Creating a Government That Works Better and Costs Less* (REP. OF THE NAT'L PERFORMANCE REV.) (1993) [hereinafter *National Performance Review*]. For a discussion of this report, see Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165 (1994); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180 (1994); Paul R. Verkuil, *Is Efficient Government an Oxymoron?*, 43 DUKE L.J. 1221 (1994).

governance. It assumes that producing a government that works better and costs less can come solely from structural and procedural changes within the government itself rather than substantive changes.<sup>133</sup> The market and market forces are but a means to an end, and those ends often are intended to be essentially the same as before. Market approaches and market discourses, however, can change more than simply the means by which governments act. Not all public law values are capable of being translated into a cost-benefit discourse.<sup>134</sup> Inevitably, there is something lost in translation when citizens are viewed primarily as customers or consumers rather than active participants in the public policy issues the provision of government services embody. Moreover, at times, the attempt to apply a market discourse to regulatory problems may be a substitute for a kind of procedural *laissez-faireism*, falling more into the first category above.

There are limits to the extent to which the market metaphor can apply effectively to public services or functions without changing outcomes. The third approach to law reforms is closely akin to the efficient state model just described. We shall call this approach globalization because the globalizing state is being transformed by the processes of globalization and plays an active role in those processes. The globalizing state is both an agent of globalization and an entity that is itself shaped and changed by these very processes of which it is a part. This approach blends public and private power in ways aimed at maintaining the importance of a public role, even though a market discourse may be prominent. Moreover, the use of the market and market approaches does not necessarily imply a status quo ante approach. Performing governmental tasks more efficiently is not the only goal. Change in the form, structure, and substance of regulatory approaches is also contemplated. Indeed, the globalizing state seeks to maintain a public perspective on transnational issues as well as recognize that multigovernmental approaches and the involvement of non-state actors may be increasingly necessary if the state is to be active—even in issues that once were thought to be wholly private and domestic in nature.

We shall now expand on each of these three major approaches to lawmaking and law reform.

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133. SCHACHTER, *supra* note 121, at 2-3.

134. *Id.* See generally MARK SAGOFF, *THE ECONOMY OF THE EARTH* (1988) (arguing that social regulation "responds to a need to make markets more humane, not necessarily to make them more efficient").

## 1. Back to the Future—The Strong State

One assumption that can be made regarding the global political economy is that the state, especially the United States, remains strong and in control of its own destiny.<sup>135</sup> There are at least two polar versions of the strong state thesis and both involve domestic political and legal responses that clearly resonate with long-standing political assumptions and public law theories, both domestic and international.

A rhetorical approach to global competition that fits easily with the realities of today's global economy is to return to a conception of the minimal state,<sup>136</sup> especially at the federal level. Deregulation, privatization, lower taxes, and smaller and less intrusive government when it comes to economic issues, are seen by strong state reformers as ends in themselves.<sup>137</sup> A market economy knows no boundaries, and this fact, along with the additional impetus the ideology of competition receives from global competition, mandates a return to the pre-New Deal state. Such an approach coincides with the shift occurring from states to markets outlined above, but the market approaches that result are not simply because of the difficulties in asserting regulatory control over transnational actors and transnational problems; they represent an affirmative choice on the part of a strong state to reimpose a laissez-faire economy.<sup>138</sup>

Along with this assumption of a strong state are certain assumptions about law, particularly the law that governs governmental actions and the boundaries between public and private powers and state and federal jurisdiction. Perhaps the most significant aspect of a laissez-faire, strong state conception of global competition, is the need for a clearly defined line between public and private powers. The purpose of privatization and deregulation is to return decision-making back to the private sector, where private ordering and a market economy, coupled with clear property rights and effective criminal law enforcement, will supply the structure, order, stability, and rules needed for the economy to prosper. Thus, the diffusion of state power, especially

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135. See generally ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987) (inquiring how the interaction of the state and market is transforming international relations); JOSEPH S. NYE, JR., *BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER* (1990) (examining the transition of international power in the twentieth century and the role of the United States as a leader).

136. See NOZICK, *supra* note 4.

137. *Id.*; see James Gerstenzang & Marc Lacey, *Gore, Kemp Clash on Tax Cuts and Economic Growth Politics*, L.A. TIMES, Oct. 10, 1996, at A1 (quoting Jack Kemp as stating that the U.S. economy is "overtaxed" and "overregulated").

138. CRAIG, *supra* note 109, at 153-57.

at the federal level, coupled with the jurisdictional problems encountered by states that attempt to regulate transnational actors, technologies, or problems, all encourage moving as much power as possible from the public to the private sector. Such a view would be consistent with approaches to state action and privatized governmental services that seek to maximize the role of the private sector, and the private values and operating procedures this implies.<sup>139</sup>

If a public response in the form of law is necessary, it should, to the extent possible, occur at the most local level of government.<sup>140</sup> Thus, another structural legal assumption that underlies the strong laissez-faire state thesis is that there should be clear lines between national, state, and local governments.<sup>141</sup> This sense of what the appropriate allocation of governmental power should be is, essentially, a pre-New Deal approach to the federalism aspects of the Constitution. It conforms to the idea that national power should be decentralized and minimal and that this is a federal choice. Not unlike the balanced budget amendment,<sup>142</sup> constitutionalizing such basic premises and removing even the temptation of choice often is seen as a desirable outcome by advocates of this position. Of course, a truly strong national state might pass federal laws mandating certain laissez-faire approaches at the state level, if necessary. In general, however, the federal government's leadership comes in maximizing the economic freedom of its citizens, rather than in trying to micro-manage various markets or problems best left to the private sector and, if necessary, individual states.

This particular laissez-faire view of the state does not play itself out in a pure form,<sup>143</sup> but it is strongly evident in the isolationist approaches of some policymakers to international law as well as to approaches to free trade and, more domestically,

139. See, e.g., Chief Justice Rehnquist's approach to state action in *NCAA v. Tarkanian*, 488 U.S. 179 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, (1974); *Moose Lodge 107 v. Irvis*, 407 U.S. 163 (1972); see also Cerny, *What Next For the State?*, *supra* note 6, at 130 ("[G]lobalization entails the undermining of the public character of public goods and of the specific character of specific assets, i.e. the privatization and marketization of economic and political structures.").

140. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

141. *Id.*

142. H.R.J. Res. 52, 105th Cong. (1997).

143. For example, many strong state laissez-faire advocates in the economic sphere often support state intervention on social issues. See ANDREW GAMBLE, *THE FREE ECONOMY AND THE STRONG STATE* 35 (1988); see also Dan Carney, *School Prayer Delayed by GOP Squabbles*, 54 CONG. Q. WKLY. REP. 2529 (1996) (discussing social conservatives' proposed constitutional amendment to protect school prayer).

certain cost-benefit analysis approaches at the regulatory level.<sup>144</sup> Adding an explicit cost-benefit dimension to regulatory processes can mean many things, but in the context of strong state laissez-faire advocates, it can be a means by which procedures are used to achieve substantive ends—i.e., minimal or no governmental action.<sup>145</sup> Indeed, market discourses can not only refine governmental choices and decision-making, but, depending upon how one defines cost and benefit, they can also substantially limit the substantive role of the state.

The politics generated by advocates of a strong, laissez-faire state is remarkably similar to traditional political debates between conservatives and liberals, with the market, freedom, and liberty placed in opposition to command and control regulation, federal bureaucracies, and governmental intervention. The bright lines between the public and the private, government and markets, rights and freedoms, among and between nations (as in the immigration debates), and between nations and internal states, all reinforce legal and political debates that appear to continue without regard to the very different economy and world in which we live today. They also reinforce a political theory of the state that suggests that, when it comes to intervention into the market

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144. See the isolationist positions of some conservative senators, such as Jesse Helms's proposed Foreign Relations Revitalization Act (S.908), which would have eliminated the Agency for International Development, the U.S. Arms Control and Disarmament Agency, and the U.S. Information Agency 141 CONG. REC. S18617-02 (daily ed. Dec. 14, 1995) (statements of Sen. Helms). See also Helms's opposition to the International Chemical Weapons Convention, 143 CONG. REC. S3570-628 (daily ed. Apr. 24, 1997) (statement of Sen. Helms), and some of the more extreme APA cost-benefit reforms of the 104th Congress designed more to ensure agency inaction than any real reform, such as the Comprehensive Regulatory Reform Act of 1995, S.343, 104th Cong. 1995.

145. Using process to achieve substantive results that prevent governmental intervention is a kind of laissez-faire proceduralism. See Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 264 (1978). As Professor Verkuil has noted with respect to early United States administrative law:

[T]he substantive values of the nineteenth-century liberal, non-interventionist state and the procedural values of the common-law, adversary model of decision-making have a common core and are mutually supportive. Both sets of values reflected a common philosophical premise that the correct result would be achieved by the free clash of competing forces in the marketplace, or courtroom. As Jerome Frank noted, the 'fight [or adversary] theory of justice is a sort of legal laissez-faire.'

*Id.* (quoting JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 92 (1949)). For a case study of how Congress used procedure and agency structure to constrain the abilities of a regulatory agency, the Department of Energy, see Alfred C. Aman, Jr., *Institutionalizing the Energy Crisis: Some Structural and Procedural Lessons*, 65 CORNELL L. REV. 491 (1980).

economy, there is no public interest beyond what the market itself might provide.<sup>146</sup>

A second type of strong state response to the global economy decries deregulation and privatization and is especially skeptical of international regulatory approaches to issues.<sup>147</sup> This vision of the state resurrects its own nostalgia for the past. It assumes that the state can simply regulate markets as we always have and the rest of the world will either cope or follow our lead.<sup>148</sup> The global aspects of today's markets, actors, and technologies need not limit our responses, if we can muster the political will to act.<sup>149</sup> By setting the appropriate regulatory standards at home, we can set standards for the rest of the world. If they do not choose to follow our lead, that should not inhibit our use and further development of a strong regulatory approach and a public law based on transparency and participation.<sup>150</sup>

Not unlike the strong state response of the laissez-faire advocates, those who advocate the regulatory strong state response also believe in a public/private dichotomy, but the public sphere, particularly when it comes to the economic and environmental well being of individuals, is a broad one, while the private sphere is not.<sup>151</sup> What is private relates more to rights such as individual privacy, or the separation of church and state.<sup>152</sup> Given the need for uniformity and the fear of a "race to the bottom" when it comes to economic legislation, they advocate strong national regulation and a view of states that substantially limits their freedom from uniform and unifying national regulation.<sup>153</sup>

146. See SELF, *supra* note 107, at 48-69.

147. See *Uruguay Round Agreements of the General Agreements on Tariffs and Trade: Hearing Before the House Small Business Commission* (Apr. 265, 1994) (testimony of Ralph Nader), available in 1994 WL 230684 ("[D]ecisions arising from such [international] governance can pull down our higher living standards in key areas or impose trade fines and sanctions until such deregulation is accepted.") [hereinafter Nader].

148. *Id.*

149. See Alissa J. Rubin, *Buchanan's Protectionism Slows Trade Agenda*, 54 CONG. Q. WKLY. REP. 532 (March 2, 1996) (discussing Patrick Buchanan's anti-trade rhetoric in the context of the 1995 trade deficit); see also *Eat Your NAFTA*, ECONOMIST, Nov. 13, 1995, at 15 (discussing Ross Perot's anti-NAFTA stance).

150. See Nader, *supra* note 147.

151. See Martin Crutsinger, *Clinton Pushing to Expand Free Trade in Latin America*, ASSOCIATED PRESS, Apr. 11, 1997, at 2, available in 1997 WL 4861704 (discussing Ralph Nader's Public Citizen Trade Watch's assertion that a recent outbreak of hepatitis among Michigan school children caused by Mexican strawberries was the result of weak Mexican regulation).

152. See *supra* note 141.

153. See *Family Self-Sufficiency Act* (H.R. 4), 141 CONG. REC. S11735-784 (daily ed. Aug. 7, 1995) (containing statements of Sen. Wellstone opposing block grants to the states because they would "lower the floor of federal protection").

While debates between these strong state advocates often predictably focus on what should be public and private, or a federal as opposed to a state issue, the debate can sometimes be less predictable when it comes to the role that free trade and treaties (such as NAFTA) or legislation (such as fast-track) should play in our economy.<sup>154</sup> The strong state free-traders are usually eager to expand markets in whatever ways they can, especially if more wage and job competition results in the U.S.<sup>155</sup> The strong state regulators fear that domestic legal institutions will be undermined, and private power will be greatly enhanced at the expense of public control and public law values.<sup>156</sup> At the extremes of the regulatory view are those who advocate direct forms of economic protectionism as a response to global competition.<sup>157</sup> Less extreme is a view that would negate free trade agreements such as NAFTA in the absence of clear regulatory solutions to environmental, wage, and labor issues.<sup>158</sup>

In summary, one response to the global economy is to assert the strong will of the state either in a manner that seeks to maximize competition at home and abroad, or one that seeks to soften, if not minimize it at home. Both views, however, assume a theory of the state in which states are the primary actors in the international system and have substantial control over their own national economy.<sup>159</sup> This view of the state, however, and the

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154. See the differences on this issue among liberal democrats who otherwise support national legislation. See *Fast Track Negotiating Authority: Hearings Before the Senate Commerce, Science and Transp. Comm.* (Sept. 30, 1997), available in 1997 WL 6056 (discussing the president's request for fast-track authority).

155. See *NAFTA Membership for Chile: Hearings Before the Trade Subcomm. of the House Ways and Means Comm.* (June 21, 1995) (testimony of Charlene Barshefsky), available in 1995 WL 373535 ("expanding trade is critical to our efforts to create good, high-wage jobs").

156. Ralph Nader has argued that "GATT sets up an apparatus that is secretive, inaccessible and unappealing to decide disputes and harmonize standards—in our case downward—by subordinating and therefore subjugating critical health and safety consumer issues, environmental issues and workplace issues to the imperatives of commercial trade." *Nader Blasts GATT*, FIN. POST Dec. 23, 1993, at 1.

157. See *Is Free Trade Good or Bad for America?*, STAR-LEDGER, Sept. 14, 1997, available in 1997 WL 12560888 (containing comments made by AFL-CIO president Charles Wolkaneck explaining the AFL-CIOs opposition to fast track legislation: "[American labor] can't compete with \$2 wages").

158. See *All Things Considered: Richard Gephardt Announces Opposition to Nafta* (National Public Radio radio broadcast, Sept. 21, 1993) ("[M]embers of Congress who come to oppose or vote to oppose this NAFTA are not protectionist and we're not against Mexico. We simply believe that passing a NAFTA that fails to ensure sensible Mexican wage increases . . . is worse than no NAFTA at all.").

159. In some ways, these strong state views are somewhat akin to the realists' position vis-à-vis the state in international relations theory. The state is viewed as a unified whole. See Anne-Marie Slaughter, *supra* note 21, at 722.



public law and policy that flows from it, is no longer in accord with the realities of the global economy today, unless states and their citizenry are willing to ignore the impact of a pure laissez-faire economy on those who are unable to compete effectively, or, in the alternative, take actions that substantially raise the costs of those doing business within their borders.<sup>160</sup>

## 2. Reinventing Government—The Efficient State

As previously noted, a different way of conceptualizing the state is as a unit made up of individuals and groups, whose preferences matter and whose preferences increasingly are formed beyond national borders.<sup>161</sup> Quite apart from whether the state is strong or weak relative to global markets, the reinventing government movement tries to maintain active state involvement, but it assumes the state must act differently than it has in the past. States need not, however, withdraw state power completely in favor of the power of markets. The goal of governmental efficiency is asserted in place of the ideological regulation or deregulation debate. Indeed, at the heart of the reinvention of government approach is its belief that procedural and structural legal reform make it possible to have a government that works better and costs less.<sup>162</sup> Such reforms resonate with the global competition discourse of today in part because of the market rhetoric such approaches produce and the greater reliance now placed on market approaches to regulation and bureaucratic structures. The reinvention approach also produces government that “looks like” or, at least, sounds like the private entities with which it deals and tries to influence.<sup>163</sup>

Turning to the private sector for ideas is not unusual. Governments, especially activist governments, have usually borrowed their regulatory forms and structures from the very entities they seek to influence and control. In the New Deal, for example, government borrowed heavily from the more fluid organizational conceptions of corporations when it came to designing the internal structures of independent regulatory

160. See Thomas Sanction, *A New French Twist*, TIME, June 16, 1997, at 54 (discussing the effects of Lionel Jospin's job creation proposals on France's plan to join the single European currency); see also *France Still Trapped*, ECONOMIST, July 5, 1997, at 51.

161. For an analogy to this view of the state, see Anne-Marie Slaughter, *supra* note 21, at 727-28 (describing a liberal theory of international relations).

162. See National Performance Review, *supra* note 132; see also Aman, *A Global Perspective On Current Regulatory Reform*, *supra* note 59, at 450-51.

