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Federalism's Future in the Global Village

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Federalism's Future in the Global Village

Barry Friedman*

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I. INTRODUCTION

The world we live in is becoming smaller. Although no doubt people have been saying that since at least the travels of Marco Polo, Columbus, and Vespucci, events appear to be moving with startling rapidity. Global trade, global travel, global communication—all are bringing us together in ways that even twenty years ago we hardly could imagine. The words “globalization” and “internationalization” are heard frequently now, and in many new and different contexts.

In contrast to the globalization phenomenon, we are accustomed to thinking about American federalism largely in domestic terms. The primary arena in which the debate about the role of the states plays out is a national one. Other than a few odd cases in which state action has been challenged as interfering with interna-

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tional relations,¹ or the even fewer cases in which actions taken by the national government in the international sphere have been challenged on federalism grounds,² most of the debate is about activity wholly domestic. Foreign affairs usually is seen as something remote from, although occasionally touching, the question of national-state relations.³

In the next century, the process of globalization is likely to cause us to reconsider the way we think about federalism.⁴ As the world gets smaller, it will become more difficult to separate the domestic and foreign spheres. Domestic regulation increasingly has an impact on the international sphere, just as international integration has important implications for domestic activities. This international effect in turn triggers the foreign affairs powers of the national government, with regulatory implications for the states. In short, as the barriers between countries fall, the lines we have drawn between the national government and the states will come under increasing strain.

The challenge here is to begin to develop an understanding of globalization's impact upon the American federal system. Part of developing that understanding is getting an idea of how globalization is proceeding, and the impact it likely will have on state regulatory authority. Thus, Part I of this Article describes the process of globalization as it relates to federalism concerns. Then, Part II samples some of the multitude of state regulatory areas that globalization, in one way or another, likely will affect. Next, it is useful to compare the legal framework under which federalism concerns are addressed when domestic regulation is at the fore with what likely would be the standards against which state action is judged when international relations is the issue. Thus, Part III canvasses the law regarding the deference due the national government in foreign affairs, concluding that, if anything, the governing law is even less solicitous to federalism than the case law that has developed in the primarily domestic area.

1. See, for example, *Zschernig v. Miller*, 389 U.S. 429 (1968).

2. See, for example, *Missouri v. Holland*, 252 U.S. 416 (1920).

3. A recent article noting generally that globalization will have an impact on American federalism is Lawrence T. Auerbach, *Federalism In the Global Marketplace*, 26 Urb. Lawyer 235 (1994).

4. In recognition of the impact of globalization upon American federalism, the Advisory Commission on Intergovernmental Relations recently published a set of findings and recommendations on state and local governments in international affairs. See *Special Feature: State and Local Governments in International Affairs—ACIR Findings and Recommendations*, 20 Intergovernmental Perspective 33 (Fall 1993-Winter 1994).

Finally, Part IV takes a stab at predicting the future, assessing how this trend toward globalization, and the obvious impact it will have upon federalism, likely will play out in the next century. While I am not sanguine about the future of state authority in a globalized world, I do think globalization may hold some unexpected promise for localism. The very same pressures to uniformity and centralization that are driving globalization will, I suspect, create new opportunities for federalism. As bureaucracy is centralized and nationalized, it inevitably loses touch with the people whom it is to serve. The governed become alienated from the governors and seek to obtain greater control over their government. This, for example, has been the experience throughout the evolution of the European Union. And it is in this insight that I think federalism's future may rest. As we become subject to regulation that develops farther and farther from our grasp, there will be a strong incentive to reinvigorate local and state government, in order to return control over other aspects of our lives to governments quite close to home.

II. GLOBALIZATION

It is a little difficult, and perhaps counterproductive, to offer one specific definition for globalization, or internationalization. The process is happening in so many areas that the term means everything to everyone. Lack of an exact definition presents little problem, however, for the process is so widespread that it is almost enough simply to observe the phenomenon.

Even at the level of one's personal everyday life it is difficult to ignore the process of globalization. On a recent trip from Nashville to Orlando, I encountered travelers to Prague, a large group arriving in Nashville from Asia, signs in the Orlando airport in Spanish and English, and announcements in German as well. I drove in a Japanese car, ate Cuban food, and found cappuccino readily available. In Palm Beach I found newspapers from all over the globe and watched European warmblood horses at work. More and more products, films, food, and periodicals are available from abroad. Most of the world is relatively accessible to travel. The personal encounter with internationalization only reflects a much broader and more momentous trend, however. The world is, at least in some ways, opening

up.⁵ Products, people, and communications easily are crossing international boundaries.

Accompanying this internationalization of commerce is a similar process regarding regulatory authority. Just as recent years have witnessed the tumbling of international boundaries and blockades, there also has been significant growth in both the number of international agreements that tie the world together, and the activity of international organizations acting under those agreements. Maastricht and the North American Free Trade Agreement ("NAFTA") are indicative of a movement toward regional integration, at least at some levels,⁶ and the recently concluded Uruguay round of the General Agreement on Tariffs and Trade ("GATT") was the most thorough yet with regard to non-tariff barriers to trade.⁷ Developments such as these strengthen and cause greater reliance on transnational organizations and regulatory authorities.⁸

While the process of globalization has been chronicled in many different contexts elsewhere, for present purposes, what is interesting is the extent to which the globalizing process mirrors the process of "nationalization" that has occurred in this country, and the impact in general terms that globalization will have. The balance in our federal system depends upon the extent to which the national government exercises regulatory authority: The Tenth Amendment leaves to the

5. While much of the world "globalizes," events in places such as Bosnia and Somalia demonstrate that other parts of the world are fragmenting, often with tragic consequences. Benjamin R. Barber, *Global Democracy or Global Law: Which Comes First?*, 1 Ind. J. Global Legal Stud. 119, 121-24 (1993). See also text accompanying notes 236-48.

6. There is a wealth of literature on European integration, less on NAFTA. As to the former, see, for example, William Wallace, ed., *The Dynamics of European Integration* (Pinter, 1990); Robert O. Keohane and Stanley Hoffmann, *The New European Community: Decisionmaking and Institutional Change* (Westview, 1991). As to NAFTA, see, for example, Frederick M. Abbott, *Regional Integration Mechanisms in the Law of the United States: Starting Over*, 1 Ind. J. Global Legal Stud. 155 (1993).

7. The Uruguay Round for the first time creates a formal international organization of the World Trade Organization to enforce the Agreement. There is a burgeoning literature on the Uruguay Round. See, for example, John H. Jackson, *Dolphins and Hormones: GATT and the Legal Environment for International Trade After the Uruguay Round*, 14 U. Ark. Little Rock L. J. 429 (1992); Matt Schaefer and Thomas Singer, *Multilateral Trade Agreements and U.S. States: An Analysis of Potential GATT Uruguay Round Agreements*, 26 J. World Trade 31 (Dec., 1992); Conference: Prospects for Multilateral Agreement on Services and Intellectual Property in the GATT Multilateral Trade Negotiations, 19 Ga. J. Int'l & Comp. L. 287 (1989). As of the date of publication, the Congress of the United States was considering legislation to approve United States participation in the WTO.

8. For an excellent study of international institutions and cooperation, see Robert O. Keohane, *After Hegemony* (Princeton U., 1984).

states only that which is not delegated to the national government.⁹ While the rules of preemption leave sway for state regulation even of delegated authority, state authority exists only so far as centralized regulation permits. As every student of United States history knows, the process of nationalization has occurred throughout our nation's history, reaching a peak in this post-New Deal era.¹⁰ It turns out on examination that close parallels exist between the impetus for, and process of, globalization on the one hand, and nationalization on the other. These parallels offer some suggestion as to where all this is headed.

Public choice theory would attribute much of nationalization to the pressure of domestic interest groups. Commentators have observed the impetus for interest groups unable to obtain what they desire at the state level simply to lobby the national Congress for the regulatory solution they wish.¹¹ Environmental regulation serves as an example here, but so do civil rights regulation, consumer safety regulation, and countless other regulatory schemes. This public choice explanation also is offered to account for the internationalization of law.¹² Interest groups might be disenchanted with the result reached in domestic politics and have some hope that international accords will bring a more favorable domestic regulatory outcome. Or, the interests of domestic groups might simply transcend national boundaries.¹³ An obvious example is environmental regulation. By uniting with domestic groups from other nations, or by forming international interest groups, those seeking particular regulatory out-

9. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

10. See Cass R. Sunstein, *Democratizing America Through Law*, 25 Suffolk U. L. Rev. 949, 952 (1991). For a bold interpretation of the impact of the New Deal on American constitutionalism, see Bruce Ackerman, *We the People: Foundations* (Belknap, 1991).

11. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 Va. L. Rev. 265, 271-74 (1990), provides a public choice explanation for why federal regulators would ever choose to favor state regulation.

12. An excellent account is offered in Anne-Marie Burley and Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 Int'l Organization 41, 54-56 (1993) (discussing neofunctionalism as a theory of integration and identifying actors above and below the state level who promote integration to advance self-interest). See also Robert W. Hahn and Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 Harv. Int'l. L. J. 421, 429-31 (1989) (explaining the impact of interest-group pressure on international regulation).

13. Burley and Mattli, 47 Int'l Organization at 55-56 (discussing the coalescing of national interest groups at a supranational level in response to sectoral integration).

comes may achieve their desired outcome if they can obtain agreements at the international level.

Similarly, trade and commercial competition have contributed both to nationalization and to internationalization.¹⁴ Trade works best when barriers are low;¹⁵ one, if not the best, way to lower barriers is through centralized regulation (or perhaps deregulation) of trade.¹⁶ Thus, commercial interests—interest groups themselves—seek international agreement. And nations that want a healthy economic environment strive to eliminate barriers to trade and to open their markets.

Add to these forces the momentous and numerous technological changes that have facilitated both nationalization and internationalization, and you start to get the whole story. Advances in technology have revolutionized the way we communicate, travel, and trade. It is one thing to talk in theory about interest groups seeking international regulatory regimes. It is quite another to visualize the reality of this: teleconferencing, overnight couriers, global fundraising efforts, and the like. Similarly with international trade. While centuries-old trade routes suggest the ancients moved some goods in ways that astound us even today, the modern miracle is of quite a different nature. Goods and services now move around the globe with a rapidity that was difficult to perceive clearly even twenty years ago. The direction we are headed is, and has been, dictated as much by what science has accomplished for us as by political theory.