163. An example of this on the international level is the private standards called ISO 14000. See *infra* note 237.

agencies.<sup>164</sup> Strict separation of power approaches were eschewed in favor of a more practical governmental model, borrowing from large corporations concepts of internally shared responsibility and power.<sup>165</sup>

The reinvention approach to the state also borrows heavily from the corporate sector, including its decision to downsize, decentralize, and, more generally, re-engineer its own bureaucratic structures and procedures to maximize its global competitiveness.<sup>166</sup> The increase in direct global competition from other corporate entities, coupled with potential opportunities to expand in worldwide markets may drive many companies to lower their costs and maximize their flexibility. In this regard, the web-like nature of transnational corporations is perhaps the ultimate form of this drive for efficiency.<sup>167</sup> Sometimes processes are farmed out to subsidiaries in other countries;<sup>168</sup> other times less lengthy or formal relationships are involved, as various tasks are contracted out to a variety of independent contractors to ensure that the lowest cost providers can be found.<sup>169</sup>

Applying these approaches to governments has its limits, but the interjection of market concepts of efficiency into the regulation versus no regulation debate, with the intent that these concepts apply to the government, has changed the discussion.<sup>170</sup> More often than not, the focus on governmental efficiency is an attempt to recognize some of a state's shortcomings in the past, and to try to make amends by achieving its goals in less costly and less intrusive ways. At the heart of such a response, however, is a fundamentally status quo ante strategy. A government that seeks to be more productive and less costly by making primarily procedural and structural changes is not necessarily one that is fundamentally changing the substantive politics of what it is trying to accomplish; the changes are to the means used to achieve those ends.<sup>171</sup> Nor are these approaches

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164. See AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5, at 13.

165. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 10-12 (1938).

166. See generally CERNY, *THE CHANGING ARCHITECTURE OF POLITICS*, *supra* note 22, at 227-29.

167. See DICKEN, *supra* note 32, at 212-23 (discussing the interconnections of corporations).

168. See *id.* at 191-212 (analyzing the internal relationships of transnational corporations).

169. See *id.* at 215-21 (analyzing subcontracting).

170. Perhaps the ultimate political example of this was President Clinton's statement in his 1996 State of the Union Address that "the era of big government was over." President Bill Clinton, *State of the Union Address* (Jan. 23, 1996), in 32 *Weekly Comp. Pres. Doc.* 90. The political left had a sharp reaction to this. See David Kusnet, *Feeling His Way*, *MOTHER JONES*, Feb. 1, 1997, at 46.

171. See SCHACHTER, *supra* note 121, at 9.

necessarily intended to be representative of a state that differs in any significant way from the conception of the nation-state that has dominated our legal imagination since the New Deal.

At the same time, from the perspective of those who advocate either a return to a more laissez-faire economy or a more traditional regulatory state, the very change of the language of regulation from one steeped in demands and requirements, to one that emphasizes costs and benefits, provides a discourse that can have a very definite substantive effect. For example, when public law values involving long-term judgements regarding the value of life, the beauty of the environment, or other non-economic issues are translated into a cost-benefit economic discourse, such changes are not simply alternative translations, but—like other kinds of translation—introduce nuances and substantive changes.<sup>172</sup> Economic language itself can have a deregulatory effect, depending upon how one defines costs and benefits.<sup>173</sup> Moreover, from either the point of view of strong state laissez-faire advocates, or regulators and efficiency-minded governance advocates, the metaphor of citizen-as-customer has serious limitations and raises important concerns from whatever state standpoint one assumes. As we have noted above, the idea of citizen-as-customer can often encourage a passive view of the electorate, one that sees citizens as concerned only with very personal bottom lines, rather than a series of public processes that lead to those bottom lines, in which their input is sought and treated as meaningful.

The public law that the efficient state theory encourages is similar, in some ways, to what some commentators have called the new public law.<sup>174</sup> The new public law assumes, if not a strong state, certainly a state with choices. It also assumes the existence of a state-centered system of politics in which the choices made are shaped by the politics that produce them.<sup>175</sup> Its emphasis on transformations and the ability of law and politics to achieve those transformations emphasizes a view of politics that is or can be effective. Political choices are endogenous to the system and politics and law are closely linked.<sup>176</sup> Democratic

172. See generally SAGOFF, *supra* note 134.

173. For a discussion of the similarities and the differences between the cost-benefit approaches in the executive orders issued by the Clinton Administration and the Reagan-Bush Administration, see Ellen Siegler, *Executive Order 12,866: An Analysis of the New Executive Order on Regulatory Planning and Review*, 24 ENVTL. L. REP. 10,070 (1994).

174. See generally Symposium, *The New Public Law*, 89 MICH. L. REV. 707 (1991).

175. See William Eskridge & Gary Peller, *The New Public Law Movement: Moderation As A Postmodern Cultural Form*, 89 MICH. L. REV. 707, 749 (1991).

176. *Id.*

theory is also important to this view. It is only by participation in the political process that political views can form and be transformative.<sup>177</sup> Finally, the new public law emphasizes normativity and substance rather than objective procedural processes alone, and it stresses the need for interpretivism, a flexible approach to law that allows decision-makers, especially courts, to adapt statutory meaning to the continual demands of the present.<sup>178</sup>

The new public law results, like the reinvention approach itself, in a pragmatic approach to law and the use of law to effectuate change.<sup>179</sup> Indeed, much of the deregulation that occurred, especially in the early days of the Reagan Administration, was the result of pragmatic public law interpretations and regulatory choices.<sup>180</sup> When the Reagan Administration was unable to achieve its more philosophically based deregulatory goals through Congress, it adopted both a judicial and an executive agency strategy to achieve its ends. It imposed, primarily through executive orders, a rigorous, cost-benefit approach to federal agency rulemaking that sought to slow the growth of agency regulation<sup>181</sup> and the Administration appointed officials to regulatory bodies who interpreted their statutory powers in ways that encouraged deregulation and other market approaches.<sup>182</sup> Indeed, they were able to achieve substantial deregulation within the very same statutory frameworks that created the very regulatory structures they sought to dismantle.<sup>183</sup> For the most part, courts took a very deferential approach to agency interpretations of their own broad statutory delegations of power to achieve the public interest, thereby authorizing those agencies to use market approaches to achieve their goals.<sup>184</sup> *Chevron v. United States* was the symbolic embodiment of this judicial approach.<sup>185</sup>

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177. *Id.* at 733-34.

178. *Id.* at 746-47.

179. *Id.* at 749-50.

180. See AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 5, at 47-62 (showing how deregulatory economic approaches by agencies were approved by courts, pursuant to broad public interest statutory language).

181. *Id.* at 81-82.

182. *Id.* at 1.

183. Deregulation was particularly effective at The Federal Communications Commission. *Id.* at 54-59. Overall, however, the size of the bureaucracy increased during the Reagan Administration. See IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 7-12 (1992).

184. *Id.*

185. *Chevron v. United States*, 467 U.S. 837 (1984). For an analysis of *Chevron* and its relationship to deregulation, see AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 5, at 108-21.

The laissez-faire philosophical side of the Reagan deregulatory strategy, however, failed in Congress and in the courts. With few exceptions, Congress refused to repeal outright its regulatory statutes or to abolish regulatory agencies.<sup>186</sup> While the courts were willing to take a deferential approach to agency interpretations that allowed the market and market approaches to be used as regulatory tools, the Court resisted constitutional approaches to issues that would, in effect, repeal substantial portions of the New Deal.<sup>187</sup> In a series of cases culminating in *Mistretta v. United States*,<sup>188</sup> the Supreme Court rejected approaches to separation of power questions that would, in effect, have put the constitutionality of independent regulatory commissions very much in doubt.<sup>189</sup> At the same time, the Court's approach to federalism issues as well as state action and takings questions remained relatively stable, despite a growing political debate regarding the appropriate role of the federal government and the courts in a variety of regulatory contexts.<sup>190</sup>

The efficient state, however, was more than a reflection of the Reagan Administration's conservatism. The use of market approaches has continued, and forms the cornerstone of many Clinton Administration reforms.<sup>191</sup> In many ways it is a transition to the globalizing state described below.

### 3. Mixing Public and Private Power—The Globalizing State

The concept of the globalizing state differs significantly from the strong and efficient state scenarios discussed above. Those concepts of the state assume a relatively closed system in which the power of states, individually and as an international order, does not significantly change.<sup>192</sup> States must now choose new or

186. *Id.* at 2.

187. *Id.* at 91-103.

188. 488 U.S. 361 (1989).

189. See AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 5, at 102-03.

190. See Peter Shane, *Structure, Relationship, Ideology, or, How Would We Know a "New Public Law" If We Saw It?*, 89 MICH. L. REV. 837, 844-45 (1991).

191. For an analysis of why there were far fewer differences between the regulatory approaches of the Bush and Clinton Administrations, see Aman, *A Global Perspective On Current Regulatory Reform*, *supra* note 59.

192. For an analysis critiquing this closed system approach, see GUËHENNO, *supra* note 87, at 49-65:

We are entering into the age of open systems, whether at the level of states or enterprises, and the criteria of success are diametrically different from those of the institutional age and its closed systems. The value of an organization is no longer measured by the equilibrium that it attempts to establish between its different parts, or by the clarity of its frontiers, but in

different strategies to deal with the processes of globalization, be they more market approaches to regulation or more direct resistance to global forces. Essentially, however, the focus remains the same and very much on state institutions. Any reforms that might be advocated usually assume that a relatively bright line still exists between the global and the local or between domestic and international conceptions of a problem.

The concept of the globalizing state differs in degree and in kind from these conceptions. It assumes that the line between the global and the local is blurry at best, and irrelevant in most instances. The global and the local are facets of a single, dynamic system, not simply an arrangement of parts and a whole. Moreover, though globalization does not, by any means, imply the disappearance of states, it does imply much more fragmentation of state power than a state-centered conception of globalization would allow.<sup>193</sup> The fact that global problems, processes, and economic activities of various non-state actors do not map onto the territory or jurisdiction of any one state does not render state power meaningless. Under these conditions, levels of power are layered by networks of actors and rules that derive from other states, as well as from the global legal systems that non-state actors are developing. These bodies of rules and law as well as economic forces are influential for global actors but often initially have little to do with the purely state-centered approaches to law of any one jurisdiction.<sup>194</sup>

More fundamental is the fact that the globalizing state is a dynamic concept. The globalizing state itself is a constant work in progress and the term—globalizing state—is double-edged. It means that the state itself is an agent of globalization in that it

the number of openings, of points of articulation that it can organize with everything external to it.

*Id.* at 49.

193. See Cerny, *What Next for the State?*, *supra* note 6, at 130. But see Geoffrey Garrett & Peter Lange, *Political Responses to Interdependence: What's 'Left' for the Left?*, 45 INT'L ORG. 539 (1991).

194. See, e.g., Jeff Gerth, *Where Business Rules, Forging Global Regulations That Put Industry First*, N.Y. TIMES, Jan. 9, 1998, at D-1 (discussing the global, informal, harmonized rules suggested for governing worldwide auto safety standards by industry in United Nations rulemaking proceedings).

In the interest of breaking down trade barriers, negotiations like these are trying to harmonize or create common regulations for products to be sold around the world.

At the dawn of this new worldwide regulatory machinery, it is premature to predict its impact. But corporate executives are generally ecstatic, consumer advocates are increasingly critical and many regulators from the United States have mixed feelings.

*Id.*

further certain processes of this emerging new economic order through, for example, policies designed to attract and retain investment. It is also in the process of being transformed by the very processes it seeks to further. The state, like the transnational enterprises with which it deals, is affected by and ultimately changed in fundamental ways by the increased fragmentation of its powers which now must be shared with other states and, as we shall see, with non-state actors. A state no longer has a monopoly on certain areas of law and policy and the new combinations of public and private power that are emerging requires a redefinition of what is public and what is private. The globalizing state thus differs in kind as well as degree from the states discussed above. As its role shifts to one in which it seeks primarily to further the kind of competitive environment that results in greater economic prosperity for those who live within its borders, it transforms itself. Changes in approach that increasingly rely on the private sector to carry out what once were conceived of as essentially public responsibilities globalize the state as much as the efficiencies it presumably achieves enable its constituents to compete more effectively in the global economy.

This double-edged aspect of the globalizing state raises serious issues with which institutions at all levels—local, state, national, and international—must grapple. As Professor Cerny has pointedly argued, fragmentation of state power and the dilution of democracy are two of the most negative aspects of globalization:

[G]lobalization entails the undermining of the public character of public goods and of the specific character of specific assets, i.e., the privatization and marketization of economic and political structures. States are pulled between structural pressures and organizational levels they cannot control. Economic globalization contributes not so much to the supersession of the state by a homogeneous global order as to the splintering of the existing political order. Indeed, globalization leads to a growing disjunction between the democratic, constitutional and social aspirations of people—which are still shaped by and understood through the frame of the territorial state—on the one hand, and the dissipating possibilities of genuine and effective collective action through constitutional political processes on the other.<sup>195</sup>

If the globalizing state defines itself exclusively in terms of its ability to promote efficiency, these negative aspects will be exacerbated. As Part IV shall argue, however, the concept of the globalizing state must also involve non-market values such as the norm of democracy. The norm of democracy involves more than traditional electoral forms of participation and political

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195. Cerny, *What Next for the State?*, *supra* note 6, at 130.

representation. It involves, more broadly, the concept of accountability and the various ways in which accountability can be furthered. At the market level, accountability can be enhanced by information, and at the state level, by basic administrative law protections, such as transparency and public participation.

Given the transition now occurring from a national economy to an integrated global economy, cases that might seem remote from the forces of globalization take on added significance. There are innumerable fundamental but hidden issues in seemingly simple cases involving, for example, the contracting-out of types of governmental services, that have a profound effect on how we begin to redefine the public and the private and, in the process, structure a more fluid, flexible, and democratic governmental system appropriate for the global era. Indeed, the contracting-out of governmental services to the private sector<sup>196</sup> and extensive use of market structures and approaches to regulation directly involve the uses of private power to achieve public ends. They also involve increasingly common partnerships between the state and private actors that now provide such local services as schools, prisons, and snow and garbage removal.<sup>197</sup> These new partnership approaches also involve links between and among different governmental entities, especially federal and state. Programs such as welfare now involve new relationships between and among various levels of government and the private sector as well.<sup>198</sup>

These mixtures of the public and private as well as federal, state, and local, are representative of more than a collection of new governmental approaches to achieve common ends in an efficient manner. They also represent some of the ways in which the globalizing state now interacts in an economy that knows no borders. The changes involved are more than political choices to favor markets over the state or market regulatory approaches over command and control rules; they are structural as well. They are indicative of a de-centered state and they create new demands and problems that the state-centered public law of the past, even in its newer, more pragmatic forms, cannot fully meet. First and foremost among these problems is what might be called the democracy problem in globalization, which we shall explore more

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196. See generally PATRICK BIRKENSHAW ET AL., *GOVERNMENT BY MOONLIGHT* (1990); HARDEN, *THE CONTRACTING STATE*, *supra* note 124.

197. For a discussion of schools, see generally Gary Peller, *Public Imperialism and Private Resistance: Progressive Possibilities of the New Private Law*, 73 *DENV. L. REV.* 1001 (1996).

198. See, e.g., *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-93, 110 Stat. 2105 (1996).



fully below.<sup>199</sup> Given greater and greater delegations of public power to the private sector, as well as actors, problems, and technologies that are not bound by state borders, how can we institutionally ensure democracy and public participation in decisions that affect the everyday lives of individuals? A second issue, also explored below, is flexibility and the need for states and private entities to maximize the impact of various networks of relationships that are formed within and beyond state borders.

These questions not only place new issues on lawmakers' agendas, but they require that decisions made on the basis of older models of constitutional and public law be viewed in a new light. Judicial decisions that limit the flexibility of public/private partnerships, as well as decisions that continue to treat the line between the public and the private as representative of the strong state, can do more harm to democratic decision-making than good. Moreover, decisions designed to constitutionalize traditional forms of state autonomy at the expense of federal power can also substantially undercut the flexibility of governmental policy makers and reinforce aspects of the strong state approach to public policy that no longer is in accord with global realities. Parts III and IV will examine various aspects of these mixes of public and private power and their implications for administrative and constitutional law.

#### IV. THE GLOBALIZING STATE, DEMOCRACY, AND THE PUBLIC/PRIVATE DISTINCTION

Domestic public law has long struggled with issues of democracy in assessing, for example, the appropriate allocation of power between courts and legislatures.<sup>200</sup> The democracy problem inherent in globalization, however, is even more fundamental. It involves more than a debate over which public institution—the court or the legislature—is best suited to decide certain kinds of legal issues. What often is at stake when the globalizing state delegates power to non-state, private, actors is a choice between some democracy and none at all. While one might argue that there is, in effect, a democracy problem if unelected federal judges play too active a role in resolving legal policy issues, the democracy deficit created by globalization is, thus, of a different order of magnitude.

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199. See *infra* text accompanying notes 211-32.

200. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

Global economic forces, their interaction with essentially liberal states committed to market economies and the rule of law,<sup>201</sup> and the structural preferences these forces create for market solutions to various problems pose a very different question: when should the exercise of power by the private sector be viewed as essentially public? Put another way, the question presented by new forms of market-oriented regulatory reforms is this: when should citizens view the resort to market forces as a true preference for the private ordering of the market and when should the resort to the private sector be viewed as a new mixture of public/private power, designed by the globalizing state to achieve its goals as efficiently as possible, but not entirely at the expense of such public law, non-market values as transparency and public participation?

Part IV shall explore these questions by analyzing three broad categories of regulatory reform against the historical backdrop of the public/private distinction: (1) the wholesale substitution of the market for state intervention through the legislative process; (2) the use of the market as a regulatory tool, primarily by administrative agencies; and (3) judicial supervision of the market in partnership with the state. We will examine this last category in some detail because in many ways it is emblematic of the globalizing state—one that seeks to maintain an effective role in a world in which it must now increasingly share power not only with other states, but non-state actors as well.

It is important to emphasize at the outset, however, that whether we are focusing on the contracting-out of governmental services to the private sector or the use of the market as a substitute for regulation or as a regulatory tool, these mixes of public and private power must be seen as part of a larger global picture, one that highlights four very significant, simultaneously ongoing processes. First, the de-centered, globalizing state is not only reallocating power between the public and private sectors, but also redefining what is public and what is private. In so doing, the state is transforming its own role and our conception of that role. Second, this transformation is occurring within a very dynamic context—one in which the state increasingly is in intense competition with other states for jobs and the investment that creates these positions. This fact places its legal system in competition with other legal regimes around the world as well. States with overall lower production costs and more supportive legal structures may be more successful in retaining current levels of investment and attracting new capital.

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201. See generally Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT'L L. 449 (1997).

By comparison, the third process, the move from states to markets, is due to pressure from global actors as well as regulatory competition and separate jurisdictions trying to maximize their economic attractiveness vis-à-vis other states. Many of the global actors within each of these states do business in multiple jurisdictions and they conceptualize their operations as essentially borderless. There is, thus, increasing pressure on states to harmonize regulatory regimes to fit the global realities of the global entities that are affected by these laws.<sup>202</sup> In short, the global pressures felt by domestic lawmakers stem not only from increased regulatory competition between and among separate nation-states, but from global actors who simultaneously are located in many of these states and who wish to create legal systems that can facilitate their ability to carry out their operations as efficiently as possible. As a result, there are increasing pressures for various forms of harmonization or deep integration of national economies into the global economy.<sup>203</sup>

Fourth, along with harmonization and deep economic integration, there is a growing body of global or, in effect, denationalized law, as well as various international standards designed to resolve disputes and structure the legal relationships of entities whose activities cut across a number of jurisdictions.<sup>204</sup> This body of law also can be both in competition with and a force for harmonizing various domestic law regimes, as global actors seek to construct legal regimes suitable to their needs worldwide. Unlike harmonized national or state legal structures, however, global law often is developed with little transparency and little regard for broad-based public participation.<sup>205</sup>

The pressure for deeper economic integration applied by various global actors, and the competition individual states experience from other state and global legal regimes, usually

202. See, e.g., MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 271 (1997) ("Because capital, in particular, is extremely mobile across international boundaries, every nation's sovereignty over its own tax policy is constrained . . . . As nations compete for investments, they tend to reduce their taxes on capital to make such investments more attractive."); see also *supra* note 194; see *infra* notes 237-38.

203. See generally ESTY, *GREENING THE GATT* 108-11 (1994).

204. See, e.g., *supra* note 1 (dealing with *lex mercatoria*); see also Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 285 (1997). Global law is developed outside the framework of any one state and largely outside the framework of states at all. See G. TEUBNER, *supra* note 1.

205. See, e.g., Lewis Rosman, *Public Participation in International Pesticide Regulation: When the Codes Commission Decides, Who Will Listen?*, 12 VA. ENVTL. L. J. 329 (1993).

result in the creation of more economic approaches to regulatory issues and governmental tasks. Such approaches to governance emphasize flexibility, efficiency, and cost, all of which are very much a part of achieving success in the global economy. They are not, however, simply the result of new functional regulatory approaches employed by the same state that brought us the New Deal or nineteenth century *laissez-faire*. The participants in state lawmaking processes, the demands for law that they make, the various state responses made to these demands, and, even more importantly, the structural changes the state itself undertakes to increase its own efficiency and competitiveness, are changing the nature not only of the law involved, but of the state itself.<sup>206</sup> As the state itself both emulates and co-opts the market to achieve its goals, these various transformations raise important issues concerning what is now public and private that differ significantly from an earlier time when such categories had a very different meaning.<sup>207</sup> They also necessitate broader ways of conceptualizing democracy beyond traditional concepts of political representation. This is because the resort to markets alone cannot necessarily always be viewed as the end of a sense of community involvement or interest.

A. *The Public/Private Distinction and Three Types  
of Regulatory Reform*

The public/private distinction once demarcated two relatively separate worlds—government and the private market.<sup>208</sup> Private capital markets tended to be primarily local, and capital had little mobility.<sup>209</sup> Private in this sense, however, has long passed into history. Moreover, deregulation and the various other regulatory reforms we have earlier called the efficient state have merged the public and the private in various ways, utilizing what previously were primarily private market approaches, techniques, and

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206. See *infra* text accompanying notes 161-99.

207. Various mixtures of public and private power, and the constitutional problems some of them can cause, of course, long predate the rise of the global state. See, e.g., Note, *Lawmaking By Private Groups*, 51 HARV. L. REV. 201 (1937). More recently, commentators have discussed a variety of potential constitutional problems that could arise when lawmaking power is delegated to private groups. See, e.g., Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L. Q. 165 (1989); Herold J. Krent, *Fragmenting The Unitary Executive: Congressional Delegations of Administrative Authority Outside The Federal Government*, 85 NW. U. L. REV. 62 (1990); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986).

208. See SASSEN, *THE MOBILITY OF LABOR AND CAPITAL*, *supra* note 7.

209. *Id.*

structures to advance public interest goals.<sup>210</sup> Given the dynamic aspects of the globalizing state, and the fact that the state is an agent transformed by the processes of globalization, it is important to understand fully the global implications of these various deregulatory reforms at the legislative, administrative agency, and judicial levels. The following sections examine three contexts in which globalization affects the mixtures of public and private power that result, the ways in which our institutions respond to these forces, and how best we should conceptualize those responses in light of the globalizing forces involved.

### 1. The Market as a Complete Substitute for Regulation—Legislative Change

The globalizing state introduces additional factors into traditional notions of the public/private distinction, even recognizing that public and private are now often blurred or merged. What constitutes many of the private interests and the private sector generally is itself now global in its orientation and goals. The globalization of the private sector has profound influences on public, domestic, and international lawmaking processes. Given the pluralistic nature of our lawmaking processes, these changes encourage harmonization, if not deregulation or privatization of these very processes. In the first instance, the infusion of such global, market forces is facilitated by public-oriented, participatory processes that give the private, globalized sector very definite roles to play in the lawmaking processes. This, of course, begins at the legislative stage, when Congress considers new legislation on various issues.<sup>211</sup>

The purest kind of deregulation is that which removes governmental regulation where it once existed, with no strings attached.<sup>212</sup> For example, during the Carter Administration, when the head of the Civil Aeronautics Board (CAB), Alfred Kahn,

210. See AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5, at 42-62.

211. See, e.g., Congressional testimony in support of fast track authority by Robert W. Holleyman, Testimony to Congress, President of Business Software Alliance (1995 WL 293530 (F.D.C.H.), May 11, 1995); Marc Curtis, American Soybean Association, (1997 WL 592041 (F.D.C.H.), Sept. 23, 1997). See also The Republican Contract with America, 104th Congress, which "would temporarily suspend most new regulations; subject proposed rules on health, safety and environmental protection to elaborate scientific reviews; override the health considerations in existing laws with economic calculations of regulatory costs and benefits, [and] compensate private landowners when regulations reduce their property values." *House Oks Anti-Regulation Package*, THE CHATTANOOGA TIMES, Mar. 4, 1995, at A5.

212. It is assumed, however, that the antitrust laws still apply when, for example, pricing regulations are removed.

declared that airplanes were, essentially, marginal costs with wings,<sup>213</sup> it was because he believed that the airline industry was an essentially competitive one and price regulation was not necessary. The Administration advocated deregulation of various aspects of this industry as well as the abolition of the CAB itself.<sup>214</sup> Congress agreed, and it passed the Airline Deregulation Act of 1978.<sup>215</sup> Similarly, when President Reagan took office in 1981, one of his first official acts was to deregulate completely the price of oil at the wellhead,<sup>216</sup> a process which had begun pursuant to the Emergency Petroleum Allocation Act.<sup>217</sup> Oil producers were subject to the discipline of a competitive market and there was simply no need for governmental intervention. The same reasoning applied to the trucking industry which led to its deregulation and, ultimately, to the Clinton Administration's support for Congress' abolition of the Interstate Commerce Commission.<sup>218</sup>

In all of these examples, the deregulation involved was relatively pure—Congress removed completely certain aspects of the regulatory structure because it was assumed that a free market existed and that that market would protect consumers from unfair pricing. The line between the public and the private could thus be seen as a bright one, with deregulation indicating a clear preference for the private ordering of market forces.

Those who adhered to a strong state *laissez-faire* philosophy greeted these reforms with enthusiasm. At the same time, advocates of a strong regulatory state also rationalized these decisions. The theory of airline deregulation was that it would actually lower prices for consumers and abolish the role of an administrative agency that had, in effect, been captured by the

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213. See Elizabeth Bailey & Dong Liu, *Airline Consolidation and Consumer Welfare*, 21 E. ECON. J. 463 (1995):

While it was recognized that regional carriers had a higher cost structure than national carriers, it was thought that this would be eliminated by permitting free entry and exit. As Alfred Kahn once expressed it, airplanes are "marginal costs with wings" that can readily be deployed in newly opened markets.

*Id.*

214. MARTHA DERTHICK & PAUL J. QUIRK, BROOKINGS INST., *THE POLITICS OF DEREGULATION* 111-12 (1985).

215. Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705.

216. Exec. Order No. 12, 207, 3 C.F.R. 124 (1981), *reprinted in* 15 U.S.C. § 757 (1982).

217. 15 U.S.C. § 753(a) (1976).

218. See Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

very industry it sought to regulate.<sup>219</sup> The same can be said of trucking deregulation and the abolition of the ICC.<sup>220</sup> Oil pricing deregulation also occurred at a point when oil prices were coming down and competition could be trusted to create affordable sources of energy for consumers of average means.<sup>221</sup>

In this sense, these deregulatory decisions were in accord with the theory of the efficient state as well. A large, costly bureaucracy was not necessary to yield the lower prices the market could now provide. This was another example where the government could accomplish its end results with less cost to society.

Both the strong and efficient state rationales, however, depend on a state-centered form of analysis. They assume that the state can make such decisions largely on its own and that the decision to resort to the market is completely voluntary. They also assume that there is a clear divide between the public and the private. In the case of price controls on airlines, trucking, or oil, it was best for philosophical and practical political reasons to return these activities to the rigors of the marketplace.

Viewing these changes through the prism of the globalizing state does not require disagreement with the results reached in these examples, but it does require a different analysis. First, by eschewing any bright line distinctions between the public and the private, this concept of the state starts from the premise that what is involved is not so much the release of but the delegation of power to the private sector. Is this a voluntary delegation, based on a sense that better policy results will be achieved, or is this imposed by the structural requirements of globally competitive private actors? The end result of the legislation involved may be a more efficient government or a more deregulated economy, but does this contribute to a "race to the bottom" in any of the issues involved? To what extent should a public component remain a part of these deregulated activities, beyond the threat to enforce the antitrust laws if the markets do not function as planned?

These questions do not necessarily require a different result, particularly when such pricing decisions, as described above, are involved; but they start from different premises so far as the role of the state is concerned. By asking whether these decisions are voluntary or imposed by the competitive global structure

219. See, e.g., Mark Green & Ralph Nader, *Economic Regulation v. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973).

220. In fact, the deregulation imposed by the agency itself ultimately led to a "deregulation" bill that sought to regulate this area. See AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 5, at Introduction n.13.

221. *Id.*

described above, such an analysis requires a sense of the overall global context in which the deregulation occurs. Closely related to this line of questioning is whether or not the deregulatory action involved makes it easier or harder to help create or link-up with emerging international approaches to certain kinds of problems and issues. In other words, is this a decision with global consequences, and if so how does it mesh with the global economic and legal regimes? How much coordination among states is required for these deregulated markets to work?

These kinds of questions are not usually the ones that legislators ask. The more comprehensive the legislative change proposed, the broader the political spectrum involved, and the more domestic the discourse is likely to be. It is necessary to translate the global forces at work into a local, domestic political discourse to form the kinds of political coalitions necessary to motivate a majority of 535 legislators to take action.<sup>222</sup> The deregulatory reforms of the Carter, Reagan, Bush, and even Clinton administrations, were effectively "sold," almost as if they were a form of consumer legislation. Indeed, whether it was airline prices in the 1970s, oil prices in the 1980s, or trucking prices in the 1990s, the promise of these deregulatory reforms was lower prices for consumers.

It would be a mistake, however, not to examine these examples of deregulatory changes from a broader, global perspective. Certainly airlines, and energy in particular, are irrevocably tied up with the global economy and with industries that do business and compete worldwide. The New Deal, national-based, zero-sum domestic political forms of regulation cannot easily or sensibly be applied to such industries. As long as competitive markets were in place, it was not necessary to protect consumers in their role as consumers of these products and services.

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222. See STEPHEN BREYER, *REGULATION AND ITS REFORM* 320 (1982):

The Ford administration first unveiled support of airline deregulation at the Kennedy hearings which, in turn, were designed to depict regulatory reform as an effort to help the consumer and to lessen burdensome regulatory bureaucracy. If the issue is seen as one of "lower prices," "helping the consumer," or "freeing business from the 'dead hand of regulation,'" it can pick up support, time, and effort from many persons who will not interest themselves in "higher airline profits," "more efficient use of aircraft," or "more efficient or effective airline regulatory programs." Thus, political support is, in part, a function of how one sees the issue—how it has been characterized—and that is a matter that is partly, but not wholly, within the control of those who are seeking to bring about reform.



These particular examples of wholesale market reform represent a relatively pure form of privatization and they also avoid the democracy problems usually associated with globalization.<sup>223</sup> The fundamental decision to deregulate at the legislative level was the subject of democratic debate and legislation. The return of these pricing functions to the private sector was accompanied by a legislative understanding that not only were there competitive markets involved, but that the results of those markets would be favorable to consumers.

Quite apart from outcome, however, which is relevant to the political viability of the legislative change at a particular point in time, it is the expectation of a "real" market at work that is important from an analytical point of view. The fact that consumers have real choices, and that competition sets the prices involved, means that a kind of consumer democracy or sovereignty can exist. The threat to vote with one's feet or with one's dollars is a real one. The privatization that results does not, therefore, take power away from citizens, nor does it delegate it to the kinds of private entities that resemble the monopolistic power of states. There is, thus, a kind of regulatory discipline that a well-functioning market can provide. Citizens or consumers, however, require information for this to occur. Beyond the kind of information that can enable an individual consumer to make a rational choice in a domestic market, there also is information that can have more of a collective, political effect. For example, publicity concerning the corporate practices of global firms that pay exceedingly low wages or make extensive use of child labor

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223. Similarly, the recent massive deregulatory act involving the telecommunications industry is also the result of comprehensive Congressional reform. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)). See generally Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 252 (1996).

[The Telecommunications Act of 1996] represents a vision of a telecommunications marketplace where the flexibility and innovation of competition replaces the heavy hand of regulation. It is based on the premise that technological changes will permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers and programmers being made available to the American consumer.

*Id.* Creation of the markets necessary for this Act to work has been a major task facing the Federal Communications Commission. See, e.g., Charles M. Oliver, *The Information Superhighway: Trolls at the Tollgate*, 50 FED. COMM. L.J. 53, 61 (1997) ("[T]he core of the Telecommunications Act of 1996 is a quid pro quo: the RBOCs [Regional Bell Operating Companies] will be allowed to get into the long distance and manufacturing businesses, in return for which they must open their markets to local competition.").

can lead to global consumer boycotts of these products.<sup>224</sup> In these instances, the market and the consumer sovereignty it creates helps provide an informal, global sanction aimed at curbing practices that individual states have either been unable or unwilling to correct. In effect, the market becomes a kind of legislature at the global level, quite apart from any actions by states or local legislatures.<sup>225</sup>

Democracy as accountability, enforced through consumer boycotts of this kind, represents a necessary form of global reprise when more traditional legal approaches may not be effective. Of course, states can try to facilitate the use of the market in this way through disclosure laws and the dissemination of this information.<sup>226</sup> An important aspect of the globalizing state is the

224. For example, when reports surfaced that Reebok was purchasing soccer balls stitched by children, the company responded by creating a centralized production facility and establishing independent monitors. After Starbucks Coffee was picketed by activists concerned with its Guatemalan plantations, the firm issued a revised code of conduct and specific action plans for dealing with abuses. Also bowing to public pressure after high profile consumer protests, The Gap committed itself to third-party monitoring by signing an agreement with the National Labor Committee. See Debora L. Spar, *The Spotlight on the Bottom Line: How Multinationals Export Human Rights*, 77(2) FOREIGN AFF. 7, 9 (1998). In response to pressure over labor issues, U.S.-based transnational corporations have created codes of conduct that address workers' rights. A Reebok spokesman has stated that "[c]onsumers today hold companies accountable for the way products are made, not just the quality of the product itself." Lance Compa & Tashia Hinchiffe-Darricrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995); see also Gerard Aziakou, *US Nike*, Agence France Presse, Apr. 10, 1998, Advisory Section (reporting that labor rights groups are planning a worldwide day of protest on Apr. 18, 1998, to highlight Nike's workers' rights violations at its overseas facilities); Jeff Manning, *Nike Battles Back, But Activists Hold the High Ground*, PORTLAND OREGONIAN, Nov. 10, 1997, 1997 WL 13136566 (reporting that New Jersey schoolchildren staged an anti-Nike play on Broadway, and that a 1996 consumer survey listed "bad labor practices" as the third most applicable phrase describing Nike); Rosalind Rossi, *Poshard Joins Protest at Nike Store*, CHICAGO SUN-TIMES, April 9, 1998, at 10 (reporting that 75 demonstrators protested outside Nike's Michigan Avenue store concerning Nike's treatment of its foreign workers). Following media revelations of forced labor in China and child labor in Southeast Asia, major retailers and apparel and footwear manufacturers adopted policies and codes of conduct concerning forced labor, child labor, and worker health and safety. Firms with such codes and policies include: Levi Strauss, Sears, J.C. Penney, Wal-Mart, The Gap, Starbucks, Timberland, Nike, and Reebok. Some firms, including Levi Strauss and Timberland, have gone so far as to pull out of entire countries where there are pervasive human rights violations. See Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1973 (1996).