Although the impact of this internationalizing trend is varied and vast, there is one result—the process of harmonization—that plays a particularly significant role here. Harmonization is the vogue international word for what is similar, in a sense, to the domestic concept of uniformity.¹⁷ Uniform regulation is a necessary goal and by-product of many of the forces outlined above. To cite an obvious

14. Barber, 1 *Ind. J. Global Legal Stud.* at 129 (cited in note 5) (stating "McWorld is ecological and technological, but most of all it is a product of popular culture driven by expansionist commerce").

15. See Daniel A. Farber and Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 *Vand. L. Rev.* 1401, 1404-07 (1994). See generally Ernst-Ulrich Petersmann, *International Competition Rules for the GATT-MTO World Trade and Legal System*, 27 *J. World Trade* 35 (Dec., 1993) (arguing for more competition rules, in addition to rules prohibiting trade restraints, to ensure free trade).

16. Petersmann, 27 *J. World Trade* at 36-37 (explaining why, despite arguments in favor of diverse trade regulation, there is a need for centralized uniform regulation of trade).

17. George A. Bermann, et al., eds., *Cases and Materials on European Community Law* 79 (West, 1992) (noting that "[h]armonization' or 'approximation' denotes the process by which, through community legislation of some sort, the laws of the Member States on a given matter are brought more closely into line with one another, possibly though not necessarily even made uniform").

example, non-uniform regulation may be a significant barrier to trade: opening up borders to trade requires a certain amount of harmonization of the rules that affect international commerce.¹⁸

This process of harmonization will have an important impact on American federalism. In part, non-uniformity is inherent in the idea of American federalism—the notion that fifty different states and numerous local governments can go their own way in developing regulatory frameworks.¹⁹ This idea of non-uniformity has come under tremendous strain in the last half century as the process of nationalization proceeded. It is fair to say that in recent years, however, there has been *some* slowing to the nationalizing trend, or at least more rhetorical attention to concerns about local autonomy.²⁰ But at the same time, we are on the front end of a new wave of nationalizing, this one brought about through international pressures. And with this latest wave will come even more pressure to “harmonize,” and a concomitant pressure to reduce state autonomy.

III. THE IMPACT OF GLOBALIZATION ON THE STATES

Although predicting the future is dicey business, it is important to present some picture of how globalization will affect state regulatory autonomy. This section strives to do so, identifying a host of areas in which concerns for uniformity and change wrought by international agreements may lead to limitations upon, or changes to, state regulatory authority.

In considering the predictions made here, it is important to bear in mind the forward-looking nature of the project. Some of the changes here are almost certain to happen, and many will happen in the near future to one degree or another. But there are other changes

18. Abbott, 1 *Ind. J. Global Legal Stud.* at 156-57 (cited in note 6).

19. The classic citation is to Justice Brandeis' dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932): “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” For an examination of Brandeis' thesis and a skeptical conclusion, see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 *J. Legal Stud.* 593 (1980).

20. See, for example, *Federalism Initiative*, 18 *Weekly Comp. Pres. Doc.* 876 (1982) (reporting President Reagan's remarks on federalism to a group of state and local officials). See also Tim Golden, *Governor Turns Florida Into His Lab for Change*, *N.Y. Times* 16 (Aug. 11, 1991) (reporting on Florida Governor Lawton Chiles' efforts to reinvigorate local and state government in that state). See generally David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Patrick/Addison-Wesley, 1992).

suggested that will be more distant, and whose future is more, to one degree or another, uncertain. Resistance to some of the change discussed here has emerged consistent with attachments to local regulation. But the hypothesis is that as the trend toward globalization continues its inexorable course, such resistance will be overcome or will simply dissipate. Thus, while some of what is described here is easily imaginable, and is occurring, other aspects will appear more tenuous. In considering the likelihood of these predictions, therefore, one must put on future-seeing lenses: Things we would have been skeptical about just a decade ago are happening now.

A. Co-Regulation of Business and Industry

A likely place to begin is with a survey of some areas in which states currently exercise a significant amount of regulatory authority in conjunction with the federal government, but in which internationalizing pressures may require reconsideration of the states' roles. A ripe beginning is regulation of industry and business.²¹ To a very great extent, the growth of the national market and a need for uniform regulation of commerce have been the primary impetus for national regulatory schemes that preempt or limit regulation by the states. Nonetheless, for political and historical reasons there remain significant aspects of commerce over which the states maintain important regulatory control. Globalizing pressures, however, are likely to lead to increased calls to eliminate or further modify independent state regulatory authority in these areas.²²

One obvious area that comes to mind is regulation of the securities markets. This is an area in which, beginning in the 1930s, the federal government took on a substantial regulatory role, assisted by major pieces of federal legislation such as the Securities Act of 1933²³ and the Securities Exchange Act of 1934,²⁴ and by federal agencies such as the Securities Exchange Commission.²⁵ Nonetheless, despite a broad web of federal regulation, the states also continue to regulate

21. An excellent source on this, and of prime assistance in this part of the Article, is Andreas Falke, *The Impact of the International System on Domestic Structure: The Case of American Federalism*, which will be published in 39 *Amerikastudien* No. 3 (Autumn, 1994) (manuscript copy on file with author). Falke's thesis is similar to mine, though his ultimate conclusions differ. I also am indebted to Falke for a very useful discussion of these issues while I was in Bonn last year.

22. Falke, *The Impact of the International System* at 3.

23. 15 U.S.C. § 77a et seq. (1988).

24. 15 U.S.C. § 78a et seq. (1988).

25. The Securities Exchange Commission was established pursuant to § 4 of the Securities Exchange Act of 1934. 15 U.S.C. § 78d (1988).

securities. Every state in the Union retains some sort of "blue sky" law.²⁶ Issuers of securities must comply not only with the federal regulations, but with state blue sky laws as well.²⁷

Calls for abolition of separate state authority to regulate securities likely will gain force as international competitive pressures increase.²⁸ Commentators criticize the existing system for its duplicative nature, and for the confusing web of regulation it creates.²⁹ In acknowledgment of some of these difficulties, many states have adopted the Uniform Securities Law,³⁰ proposed by the National Conference of Commissioners on Uniform State Laws. But individual state modifications of the uniform law and differing judicial interpretations interfere with any progress toward uniformity,³¹ and, at any rate, the Uniform Act does little to eliminate dual national and state regulation. In the meantime, the trend is toward uniformity in international securities regulation.³² For example, the European Union³³ ("EU") is in the process of developing a uniform capital market.³⁴ The International Organization of Securities Commissions has recommended harmonizing disclosure regulations to bring greater efficiency

26. Brian J. Fahrney, Comment, *State Blue Sky Laws: A Stronger Case for Federal Pre-emption Due to Increasing Internationalization of Securities Markets*, 86 Nw. U. L. Rev. 753, 757 (1992). State securities laws range from extremely strict regulatory requirements judging securities transactions on their "merit" to a more "hands-off" approach exempting a majority of transactions from regulatory requirements. *Id.* at 759-60.

27. *Id.* at 757.

28. The SEC, while ensuring that it fulfills its role as regulator to protect investors, nonetheless has taken steps to "find solutions to problems to attract foreign issuers to our markets." Richard Kosnik, *The Role of the SEC in Evaluating Foreign Issuers Coming to U.S. Markets*, 17 Fordham Int'l L. J. S97, S99 (Symposium, 1994).

29. See, for example, Fahrney, 86 Nw. U.L. Rev. at 757-58 (cited in note 26) (commenting that the negative consequences of the dual system are higher costs to securities issuers, wasteful and inefficient compliance efforts, and confusion).

30. See *id.* at 761-62. The Uniform Securities Act was first drafted in 1956 and has been repeatedly amended since. *Id.*

31. *Id.*

32. See Mark A. Sargent, *A Future for Blue Sky Law*, 62 U. Cinn. L. Rev. 471, 489-92 (1993) (describing the trend toward uniformity, but acknowledging obstacles). Although the trend is toward uniformity, numerous contemporary commentators support international regulatory diversity. See James D. Cox, *Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition*, 55 L. & Contemp. Prob. 157, 158-59 (Autumn, 1992) (noting, however, that these commentators "follow too simple a path" and that diversity can be "both a blessing and a curse"). These commentators tend to focus on two main benefits of diversity—regulatory competition and fostering experimentation and innovation. *Id.*

33. The "European Union" is the name of recent origin for what is perhaps more familiarly known as the European Community ("EC") or the European Economic Community ("EEC"). I adopt, except where plainly not relevant, the new terminology.

34. Fahrney, 86 Nw. U. L. Rev. at 768 (cited in note 26). In an effort to integrate the market, the Council of the European Communities, the main governing body of the EEC, has issued a number of directives that directly affect securities issuance. *Id.* at 769.

to the international capital market.³⁵ Increasingly, the complicated web of regulation in the United States interferes with the sale of foreign securities in the United States and leads to growth in an off-shore securities market not easily subject to control by United States regulatory entities.³⁶

The difficulties associated with dual or multiple regulation of the securities market and increased international pressures for uniformity lead to repeated calls for the preemption of state regulation of securities.³⁷ But while those calls have so far been resisted, regulators already are modifying practices to adapt to pressures for harmonization.³⁸ Most significantly, national and global issues increasingly are exempt from blue sky requirements.³⁹ Thus, in the face of globalization, state regulatory authority already has been narrowed.

Globalizing forces also are at work in the area of banking,⁴⁰ and with similar outcomes likely. Banking is regulated by both the national and state governments, yet the regulatory scheme is extremely complicated, particularly at the national level and, some would argue, Byzantine.⁴¹ But just as there are domestic political

35. *Id.* at 772.