225. *Id.*

226. See, e.g., Peter D. Enrich & Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement*, 35 HARV. J. ON LEGIS. 87, 103-04 (1998):

creation and dissemination of information that allows the democracy of the market to work. Given the reliance the globalizing state places on the market and market processes, providing information that encourages this kind of consumer sovereignty may enhance a new form of democratic action and create the kind of accountability that democracy requires.

Quite apart from such substantive deregulatory reforms, other recent deregulatory reforms at the legislative level deal explicitly with the global economy and focus as much on the process of legislative change as on its substance. For example, the recent legislative proposal involving fast-track legislation for trade bills seeks to enhance the President's position and to limit the legislature's role in the process of considering trade legislation by limiting the power to amend the legislation involved on the floor of the House or Senate.<sup>227</sup> For certain kinds of trade legislation, there must be an up or down vote. Unlike the democratic approaches to deregulatory legislation described above, proposals to deregulate the legislative process raise concerns regarding the norm of democracy, concerns which must be balanced with the nature of the issues involved and the extent to which meaningful public participation can and should occur.<sup>228</sup> In this respect, the treaty process may be considered to

Essentially, the new federal system would require manufacturers to supply the FDA with a list of ingredients, other than tobacco or water, "which are added by the manufacturer to the tobacco, paper or filter of the tobacco product by brand and by quantity in each brand." For each such ingredient, the manufacturer would have to indicate whether it believes the ingredient is exempt from public disclosure under the legislation. Under the Proposed Settlement, manufacturers would have to "disclose ingredient information to the public under regulations comparable to what current federal law requires for food products, reflecting the intended conditions of use."

*Id.*; see also Robert F. Blomquist, *Models and Metaphors for Encouraging Responsible Private Management of Transboundary Toxic Substances Risk Toward A Theory of Incentive-Based Environmental Experimentation*, 18 U. PA. INT'L ECON. L. 507, 558-59, n. 109 (1997) ("Information reporting is an incentive-based environmental tool whereby the government 'requires firms to provide specified types of information, either to a government agency or to the public directly.'").

227. See Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687 (1996).

228. See, e.g., Testimony of Hon. Dana Rohrabacher, *Pennies for Thoughts: How GATT Fast Track Harms American Patent Applicants*, 11 ST. JOHN'S J. LEGAL COMMENT 491 (1996) (arguing that in an effort to harmonize U.S. patent law with international laws, the U.S. Patent Office traded away critical patent protection American inventors had come to expect); see also Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 650-97 (1994) (proposing revision of the fast-track process to allow social values and consumer concerns to be considered when trade agreements are proposed). Many commentators argue that fast-track does provide ample

be the outer edges of a deregulated legislative process tailored to produce globally influenced legislation. The nature of this process is that a treaty can be ratified with a two-thirds vote of the Senate alone. Executive treaties, of course, do not even require the Senate.

There may be a strong tendency for democratic processes to diminish in proportion to the global, economic interests involved.<sup>229</sup> The nature of the legislative process is primarily domestic and the desire for some global players to bypass the legislative process altogether is driven not only by their own policy goals, but by the fact that such entities often are doing business in multiple jurisdictions and can more easily work out private, transnational arrangements to facilitate their business transactions. Global law—essentially denationalized approaches to global issues—is their preferred solution.<sup>230</sup> But this is not always possible. Nor is complete privatization possible, particularly when the issues involved are not—like pricing or trade—primarily economic but involve externalities and spillovers of various kinds.<sup>231</sup> Just as administrative agencies initially were more successful in deregulating their respective areas of the law than Congress was,<sup>232</sup>

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opportunities to debate and deliberate fully. The President is required to notify Congress of his intent to enter into a trade agreement and has 90 days from that date to consult with Congress on the terms of the agreement. 19 U.S.C.S. § 2902(c)-(d) (1998). Because amendments are not permitted under the fast-track process, this consultation period serves as an opportunity for the Executive and Legislative Branches to discuss the issues and make changes to the proposal before the final vote. For a detailed description of this process, see Janet A. Nuzum, *Comments on the Fast-Track Process for Congressional Consideration of NAFTA*, 1 U.S. MEXICO L.J. 339 (1993). In addition, Congress has the power to choose to “derail” fast-track and follow the usual approach of Congressional deliberations. See Carrier, *supra* note 227; 19 U.S.C.S. § 2903(c).

229. The number of executive treaties has risen in recent years. See L.K. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS* 13 (1986). For a discussion of the relationship of such executive action to the legislative process, see AMAN, *ADMINISTRATIVE LAW IN A GLOBAL ERA*, *supra* note 5, at 132.

230. See, e.g., *supra* note 1; see also James C. Allen, *Fed to Test Self-Regulation Idea for Setting Derivatives Capital*, AMERICAN BANKER, April 18, 1996, at 24 (“The so-called precommitment-of-capital approach to trading risk management is not expected to immediately replace internationally accepted regulations. But bankers are hopeful the test will show banking regulators the benefits of self-regulation.”); *Self-Regulatory Paradigm Banks Prepping for Test*, 6 AMERICAN BANKER-BOND BUYER No. 19, 1 (1996) (“Seven major banks are considering participating in a trial run of a self-regulatory market risk capital approach proposed by the Federal Reserve. The concept eventually could be applied to all banks, saving them resources now devoted to complying with regulations.”).

231. See generally JUTTA BRUNNÉE, *ACID RAIN AND OZONE LAYER DEPLETION: INTERNATIONAL LAW AND REGULATION* 112-21 (1988).

they also are likely to be more responsive to the globalization processes as well. Agencies are less visible to the public. They often deal with highly technical issues that are not easily politicized, and they can engage in a focused, substantive dialogue through the administrative process with those entities and interests most likely to be affected by them. The fact that administrative agencies will increasingly resort to market tools and market discourse is the result of the kind of synthesis that goes on as agencies seek not just to be appropriately responsive to the interests with which they deal, but effective as well.

## 2. The Market as a Regulatory Tool

Legislative deregulation or privatization is to be distinguished from the use of market incentives and market regulatory approaches as a substitute for so-called command and control regulation. Perhaps the most extensive U.S. example of this approach is the use of market regulation by the Environmental Protection Agency (EPA).<sup>233</sup> Rather than trying to mandate precisely how certain industries might lower their pollution levels, the EPA seeks to provide market incentives to achieve such goals. For example, a market for pollution reduction might be created by selling pollution permits. Those industries capable of lowering their pollution below mandated levels can receive compensation from those companies unable to meet their goal.<sup>234</sup> Using the market in this way is a form of deregulation in that it provides more compliance alternatives to the regulated entities, and more flexibility for regulated entities in determining how best to achieve their goals. Such approaches usually are less costly to implement and enforce.

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232. See, e.g., AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, *supra* note 5, at Chs. 1-2 (reviewing the decisions of the FCC and ICC and the manner in which courts allowed these changes to occur).

233. See generally Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1341 (1985):

Our basic reform would respond to these deficiencies by allowing polluters to buy and sell each other's permits—thereby creating a powerful financial incentive for those who can clean up most cheaply to sell their permits to those whose treatment costs are highest. This reform will, at one stroke, cure many of the basic flaws of the existing command-and-control regulatory systems discussed earlier.

*Id.*; see also Marshall J. Breger et al., *Providing Economic Incentives In Environmental Regulation*, 8 YALE J. ON REG. 463, 468-69 (1991) ("I am persuaded that the endless proliferation of command-and-control regulations is not, in general, a workable or appropriate long-run way of dealing with this problem.").

234. *Id.*

As we have seen in Part III, such approaches meet very well with concepts of the efficient state.<sup>235</sup> Despite the market-based nature of these rules and programs, however, such regulatory regimes are the products of Administrative Procedure Act processes, and are thus subject to standard public law procedural requirements—notice, public participation, and a clear statement of the basis and purpose of the rules.<sup>236</sup> Yet, it is this very openness to the viewpoints and arguments of global participants that helps to globalize the rulemaking processes that promulgate these rules. It is one way in which domestic processes help to democratize and, in effect, re-nationalize various global processes, thereby furthering economic integration and regulatory harmonization.

For those who see much or most of the globe as a potential marketplace, more is at stake in such lawmaking processes especially if they are experiencing competition from firms that play by different rules in other jurisdictions. These pressures may not only yield more intense advocacy of low-cost regulatory approaches that might give them a competitive edge, but also, at a minimum, a desire to standardize or harmonize the regulation that ultimately affects them.<sup>237</sup>

As Part II has shown, the essence of globalization is that it involves cultural, economic, and social processes that usually have little direct impact on any one particular state. The processes of globalization are denationalized processes. This fact does not mean that domestic law will not apply to some aspects of these processes, but rather that the law that does emerge includes and is affected by these denationalizing forces. Thus, for

235. See *supra* text accompanying notes 161-91.

236. See Federal Administrative Procedure Act, 5 U.S.C. §§ 551, 553, 556, 557 (1994).

237. See, e.g., Christopher L. Bell, *Bench Test*, THE ENVIRONMENTAL FORUM, Nov./Dec. 1997, at 24, 24-26, 28-29, 32-34 (describing the International Organization Standardization's environmental management standard, "ISO 14001," a voluntary standard, devised privately, that is meant to provide uniform approaches to environmental management for companies operating around the world). See also Gerth, *supra* note 194, discussing global auto safety rules and noting:

The final automotive standards agreement is expected by March [1998] but few consumer advocates will have had a say. There were 62 government regulators and 26 industry representatives who took part in the Geneva auto committee last November, under United Nations rules, but only one consumer representative from London and one auto club member from France.

*Id.* See generally Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, WASH. Q., Winter 1995, at 45.

example, when certain private groups propose or support certain types of environmental or safety regulation, they often seek to encourage adoption of approaches that, to a large extent, further their harmonization goals. In an important sense, the political, domestic rulemaking processes in which such actors participate serve, in effect, as a means of re-nationalizing a set of rules driven by global as opposed to solely national concerns. The end result may be the provision of a U.S. regulatory stamp to a set of rules that are more global in their outlook and creation than they are local or national. This process furthers a kind of deep integration of the national economy with the global economy. The market-oriented rules that often result need not be exactly like those in other jurisdictions but they are likely to be reasonably compatible with other legal systems, making it easier for transnational non-state actors to carry out their operations more efficiently as well as for states to retain and to compete more effectively for their business.<sup>238</sup>

This relationship between the ways public lawmaking processes can incorporate and translate private, global perspectives and interests into binding rules is paralleled, to some extent, by the relationship between such processes of deep integration and democracy. To the extent that integration occurs essentially outside of national or state legal structures with, for example, the development of a global system of rules that facilitates the goals of transnational actors, such rules are less likely to have anything to do with a state's democratic processes. Though global law can develop in the shadow of the state, it is usually a private creation, controlled by the needs of the non-state actors. Integration that occurs as a result of national legal regimes harmonizing their own regulatory structures in competition with other states and denationalized global regimes has the advantage of at least making some of the issues involved public and subject to such public processes as the rulemaking procedures of the Administrative Procedures Act and other regulatory statutes. The private and denationalized legal preferences of global actors are re-nationalized when they are adopted in whole or in part pursuant to national regulatory proceedings, and democratized as well.<sup>239</sup>

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238. For an excellent, thorough analysis of harmonization in the environmental area, see Esty & Geradin, *supra* note 204.

239. For example, to the extent that ISO 14000 rules ever become a part of APA rulemaking or to the extent that they begin to influence both the approaches of the state to environmental issues and the actual outcome of domestic rulemaking proceedings, such proceedings would then nationalize the denationalized approaches and standards developed by these global actors. While it may be contended that such public participation comes too late

What are the implications of such rulemaking processes for the globalized state? First and foremost, it is important that the state maintain a public role in the integrative processes now underway. To the extent that the state is sidestepped or rendered irrelevant by global forces, a broad-based public voice will be eliminated from the policymaking process. More importantly, the law now developing necessarily takes as its goals flexibility, efficiency, and a stronger orientation towards the market. These goals should not be viewed as the result of capture by global corporate interests, but rather the beginnings of new, more flexible, and experimental legal regimes. Indeed, such regimes are necessary for maintaining the public's voice in what could otherwise become a wholly privatized world.

Given the de-centering of the state that has occurred, the globalizing state has had to adapt to the realities of global competition by recognizing not only its limits, but the creative opportunities that exist to construct new global approaches to issues with various non-state actors at all levels of government and enterprise. If the invocation and use of the market is seen only in state-centric terms, the debate over globalization that ensues is likely to be the familiar contest between pro- and anti-government or pro- and anti-market advocates that has dominated policy and politics to date. As this Article argues, however, it is necessary to go beyond conceptions of the market and the state that depend upon bright line distinctions between the public and the private. It also requires that we understand that simply the use of one discourse or the other does not necessarily, for legal and constitutional purposes, render some activity either public or private. In many ways, the following examples of public/private mixtures of power are emblematic of the global era and of our need to understand clearly how much is at stake as we begin to redefine what we mean by public and private.

### 3. The Market In Partnership with the State—Contracting-Out Public Services

Quite apart from the substitution of markets for states and the use of markets by administrative agencies, a third category of regulatory reform combines aspects of both of these reforms, yet

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to be maximally effective, it is important to create channels for public input as a first step towards shaping the emerging legal structure in a useful way.

For a discussion of ISO 14000 and how its standards are developed and how they influence behavior, see Christina C. Benson, *The ISO 14000 International Standards: Moving Beyond Environmental Compliance*, 22 N.C. J. INT'L & COM. REG. 307 (1996). See also *supra* note 237.



is nonetheless distinct. The state may not be relieved of the responsibility of accomplishing certain tasks, but it need not do all of them itself. Contracting-out or outsourcing to the private sector tasks once performed by government turns such tasks as snow removal, garbage collection, and the management of prisons over to the market, but this is not the relatively pure legislative deregulation described in the first set of examples. The tasks, though performed by private companies, clearly remain public responsibilities, and as we shall see, the market is often more of a metaphor than a reality. On the other hand, like the examples in Section Two above, using the private sector in this way enables the state to take advantage of the efficiencies of the market. The performance of these public functions by private entities, however, is not usually accompanied by any of the traditional administrative procedures involved in formulating the market-oriented rules described in section two above. Rather, the language of the market is often substituted for that of administrative law. Citizens are viewed as if they were only consumers of these public services, and not expected to be involved in deciding how services should be provided. Such an approach may increase the efficiency of the private company engaged in the service at issue, but it is likely to do so at the expense of fundamental public law values, as I shall now explain.

Contracts involving public services are more complex than contracts between two individuals participating in a market economy.<sup>240</sup> A distinction must be drawn between customers and consumers.<sup>241</sup> For example, when a city enters into a contract with the provider of a streetcleaning service, the customer is the city, but the consumers are those who live on and use city streets. The decision to provide this service is a public one and the price charged—through user fees or taxes—is not necessarily the market price from a consumer sovereignty point of view.<sup>242</sup> The amount charged may deviate from the market price. In other words, this is not the kind of market transaction that results when the consumers of a product are also the primary customers.

Thus, opting for the private sector as a politically preferred alternative to government, coupled with a politics that substitutes the results and processes of a private ordering system for those of a public law approach, may make what is in fact a public decision, appear to be private. Indeed, one of the most important tasks courts have in resolving disputes that flow from how these

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240. See *supra* Part III.C.

241. See HINDY LAUER SCHACHTER, *supra* note 121, at 10-11.

242. *Id.* at 11-12.

public/private arrangements are perceived, is to determine how best to conceptualize these mixtures of public and private power.

The limits of the market metaphor are even more apparent when applied to privatized prisons. Private prisons differ significantly from public services contracts for street cleaning or snow removal. The customers in the private prison context are the state or federal agencies that seek to hire private prison service providers. The consumers of the product are, in effect, the prisoners themselves. If anything, citizens are more akin to third party beneficiaries of this contract, not its consumers. Thus, this kind of service is not marketable in any usual sense of that term. Certainly the consumers involved are not willing buyers of the service provided. And, of course, the demand for the product itself is set by the state's own criminal laws and its ability to enforce them. Thus, the idea of private prisons differs substantially from other public services in which the citizens are the direct consumers, some of whom may be willing to pay additional or variable amounts for more of the services provided, as is true when, for example, private security forces or gated communities are involved.<sup>243</sup>

The kind of rhetoric that might apply in other contexts involving contractual approaches to public services is thus not applicable here. This is not a case of increasing individual autonomy and freedom. In the prison context, outsourcing is primarily an attempt by the state to lower its costs and to operate prisons more efficiently by encouraging competition among prison providers.<sup>244</sup> Indeed, some states, in their search for the lowest cost providers of the service, have even explored the possibilities of "off-shore prisons."<sup>245</sup> Arizona, for example, has considered using Mexico as a site for the construction and administration of new prison facilities necessary to house some of its prisoners.<sup>246</sup>

It would seem that, under such circumstances, the contract between the state and the private provider involved would mandate an extension of state power into what would otherwise be a state-run facility. Yet, as we shall see, there are reasons to resist either/or thinking in this context, even though the privatized prison would seem to be an obvious extension of the

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243. See generally Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1995-1996) (discussing the complexities, risks, and considerations involved in opting out of public provision).

244. See generally RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY* (1997) (stating that public accountability is crucial in private prisons not only to maintain standards but improve the penal system).

245. Gail Hulden, *New Focus: Texas Welfare, Arizona Prisons, Elsewhere*, PORTLAND OREGONIAN, May 22, 1997, at A20, available in 1997 WL 4175377.

246. *Id.*

public. More importantly, the privatization movement vis-à-vis prisons also can be motivated by factors beyond costs. To the extent that the private sector is viewed as being tougher and more efficient than the state, and the rights of prisoners are considered increasingly lower in importance as far as the general public is concerned, the reforms the private sector may bring to bear are popular, both economically and politically. The idea that the market is unforgiving in certain ways may reinforce the politics of retribution when it comes to prison reform.<sup>247</sup> Such reasoning, however, should be limited by any constitutional protections prisoners may have, and it is another way in which courts can and should play an important role when it comes to conforming the rhetoric of the market with the realities of the public/private mix of powers created.

Much is at stake when courts review the public/private blend of power that certain forms of privatization produce. There are limits to the extent that judicial decisions can further global public law principles without legislative and executive leadership, but there also are limits to the extent to which some of the more ideological aspects of global competition can and should determine the blend of public and private that such relatively new regulatory reforms reveal.

A basic framework emerges involving the contracting-out of public services, a framework that can help courts ask and resolve three very important questions. First, where do market approaches end and the market metaphors begin? By this we mean that some privately provided services may genuinely be marketable—i.e., contracted for by the actual consumers of the services and paid for at the market price, such as private security forces.<sup>248</sup> Most outsourced public services are not this pure. Though they may be paid for by taxes or user fees, the amount involved is not the same as the market price.<sup>249</sup> Closely related to this fact is the identity of the actual customer involved. When a city, state, or federal entity contracts for a service, it is, in fact, the customer, and not necessarily the consumer of the services, who is involved. This raises a second question: are the citizens involved customers or consumers or, simply interested parties in the way that all citizens are when governmental policies are involved? The answer to these questions help to further our understanding of this question: what common stake citizens/consumers have in the services being provided, and, implicitly, what role they should or can play in determining such

247. See HARDING, *supra* note 244.

248. See generally Gillette, *supra* note 243.

249. HARDEN, *supra* note 124, at 7-8.

questions as to whom, how, and when these services might be provided?

It is at this point in the analysis that important questions of democracy may surface, albeit in ways that can conflict with some of the economic goals of the privatized services involved. In the short run, democracy and public participation will usually increase the costs of decision-making. This may, in turn, cut deeply into the global currency that a purely privatized approach may create. Nevertheless, the more decision-makers opt for such distinctions as administration and policymaking or private and public, the more the global economy can undermine democracy. A fundamental tenet of outsourcing, for example, is that a clear demarcation exist between the policy to delegate certain duties to a private company and the administration of those duties by the company involved. By ensuring that the responsibility for prison administration rests completely with a private provider, the contracting agent is free to assess provider performance. The public input in this process usually is involved only at the renewability stage of the contract. The assumption is that a kind of outcome-based analysis can be used to determine whether these contracts should be renewed or not.<sup>250</sup> The more bottom-line oriented the review, the greater the incentives on the part of the company to perform efficiently, but the less on-going public input and involvement there is.<sup>251</sup>

Policy questions and administration can never fully be separated, even in what might seem to be relatively straightforward tasks such as garbage collection or snow removal.<sup>252</sup> Whose garbage or snow is removed first? Who has priority in emergencies? It may be that some of these issues can be resolved in the contracts that are negotiated, with those

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250. Aronson, *supra* note 125, at 62.

251. *Id.*

252. *Id.* at 56-58. *But see* The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) (a current tax reform proposal that seeks to differentiate between policy and administration). Section 1101 of this Act would create a new Internal Revenue Service Oversight Board to oversee the IRS's Administration, management, conduct, direction, and supervision of the executive and application of the tax laws. However, it would have no authority as to "the development and formulation of federal tax policy."

This proposal emanated from the Report of the National Commission on Restructuring the Internal Revenue Service (Sec. 1, Recommendation 2 of the Report). REPORT OF THE NATIONAL COMMISSION ON RESTRUCTURING THE INTERNAL REVENUE SERVICE: A VISION FOR A NEW IRS, Section 1, Recommendation 2, at 4 (June 25, 1997). However, skeptics have expressed doubts whether such distinctions could be maintained in practice were the proposal enacted. *See id.* at 65 (dissenting statement of Commissioner Larry Irving) ("[D]rawing the line between oversight and tax policy and management will, in my opinion, be almost impossible to police or maintain, and ultimately will raise serious accountability and jurisdictional questions.").

contracts being a kind of private constitution when it comes to providing these services.<sup>253</sup> How much public participation should be involved in negotiating those contracts in the first instance and to what extent can the public receive meaningful notice of any changes that may occur?

These are the kinds of questions that come into play as policymakers and courts become involved in these various attempts to create new blends of public and private power. Though issues such as snow removal, garbage collection, or even private prisons, may initially seem somewhat remote from the global economy, the public/private issues they embody go to the heart of the most fundamental challenge globalization makes on the de-centered state and our ability to govern ourselves. Moreover, the techniques themselves are a product of a globalizing state that seeks to redefine itself in this new era. It is, therefore, important that these partnerships be seen as raising issues involving the appropriate mixes of private and public regimes and values. A labeling exercise that uses an either/or kind of methodology will miss important chances to maintain or encourage a modicum of democratic decision-making, especially if it concludes certain decisions, once public, are now private. At the same time, too formulaic an approach to what is public can incorporate so many governmental requirements as to undercut the globalizing state's need to experiment with innovative and presumably less costly ways of achieving common goals and ends.

However, recognizing that a new mix of public and private power may now be necessary in certain areas does not mean that history is irrelevant. Public/private partnerships are not formed in a vacuum. In some contexts, what is being privatized has long been considered a public function. As such, it may be relatively easy, for state action doctrine purposes, to view many aspects of the private sector as essentially public. In other contexts what is now considered to be an important public decision may, historically, always have been viewed as private. This is especially true of certain economic decisions to invest or withdraw capital from certain markets. This factor may militate in favor of a different blend of public and private power.<sup>254</sup> From a court's perspective, questions involving a substantial change from past practice are best addressed by legislatures, especially when formally private decisions are involved. But issues having to do with where the market ends and the market metaphors begin, i.e., issues having to do with what the blend of public and private power should be, usually are in the province of the courts. So too

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253. See HARDEN, *supra* note 124, at 44-45, 75-77.

254. See generally STRANGE, CASINO CAPITALISM, *supra* note 19.

is the determination of the relevant context in which these issues arise.

A global perspective on such issues places a premium on doctrinal approaches that further rather than restrict policymaking creativity in this regard and realistically maintain the kind of public input necessary to ensure, to the extent possible, that the globalizing state's attempts to maximize its own efficiency does not minimize democracy. The analysis of private prisons as a distinct form of outsourcing and the recent Supreme Court decision in *McKnight v. Richardson*<sup>255</sup> in the section that follows will apply a global perspective to the public/private issues the Court faced.

### B. *Private Prisons and the Global Economy*

Private prisons are not new in the history of the U.S.<sup>256</sup> They were particularly common in the nineteenth century,<sup>257</sup> but they have re-emerged as an important reform in the last fifteen years or so.<sup>258</sup> There are many reasons for their popularity. As prisons have become overcrowded, privatized prisons offer an alternative to state construction and management that may be performed at a lower cost. The theory is that private sector providers will compete among themselves for a state's business by providing for more efficiently run and, in some instances, more efficiently constructed prisons than the government can provide.<sup>259</sup> Implicit in this approach is that every few years or so, at contract time, competition will re-emerge, making sure that the present provider is, in fact, the most efficient. This, of course, assumes that the price of entry—construction of a new facility—will not be a significant bar to future competition. If only the management of prisons is involved, such competition theoretically can occur much more easily.<sup>260</sup>

When comparing private prisons to publicly managed facilities, the question that arises is: what are the bases of this competition? Clearly, if the competition is based on providing a secure and humane environment more cheaply than a public bureaucracy can, private prisons increase the global competitive currency of a state in an acceptable manner. If some of these

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255. *McKnight v. Richardson*, 117 S. Ct. 2100 (1997).

256. See generally HARDING, *supra* note 244.

257. See, e.g., *McKnight*, 117 S. Ct. at 2104-05; James Theodore Gentry, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353 (1986).

258. *Id.*; see also HARDING, *supra* note 244, at 3.

259. See, e.g., HARDING, *supra* note 244, at 3; Gentry, *supra* note 257.

260. See, e.g., Gentry, *supra* note 257, at 357-58.

lower costs, however, derive from the fact that fewer constitutional protections are applied to private inmates than those held in public prisons, legal issues may arise which, eventually, may and should eliminate such forms of competition.<sup>261</sup>

It is not yet clear how far courts will go to extend constitutional protections such as due process, for example, to privately run prisons.<sup>262</sup> Were they to be exempt from all or part of these constitutional protections, they would be indicative of the worst of globalization trends: the removal of public rights and dialogues by the simple device of moving what was once public to the private sector. This is perhaps unlikely,<sup>263</sup> given the nature of the relationship between a contracting governmental body and a private prison provider, the state's duty to enforce its laws and house its criminals, and the various ways in which the market cannot apply with full rigor to this kind of situation. Nevertheless, apart from the potential savings in cost that a more efficiently managed prison promises, there are other political reasons, some of them marginal or even illegitimate, that also can fuel this transfer of functions from the public to the private sector.

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261. If, for example, prison guards can simply tie up inmates with straightjackets (as in *McKnight*) and leave them for days at a time, certainly Eighth Amendment and Fourteenth Amendment concerns should arise. Without the possibility of constitutional oversight in the federal courts, these fundamental rights—already litigated and settled in the federal courts—would be rendered moot by a nationwide wave of such “outsourcing.” The system may soon have an opportunity to address these questions in the context of abuse in privately run juvenile prisons. The Tallulah Correctional Center for Youth, a privately run detention facility in Tallulah, Louisiana, came under harsh criticism amid allegations of physical abuse by guards, failure to educate and counsel the youths, and arbitrary and severe punishments for misbehavior. Louisiana’s juvenile prison system is just one of a series being investigated by the U.S. Justice Department. Kentucky, Puerto Rico, and Georgia are also under investigation, and “private juvenile prisons in Colorado, Texas, and South Carolina have been successfully sued by individuals and groups or forced to give up their licenses.” Fox Butterfield, *Profits at Juvenile Prisons Earned at a Chilling Cost*, N.Y. TIMES, July 15, 1998 at A1.

262. See generally Douglas W. Dunham, *Inmates’ Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475 (1986) (arguing that comprehensive safeguards are necessary to ensure the protection of inmates’ constitutional rights in private prisons); Warren L. Ratliff, *The Due Process Failure of America’s Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997) (considering whether privatization statutes establish correctional systems that conform with constitutional “due process”).

263. See, e.g., *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (addressing actions by a private individual during the trial process which may be considered a “state action” when the individual violates a party’s constitutional rights); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) (addressing certain actions of private entities that may constitute “state action” under 42 U.S.C. § 1983).

Global competition has, as we have seen, focused on the need for individuals, corporate entities, and states to be maximally competitive. This has spawned a rhetoric that, along with the drive for efficiency, can be intensely anti-state in its assumptions as well. Any number of state functions, when compared to the ideal of the market, usually come up short.<sup>264</sup> As noted above,<sup>265</sup> however, it is very difficult to compare public duties to pure market approaches when only outsourcing is involved. Private prisons, in particular, do not fit easily into the private ordering, contractual model.

The idea of private prisons also can involve political overtones that can exacerbate some of the more retributive trends in current approaches to criminals and criminal behavior. In the minds of some people, prisons exist primarily to punish those who break the law. For some, the impersonal harshness of the market may seem more appropriate for such law breakers, especially if it means that an efficiently run prison will not provide certain legal amenities or services that criminals will be deemed to have forfeited. A "no nonsense," efficient market environment can be seen, politically, as being more punitive, thus also increasing the popularity of privatized prisons as a regulatory reform.<sup>266</sup>

How should the courts treat private prisons? The context of global competition requires courts ultimately to assess carefully not just what is public or what is private, but what the blend of these two systems should be. To do this, courts should be skeptical of labels and determine at what point the market becomes a metaphor that is inapplicable to the issues at hand. When that occurs, are the policies of the market appropriate for an institution that is privately run, but publicly required? When the market becomes more metaphorical than real, how should a court assess the blend of public and private power that results? To what extent can public input into private prison decisions be required and how often should this occur? Finally, at what point should a court conclude that the global currency created from certain aspects of privatization should not be allowed? These are some of the key questions presented in *McKnight v. Richardson*.<sup>267</sup>

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264. See, e.g., Rep. Philip M. Crane's proposal to privatize the U.S. Postal Service, 135 CONG. REC. E547-48 (daily ed. Feb. 28, 1989) ("The performance of the post office can only be improved by transferring it to the private sector.").

265. See *supra* text accompanying notes 240-55.

266. Of course, one can imagine a more positive view of private prisons as well, one where a more efficiently trained workforce runs a cleaner, more effective facility. But even the more positive political rhetoric that can surround this reform is implicitly negative vis-à-vis the state. It reinforces the laissez-faire conception of the state noted above, by its implication that the market can handle prisons more effectively than government.

267. 117 S. Ct. 2100 (1997).



## 1. McKnight v. Richardson

Ronnie Lee McKnight brought suit against two prison guards in a private prison in Tennessee.<sup>268</sup> He alleged that they had violated his constitutional rights by injuring him with extremely tight physical restraints.<sup>269</sup> He brought suit under section 1983, even though he was incarcerated in a private prison.<sup>270</sup> The private prison guards moved to dismiss, claiming the same kind of qualified immunity that would apply if they had been guards in a public prison facility.<sup>271</sup> The U.S. District Court, the Court of Appeals, and the Supreme Court all agreed that qualified immunity did not extend to private prison guards.<sup>272</sup> Recognizing that section 1983 can sometimes result in imposing liability upon a private individual, all three courts resisted the application of a defense commonly used by public officials doing essentially the same job.<sup>273</sup>

The Supreme Court split 5-4 on this issue.<sup>274</sup> Writing for the majority, Justice Breyer found that there was no historical precedent requiring an extension of qualified immunity to private prison guards.<sup>275</sup> More importantly, he analyzed the market context in which immunity might apply and rejected its extension on policy grounds as well.<sup>276</sup> The dissent disagreed on both counts—history and policy. For the dissent, nothing in the past affirmatively prevented the extension of qualified immunity to private prisons.<sup>277</sup> In fact, public and private prisons were functionally the same.<sup>278</sup> For the dissent, the fact that there was no precedent barring the extension of this common-law-based immunity meant it could be applied.<sup>279</sup> For the majority, the fact that there was no precedent authorizing this extension was further evidence that the extension of this immunity was not required.<sup>280</sup>

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268. *See id.* at 2102.

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. *See id.* at 2102-03.

274. *See id.* at 2108 (noting the dissent of Justices Scalia, Rehnquist, Kennedy, and Thomas).

275. *McKnight*, 117 S. Ct. at 2105.

276. *Id.* at 2106.

277. *See id.* at 2108-09.

278. *See id.* at 2108-09 (noting that the two prison systems perform the same duties).

279. *Id.* at 2109.

280. *Id.* at 2105-06.

It is at the policy level where the differences between the majority and the minority are particularly instructive. The mix of private and public that the majority's decision sanctioned arguably would provide more protections for the prisoners than if qualified immunity were to extend to them. The majority saw the use of the market more as a means of assuring certain public values than as an end in itself. Its refusal to adopt the functional approach advocated by the dissent resulted in a complex approach to issues involving both citizen/consumers and prisoners. The majority's conclusion that private guards were not entitled to the qualified immunity public prison guards would receive was, ironically, premised on public law values, including the constitutional rights of the prisoners involved and an implicit argument that cost was not the only relevant factor in deciding how best to determine the appropriate public/private blend in this case.<sup>281</sup> In short, the results in this case are best explained by seeing the majority's preference for a private approach as best serving the needs of the prisoners involved as well as the public's responsibility. The dissent's more functional approach would have extended the public label to this context, but primarily for cost considerations.

## 2. The Public/Private Mix

The majority analyzed the market approach of a private prison against a backdrop of public law.<sup>282</sup> In fact, in contrasting private prisons with public prisons, the majority implied that in this context public prisons seemed to embody the status quo:

[G]overnment employees typically act within a *different* system. They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibility to reward, or to punish, individual employees.<sup>283</sup>

Indeed, though the majority sought to describe two different systems, the public and the private, it opted for a combination of the two, favoring greater reliance on the market when it came to advancing the primary purpose of the immunity doctrine—avoiding either timid or overly aggressive behavior on the part of the guards involved.<sup>284</sup> Indeed, in the public prison context,

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281. *Id.* at 2105.

282. *Id.*

283. *Id.* at 2107.