36. See Cox, 55 L. & Contemp. Prob. at 159-60, 184 (cited in note 32) (discussing the negative effects on U.S. markets of disparity in disclosure standards between the United States and foreign markets and the ensuing disparity in transaction costs); Donald C. Langevoort, Schoenbaum Revisited: *Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace*, 55 L. & Contemp. Prob. 241, 244 (Autumn, 1992) (observing that "[t]he rapid internationalization of the securities markets has been driven [in part by] schemes of regulation that can be avoided by off-shore activity"); Fahrney, 86 Nw. U. L. Rev. at 775 (cited in note 26).

37. See, for example, Sargent, 62 U. Cinn. L. Rev. at 490-91 (cited in note 32) (discussing SEC Chairman Breeden's calls for elimination of state regulation of international offerings); Fahrney, 86 Nw. U. L. Rev. at 762, 776-77 (arguing that "[o]utright pre-emption of the states' laws is the only way out of the current regulatory morass," *id.* at 762).

38. See Fahrney, 86 Nw. U. L. Rev. at 773-74. For example, the SEC is currently working toward a transnational securities offerings agreement with a number of nations. *Id.* at 773. The SEC also has plans for a multi-jurisdictional disclosure system. *Id.* This system is intended to be used by countries having a cross-border offering agreement with the United States. *Id.* at 773-74. Finally, the SEC promulgated Rule 14(4)(A) which exempts from the 1933 Act transactions in the sale of foreign securities if the buyer of the securities resells the securities. *Id.* at 774 n.175 (explaining the limits of the regulatory exemption). The rule is intended to encourage the sale of foreign securities in the U.S. *Id.*

Commentators rejecting complete federal preemption of state regulation have argued that this remedy is too extreme to accomplish the goal of state uniformity. *Id.* at 776. Rather, these commentators prefer the adoption of uniform state laws and uniformity agreements. *Id.*

39. Sargent, 62 U. Cinn. L. Rev. at 491 (cited in note 32) (commenting that states are "mostly irrelevant" in context of global securities market and discussing exemption of international issues from blue sky rules).

40. F. William Hawley, *Perspective of the Private Sector—Banking*, 19 Ga. J. Int'l & Comp. L. 404, 404 (1989).

41. See generally Falke, *The Impact of the International System* at 16-18 (cited in note 21) (observing that the federal regulatory structure is highly fragmented between five separate

pressures to retain the states' role in regulation of banking, there are enormous pressures to overhaul banking regulation entirely, most probably in ways that would eliminate or curtail state regulation.⁴²

Technology has a good deal to do with motivating banking reform. As one commentator pointed out, "we are living in an instantaneous transaction type of global system which requires global multi-lateral rules."⁴³ The world of banking has changed dramatically in the last decade or so, with banking by mail, by computer, and by ATM replacing traditional notions of what it means to bank.⁴⁴ But competitiveness concerns equally play a major role here. The EU again is one catalyst; liberalized rules for EU member states grant tremendous competitive advantages, which may require the United States to re-vamp its system to compete.⁴⁵ While a new national regulatory mechanism is considered, de facto states might be expected to focus on regulating local institutions, leaving more and more the regulation of national and international banks to national regulators.

Pressures of internationalization also are likely to be felt in the regulation of the insurance industry,⁴⁶ although in this area preemption may be much longer in coming.⁴⁷ Unlike securities regulation, the regulation of the insurance industry is almost completely a matter of state control,⁴⁸ authority that is jealously guarded.⁴⁹ Nonetheless, the need for uniformity has been felt and respected to a certain extent in this sector as well, with associations such as the National Association of Insurance Commissioners working toward uniform laws and regulatory regimes.⁵⁰ State governments and the insurance companies themselves, however, heavily oppose the impetus toward

agencies that share supervisory responsibility and three separate statutes that shape the system).

42. See *id.* at 3 (asserting that "[t]he increasing internationalization of financial markets and investment, and their international regulation point to a future in which it may be difficult, if not impossible, to maintain the autonomy of the states").

43. Hawley, 19 *Ga. J. Int'l & Comp. L.* at 404 (cited in note 40).

44. Falke, *The Impact of the International System* at 20 (cited in note 21) (calling the phenomenon "branchless banking").

45. *Id.* at 21-24.

46. See *id.* at 3.

47. See *id.* at 13-16 (noting that "[t]he dual federalism in insurance may be hard to challenge, and thus an adaptation to the realities of the international marketplace and reciprocal international regulation hard to achieve").

48. See *id.* at 14 (noting that the current system is based on express U.S. congressional policy to exempt the insurance industry from federal regulation).

49. See *id.* at 14 (commenting that "[a]ny attempts of the federal government to play a more active role has [sic] . . . actually led to an even stronger action by the states").

50. See *id.* at 14-15 (noticing that the actions of these voluntary associations is one of the reasons for the lack of national action in the industry).

national regulation.⁵¹ Nonetheless, events in the world at large may at some point overtake the present state of affairs. Among the non-tariff barriers subjected to agreement in the Uruguay Round of the GATT were barriers affecting the international insurance business.⁵² American insurers seeking access to markets abroad urged inclusion of the business of insurance in the GATT.⁵³ But as events move forward toward internationalizing the regulation of insurance, these same insurers may find that they are compelled to accept federal regulation in lieu of regulation by the states.

A related area in which state regulatory authority likely will see some diminution is antitrust enforcement. Antitrust enforcement authority currently rests relatively comfortably at both the federal and state levels.⁵⁴ Indeed, unlike many other areas, there has been a growth in recent years of the states' relative authority.⁵⁵ Among many commentators there is consensus that state antitrust regulation can continue to play a role in the global economy.⁵⁶ Nonetheless, there are dissenting views as to the advisability of state-by-state antitrust regulation.⁵⁷ Moreover, state antitrust regulation of international businesses has raised sufficiently serious concerns to cause some courts to interpret state authority quite narrowly.⁵⁸ The global-

51. *Id.*

52. Claude E. Barfield, *Services, Intellectual Property and the Major Issues of the Uruguay Round*, 19 Ga. J. Int'l & Comp. L. 307, 309 (1989); Falke, *The Impact of the International System* at 7-8.

53. See Gordon J. Cloney, *Impetus in the United States for the Liberalization of International Trade in Services*, 19 Ga. J. Int'l & Comp. L. 314, 315-16 (1989) (asserting that discriminatory and exclusionary policies in overseas insurance markets 25 years ago "spearhead[ed] the reform of the entire international trade policy system").

54. For a general discussion of the division of authority between the state and federal government, see Lloyd Constantine, *Antitrust Federalism*, 29 Washburn L. J. 163, 167-173 (1990); John Kincaid, *Commentary: State Antitrust Law in the Context of a New Intergovernmental and International Environment*, 29 Washburn L. J. 188, 190-94 (1990).

55. See Alan R. Malasky, *Commentary: Antitrust Federalism*, 29 Washburn L. J. 185, 186 (1990) (observing that over the last decade much of traditional antitrust enforcement has been passed to the states); Kincaid, 29 Washburn L. J. at 188 (terming the growth in state authority a "renaissance [that] is part of a more general resurgence of the states in the American federal system"); Constantine, 29 Washburn L. J. at 167 (noting that "[i]t is rare for any major development in antitrust law or policy to occur without eliciting the states' attention and without bearing the mark of their influence").

56. See, for example, Kincaid, 29 Washburn L. J. at 194-97 (suggesting that the allocation of power to the states increases their functionality and competitiveness in the world economy); Barry E. Hawk, *Internationalization of World Economies and State/Federal Antitrust Laws and Policy*, 29 Washburn L. J. 293, 293 (1990) (asserting that "internationalization of free world economies does not require the abolition of either state or federal antitrust laws").

57. See generally Constantine, 29 Washburn L. J. at 176-81 (cited in note 54) (discussing the social benefit, or lack thereof, of state antitrust enforcement).

58. See Hawk, 29 Washburn L. J. at 301 (cited in note 56) (citing *The In Porters, S.A. v. Hanes Printables, Inc.*, 663 F. Supp. 494 (M.D.N.C. 1987) and *McGlinchey v. Shell Chem. Co.*, 1985-2 Trade Cas. (CCH) ¶66,672 (N.D. Cal. 1984), and further stating that "[s]tate antitrust

izing of international trade rules is likely to call further into question a state-by-state antitrust policy, something addressed to a certain extent by uniform guidelines developed by the National Association of Attorneys General.⁵⁹ But there seems little doubt that the future will involve some curtailment of state efforts in this area as well.⁶⁰

B. *The Impact of the GATT: The Future is Now*

Reading the four fairly obvious examples set out above, one is likely to argue that the future is now. The recently concluded Uruguay Round of the GATT⁶¹ adopted rules that will begin the process of change to uniform regulation in at least some of the areas mentioned above, such as banking and insurance. But GATT has done very much more; indeed, if and as the latest GATT agreements become domestic law, there will be further—and in some instances significant—changes in the regulatory role of the states, all brought on by the internationalizing of trade.⁶²

GATT is a multilateral agreement that serves as the primary international means of regulating trade.⁶³ GATT provisions do not automatically become domestic law, however.⁶⁴ As an “agreement,” rather than a treaty, the President has authority to negotiate and enter into the GATT accords without the approval of the United States Congress.⁶⁵ To the extent that implementation of the agreement requires the enactment of legislation, however, the

laws . . . should be interpreted and enforced with greater sensitivity to foreign government interests given the potential interference with U.S. foreign relations”).

59. See Constantine, 29 Washburn L. J. at 167 n.41, 168 (cited in note 54).

60. See Hawk, 29 Washburn L. J. at 295 (cited in note 56) (noting that U.S. foreign investment needs suggest a limited role for state antitrust efforts in some areas with an international dimension such as mergers and acquisitions).

61. The results of the Uruguay Round can be found in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN/FA (“1994 GATT Final Act”).

62. See note 7 regarding the current status of the GATT in the United States.

63. On the history and workings of the GATT, see generally Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Butterworth, 2d ed. 1990) and John H. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill, 1969).

64. On the implementation of the GATT in the United States, see generally John H. Jackson, *United States Law and Implementation of the Tokyo Round Negotiation*, in John H. Jackson, Jean-Victor Louis, and Mitsuo Matsushita, eds., *Implementing the Tokyo Round: National Constitutions and International Economic Rules*, 139-97 (“Tokyo Round”) (U. of Mich., 1984).