284. *Id.* at 2105.

immunity from suit was justified primarily on the ground that public guards should not have to fear that, simply by doing their duty, they would be subjected to a lawsuit.<sup>285</sup>

For the majority, private prisons provided ample incentives for guards to behave properly, including more opportunities for market-sensitive supervisors either to reward or to discipline them, if they were too aggressive or not aggressive enough when dealing with prisoners.<sup>286</sup> In addition, the majority emphasized that in the private sector, it was commonly understood that the prison providers would purchase insurance coverage for guards that were held liable for damages resulting from prison lawsuits such as in this case.<sup>287</sup> Moreover, as the majority saw it, there also was more public input into this process, when prisons were, in fact in private prisons. Since the prison contract expires after three years, "its performance is disciplined not only by state review . . . but also by pressure from potentially competing firms who can try to take its place."<sup>288</sup> In a sense, this three year review and the choice of other providers the state may have is a very effective way of ensuring public input that is focused and directed specifically towards the tasks of running a prison.<sup>289</sup> More importantly, by not extending immunity to the guards themselves, the court recognized but disregarded the significance of any distractions that might result from lawsuits. This was a small price to pay "given a continued and conceded need for determining constitutional violations . . . ."<sup>290</sup> Indeed, one could view the resulting jury trials as another form of public, citizen input into this private regime, one that does not normally exist in the public realm. In the context of qualified immunity, the use of market forces may, in fact, result not only in a well-run prison, but actually enhance the public accountability and public input aspects of this regime as compared to public prisons. In short, the majority opted to treat private prisons as private, when it came to the qualified immunity doctrine.<sup>291</sup>

### 3. The Limits of the Market Metaphor

It is ironic that the more conservative wing of the Supreme Court, through Justice Scalia, would argue for a result that would extend the public aspect of prisons to this private regime. Justice

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285. *Id.* at 2107.

286. *Id.* at 2106-07.

287. *Id.* at 2106.

288. *Id.*

289. *Id.* at 2107.

290. *Id.*

291. *Id.*

Scalia, however, was not interested in drawing distinctions between the public and the private in this context. Indeed, opting for a functional approach to public and private prisons and their guards, the dissent could see no difference between the public and the private in the qualified immunity context.<sup>292</sup> Prison guards performed the same functions no matter whether the prison was privately or publicly run.<sup>293</sup> Not extending immunity in this context made little sense, the dissent argued,<sup>294</sup> and, in fact, market incentives might actually encourage cost-cutting behavior that could be harmful to the prisons involved.<sup>295</sup> The insurance private providers regularly purchase could also be obtained by public prisons and the bureaucratic complexity that made sanctions or rewards in the public sector difficult was not, in the dissent's view, necessarily required.<sup>296</sup> In the final analysis, the dissent concluded that failure to extend immunity protection in this case only added to a private prisons costs;<sup>297</sup> it acted as a disincentive to privatize in the first instance.<sup>298</sup>

Cost was thus an important reason underlying the dissent's desire to extend the public umbrella over privatized prisons. But also underlying the dissent's opinion was a desire for a bright line approach for determining what was public and private. This was clear in the way the dissent focused on the limits of the applicability of what it considered to be "real market" forces and, by implication, the limits of the market as a metaphor. The majority tested those limits against the policies it thought the approach might generate; the dissent tested those limits against microeconomic theory.

Indeed, the dissent refused to use the market as a metaphor or as a means of blending aspects of the public and the private. There was a clear line between the two and this justified the all public approach it advocated:

[I]t is fanciful to speak of the consequences of "market" pressures in a regime where public officials are the only purchaser, and other people's money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison management firm only if a decision is made by some *political* official not to renew the contract....This is a government decision, not a market choice.<sup>299</sup>

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292. *Id.* at 2112.

293. *Id.* at 2107.

294. *Id.* at 2112-13.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 2107.

299. *Id.* at 2111.

The dissent went on to discount the significance of public input at this point in the process and resisted comparing that input to anything like a real market choice.<sup>300</sup> The dissent did not suggest that such input was impossible, but that it certainly was unlikely:

The process can come to resemble a market choice only to the extent that the political actors will such resemblance—that is, to the extent that political actors (1) are willing to pay attention to the issue of prison services, among the many issues vying for their attention, and (2) are willing to place considerations of cost and quality of service ahead of such political considerations as personal friendship, political alliances, in-state ownership of the contractor, etc.<sup>301</sup>

In effect, the dissent refused to recognize the market as a metaphor and resisted blending the public with the private or the uses of the private to accomplish public ends. As far as the dissent is concerned, prison operation is a public function and there is no difference between public prisons and prisons run on behalf of the public by private providers. The dissent's preference for the public is premised on the belief that a bright line exists between these two worlds and that the real reason for opting for the private sector is price.<sup>302</sup> As a result, because "a contractor's profits must depend upon its costs," the end result of the majority's decision would be, quite simply, to increase costs.<sup>303</sup> And under such circumstances, private prison guards are in as much need of immunity as their public counterparts.<sup>304</sup>

Similarly, the dissent discounts the majority's reasoning regarding the differences that privatization of prisons makes as far as insurance coverage is concerned, as well as the relatively easy ways in which private employers can discipline their employees.<sup>305</sup> The dissent finds it ironic that outsourcing prisons should result in rules that make them more expensive.<sup>306</sup> For the dissent, public prison guards can also purchase insurance,<sup>307</sup> and there is no reason why they need have so many civil law service restraints.<sup>308</sup>

More importantly, the dissent sees no difference between public and private prison guards when it comes to the constitutional rights of prisoners: "One would think that private prison managers, whose § 1983 damage come out of their own

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300. *See id.*

301. *Id.*

302. *Id.*

303. *Id.* at 2111-13.

304. *Id.* at 2111.

305. *Id.* at 2112.

306. *Id.* at 2112-13.

307. *Id.* at 2111-12.

308. *Id.*

pockets, as compared with public prison managers, whose § 1983 damages come out of the public purse, would, if anything, be more careful in training their employees to avoid constitutional infractions.”<sup>309</sup> The dissent concluded that it saw “no sense in the public-private distinction” nor did it “see what precisely it consists of.”<sup>310</sup>

The methodology used by the majority in this case to determine whether a private or public perspective was to prevail resulted in a decision that favored the market approach for essentially public reasons. By resisting a precedent-bound historical approach, the majority was free to entertain a variety of policy arguments that applied private rationales for public ends. The dissent’s more functional approach certainly has the merit of resisting a simple labeling approach, based on the nature of the service provider, but it also was indicative of an all-or-nothing approach often used by courts in state action cases, and a recognition that there is a bright line between the public and the private, with minimal overlap between the two.

### C. *Implications of the Globalizing State for Public/Private Law*

As we have seen, the globalizing state approaches problems in ways that often resemble those of the global corporate entities they seek to influence. Thus, like global corporations, states downsize, decentralize, or deregulate, and they call upon the market and private actors to achieve their goals.<sup>311</sup> Contracting-out or outsourcing to the private sector is an increasingly common way for states to carry out their public responsibilities. The state also has used, with increasing frequency, various market structures, and market regulatory techniques to carry out its duties.<sup>312</sup> All of these approaches and interactions with the private sector involve aspects of the public/private distinction, but this distinction no longer demarcates two very distinct areas as it once did.

The concept of the globalizing state emphasizes the importance of ensuring that courts and policymakers understand the complexities of the public/private distinction as it now arises.

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309. *Id.* at 2112.

310. *Id.*

311. See, e.g., Adam Melita, Note, *Much Ado About \$26 Million: Implications of Privatizing the Collection of Delinquent Federal Taxes*, 16 VA. TAX REV. 699, 727 (1997) (examining the broader tax policy ramifications that underlie the spirit of the pilot program, namely that private collection of federal taxes may be more efficient than the present system).

312. See Aman, *A Global Perspective On Current Regulatory Reform*, *supra* note 59, at 454-62.

First, given the tendency of globalization processes to put a premium on market processes and outcomes, it is important to understand the extent to which private forces and techniques are involved to reach *public* ends, thereby maintaining a state connection to what otherwise may seem to be essentially private activities. Second, given the new pressures experienced by states and the strength of global markets, the resort to the private sector need not be simply evidence of agency capture or the triumph of a relatively pure form of global capitalism. Rather, treaties such as NAFTA, contracting-out of governmental services, and the use of market regulatory structures and techniques, are but the beginnings of new approaches on the part of the global state to achieve public interest ends—ends which may be in a global public interest. Third, the realms of public and private themselves have been and are subject to the processes of globalization. Domestic law processes that involve the private sector very directly in the lawmaking process will often include the global perspective of many of the participants involved in these issues. Similarly, in many areas of regulation and state involvement, the public realm itself does not stop at U.S. borders.

For certain kinds of regulation to be effective, the global state must link up with other states on a global or regional basis. Thus, governmental decision-makers need to bring a global perspective to issues that may seem to evoke familiar debates over the local and the global, but in fact now require a broader political, economic, and legal framework of analysis. A global perspective is, in reality, a critical one. It seeks to determine the extent to which domestic decisions by Congress, administrative agencies, and the courts further flexible, public/private partnerships, as well as preserve or create opportunities for public participation. This perspective is also normative, in that it posits the importance of maintaining a public viewpoint in decision-making processes that might otherwise be private.

The globalizing state highlights the need for encouraging and protecting the norm of democratic decision-making as well as the need for facilitating the kind of flexibility necessary for new kinds of public/private and state/federal partnerships to form. These goals as well as the more traditional goals of private and public law are greatly affected by the way courts approach the public/private distinction in the various contexts in which it now arises.<sup>313</sup> The issues are complex because, depending upon the context, labeling something as private does not necessarily mean

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313. See, e.g., *supra* text accompanying notes 268-310. See generally Symposium, *The New Private Law*, *supra* note 3 (providing examples of how private law can merge or take on public law aspects).

that the legal consequences of that label will yield negative results from a policy point of view, even when judged by public law values such as accountability, transparency, and participation.<sup>314</sup> Similarly, labeling something as public does not mean that such values are always encouraged or furthered.<sup>315</sup> The market and market regulatory approaches can be very effective regulatory tools, and some governmental or public approaches can represent a decision to opt for the status quo.<sup>316</sup>

There are other facets of privatization in addition to creative problem solving. The desire on the part of governments at all levels to lower their costs and to create the currency of global competition is one of the main motivating forces for privatization. Lower regulatory costs make it easier to attract new business to a locality or to retain old ones. But quite apart from cost, the decline in public confidence in the ability of government to perform any number of functions efficiently or competently has made governmental resorts to the private sector politically popular as well. This fact alone requires that the rhetoric of global competition must, at times, be separated from the reality of the reform involved. To invoke the language and concepts of the private sector in contexts that are or should remain public can unnecessarily diminish the role of democracy.

Like the interpretation of the public/private distinction, much is at stake in judicial decisions that draw bright lines between federal and state power. The pressures of global competition on the state for low-cost, regulatory, or deregulatory approaches to issues, create incentives to conceptualize new mixtures of public and private power as essentially private, rather than public. But these pressures are increased by the role the state itself now plays as it affirmatively seeks to retain and attract new investment to its own jurisdiction. As the globalizing state attempts to create additional currency to compete in the global economy, the ways in which courts view doctrines that allocate power between the public and private sector take on major significance, especially when dealing with so-called local issues. As Part IV has shown, these often are the arenas in which the values of democracy are at stake. But courts cannot fight all such battles alone. Legislatures must also be involved. As Part V will now show, fragmenting democracy by constitutionalizing certain interpretive approaches to federalism may deprive the globalizing state of the flexibility it needs to ensure that such

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314. See Peller, *supra* note 197 (discussing public schools and various reform proposals); see also Aronson, *supra* note 125.

315. See Peller, *supra* note 197, at 1004-05.

316. *Id.*



concepts as citizenship, sovereignty, and democracy remain relevant in the twenty-first century.

Part V will argue that recent federalism decisions risk making certain kinds of federal action problematic. The ability of the federal government to act in certain situations that involve new mixtures of local as well as national concerns may be necessary if effective legal regimes are to develop. It is, therefore, especially important to understand and to assess the significance of recent judicial trends involving federalism from a global perspective.

## V. THE GLOBALIZING STATE AND FEDERALISM

Since the founding of the republic, power in the United States has generally flowed from the states to the national government.<sup>317</sup> As local economies became more integrated with a growing national economy, the logic of Supreme Court decisions, particularly those after 1937, almost always resolved disputes between federal and state levels of governance in favor of national power.<sup>318</sup> Post New-Deal, the outcome in cases involving the scope of the Commerce Clause of the Constitution seemingly had become such a foregone conclusion that it prompted then Justice Rehnquist's quite pointed concurrence in *Hodel v. Virginia Surface Mining and Reclamation Association Inc.*<sup>319</sup> "Although it is clear that the people, through the States, *delegated* authority to Congress to 'regulate Commerce . . . among the several States,' U.S. Const., Art. I, § 8, cl. 3, one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress."<sup>320</sup> Indeed, he viewed the proposition that Congress exercises only power delegated to it as "one of the greatest 'fictions' of our federal system."<sup>321</sup>

Chief Justice Rehnquist now speaks for a majority on the Court whose approaches to federalism issues are more open to arguments involving state autonomy and rejecting expansive readings of the Commerce Clause. Specifically, the Court takes

317. See generally Phillip Kurland, *The Role of the Supreme Court in American History: A Lawyer's Interpretation*, 14 BUCKNELL REV., NO. 3, 16-26 (1966) (discussing the Supreme Court's role in marking the boundary between state and national authority).

318. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1957) (the so-called switch-in-time that saved nine case); Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314-15 (1955) (showing that the vote in *West Coast Hotel* was taken before legislation to expand court was proposed).

319. *Hodel v. Van Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

320. *Id.* at 307-08.

321. *Id.* at 307.

issue with attempts by the federal government to “commandeer” state bureaucracies to carry out federal mandates.<sup>322</sup> Moreover, the Court attempts to breathe new meaning into the Tenth Amendment by arguing, for example, that federal regulation of guns near schools is too local an issue to be supported by the Commerce Clause of the Constitution.<sup>323</sup>

While a good doctrinal argument can be made in support of the Court’s decisions in some of these cases,<sup>324</sup> the reasoning in these cases suggests a shift in the Court’s methodology to such issues and its underlying philosophical approach to federal-state issues that transcends the facts of these cases. This shift in emphasis from federal power to state autonomy and power coincides with economic and political shifts in the global economy that also encourage decentralization of power. However, interpreting these changes in federal-state relations in a manner that diminishes the flexibility of federal and state policymakers to experiment with new regulatory approaches runs the risk of substantially undermining the range of policy alternatives and administrative structures necessary for the global state to be effective.<sup>325</sup>

#### A. *A Global Perspective on Federalism*

The Court’s shift in the power relationships between the nation and the states and its underlying rationale for this change are likely to encourage more competitive models of the global state, at the expense of developing a more cooperative-based understanding of the state at both the national and the international levels. The emphasis on the individuality of states and their identities and power increases the transaction costs of reaching cooperative agreements that could apply to all states. In a sense, an extreme view of federalism would make national legislation as difficult as negotiating multi-lateral treaties. This is not to argue that a “race to the bottom” is inevitable in such a

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322. See, e.g., *New York v. U.S.*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

323. *U.S. v. Lopez*, 514 U.S. 549 (1995).

324. See Barry Friedman, *Federalism’s Future in the Global Village*, 47 VAND. L. REV. 1441 (1994) (arguing that the Court reinstated state sovereignty in *New York v. United States*).

325. For a discussion of federalism advocating an alternate view—i.e., that federalism is an empowerment of the national government—see Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 504 (1995) (“[I]t is desirable to have multiple levels of government all with the capability of dealing with the countless social problems that face the United States as it enters the 21st century.”).

situation.<sup>326</sup> It is to argue, however, that creative, cooperative approaches to issues may be unnecessarily constitutionally excluded, when they should at least be politically possible.

Moreover, the strong state assumptions used by the Supreme Court in its analysis of federalism opinions, coupled with its emphasis on dual citizenship, cost, and accountability, do not sufficiently capture the heterogeneous quality of states as actors in today's economy and the multicentric complexities of the relationships that now typify the transnational actors that states seek to influence. Nor does it capture the more cosmopolitan nature of citizenship today. A citizen of a state is, of course, a citizen of the U.S. and a global citizen as well. Individuals carry all of these identities with them on a daily basis.<sup>327</sup> The Court's emphasis on democracy and accountability at the state level overestimates the degree of choice states have when working by themselves, especially when the problems involved simultaneously include state, federal, and often international components. It also underestimates the cosmopolitan nature of citizens today, and the fact that individuals are able to differentiate among various levels of power that they believe are involved and with which they identify.

Paradoxically, perhaps, globalization exerts a downward pull when it comes to the exercise of both federal and state power, providing incentives for more state autonomy and power and more local authority within states.<sup>328</sup> At the same time, globalization also creates pressures from outside the nation-state to take actions that allow for international solutions to problems such as ozone depletion or global warming.<sup>329</sup> In addition, there are horizontal competitive forces at work as well, brought about by transnational corporations, with economic power sometimes approximating the power of a small state and with the capability of locating their operations anywhere in the world. Indeed, a

326. See, e.g., Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (explaining how states race to the bottom by relaxing environmental standards to attract industry). But see Esty, *Revitalizing Environmental Federalism*, *supra* note 30.

327. See, e.g., Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 2-20 (Joshua Cohen ed., 1996) (arguing for global allegiance over national patriotism); see also Kwame Appiah, *Cosmopolitan Patriots*, *id.* at 21-29 (emphasizing that people should remember their responsibility as a world citizen).

328. See Aman, *A Global Perspective On Regulatory Reform*, *supra* note 59, at 435-37. For an argument that much of what courts claim are rationales for federalism are, in reality, an argument for decentralized management, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903, 914-26 (1994).

329. See BENEDICK, *supra* note 43.

multicentric world, consisting of non-sovereign power centers pursuing their own private interests adds another important power dimension to federalism issues. As a consequence, issues involving sovereignty and democracy arise that go beyond the traditional discourse of federalism, as it has developed so far. This is true of citizenship issues as well, as citizens in a global world regularly function on multiple levels of political awareness.