65. See *id.* at 145. Compare generally, Michael J. Gleason, *Constitutional Diplomacy* 177-91 (Princeton U., 1990) (discussing the reaches and limits of the President’s authority to enter into international executive agreements without Congressional approval); Louis Henkin, *Foreign Affairs and the Constitution* 173-188 (Foundation, 1972); Rostatement (Third) of Foreign Relations Law of the United States § 303, Comment e (ALI, 1987).

Congress plays an important role.⁶⁶ For example, the necessary congressional participation threatened the success of the 1972 and 1973 Tokyo Round of the GATT, which was the first to concern itself with non-tariff barriers.⁶⁷ In order to involve itself without constantly derailing trade agreements after the fact, therefore, Congress in 1974 passed legislation creating a special "fast track" procedure for trade legislation.⁶⁸ This procedure requires that Congress be notified ninety days before the President signs an agreement on non-tariff barriers, and then provides streamlined methods for enacting domestic legislation.⁶⁹

Prior to the Uruguay Round, most of the GATT negotiations had involved trade in goods.⁷⁰ With regard to these negotiations, state authority was involved little and remained reasonably intact. The only issue of significance to the states was negotiation at the Tokyo Round about government procurement policies, but this negotiation did not result in binding subnational governments.⁷¹

In sharp contrast to prior negotiations, the Uruguay Round of the GATT adopted rules in many areas that will affect state regulatory authority.⁷² Significant areas of agreement that will have an impact on the states include the agreements on Sanitary and Phytosanitary Measures,⁷³ Technical Barriers to Trade,⁷⁴

66. See Jackson, *Tokyo Round* at 145 (cited in note 64) (noting that for years Congress refused to recognize the GATT).

67. *Id.* at 146-47.

68. See *id.* at 147-49.

69. *Id.* at 148.

70. See Falke, *The Impact of the International System* at 8 (cited in note 21) (observing that the Uruguay Round brought services within the gambit of GATT for the first time).

71. Jackson, *Tokyo Round* at 143-45 (cited in note 64). Jackson reports that the United States negotiators were prepared to agree to an international government procurement rule that would bind the states in federal nations, but that other foreign negotiators opposed this provision. *Id.* at 144. Nevertheless, Jackson questions whether such a provision would be constitutional, suggesting that it is arguable "that purchases by state government is a matter so intimately connected with normal sovereign and administrative authority reserved to the states that the federal government would not have the [constitutional] authority to enter into an international agreement that constrained or interfered with that sovereignty." *Id.* at 143-44.

72. Schaefer and Singer, 26 *J. World Trade* at 31 (cited in note 7); Pete Du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 *Harv. J. L. & Pub. Pol.* 137, 143 (1993).

73. 1994 GATT Final Act, *Agreement on the Application of Sanitary and Phytosanitary Measures* ("1994 GATT SPS Agreement"), II-A1A-4. See generally Schaefer and Singer, 26 *J. World Trade* at 43-46.

74. 1994 GATT Final Act, *Agreement on Technical Barriers to Trade* ("TBT"), II-A1A-6. See generally Schaefer and Singer, 26 *J. World Trade* at 36-43. See also Conrad Weller, *GATT, NAFTA and State and Local Powers*, 20 *Intergovernmental Perspective* 38, 39-40 (Fall 1993-Winter 1994).

Trade in Services,⁷⁵ Government Procurement,⁷⁶ and Subsidies.⁷⁷ Regulatory harmonization is in large part the goal of these agreements;⁷⁸ thus, state regulatory autonomy necessarily is implicated.⁷⁹

Perhaps the most significant aspect of the GATT agreement with regard to state regulatory autonomy is the agreement respecting Technical Barriers to Trade ("TBT"). Technical barriers to trade are mandatory measures that regulate products, as well as their packaging and the process of production.⁸⁰ The theory behind agreements such as the TBT is that as the ability to impose obvious economic barriers to trade, such as tariffs, is eliminated, governments will impose more subtle barriers, in the form of technical regulation and the like.⁸¹ Thus, a government might impose packaging, labeling, or testing standards that in practice provide a competitive advantage to domestic goods and discriminate against foreign commerce.

75. 1994 GATT Final Act, *General Agreement on Trade in Services* ("GATS"), II-A1B. See generally Schaefer and Singer, 26 J. World Trade at 53-56. See also, Weiler, 20 Intergovernmental Perspective at 39.

76. 1994 GATT Final Act, *Agreement on Government Procurement* ("GP"), II-A49(b). See generally Schaefer and Singer, 26 J. World Trade at 56-57. See also, Weiler, 20 Intergovernmental Perspective at 39.

77. See generally 1994 GATT Final Act, *Agreement on Subsidies and Countervailing Measures* ("SCM"), II-A1A-13. See generally Schaefer and Singer, 26 J. World Trade at 47-53.

78. See Katherine Tammaro, *Why the States Should Worry About GATT* in Center for Policy Alternatives, *Policy Alternatives on the Environment: A State Report* 7, 8 (Aug., 1992); Jackson, 14 U. Ark. Little Rock L. J. at 447 (cited in note 7) (suggesting, however, that "harmonization can probably only be pushed to a limited degree, at least at the broader world-wide level (as compared to regional, or federal-state systems)").

79. See Tammaro, *Why the States Should Worry About GATT* in *Policy Alternatives* at 8 (positing that "[h]armonization' could strip states of their authority over key health and safety issues and prevent independent regulation by the states"). Although state laws that are inconsistent with international GATT standards are not automatically invalid, they are subject to GATT and to challenges by objecting nations. *Id.* at 13. Furthermore, under GATT the United States must take reasonable measures "to ensure observance of GATT by regional and local governments." *Id.* For a discussion of internationalization in yet another area under the Uruguay Round, see generally J. H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 Fordham Intell. Prop., Media & Ent. J. 171 (1993).

80. Technical regulations are defined in 1994 GATT Final Act, *TBT*, II-A1A-6, Annex 1.1 (cited in note 74). See also Schaefer and Singer, 26 J. World Trade at 38-39 (cited in note 7).

81. John H. Jackson, Jean-Victor Louis, and Mitsuo Matsushita, *Law and World Economic Interdependence*, in John H. Jackson, Jean-Victor Louis, and Mitsuo Matsushita, eds., *Implementing the Tokyo Round: National Constitutions and International Economic Rules* 1, 12 (U. of Mich., 1984) (stating "[h]ecause tariffs had been reduced over several decades, nontariff barriers had become significant restraints on international trade and major obstacles to further trade liberalization").

Although the goal of the TBT Agreement is to eliminate discrimination against foreign trade,⁸² the mechanism for achieving this may sweep more broadly.⁸³ Discrimination need not be facial; it may be challenged in effect.⁸⁴ Once so challenged, the question becomes whether the regulation is broader than necessary to protect legitimate interests such as the health and safety of citizens.⁸⁵ In defining what technical standards are acceptable, however, the GATT refers largely to existing international standards.⁸⁶ If a government wants to impose barriers in excess of existing international standards, or to impose standards where no international standard exists, the government bears a heavy burden of proof.⁸⁷ Signatory states must adhere to "recommendations" of appropriate technical standards;⁸⁸ failure to do so may subject the signatory state to economic sanctions.⁸⁹ Accompanying the ban on unnecessary technical barriers are elaborate provisions for notice and comment about the imposition of technical standards.⁹⁰

The impact of the technical barriers agreement may not even yet be fully appreciated; nonetheless, there are obvious areas in which state regulatory autonomy is in jeopardy. The impact of the TBT may well be to limit, to some extent, state authority to protect citizens

82. See Schaefer and Singer, 26 *J. World Trade* at 39 (cited in note 7) (noting that the TBT Agreement prohibits state governments from discriminating "between domestic and foreign goods or between goods from different foreign countries"); Weiler, 20 *Intergovernmental Perspective* at 39 (cited in note 74).

83. See Schaefer and Singer, 26 *J. World Trade* at 38 (contemplating that "the Agreement may significantly constrain state regulatory freedom and powers in favor of broader, internationally harmonized standards . . . [and] may indeed require the Federal government to modify legislation delegating regulatory power to states to ensure that they comply with certain obligations under the TBT Agreement").

84. See Farber and Hudec, 47 *Vand. L. Rev.* at 1421-31 (cited in note 15) (noting that recent GATT jurisprudence indicates that disproportionately burdensome effects are a violation of GATT); Schaefer and Singer, 26 *J. World Trade* at 39-40.

85. 1994 *GATT Final Act, TBT*, II-A1A-6, Art. 2.2 (cited in note 74). See Schaefer and Singer, 26 *J. World Trade* at 39; Farber and Hudec, 47 *Vand. L. Rev.* at 1433-34.

86. 1994 *GATT Final Act, TBT*, II-A1A-6, Art. 2.4. See also Schaefer and Singer, 26 *J. World Trade* at 39.

87. See Schaefer and Singer, 26 *J. World Trade* at 40 (stating "[w]here an international standard exists and it has not been followed it would appear that a party would have to explain the justification in terms of a fundamental, objective condition that makes the international standard 'ineffective or inappropriate'"); Tammaro, *Why the States Should Worry About GATT*, in *Policy Alternatives* at 9 (cited in note 78) (discussing state recycling laws).

88. See Schaefer and Singer, 26 *J. World Trade* at 39, 42.

89. See *id.* at 35-36 (indicating that some available economic sanctions are compensation and suspension of concessions).

90. 1994 *GATT Final Act, TBT*, II-A1A-6, Art. 2.9-2.10 (cited in note 74). See also Schaefer and Singer, 26 *J. World Trade* at 40 (noting that these obligations arise when a proposed technical regulation "is not in accordance with the relevant international standard (or an international standard does not exist)").

from risks to health and safety.⁹¹ The extent to which this is true is a matter of very sharp controversy.⁹² Only time will reveal precisely how broad the TBT Agreement's impact is. Nevertheless, examples of laws that will be subject to challenge and perhaps invalidation under the TBT include recyclability of goods requirements, regulation of beverage caps and beverage container disposal methods, and varying emissions standards such as those in place in California.⁹³

Closely related to the TBT is the agreement regarding Sanitary and Phytosanitary Measures ("S&P Measures"). Indeed, it is difficult for some to see where one agreement ends and the other begins.⁹⁴ Generally speaking, S&P Measures are those taken to ensure the safety of human, animal and plant life and health.⁹⁵ S&P Measures seem to relate particularly to regulation of additives and toxins in foods, and protection against imports that threaten to carry pests or diseases.⁹⁶ The regulatory framework is similar to that of the TBT.⁹⁷ International standards generally are to govern.⁹⁸

Here, too, there is sharp disagreement about impact, but evidently there will be some displacement of state regulatory authority.⁹⁹ As with many aspects of the Uruguay Round, the United States was at the forefront in negotiating this agreement, concerned about European banning of American beef that had been raised using

91. Tammaro, *Why the States Should Worry About GATT*, in *Policy Alternatives* at 8 (cited in note 78); Farber and Hudec, 47 *Vand. L. Rev.* at 1409-10 (cited in note 15).

92. See, for example, Schaefer and Singer, 26 *J. World Trade* at 38 (cited in note 7) (noting that conclusions by environmentalists that Congress will be required to establish federal pre-emption standards in every case "appear to overstate the consequences and effects of these provisions").

93. See Weiler, 20 *Intergovernmental Perspective* at 39 (cited in note 74) (mentioning a 1992 EEC challenge to numerous U.S. state and local laws including a California glass food and beverage cap recycling law). For analysis on specific examples of threatened state and local laws, see Tammaro, *Why the States Should Worry about GATT*, in *Policy Alternatives* at 9-13 (cited in note 78) (discussing the potential effects of GATT on various state and local laws regulating recycling and waste reduction, clean air, pesticide control, and wildlife and natural resources).

94. See Schaefer and Singer, 26 *J. World Trade* at 36-37 (cited in note 7) (noting that although the two agreements are not intended to overlap, their exact relationship is not entirely clear).

95. *1994 GATT SPS Agreement*, II-A1A-4, Annex A.1 (cited in note 73); Schaefer and Singer, 26 *J. World Trade* at 37.

96. *1994 GATT SPS Agreement*, II-A1A-4, Annex A.1; Schaefer and Singer, 26 *J. World Trade* at 37.

97. Schaefer and Singer, 26 *J. World Trade* at 43-44.

98. *1994 GATT SPS Agreement*, II-A1A-4, ¶ 9; Schaefer and Singer, 26 *J. World Trade* at 45.

99. See Schaefer and Singer, 26 *J. World Trade* at 44 (commentating that "the [S&P] Decision may significantly constrain state regulatory freedom and powers in favor of scientifically justified regulations and internationally harmonized standards").

growth hormones.¹⁰⁰ But liberalization works in two directions. Commentators have identified numerous state laws that might be subject to invalidation.¹⁰¹ Examples might include, again, bottle bills, as well as state food and water labeling requirements, and prohibitions on certain toxic ingredients.

Of almost equal importance to state regulatory authority likely will be the General Agreement on Trade in Services.¹⁰² This agreement may represent the most significant action of the Uruguay Round. Recognizing that the world economy is as much run by the service sector as by trade in goods, negotiators sought¹⁰³ and obtained liberalization in the trading in services. The general thrust of the agreement as to services is that all service suppliers of signatory countries should receive "most-favored nation" treatment,¹⁰⁴ that barriers to market access should be eliminated,¹⁰⁵ and that measures should be taken to eliminate licensing and qualifications as barriers to the free trade in services.¹⁰⁶

Obviously, the agreement has a potentially vast impact on state regulatory authority. A key area of state regulation is that of individuals working within the state. The services agreement of GATT, however, likely will begin to lead to the breakdown of state regulation of banking and insurance, as well as the telecommunications industry.¹⁰⁷ Other candidates to be removed from individual state regulatory regimes include accounting, engineering, construction, travel, and a favorite no doubt of anyone reading this, the practice of law.¹⁰⁸ State regulatory authority over trade in services likely will have to undergo careful examination.

Two other aspects of GATT deserve notice. First, the Uruguay Round places local government procurement under GATT scrutiny, calling into question the already questionable buy-American laws.¹⁰⁹

100. See Jackson, 14 U. Ark. Little Rock L. J. at 435-36 (cited in note 7); Farber and Hudec, 47 Vand. L. Rev. at 1410 n.23 (cited in note 15).

101. See Du Pont, 16 Harv. J. L. & Pub. Policy at 143-44 (cited in note 72).

102. *Final Act, GATS, II-A1B* (cited in note 75).

103. See John H. Jackson, *International Competition in Services: A Constitutional Framework* 4 (American Enterprise Institute for Public Policy Research, 1988). On the major role of services in the world economy today, see generally Geza Feketekuty, *International Trade in Services: An Overview and Blueprint for Negotiations*, 37-58 (Ballinger, 1988).

104. *Final Act, GATS, II-A1B, Part III* (cited in note 75).

105. Jackson, *International Competition in Services* at 8-9 (cited in note 103).

106. See Schaefer and Singer, 26 J. World Trade at 54-55 (cited in note 7).

107. See *id.* at 53 n.47; Weiler, 20 Intergovernmental Perspective at 40 (cited in note 74).

108. Weiler, 20 Intergovernmental Perspective at 40.

109. See Falke, *The Impact of the International System* at 12 (cited in note 21) (noting that because of the impact of the Uruguay Round the National Association of Governors has called for elimination of buy-American provisions in state and local procurement contracts); Note,

Finally, the Uruguay Round strengthens controls on subsidies to various industries and specifically applies the subsidy prohibitions to the states.¹¹⁰ These rules will have an impact upon state programs to encourage exports through subsidies and tax exemptions,¹¹¹ and may have an impact on aid to research programs at universities and even on aid to depressed areas or regions of a state.¹¹²

This last point touches on an interesting twist in federal-state relations that also is likely to come under increasing pressure in future years. Just as the national sphere has expanded at the expense of state autonomy, the states have taken on a greater role internationally. Many states have trade programs and it is a priority of state government to seek out foreign investment.¹¹³ There is some question whether any of these programs will need to be dismantled under the GATT. States have also tried to express themselves on matters of international concern such as apartheid and nuclear disarmament.¹¹⁴ Already the case law is not favorable to state efforts to participate in the international arena,¹¹⁵ but the process of harmonization suggests an even smaller, not greater, role for the states.

C. *The NAFTA*

Of course, running closely on the heels of the GATT is a recent important development at home: approval by Congress of the North

State Buy-American Laws—Invalidity of State Attempts to Favor American Producers, 64 Minn. L. Rev. 389, 390-91 (1980). Compare Jackson, *Tokyo Round* at 143-44 (cited in note 64) (discussing the impact of the Tokyo Round on state buy-American laws and suggesting that the laws might not be constitutionally valid).

110. Schaefer and Singer, 26 J. World Trade at 47 (cited in note 7).

111. *Id.* at 51 & n.42 (noting that tax exemptions that apply only to export sales of exporting trading companies are prohibited by GATT).

112. *Id.* at 48-49.

113. A good early article anticipating the growth of state activity encouraging international trade and discussing the difficulties with state involvement in the area is Harold G. Maier, *Cooperative Federalism in International Trade: Its Constitutional Parameters*, 27 Mercer L. Rev. 391 (1976). See also Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l L. 821, 821-22 (1989); Falke, *The Impact of the International System* at 2 (cited in note 21).

114. See Bilder, 83 Am. J. Int'l L. at 822; Johanna S. R. Mendelson, *Foreign Policy By Federalism: The Reagan Years*, 21 U. Miami Int-Am. L. Rev. 81, 83 (1989).

115. See, for example, *Zschernig v. Miller*, 389 U.S. 429 (1968). For a discussion of *Zschernig* and the confusion it has wrought, see Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 Vand. J. Transnational L. 133, 136-59 (1971) (arguing, at 151, that "*Zschernig*, taken as a whole, does not provide an effective tool for identifying the division of state and federal power in private international cases"). For a discussion of state efforts in the international arena and the case law surrounding such efforts, see Mendelson, 21 U. Miami Int-Am. L. Rev. at 93-117.

American Free Trade Agreement ("NAFTA").¹¹⁶ It is difficult to assess yet exactly what NAFTA's impact will be on state regulatory autonomy.¹¹⁷ Several things are apparent, however. First, the NAFTA adopts many of the approaches of the GATT, such as rules relating to technical barriers, sanitary and phytosanitary measures, and government procurement.¹¹⁸ Second, there are instances in which the NAFTA is more specific than the GATT, such as its discussion of the development of specifically allowable automotive goods standards,¹¹⁹ emissions standards, and its elaborate guidelines on the practice of law from country to country.¹²⁰ Third, the NAFTA contains specific provisions—as does the GATT, but the direction seems clearer here—for future liberalization.¹²¹ Finally, the NAFTA sets up a plethora of committees to recommend future measures that will increase harmonization.¹²² All of these aspects of the NAFTA are going to have an impact similar to, yet likely more direct and immediate than, the GATT.

* * *

The preceding discussion provides a fairly good indication of the direction in which matters are headed. There are forces at work bringing the world closer together, but those very same forces demand greater uniformity and coordination of regulation. The result is a narrowing of the state regulatory sphere. Some of the areas of narrowing are perhaps not surprising, dealing as they do with the international market economy. This is but a logical extension of the state of affairs under the domestic Commerce Clause, although it in some ways or applications may sweep more broadly.¹²³ Many of the regulatory areas subject to internationalization, though, increasingly touch upon the central role of the states, protecting the health and safety

116. North American Free Trade Agreement, reprinted in 32 Int'l Legal Materials 605 (1993) ("NAFTA").

117. Among other problems, the NAFTA is, in currently available form, enormous and unindexed.

118. On rules relating to technical barriers, see NAFTA, Ch. 9; on rules relating to sanitary and phytosanitary measures, see NAFTA, Ch. 7; and on rules relating to government procurement, see NAFTA, Ch. 10. See also Weiler, 20 Intergovernmental Perspective at 41 (cited in note 74) (stating that "[c]ritics worry that GATT interpretations may well apply to NAFTA language" in some areas).