### 1. The Downward Pull of Globalization

As argued in Part III,<sup>330</sup> globalization encourages increasingly intense international competition among nations, states and cities to attract and keep industries that they believe can create economic growth in their areas. Though the location of a plant or manufacturing operation turns on numerous, primarily cost-related factors, low taxes and the imposition of minimal regulatory costs on industries located in these jurisdictions usually constitute important elements of a jurisdiction's strategy to attract industry and jobs to a particular locale.<sup>331</sup> The tax and regulatory policies devised on the local level to attract industries to a certain locale are often the result of decision-making processes that are more akin to local corporatism than to more traditional forms of democracy. Indeed, one commentator has noted based on a study of Japanese investment in the Midwest, that a kind of embedded corporatism best describes the process by which new investment is sought.<sup>332</sup> This involves, among other things, "an activist local state working with the business class to attract foreign investment and thereby stimulate the local economy."<sup>333</sup> As a result of agreements among business, government, and labor, substantial tax relief and various other economic and cultural incentives are commonly offered as forms of currency in this global competition for business.<sup>334</sup>

Individual states and municipalities within the U.S., eager to attract such new investment and to retain its current industries, have a great interest in gaining control of as many factors as possible affecting firms' decisions to relocate to or remain in their jurisdiction. They can create currency for global competition by providing services such as welfare more efficiently than

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330. See *supra* text accompanying notes 91-117.

331. See PERRUCCI, *supra* note 74, at 41-76.

332. See *id.* at 125-45.

333. *Id.* at 17.

334. See *id.* at 131-34.

neighboring states.<sup>335</sup> Thus, closely related to global incentives for regulatory cost-cutting and the imposition of lower taxes at the federal, state, and local levels, is the increased desire of each particular jurisdiction seeking increases in economic investment to control its own costs. Relocating federal regulatory responsibility for costly regulatory programs in the individual states arguably gives states the opportunity to create more global currency by maximizing the efficiency with which they provide such services.

There may, of course, be some forms of global competitive currency individual states should not be allowed to create.<sup>336</sup> And there may be national interests that should take precedence over state concerns. Level playing fields are not necessarily sought by states when the primary motivation involved is competition. Moreover, a level playing field in the U.S. alone does not solve the competitive problems of states that arise from competition from other parts of the globe. The multicentric aspects of the global economy stem from the fact that there are multiple state and non-state power centers capable of affecting where investments may or may not occur. All of these pressures militate in favor of decentralized decision-making.

## 2. The Pull from the Top—National and International Pressures

Increasing a state's power to control the costs imposed on its inhabitants and potential investors through devolution is only one aspect of current federalism trends. There are also forces operating simultaneously to reinforce federal powers. National standards and approaches may be necessary to prevent the creation of illegitimate global currency.<sup>337</sup> They also are necessary to achieve certain levels of regulatory uniformity if businesses are to avoid an unnecessary differing patchwork quilt of state rules and regulations.<sup>338</sup> More importantly, there also are issues such as the environment, in which it is in the interest of nation-states to play an active regulatory role at the global level.

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335. See Aman, *Administrative Law For A New Century*, *supra* note 17, at 101.

336. For example, private prisons' costs should not be lower because there are fewer constitutional protections available to prisoners.

337. See, e.g., Esty, *Revitalizing Environmental Federalism*, *supra* note 30; Diane P. Wood, *United States Antitrust Law in the Global Market*, 1 *IND. J. GLOBAL LEGAL STUD.* 409 (1994).

338. See ESTY, *GREENING THE GATT*, *supra* note 203, at 108-11; see also J. William Hicks, *Protection of Individual Investors Under U.S. Securities Laws: The Impact of International Regulatory Competition*, 1 *IND. J. GLOBAL LEGAL STUD.* 431, 464 (1994) (arguing that federal and state regulators must cooperate to protect securities markets).

Effective national participation at the global level requires a national "presence" in certain domestic areas affected by these global concerns. And indeed, international agreements and multilateral approaches have been increasing at a rapid rate.<sup>339</sup> For example, if there were no effective national control over air pollution, it would be very difficult for the national government to speak for all fifty states and enter into serious negotiations at the global level.

The ability of the national government to participate effectively in global issues at the international level can help mitigate the extremes of global competition. Along with the trend toward a devolution of federal power there is also at least the beginning of an evolutionary trend involving the national government more directly in sharing in the responsibilities of *international governance*.<sup>340</sup> At the national level, this trend toward multinational decision-making and problem-solving often expresses itself negatively in debates over the undue restriction of national sovereignty,<sup>341</sup> but international cooperation and multinational agreements are nonetheless increasing.<sup>342</sup> International cooperation and regulation highlight the importance of the national government's ability to play an active role at the domestic level. To the extent that federal power is limited in this regard, enforceable international regulatory regimes are more difficult to create than when only one major decision-maker is involved.<sup>343</sup>

### 3. Horizontal Forces and the Transnational Corporation

Federalism traditionally is seen primarily in vertical terms.<sup>344</sup> Usually, the flow of power involved is between state and federal

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339. For example, according to the Multilaterals Project at Tufts University, at least 36 major multilateral environmental treaties have opened for signature since 1972. <<http://www.tufts.edu/departments/fletcher/multilaterals.html>>.

340. *Id.*; see, e.g., WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987).

341. For example, consider the debate over sovereignty that occurred when the World Trade Organization was established. See also *Senate Comm. on Commerce, Science and Transp. Hearing on Fast Track legislation*, 1997 WL 605646 (F.D.C.H.) (Sept. 30, 1997) (comments by Senator Ernest F. Hollings, D-SC) (arguing that NAFTA has not lived up to its potential).

342. For a public choice perspective on this overall increase in international agreements, see Enrico Columbatto & Jonathan Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 *CARDOZO L. REV.* 925 (1997).

343. See, e.g., *supra* note 341 (including part of a recent Congressional debate on the renewal of fast track authority).

344. Of course, it can be horizontal as well when, for example, states try to take advantage of other states. See, e.g., dominant Commerce Clause cases such

centers of authority. A global perspective introduces not only an additional vertical level of power, namely the international level, but additional horizontal dimensions as well.<sup>345</sup> A global perspective emphasizes the fact that states outside the U.S. now play an increasingly important role when it comes to global competition and it also highlights the significant role non-state actors, such as transnational corporations, now play in influencing local legal regimes and policies. The ability of non-state actors to render a sense of place relatively irrelevant when it comes to deciding where to locate its plant, for example, substantially undercuts the ability of individual governments, state or federal, to regulate the activities of such entities effectively. The fact that capital moves relatively freely from state to state also means that investment can sometimes leave as quickly as it may have come.<sup>346</sup> The jurisdictional difficulties faced by states trying to influence such actors cannot be dealt with as it was during the New Deal, when federal regulatory regimes leveled the playing field nationwide. There are now many other countries involved, and international approaches are necessary if state intervention and a more cooperative approach to international governance is the goal.<sup>347</sup> Of course, if a strong state laissez-faire response is the goal, then maximum decentralization of power would further that kind of global economy. This is and should be a political decision, however, and not one subject to constitutional dictates.

In short, the transnational or horizontal character of these entities introduces an independent and significant power relationship into the equation that substantially undercuts the power of states to influence these entities in ways individual states believe further the public interest. The economic power that some of these entities possess and the structural economic issues or choices they can present for states and individuals, in some ways, makes them somewhat akin to states themselves.<sup>348</sup>

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as *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (holding unconstitutional an Iowa law prohibiting 65 foot trailers within its borders). These issues, however, involve only states and are controlled by the relationship of the state law to the Commerce Clause.

345. For a discussion of the power of transnational corporations and their impact on politics, see STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 44-54. "[T]he progressive integration of the world economy . . . has shifted the balance of power away from states toward world markets. That shift has led to the transfer of some powers in relation to civil society from territorial states to TNC's." *Id.* at 46.

346. See generally STRANGE, *CASINO CAPITALISM*, *supra* note 19.

347. See *THE GROUP OF LISBON*, *supra* note 23.

348. See STRANGE, *THE RETREAT OF THE STATE*, *supra* note 6, at 54 (arguing that if one excludes war and peace, and focuses more broadly on day to day

There is, in effect, a much more distinct private power center that no longer can easily be neutralized by a set of uniform rules, even at the national level.

#### 4. Global Citizenship

Citizenship operates on multiple levels today. Legal residents who live in states are U.S. citizens, but they often also identify their economic interests with the transnational corporation they work for or that invests capital in the community in which they live.

On a more public interest level, local and national citizens increasingly are aware of the global implications of local or national decisions and these, too, are becoming a part of everyday politics. For example, the debate over the tobacco settlement has a global component to it. If the settlement makes it easy for companies to open new markets abroad, this factor does and should affect a local, domestic political response.<sup>349</sup> Similarly, environmental regulation that moves certain industries off-shore, thereby increasing global pollution, also should be factors at the state and federal levels of political discussion.<sup>350</sup>

Global citizenship involves multiple identities and the ability of citizens to differentiate among the various roles that different levels of government perform. At the same time, built into these multiple identities are often conflicting and conflicted responses to certain issues. What might further one's local interest may harm the global competitiveness of the entities that contribute to the economic health of an area or region. These are the kinds of trade-offs the political process makes on a regular basis, but it is important that all levels of government—municipal, state, federal, and international—be involved in the decision-making mix as much as possible. A constitutional approach to the allocation of power issues involved that maximizes political choice at all levels of citizenship and government is preferable to one that forecloses important considerations from public debate, as well as individual contemplation.

A global perspective on power allocation issues between federal and state governments thus provides us with additional criteria with which to evaluate the Court's federalism decisions. It also creates additional concerns when it comes to global governance and the role of individual states in that process. As we begin to analyze concepts

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economic issues, transnational corporations have come to play a significant role in determining who gets what in the world system).

349. See generally Allyn L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 *YALE J. INT'L L.* 257, 273-78 (1996).

350. See generally Aman, *The Earth As Eggshell Victim*, *supra* note 32.



of federalism from a global perspective, democracy and public participation questions loom large. Traditional federalism responses and calls for a return to pre-New Deal days do not necessarily solve these problems, given the global dispersion of power that now exists.

Just as it is impossible to recreate the sense of the private that existed in an earlier historic era, it is impossible to view states as independent units of power, unaffected by actors and problems that do not correlate with geographic boundaries. It may be that there needs to be more local control over certain issues, but there may also need to be new forms of governance and participation at the global level. Judicial approaches that unnecessarily limit these new possibilities may do more harm than good by, in effect, playing a role somewhat akin to the role the Court played as this country began, politically coming to grips with the legal and economic implications of a national economy.<sup>351</sup>

### B. *Sovereignty, Federalism, and the Court*

A rigid concept of state sovereignty emerges from the Court's recent opinions declaring certain federal acts in violation of the Commerce Clause or the Tenth Amendment.<sup>352</sup> A strong state set of assumptions underlies the Court's analyses in these cases, assumptions which may undermine future attempts to create the multilevel, fluid, governmental and private partnerships necessary for the globalizing state to be relevant, much less effective. The Court's notion of state sovereignty is steeped in nineteenth century precedents and the consequent view of state power that conceptualizes individual states as separate and distinct from federal power and the power of other states. This conception of states is in stark contrast to the fluidity of state borders and the multicentric aspects of their make up today.<sup>353</sup> Just as nation-states are not unified entities capable of devising

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351. See ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 117-38 (1987) (tracing the court's role in the economic development of the United States). See generally Ellis Hawley, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* 127-30 (1966) (noting how the Court struck down New Deal legislation).

352. See, e.g., *Printz v. U.S.*, 117 S. Ct. 2365 (1997) (holding unconstitutional the Brady Act, which required state officials to conduct background checks); *U.S. v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zone Act exceeded Commerce Clause power); *New York v. U.S.*, 505 U.S. 144 (1992) (holding unconstitutional a statute which required states to take title to Low-Level Radioactive Waste); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (upholding the constitutionality of a Missouri law mandating retirement for judges).

353. See Jan Aart Scholte, *The Globalization of World Politics*, in *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 13, 23-26 (John Baylis & Steve Smith eds., 1997).

solutions to problems entirely on their own, individual states also are an integral part of a global economy.<sup>354</sup>

The Court's opinions also reflect an aspect of public choice theory by emphasizing accountability and cost as important bases for its decisions, especially when federal attempts to use the apparatus of states to implement federal policies are involved. In so doing, however, the Court emphasizes the importance of differentiating clearly between the levels of government responsible for these additional costs. In its view, democracy, freedom, and liberty require that those who make decisions should bear its costs and be accountable to the electorate who must pay them.<sup>355</sup> Unfunded mandates, in this sense, violate the spirit of democracy and undermine political accountability.<sup>356</sup>

History, accountability, cost, and democracy are, of course, important considerations, when viewed from a global perspective. Yet, the bright lines the Court draws between federal and state authority and the concept of sovereignty it employs is overly simplistic and rigid when it comes to the fluidity of the global economy and the flexibility required of local, state, federal, and international policy-makers today. Similarly, the approach the Court takes to federalism issues is steeped in a history that views the sovereignty of states as if all of the fifty states were separate, fully-contained entities, similar to a conception of individualism that emphasizes liberty and independence, at the expense of community. The separate, distinct character of states that the Supreme Court majority assumes in its analysis of federalism issues is reminiscent of treating states as if they were billiard balls rather than interconnected entities in a global web of economic and political activity. The present reality involves issues and problems that are not at all centered in any one nation-state, much less a sub-unit of that state.

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354. See generally J. A. CAMILLERI & J. FALK, *THE END OF SOVEREIGNTY* (1992) (arguing for a globally integrated economy).

355. See, e.g., *U.S. v. Lopez*, 514 U.S. 549, 577 (1995) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."); see also *Printz v. U.S.*, 117 S. Ct. 2365, 2377 (1997) ("The Framers' experience under the Article of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict . . . [t]he Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.").

356. See *Printz*, 117 S. Ct. at 2377.

## 1. Sovereignty

The Court's self-contained, nineteenth century conception of state sovereignty is most apparent in *Gregory v. Ashcroft*.<sup>357</sup> The manner in which the Court discussed power and its allocation has a quaint ring to it. More importantly, though, it has little to do with the way states operate today in a global economy.

At issue in *Ashcroft* was Missouri's mandatory retirement law for state judges.<sup>358</sup> That law had been challenged as a violation of the Age Discrimination in Employment Act (ADEA) and the Equal Protection Clause of the 14th Amendment.<sup>359</sup> In rejecting these arguments, Justice O'Connor, writing for the majority, found that the ADEA was not applicable to the case at bar, using a "plain statement" statutory interpretive approach to reach that result, one infused with federalistic values and constitutional assumptions.<sup>360</sup> In so doing, Justice O'Connor emphasized the sovereignty of states in a fashion that suggested a zero-sum game approach to the allocation of federal and state power:

As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt* . . . [w]e beg[a]n with the axiom that, under our federal system, the states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause . . . .<sup>361</sup>

Justice O'Connor then goes on to quote from an 1869 case that describes the constitutional scheme of dual sovereigns in greater detail:<sup>362</sup>

'[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence . . . . [W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions,

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357. 501 U.S. 452.

358. *See id.*

359. *See id.*

360. *See id.* at 460-61.

361. *Id.* at 457.

362. *See id.*

looks to an indestructible Union, composed of indestructible States.<sup>363</sup>

The idea of sovereignty used by Justice O'Connor thus implies a boundedness or a division between the powers of states and the national government that is easy to discern. It is strongly anchored in a sense of place and it is typical of notions of sovereignty and the state that were especially prevalent in the nineteenth century.<sup>364</sup> Such an approach, however, minimizes the overlap that can and often should exist between the two sovereigns, with a strong all-or-nothing sense of sovereignty.

Yet, the Court believes that sovereignty, so conceived, has important policy roles to play. Not unlike the doctrine of separation of powers that prevents the aggregation of power by any one branch of government, federalism and state sovereignty can also further freedom and more. As Justice O'Connor notes:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry . . . .<sup>365</sup>

Indeed, in the majority's view, if our constitutional scheme is to work, such clear lines demarcating the powers exercised by the states *must* be drawn. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."<sup>366</sup>

These policy goals—heterogeneity, democracy, innovation, and a mobile citizenry—when viewed from a global context, are not necessarily the same as when viewed solely as a function of federal and state power. Global competition and the desire to attract and retain private foreign investment from transnational corporations is likely to encourage more homogeneity rather than difference, as most states seek to minimize public costs so as to

363. *Texas v. White*, 68 U.S. (7 Wall.) 700, 725 (1869) (quoting *Lane County v. Oregon*, 68 U.S. (7 Wall.) 71, 76 (1869)).

364. See Alexander B. Murphy, *The Sovereign State System as Political—Territorial Idea: Historical and Contemporary Considerations*, in *STATE SOVEREIGNTY AS SOCIAL CONSTRUCTS* 81, 100-02 (Thomas J. Biersteken & Cynthia Weber eds., 1996).

365. *Gregory v. Ashcroft*, 501 U.S. at 458.