119. NAFTA, Annex 913.5.a-3 (listing four specific criteria to be applied).

120. NAFTA, Annex 1210.5, Section B.

121. See, for example, *id.* (setting out the goal of, and steps for, future liberalization in the area of foreign legal consultants).

122. Some examples of these committees include the Land Transportation Standards Committee, NAFTA Annex 913.5.a-1, the Telecommunications Standards Subcommittee, NAFTA Annex 913.5.a-2, and the Automotive Standards Council, NAFTA Annex 913.5.a-3.

123. But see Farber and Hudec, 47 Vand. L. Rev. at 1405 (cited in note 15).

and welfare of their citizens. The flip side of such regulation often is impairment of free trade, however, and it is the latter that likely will carry the day.

The following sections on the impact of internationalization are of special interest. The first is, in a sense, a continuation of the preceding discussion, but treated separately because of the extremely sensitive nature of the matters that may now face preemption under an international regime. The second section deals with human rights.

D. Special Prerogatives of the States

When the Supreme Court overruled *National League of Cities v. Usery*,¹²⁴ formal legal protection for the idea of separate "enclaves" of state authority seemed unlikely in the future.¹²⁵ Nonetheless, by reason of tradition or politics or both, there are certain areas in which states exercise regulatory authority that are considered sacrosanct to a certain extent. But in the global village, there likely will be change, even in these unique domains of state authority. The areas discussed here are regulation of alcoholic beverages, taxation, and education.

In a sense, there is nothing uniquely sovereign about the regulation of alcohol that ought to make it more important to the states than regulation of, say, waste disposal or food additives. But as a matter of history, or historical accident, regulation of alcohol is an area in which the states have and defend primacy. The price for repealing prohibition was local choice: The Twenty-first Amendment quite categorically gives to the states authority to regulate alcohol.¹²⁶

In the face of international trade agreements, however, even this sphere of relative state autonomy is threatened. In the *Beer II*

124. 426 U.S. 833 (1976) (overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985)).

125. Thomas R. McCoy and Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 S. Ct. Rev. 85, 96. For a discussion of the "enclave" construct of federalism, see John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 701-04 (1974); Raul Berger, *Federalism: The Founders' Design* 49-76 (U. of Okla., 1987). For literature discussing the demise of the enclave construct after *Garcia*, see, for example, Zoe Baird, *State Empowerment After Garcia*, 18 Urban Law. 491 (1986); Martha A. Field, Comment, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84 (1985).

126. U.S. Const., Amend. XXI. Although the states have the authority to regulate alcohol under the Twenty-first Amendment, recently the federal government has again begun to usurp those powers through the spending power by mandating a minimum drinking age in return for federal road construction funds. Du Pont, 16 Harv. J. L. & Pub. Pol. at 140-41 (cited in note 72). Furthermore, this federal exercise of power in the realm of alcohol has been upheld by the Supreme Court. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

case,¹²⁷ a GATT panel ruled that various taxes and regulations of some forty-one states violated the GATT.¹²⁸ The GATT panel further ruled that, despite the Twenty-first Amendment, the state laws do not impose "requirements which the United States could not change, or indeed has not already overruled, by executive action, including, in this case, acceptance by the United States of the obligations under the General Agreement as part of United States federal law."¹²⁹ Thus, the panel recommended that the United States bring its inconsistent state and federal laws into conformity with GATT requirements.¹³⁰ The United States has endeavored to see that those practices are changed.¹³¹

Of far greater sanctity and importance to the autonomy of the states is state authority to tax.¹³² There are rules, of course, that limit state taxing practices, such as the doctrine of intergovernmental tax immunity.¹³³ But by and large the states are free—and insist upon the freedom—to design their tax structures as they wish, taxing what they wish, and to the extent they wish. Domestically, this autonomy in the taxation area necessarily has become more difficult as the market integrates. States have developed schemes to tax many articles of interstate commerce, and parties increasingly challenge state taxing practices.¹³⁴ But the Supreme Court, while striking down discriminatory taxes,¹³⁵ has remained fairly deferential to state taxing decisions, including decisions that involve taxing international concerns.¹³⁶

There are two forces, however, that threaten state autonomy in the area of taxation. The first is that state taxes imposed upon inter-

127. GATT Panel Report, *United States-Measures Affecting Alcoholic and Malt Beverages* ("Beer II") (1992), reprinted in 4 World Trade Materials 25 (September, 1992).

128. *Beer II* at 98-101, reprinted in 4 World Trade Materials at 122-25. See also Schaefer and Singer, 26 J. World Trade at 33 (cited in note 7). The very fact of state-by-state regulation made the entire proceeding enormously complicated.

129. *Beer II* at 87-88, reprinted in 4 World Trade Materials at 111-12.

130. *Id.* at 101, reprinted in 4 World Trade Materials at 125.

131. Schaefer and Singer, 26 J. World Trade at 32 n. 7, 33 (cited in note 7); Tamarro, *Why the States Should Worry About GATT*, in *Policy Alternatives* at 7 (cited in note 78).

132. See generally Daniel Shavero, *An Economic and Political Look at Federalism in Taxation*, 90 Mich. L. Rev. 895 (1992) (discussing importance to states of power to tax).

133. See *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 326-30 (1819).

134. For example, *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

135. See, for example, the cases cited in note 134.

136. See, for example, *Itel Containers International Corp. v. Huddelston*, 113 S. Ct. 1095 (1993) (upholding state tax on containers used exclusively in international commerce); *Franchise Tax Bd. of Calif. v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990) (applying Tax Injunction Act to bar federal challenge to state tax by foreign parent corporations); *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19 (1988) (upholding state imposition of tax upon Outer Continental Shelf-derived income).

national trade are subject to increasing criticism. A classic example is the unitary tax imposed on foreign corporations.¹³⁷ Taxes such as these are likely to come under increasing scrutiny.¹³⁸

But even more problematic with regard to state autonomy are some recent suggestions that differing state tax bases and tax rates are threatening United States competitiveness.¹³⁹ The argument is that markets such as the EU, which are moving toward greater uniformity, will attract firms sensitive to tax levels and heterogeneity.¹⁴⁰ Moreover, competitiveness depends upon a certain number of desirable state services such as education, but service levels vary widely across the United States due to varying state funding levels, which in turn result from varying tax practices.¹⁴¹ The idea is that the federal government should bring some unity to tax bases and funding, either by unifying taxes, collecting them and handing them back out to the states, or by specifying tax bases and levels.¹⁴²

As dramatic as these suggestions are, it is important to recognize that they do not necessarily come from enemies of federalism. To the contrary, Alice Rivlin, whose bias in many ways is toward provision of services at the state level, is one of the champions of this approach.¹⁴³ But adopting such an approach would have a fairly significant impact upon the way we think about federalism.

Finally, there is education. Perhaps no state service is considered more immune from federal regulation than this. States receive assistance from the federal government, and comply with federal guidelines and rules about discrimination, services for the physically or mentally challenged, and the like.¹⁴⁴ When it comes to curriculum

137. Falke, *The Impact of the International System* at 9-10 (cited in note 21).

138. See *Colgate-Palmolive Co. v. Franchise Tax Bd. of Calif.*, 114 S. Ct. 2268 (1994) (rejecting a challenge to California's worldwide combined reporting requirement for calculating corporate franchise taxes).

139. See Robert P. Strauss, *Fiscal Federalism and the Changing Global Economy*, 43 Nat'l Tax J. 315, 317 (1990) (suggesting that as world-wide industry competition becomes more competitive, "U.S. firms will become increasingly sensitive to the heterogeneity of the domestic market . . . [and] to the level of taxation that is imposed").

140. *Id.*

141. See Alice Rivlin, *The Challenge of Competition to Fiscal and Functional Responsibilities*, 16 Intergovernmental Perspective 15, 16 (Winter 1990).

142. *Id.* (suggesting that a system of "common taxes" in which taxes would be centrally collected and shared by the states on a population basis); Strauss, 43 Nat'l Tax J. at 317-18 (cited in note 139) (proposing three state-ratified, federally defined tax bases for the three levels of government). But see Shaviro, 90 Mich. L. Rev. at 961-62 (cited in note 132) (arguing that federal government should mandate sources of taxation, but states should set tax rates to meet varying funding choices for public goods).

143. Rivlin, 16 Intergovernmental Perspective at 16. President Clinton nominated Rivlin as the head of the U.S. Office of Management and Budget in July, 1994.

144. See Du Pont, 16 Harv. J. L. & Pub. Pol. at 141-42 (cited in note 72).

and teaching methodology, however, states and local governments traditionally have gone their own way.¹⁴⁵ But even here there is a trend toward nationalization tied to globalization and competitiveness.¹⁴⁶ The argument is that in order for us to be competitive our schools must pursue national curricular goals.¹⁴⁷

E. Human Rights and the States

Ironically, another area in which internationalization may have an impact is human rights.¹⁴⁸ I say ironically because the United States fancies itself a world leader in this regard.¹⁴⁹ Yet, despite a stated commitment to human rights, the United States has been reluctant to adopt international agreements on human rights.¹⁵⁰ The history of this reluctance traces directly back to congressional action

145. See *id.* at 142 (asserting that "[t]he power of state governments to deliver education to their citizens and to decide upon the breadth and depth of the taxes they will extract from their citizens go to the heart of governance").

146. See *Clinton Signs Major Education Reform Bill*, *Chicago Tribune* 6 (April 1, 1994) (reporting the signing of a bill that establishes national curricular goals in order to make America more competitive in international economy).

147. *Id.*

148. See Thomas Buergenthal, *The U.S. and International Human Rights*, 9 *Human Rights L. J.* 141, 147 (1988) (noting that "internationalization of human rights is evidenced by the large number of existing international human rights agreements that have been ratified by a substantial majority of the states comprising the international community").

149. See *id.* at 141 (noting the utilization by other countries as a legislative model the substantial body of U.S. domestic law designed to promote enforcement of internationally guaranteed human rights).

150. See *id.* (noting that compared to the majority of countries, the U.S. has ratified fewer international human rights treaties); Winston P. Nagan, *The Politics of Ratification: The Potential for United States Adoption and Enforcement of the Convention Against Torture, The Covenants on Civil and Political Rights and Economic, Social and Cultural Rights*, 20 *Ga. J. Int'l & Comp. L.* 311, 311 (1990) (commenting that U.S. ratification of international human rights agreements "is a politically rare phenomenon").

For example, the U.S. has not yet ratified the following significant international agreements on human rights: the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination, Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 *U. of Ill. L. Rev.* 575, 581 n.17 (1990), the American Convention on Human Rights; and the Genocide Convention. Buergenthal, 9 *Human Rights L. J.* at 142-43 (noting that the Senate has ratified the Genocide Convention, but that legislation needed to implement the Convention still awaits passage). The U.S. has ratified the Convention on the Political Rights of Women and the Convention on the Prevention and Punishment of the Crime of Genocide. Cutler, 1990 *U. of Ill. L. Rev.* at 581 n.17. The United States was also a signatory of the Helsinki Accords, which contained human rights provisions. See *Conference on Security and Co-operation in Europe: Final Act*, Art. VII (August 1, 1975), reprinted in 14 *Int'l. Legal Materials* 1292 (1975).

in the 1950s to avoid national obligations under treaties that might have been thought to ban racial discrimination.¹⁵¹

The debate over what United States adoption of various international human rights agreements might mean is vigorous, but there are some quite interesting ideas bandied about. Commentators have suggested that adoption of one treaty or another might lead to challenges to corporal punishment in schools,¹⁵² the death penalty,¹⁵³ state homosexual sodomy laws,¹⁵⁴ or perhaps even any laws that discriminate on the basis of sexual orientation. Some commentators go so far as to suggest these agreements may have an impact on the status of "entitlements" such as welfare and education.¹⁵⁵ Think what you will about any one of these, in this area also international agreements could serve to limit state diversity.¹⁵⁶

151. Thus the story of the "Bricker Amendment." After a lower state court suggested that the human rights provisions of the United Nations charter were self-executing and that they outlawed race discrimination, several senators supported an amendment by Senator John W. Bricker that would have permitted no treaty to have the force of domestic law without implementing legislation. In order to defeat the amendment, the Administration committed not to become "a party to any such [human rights] covenant or present it as a treaty for consideration by the Senate." *Hearings On S.J. Res. 1 and S.J. Res. 43 Before A Subcomm. of the Senate Comm. On the Judiciary*, 83d Cong., 1st Sess. 10-11 (1953), quoted in Buergenthal, 9 Human Rights L. J. at 146. Although the Kennedy Administration reversed the policy in 1963, its effects linger. See generally Buergenthal, 9 Human Rights L. J. at 142-47; Covey T. Oliver, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 Hofstra L. Rev. 411, 414 (1981) (noting that "the effort to eliminate racially based discrimination by use of the treaty power induced something of a backlash in the halls of Congress").

152. See Restatement (Third) of the Foreign Relations Law of the United States § 702 n.5 (ALI, 1989) (suggesting this result).

153. See Cutler, 1990 U. of Ill. L. Rev. at 588 (cited in note 150).

154. See, for example, *id.* at 587 & n.43 (questioning whether American courts would uphold "the international human right of consenting adults to engage in private homosexual conduct," a position that the Supreme Court has heretofore refused to adopt as evidenced by *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

155. See Cutler, 1990 U. of Ill. L. Rev. at 588 (noting that some international conventions contain "entitlement" human rights such as education, employment, health care, and welfare).

156. See Buergenthal, 9 Human Rights L. J. at 148 (cited in note 148); Lawrence M. Friedman, Book Review, *The Internationalization of Human Rights* by David P. Forsythe, 13 B. C. Third World L. J. 189, 196 (1993); Nagan, 20 Ga. J. Int'l & Comp. L. at 325-26 (cited in note 150) (arguing that limits on states in the area of human rights are not incompatible with the fundamental goals of federalism); Oliver, 9 Hofstra L. Rev. at 431 (cited in note 151).

IV. FOREIGN AFFAIRS AND THE STATES

[I]n respect of our foreign relations generally state lines disappear. . . . [The states do] not exist. . . . [S]tate Constitutions, state laws, and state policies are irrelevant . . .¹⁵⁷

Before taking stock of the future of the American states in the global community, it is instructive to examine the legal regime governing the relationship of the states to the national government when internationalization is the force narrowing state authority. When nationalization is at issue, the governing law largely is the body of cases under the Commerce Clause, preemption law, spending law, and, of course, the decision in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁵⁸ Although this body of law is largely viewed as solicitous to the federal government, when foreign affairs are at issue, national authority is even greater.¹⁵⁹

Garcia probably is the *bête noir* of American federalism, relegating the states as it does to the political process and ostensibly eliminating any judicial protection against laws that limit state regulatory autonomy. But in tone at least, *Garcia* was somewhat respectful of the states, and left open the door to the possibility that unstated protections existed. The *Garcia* Court acknowledged that "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority,'"¹⁶⁰ and insisted that "the States occupy a special and specific position in our constitutional system."¹⁶¹ Perhaps most important, the Court left open the hope, fulfilled to some extent in *New York v. United States*,¹⁶² that the umpire might return at some later date to lay down rules in protection of state sovereignty. Thus, the *Garcia* Court concluded by observing that "[t]hese cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."¹⁶³

157. *United States v. Belmont*, 301 U.S. 324, 331-32 (1937).

158. 469 U.S. 528 (1985). See generally Du Pont, 16 Harv. J. L. & Pub. Pol. at 139-41 (cited in note 72); Farber and Hudec, 47 Vand. L. Rev. at 1411-17 (cited in note 15).

159. For a general background of national supremacy in the foreign relations sphere, see Mendelson, 21 U. Miami Int-Am. L. Rev. at 84-90 (cited in note 114). See also, generally, Henkin, *Foreign Affairs and the Constitution* (cited in note 65).

160. *Garcia*, 469 U.S. at 549 (alterations in the original) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (Powell, J., dissenting)).

161. *Id.* at 556.

162. 112 S. Ct. 2408 (1992) (finding unconstitutional a provision of the Low-Level Radioactive Waste Reduction Act requiring states to accept ownership of waste or regulate according to the instructions of Congress).

163. *Garcia*, 469 U.S. at 556.

The case law that presently would govern state autonomy in a globalized world offers none of the politesse of *Garcia*, nor does it suggest much in the way of a limitation upon national authority. The relevant cases largely are those dealing with the foreign relations power of the United States, and with the authority of the national government vis-à-vis the states when the foreign affairs power has been invoked. There are cases dealing with particular aspects of this relationship, but the tone is best set in generalities. Perhaps the strongest language, just to give an indication, comes from two cases, *United States v. Belmont*¹⁶⁴ and *United States v. Pink*,¹⁶⁵ both of which dealt with the refusal of New York courts to adhere to the terms of the Litinov Agreement, resolving claims between the United States and the Soviet Union. The *Belmont* Court put it this way:

In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision.¹⁶⁶

The basis of national authority vis-à-vis the states in the area of foreign policy is, according to the Supreme Court, quite different from the domestic regulatory sphere. In the domestic arena, the Tenth Amendment states the rules of the game: All powers not granted to the national government are reserved to the states.¹⁶⁷ The implicit presumption is that there are *some* powers not so granted, thus so reserved. However diminished, the states necessarily retain *some* role as to domestic regulatory affairs. Not so once foreign policy enters the picture.¹⁶⁸ The most famous statement of principles comes

164. 301 U.S. 324 (1937).

165. 315 U.S. 203 (1942).

166. *Belmont*, 301 U.S. at 331-32.

167. U.S. Const., Amend. X.

168. Commenting on the difference between the domestic regulatory sphere and foreign affairs, one author noted:

Federalism . . . appeared irrelevant to the conduct of foreign affairs even before it began to be a wasting force in American life generally—before we became one nation economically, and moved toward welfare government disregarding state lines, before the power of the States was theirs only by grace of Congress and by political realities rather than constitutional compulsion.

Henkin, *Foreign Affairs and the Constitution* at 228 (cited in note 65). See also Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l L. 832, 832-33 (1989) (noting that "[t]he consensus today is that the central Government alone may directly exercise power in foreign affairs").

from a case not directly involving state authority, *United States v. Curtis-Wright Export Corp.*,¹⁶⁹ challenging Congress' delegation to the Executive of the power essentially to criminalize the domestic sale of weapons to certain foreign countries.¹⁷⁰ To the argument that the delegation to the President exceeded that permissible, the Supreme Court responded as follows. First, the Court stated that it was unnecessary to determine whether the delegation would have been impermissible if it had related to domestic affairs, for this was a different case.¹⁷¹ Second, the difference rested on important distinctions between the national government's power in the domestic and foreign arena.¹⁷² Third, in the domestic arena, Congress' power is carved from power possessed by the states.¹⁷³ Fourth, unlike domestic power, the states never possessed the foreign affairs power; rather, that power passed directly from Britain to the Union, where it resides in full today.¹⁷⁴ And finally, "[i]t results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."¹⁷⁵

*Missouri v. Holland*¹⁷⁶ relied on this federal foreign affairs power in providing the most clear analysis of the posture states find themselves in when confronted with national power taken in pursuance of foreign policy.¹⁷⁷ *Missouri v. Holland* involved a treaty entered into by the United States with Great Britain protecting certain migratory birds.¹⁷⁸ The treaty was essential to national and international interests: the birds were at that time a vital "pesticide" that required protection.¹⁷⁹ The treaty, implemented by congressional legislation, conflicted with Missouri's view of the proper regulation of conduct toward the migratory birds, and so the State of Missouri sued.¹⁸⁰ The state argued that whatever Congress' power in this area, it was and could be no greater than the power Congress would have in the absence of the treaty.¹⁸¹ Not so, said the Court.

169. 299 U.S. 304 (1936).

170. *Id.* at 314.

171. *Id.* at 315.

172. *Id.*

173. *Id.* at 316 (stating that carving out the legislative powers from the general mass of powers held by the state was the primary purpose of the Constitution).

174. *Id.* at 316-17.

175. *Id.* at 318.