366. *Id.*

maximize their ability to attract private investment. Democracy may very well be furthered by keeping certain issues local, but this may be at the expense of a more national democracy, one that also allows citizens an opportunity to vote and express themselves at the national level. Indeed, the kind of segmented citizenship that the Court espouses does not accord with the complex realities and multiple citizenship identities that the global economy produces.<sup>367</sup>

More importantly, public innovation, too, is likely to only take the form of minimal taxes and lower regulatory costs, though this in turn may encourage more private experimentation. Yet, the more that activities move from the public realm to the private sector, the greater the risk that global currency may be coined locally at the expense of the weakest members of society.<sup>368</sup> The intense competitiveness that this model encourages may encourage more mobility among citizens in their quest to find a modicum of financial stability. More likely, though, such mobility will occur at the higher end of the income spectrum.<sup>369</sup> Freedom in the sense of making national action more difficult to achieve may be enhanced, but at the expense of developing a more cooperative model of global capitalism at the international and national levels. Greater decentralization may lead to a "race to the bottom,"<sup>370</sup> but more importantly, it raises the transaction costs involved in achieving more cooperative approaches to coping with the problems of global capitalism.<sup>371</sup>

The notion of sovereignty on which the Court's rationale is based is closely akin to a metaphor of individualism, one that sees these separate governmental entities as having a life and integrity all their own. Obviously, one state entity may be influenced by another and, at times, the federal power takes precedence over the states, but the idea of an integral body resisting certain fundamental changes from without, especially at the state level, comes through very strongly. Just as good fences make good neighbors, bright lines between federal and state power prevent tyranny. Such an approach fails to consider that many of the

367. See, e.g., Dennis Conway, *Are There New Complexities In Global Migration Systems of Consequence For the United States "Nation-State?"*, 2 IND. J. GLOBAL LEGAL STUD. 31, 35-43 (1994) (discussing international mobility, the world as an interconnected community, and how individuals relate to and identify with more than one country at a time).

368. See also GREIDER, *supra* note 32, at 360-87; see generally GARY TEEPLE, *GLOBALIZATION AND THE DECLINE OF SOCIAL REFORM* 69-74 (1995) (noting the impact of the shift from Keynesianism to Monetarism on the global economy).

369. See generally SASSEN, *THE MOBILITY OF LABOR AND CAPITAL*, *supra* note 7.

370. See Esty, *Revitalizing Environmental Federalism*, *supra* note 30, at 627-38.

371. See Rubin & Feeley, *supra* note 328.

private actors within states have power on the level of states themselves.<sup>372</sup>

The idea of a state's integrity is the foundation of the majority's opinion in *New York v. United States*.<sup>373</sup> Once again, the Court is more concerned with the forms of power, rather than with structures that make it easy to exercise power in a flexible way. In this case, the Court dealt with the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985.<sup>374</sup> The Act in question was the result of various state efforts to devise a federal structure for the regulation of low-level waste that avoided federal preemption and retained a role for states to play.<sup>375</sup> In many ways, the legislative process was akin to the negotiation and the enactment of a treaty, whereby the individual states involved retained considerable flexibility when it came to meeting their regulatory obligations.<sup>376</sup> The Act was the result of a cooperative approach to federalism, one that allows states to maintain flexibility and the primary regulatory role in their traditional realm of protecting the public's health and safety.<sup>377</sup> The federal government set the basic standards to be met, but rather than preempting state law, states chose the policies they believed best achieved these standards.<sup>378</sup> As one commentator has noted, "in theory, the system allows states to experiment and innovate, but not to sacrifice public health and welfare in a bidding war to attract industry."<sup>379</sup>

Specifically, Congress sought to achieve its federal goals by providing certain incentives to ensure that states provide for the disposal of radioactive waste generated within their borders. States were authorized to impose a surcharge on radioactive

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372. See *infra* note 348.

373. 505 U.S. 144 (1992).

374. See *id.* at 149.

375. See *id.* at 150-51.

376. See *id.* at 151-54.

377. As Justice White described it, in dissent:

[The Act] resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal preemption or intervention, but rather congressional sanction of interstate compromises they had reached . . . . [The] 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction . . . . [Unlike] legislation that directs action from the Federal Government to the States, the [Congressional action] reflected hard-fought agreements among States as refereed by Congress.

*Id.* at 189-94.

378. See Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1531 n.55 (1995).

379. *Id.* at 1532-33.

waste received from other states, a portion of which would be collected by the Secretary of Energy and placed in a trust account for those states that achieved a series of milestones in developing waste disposal sites.<sup>380</sup> States were also authorized to increase site access costs for those states that did not meet federal guidelines, eventually denying them access altogether.<sup>381</sup> None of these "incentives" violated the Court's sense of state sovereignty. A third incentive, however, provided that

[A] state that fails to provide for the disposal of all internally generated waste by a particular date must in most cases take title to and possession of the waste and become liable for all damages suffered by the waste's generator or owner as a result of the state's failure to promptly take possession.<sup>382</sup>

For the Court, this provision created constitutional problems.<sup>383</sup>

In rejecting Congress' attempt to force certain states to take title to and possession of low-level waste, the Court emphasized that Congress could not force the states to regulate in certain ways or to become agents of the federal government.<sup>384</sup> Congress could regulate individuals, but not states, because states were sovereign.

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not

380. *New York v. U.S.*, 505 U.S. at 152.

381. *See id.* at 153.

382. *Id.* at 153.

383. Writing for the majority, Justice O'Connor noted:

The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not. In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. Either way, we must determine whether any of the three challenged provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 oversteps the boundary between federal and state authority . . . .

*Id.* at 159.

384. *See id.* at 178.

authorize Congress to regulate state governments' regulation of interstate commerce.<sup>385</sup> In the majority's view, the

take title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress . . . . Either type of federal action would "commandeer" state governments into the services of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.<sup>386</sup>

In short, unlike states that enter into a treaty and agree to enact certain enabling legislation to realize its goals, the Court's concept of state sovereignty makes it impossible for the states to agree, in the federal legislative process, to take certain kinds of actions to carry out their promises.

Once again, this concept of sovereignty is not an end in itself, but a way of securing "the citizens the liberties that derive from the diffusion of sovereign power."<sup>387</sup> Indeed, it is like the doctrine of separation of powers: "The Constitutional authority of Congress cannot be expanded by the 'consent' of the government unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States."<sup>388</sup>

The Court's most recent federalism decision takes the principles of democracy, accountability, and cost, a step further. In *Printz v. United States*,<sup>389</sup> the Court struck down the Brady Handgun Violence Prevention Act on grounds that the federal government was, in effect, commandeering the state's enforcement apparatus to carry out a federal policy. According to the Court, there was little doubt that Congress had the power to regulate in this area, but it could not force states to carry out its mandates.<sup>390</sup> Writing for the majority, Justice Scalia emphasized the structural rather than the textual nature of this decision.<sup>391</sup> He also emphasized democracy and accountability:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly.

385. *Id.* at 166.

386. *Id.* at 175. It is interesting to note that New York was, of course, involved in the political process that produced this result. The Supreme Court, however, rejected arguments that New York had, in effect, consented to these federal regulations. "Where Congress exceeds its authority relative to the States . . . the departure cannot be ratified by the 'consent' of state officials." *Id.* at 182. *Cf. id.* at 200 (dissent by White).

387. *Id.* at 181.

388. *Id.* at 182.

389. 117 S. Ct. 2365 (1997).

390. *Id.* at 2383.

391. *Id.*



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.<sup>392</sup>

This case has no textual basis in the Constitution for its result, as Justice Stevens emphasized in dissent.<sup>393</sup> More importantly, once again the decision relied on a concept of sovereignty that has little to do with global realities. Only Justice Breyer chose to see this case in comparative, if not global terms, noting that no other federal system in the world today would prevent the use of state enforcement powers in this way.<sup>394</sup>

The all-or-nothing quality of this approach, however, both overstates and understates what is at stake, when viewed from a global perspective. It overstates what is at stake to the extent that it may seem that power is flowing permanently from one body to another, as power has flowed from the states to the federal level for over two hundred years. Yet, in a global economy, power arrangements should be more fluid, and multi-governmental approaches often may be necessary in which the degrees of state, federal, and international power may change over time. Constitutionalizing these decisions removes a good deal of this political flexibility. The debate over power levels can also understate what is at stake to the extent that it assumes there is any one clear, final answer which, once given, allows us to "get on with it." A decision that concludes that it is either a federal one or a state issue overlooks entirely the fact that non-state actors, especially transnational corporations, are now major power centers comparable to states in many respects. Thus, a concept of federalism that does not include a sense of how global power is allocated today runs the risk of undermining the very goals it seeks to further—democracy and liberty. It may be that moving some decisions to the national level can more easily neutralize

392. *Id.* at 2384.

393. *Id.* at 2386-88.

394. *Id.* at 2404, which states:

[A]t least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body.

*Id.* at 2404.

inappropriate uses of private power. This may not always be the case, but constitutionalizing certain results can remove an important political option.

## 2. The Commerce Power

The ability of Congress to regulate at the national level, quite apart from issues involving the use of a state's own enforcement apparatus, has also been limited by the Court's view of the Commerce power. In *United States v. Lopez*,<sup>395</sup> the constitutionality of the Gun-Free School Zone Act of 1990 was at issue.<sup>396</sup> This Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."<sup>397</sup> For the majority, this was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."<sup>398</sup> Moreover, for the majority, the argument that guns in a school zone may result in violent crime substantially affects interstate commerce proved too much.<sup>399</sup> "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."<sup>400</sup> Indeed, the majority feared that a decision holding this Act to be within Congress' Commerce Clause power would convert Congressional authority under that clause to a general police power of the sort retained by States. The Court thus concluded that the Commerce power was not infinitely expandable, and that there are limitations "inherent in the very language of the Commerce Clause."<sup>401</sup>

Justices Kennedy and O'Connor concurred, emphasizing the policy benefits of a governmental structure that divides power between federal and state authorities: "The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States."<sup>402</sup> This kind of separation was crucial for true accountability to occur:

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395. *United States v. Lopez*, 514 U.S. 549 (1995).

396. *See id.* at 551.

397. *Id.* at 551.

398. *Id.* at 561.

399. *See id.* at 551.

400. *Id.* at 564.

401. *Id.* at 553.

402. *Id.* at 576-77.

If, as Madison expected, the federal and state governments are [to] hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for failure to perform a given function . . . . Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.<sup>403</sup>

These policy justifications for the textual interpretation given by the majority are very much based on a conception of the state as a unitary entity, where citizens clearly differentiate among those who exercise power. Of course, citizens of the states also have a vote at the federal level, and the idea that they are easily fooled by the federal level of government at the expense of the states may not give sufficient credit to the discerning nature of the voters involved. But quite apart from the policy arguments, there is the broader claim that guns, violence, and the *global* economy are all interrelated, especially when education is involved.

In his dissenting opinion in *Lopez*, Justice Breyer takes a very different perspective, focusing more on the school children involved in the case and on the interrelationships of education and the national economy and beyond.<sup>404</sup> Indeed, he emphasized that education and business are directly related: "technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills."<sup>405</sup> Moreover, Justice Breyer was the only Justice to make the connection between the national economy and global competition:

[G]lobal competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports . . . . At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts.<sup>406</sup>

Indeed, Justice Breyer has a global conception of competition. Every school child competes for jobs with other school children around the globe and local jobs and prosperity turn on this competition. He notes that "there is evidence that, today more than ever, many firms base their location decisions upon the

403. *See id.*

404. *Id.* at 615.

405. *Id.* at 620.

406. *Id.* at 621.

presence, or absence, of a work force with a basic education."<sup>407</sup> For Justice Breyer guns, education, and business are interrelated: "the economic links I have just sketched seem fairly obvious."<sup>408</sup> He then questions "why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning also substantially threatens the commerce to which that teaching and learning is inextricably tied?"<sup>409</sup>

For Justice Breyer, the links between local violence, education and success in the global economy are sufficiently direct to justify federal involvement. Though he takes a global perspective on the issues before him, his judicial approach to the Commerce Clause is reminiscent of *Wickard v. Filburn*.<sup>410</sup> Though Justice Breyer is quick to add that his approach did not "obliterate the distinction of what is national and what is local,"<sup>411</sup> his willingness to define the national interest by looking beyond national borders to an interdependent global economy, represents an approach that ultimately would vest most regulatory decisions at the federal level, should the national government decide to act.<sup>412</sup> In short, globalization does not necessarily render concepts of state sovereignty based on place irrelevant, but when compared to the interests of a national government intent on being maximally competitive in a global economy, it is not wise to constitutionalize such political decisions when a national response is politically appropriate. Given the political nature of the decisions involved in passing an act of Congress, a flexible judicial response is required.

Perhaps the Court should not be faulted for analyzing federalism issues in a framework that is dominated by nineteenth century concepts of federalism, embodied in nineteenth century precedents. Yet, the Court's effort to reestablish what often appears to be a pre-New Deal position vis-à-vis national power, overlooks an aspect of New Deal judicial processes that remains highly relevant for the global state. Courts should avoid constitutionalizing issues when it

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407. *Id.* at 622.

408. *Id.* at 622-23.

409. *Id.*

410. *Wickard v. Filburn*, 317 U.S. 111 (1942) (allowing Congress to regulate the production of a single farmer because of the aggregation effect).

411. *United States v. Lopez*, 514 U.S. 549, 624 (1995).

412. One could argue that Justice Breyer's approach proves too much, i.e., the links between global and domestic economies are so apparent as to assure a federal result. As this Article has argued, the distinction between the global and various forms of the local has collapsed; this does not mean Congress must automatically act. It is not compelled to act. Rather, the issues are now political issues to be acted on in the political process, without such judicial intervention, as contemplated in *Lopez*.

is not necessary to do so. Indeed, though the Court may have been concerned with costs being imposed on states unnecessarily, such matters are best dealt with legislatively. Fragmentation need not be the most likely outcome of the global state and courts need not take the lead in sculpting the state of the future. They must, however, be sensitive to the need for the constitutional space to create and re-create the state in ways that further our evolving global conscientiousness. It is ironic that at the edge of the twenty-first century, the Court would opt for constitutional approaches that unduly limit legislative flexibility.

## VI. CONCLUSION

Parts II and III of this Article have argued that the processes of globalization now prevalent throughout much of the world have changed the state's structure and role fundamentally. These changes necessitate more than a new rhetoric or legal language. They require structural changes and a new legal architecture appropriate for problems and actors that no longer identify with any single territorial jurisdiction. Such fundamental changes cannot occur overnight, especially given the fact that domestic legal systems traditionally have been exclusively state-centered in approach and outlook. Parts IV and V have thus developed further and applied a global perspective to two fundamental doctrines and issues in public law: the public/private distinction and the doctrine of federalism.

Developing and applying a global perspective to these issues is important for a number of reasons. First, such an approach provides a critical perspective for assessing certain judicial decisions and approaches to issues, as well as those of the Congress and the Executive. These decisions increasingly utilize the private sector to carry out various public policies and they frequently devolve power to individual states. A global perspective highlights how important it is for courts to determine where the realities of markets begin and where market metaphors end. This approach also highlights how important it is for courts to retain and, at times, create the legal, interpretive space necessary to provide for regulatory flexibility, and new power-sharing arrangements. Such flexibility is necessary if new regulatory approaches are to deal with what once were domestic issues, but are now inextricably intertwined with a global economy. A global perspective thus contributes to the articulation of domestic law approaches suitable for the global realities in which states and non-state actors must operate and, increasingly, share power. A global perspective also helps us to understand that often much more is involved in such regulatory reform proposals than simply

a local political choice between a market or governmental solution, or between a state-based or federal approach.

What increasingly emerges at the heart of domestic law issues viewed in a global context are significant and important issues of democracy. This Article does not try to answer or resolve all of these issues, but in showing what is at stake in seemingly narrow doctrinal decisions involving the public/private distinction, this Article poses these issues as important questions that today should be considered in a global context. Thus, concepts of sovereignty and citizenship that once may have been appropriate when state/federal distinctions had no global significance, no longer can be viewed so simply. A balance must be struck among the various levels of citizenship that now converge in individuals and entities whose locale is only one dimension of their more global operations. Under these circumstances, democratic processes can become stretched or fragmented. Democracy that becomes too fragmented may ultimately undermine the ability of states to take collective action at a national or an international level. Concepts of citizenship and sovereignty, then, must be capable of the kind of flexibility needed to simultaneously combine in various ways local, national, and global identities insofar as these bear on democratic participation.

Courts cannot create the legal structures and doctrines necessary for this new era on their own. They can, however, be appropriately deferential to lawmakers' attempts to create new forms of regulation or to encourage new public/private partnerships. These partnerships require the development of a new sense of what is public and what is private and new sensitivities to the limits of political representation and the need for new forms of accountability. Courts and lawmakers generally must begin to see deregulation and various rises of the market as a delegation of power to the private sector, and they must seek to develop new forms of democratic accountability to preserve a public voice in these issues.

At the same time, courts can and should seek to prevent the development of illegitimate global currency—that is, the kinds of cost-savings that may enhance the global competitiveness of some individuals, firms or states, but at the expense of certain constitutional or statutory rights. Indeed, in such circumstances, it is often the rights of the least well-represented segments of society that are the most vulnerable, even when they are not under outright attack. Thus, issues involving the contracting-out of services, especially those such as prisons, should bear close scrutiny by the courts, recognizing that words such as public, private, market, citizen, and consumer, are but labels that require contextual analysis and substance before they are meaningful.

The legislative and executive branches of government ultimately must take the lead in defining the role of the state in response to the increasingly economically integrated world in which we live and whose implications for democracy remain to be worked out. This Article has put forth the concept of the globalizing state to help understand and compare the significance of the fundamentally different pressures felt by and the new roles played by the state. Ultimately, it is our conception of what a state is or can be that shapes the way we think of law, especially those areas of the law that deal directly with the government, such as constitutional and administrative law. As we begin to develop new statutory and doctrinal approaches for the globalizing state, we cannot return to any of the pasts we have known. The globalizing state requires a global jurisprudence. That jurisprudence must be sensitive to the emerging dynamics of global integration as well as the ways these dynamics highlight the range of democratic possibilities within and outside those globalizing processes.