176. 252 U.S. 416 (1920).

177. See *id.* at 432.

178. *Id.* at 430-31 ("Migratory Bird Treaty Act of July 3, 1918," c. 128, 40 Stat. 755).

179. See *id.* at 431.

180. *Id.* at 430-31.

181. *Id.* at 432.

According to the *Holland* Court, the powers of Congress in the foreign relations area are broader and less bounded than in the domestic area.¹⁸² With regard to domestic regulation, the Tenth Amendment operates, and Congress is limited to acting within the scope of Article I, Section 8.¹⁸³ “[T]he power to make treaties is delegated expressly”¹⁸⁴ to the United States, however, and while “Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, . . . treaties are declared to be so when made under the authority of the United States.”¹⁸⁵ The *Holland* Court continued:

We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, “a power which must belong to and somewhere reside in every civilized government,” is not to be found.¹⁸⁶

Holland is in many ways the *McCulloch v. Maryland* of foreign affairs. Justice Holmes reminded us that the Constitution is a constituent act, which brought to life a nation.¹⁸⁷ “It was enough [for the Framers] to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.”¹⁸⁸ The treaty at issue did not violate any express prohibition in the Constitution; “[t]he only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”¹⁸⁹ Resolving this required considering “what this country has become in deciding what that Amendment has reserved. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. . . . Here a national interest of very nearly the first magnitude is involved.”¹⁹⁰

In *Holland*, the national power was the treaty power, which required action not only by the Executive, but also by two-thirds of

182. See *id.* at 433.

183. See *id.* at 432.

184. *Id.*

185. *Id.* at 433.

186. *Id.* (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)).

187. *Id.*

188. *Id.*

189. *Id.* at 433-34.

190. *Id.* at 433-35.

the Senate,¹⁹¹ ostensibly offering some *Garcia*esque political protection to the states. The next important question is how far that national power extends beyond the treaty power, i.e., the extent to which executive agreements may govern the states.¹⁹² On this issue, too, the Supreme Court is most generous to national authority. In the words of the *Curtis-Wright* Court: "[T]he power to make such international agreements as do not constitute treaties in the constitutional sense" is vested in the United States, despite the fact that the power to make such agreements is not "expressly affirmed by the Constitution."¹⁹³

Even if national political bodies have not clearly acted to preempt the states, state law may be nonetheless preempted.¹⁹⁴ *Hines v. Davidowitz*¹⁹⁵ is a preemption case arising in the context of foreign affairs.¹⁹⁶ In determining whether the state law was preempted, the Court asked whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. "And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits."¹⁹⁷

Moreover, even in the absence of national legislative or executive action, state regulation will be trumped if the federal judiciary deems the state law in conflict with the national foreign policy. For example, *Zschernig v. Miller*¹⁹⁸ involved a state law concerning the escheat of nonresident alien property to the state upon death.¹⁹⁹ The state law did not conflict with treaty obligations, at least insofar as they had been interpreted by the Supreme Court.²⁰⁰ And the Department of Justice, appearing as amicus, stated that the

191. U.S. Const., Art. II, § 2, cl. 2.

192. For a brief discussion of executive agreements as the supreme law of the land, see Henkin, *Foreign Affairs and the Constitution* at 184-87 (cited in note 65).

193. *Curtis-Wright*, 299 U.S. at 318.

194. For a discussion of this issue and a proposed three-factor analysis for determining whether a state law is preempted in such a situation, see Maier, 83 Am. J. Int'l L. 832 (cited in note 168).

195. 312 U.S. 52 (1941).

196. The state statute at issue in *Hines* involved state alien registration. *Id.* at 56.

197. *Id.* at 67-68. The Court subsequently struck down the statute even though it was entirely consistent with the federal alien registration law. *Id.* at 66-67. The Court found that "the regulation of aliens is . . . intimately blended and intertwined with the responsibilities of the national government." *Id.*

198. 389 U.S. 429.

199. *Id.* at 430.

200. See *id.* at 432.

state law did not “unduly interfere[] with the United States’ conduct of foreign relations.”²⁰¹ Nonetheless, the state statute fell because, in application, it represented “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”²⁰²

It is important to stress at this juncture that the point of this discussion is *not* whether this very general survey of the law is normatively correct. There are excellent reasons why when it comes to foreign affairs the nation must speak with one voice, thus disabling state regulatory policy to a certain extent.²⁰³ The point that deserves notice is the impact of connecting the law surveyed in this section with the events described in the last section. As the last section makes clear, the field of what plausibly can be considered foreign affairs is expanding greatly. It bears no coincidental resemblance to the expansion of commerce power. As this survey shows, in the foreign affairs area, national authority is broad indeed. But if the national government’s power in foreign affairs is great, and the area that can be called foreign affairs is endlessly expansive, then state autonomy is subject to serious compacting by the shrinking boundaries of our global village. *That* presents the really important question: what will be the fate of the states in the global community?

V. THE FUTURE OF FEDERALISM

Although it seems undeniable in light of the foregoing that globalization will have some impact upon state regulatory autonomy, it is difficult to assess exactly what that impact will be. In making some rough predictions there are two different aspects of the problem to consider. First, there is the question of substantive state authority: to what extent will globalization limit state regulatory authority? The second aspect may be even more significant, however; to what extent will globalization have an impact upon the process of deciding where

201. *Id.* at 434 (quoting the Department of Justice brief amicus curiae). See also Maier, 83 Am. J. Int’l L. at 836 (cited in note 168) (commenting that not one of the Court’s conclusions regarding interference with foreign relations was supported by the facts of the case).

202. *Zschernig*, 389 U.S. at 432 (citing *Hines*, 312 U.S. at 63). Some commentators have termed the analysis taken by the Court in *Zschernig* as a doctrine of a “dormant” foreign relations or foreign affairs power, by analogy to the “dormant” Commerce Clause doctrine. See Bilder, 83 Am. J. Int’l L. at 825 (cited in note 113); Mendelson, 21 U. Miami Int-Am. L. Rev. at 89 (cited in note 114).

203. For a brief summary of the main arguments for and against state action in the area of foreign relations, see Bilder, 83 Am. J. Int’l L. at 827-29.

regulatory authority rests? This latter question goes directly to our democratic system of government: Who will decide whether regulatory authority rests in the national or state governments, and how will that decision be reached?

In assessing the likely impact of globalization upon the substance of regulatory autonomy and the process of allocating that authority, it is important to be precise about the shift of authority that is likely to occur. By and large, when I speak of globalization I am referring to a shift of authority from the states to the national government that occurs because of globalizing forces. This is to be distinguished from any claim of "global government." I leave entirely to one side the idea of "world government."²⁰⁴ Rather, I am interested in the extent to which globalizing forces will cause a shift of authority from state governments elsewhere, largely to the national government. This shift necessarily will involve some displacement of authority to international entities, such as the United Nations organizations. But by and large, globalization's impact will be to displace state regulatory autonomy to the national government.

Turning first to substantive regulatory authority, I cannot help but predict that globalization will be the cause of a quite substantial curtailment of state authority. This is not so very different, one might argue, than what nationalization brought in its stead. In a sense, all globalization does is bring even more authority to Congress and the Executive, either because it no longer is politically necessary to reserve certain tasks to the states, or because the expanding international market makes national uniformity all the more imperative. Judicial deference to the national political branches with regard to foreign affairs appears even to exceed that granted to Congress with regard to domestic affairs under *Garcia*. Thus, internationalization only continues what nationalization began: a diminution in the separate sovereignty and independence of state government.

The impact of internationalization upon substantive authority necessarily is only one of degree, and one might argue that the degree of change will seem small in light of nationalization's influence upon federalism in the roughly sixty years since the New Deal. Because the states' regulatory autonomy is related directly to what Congress has not been delegated, and because the process of nationalization has expanded greatly what is encompassed within Congress' power to regulate interstate commerce, the area of autonomous state authority

204. See, for example, Ronald J. Glossop, *World Federation? A Critical Analysis of Federal World Government* 49-95 (McFarland & Co., 1993).

already has shrunk significantly.²⁰⁵ But recall that we are on the front end of a trend that has great potential to snowball. It is true that GATT has been around for a while, but this latest round of the GATT, European integration, and the NAFTA have not received the enormous media, public, and scholarly attention they have because *little or nothing* is happening. To the contrary, something quite significant seems to be in the offing, and one of its costs may be a good deal of state regulatory authority. Although one only can speculate as to the precise extent to which globalization will curtail state regulatory authority, it would be a mistake to minimize that impact.

The impact of internationalization upon the *process* of allocating regulatory authority, however, may in the end prove most significant. That impact is the concern of the balance of this Article. With regard to assessing the impact globalization has on the process of allocating governmental authority, there are two possible approaches. First, one can examine how formal domestic law will treat the process of allocating regulatory authority in a time of rapid globalization. But ultimately more telling are the much less formal means by which international agreements will play a role in curtailing state regulatory autonomy.

In order to determine how formal domestic rules play out regarding the allocation of regulatory authority, it may be instructive to look for a moment more at the *Garcia* decision. Many in the academy were critical of *Garcia* as providing an unrealistically optimistic view of the political safeguards of federalism. The concern was that the normal legislative process did not protect states' governmental interests.²⁰⁶ But even accepting the *Garcia* model in the domestic sphere, it is clear the political safeguards model plays out somewhat differently when internationalization is the motivating force. That is because the way law is made under the foreign affairs power is very different than the process by which it is made under an Article I, Section 8 power.

At the outset, the President has a much greater and more autonomous role where foreign relations are concerned.²⁰⁷ The

205. Moreover, after *Garcia*, it appears that any definition of state authority finally rests to a significant extent in the Congress' hands.

206. For example, William R. Denny, Note, *Breakdown of the Political Safeguards of Federalism: A Response to Garcia v. San Antonio Metropolitan Transit Authority*, 3 J. Law & Pol. 749, 753-62 (1987).

207. See Henkin, *Foreign Affairs and the Constitution* at 37 (cited in note 65) (stating "[s]tudents of American government, and citizens generally, know that American foreign relations are in the charge of the President").

Supreme Court has sanctioned the making of executive agreements, which, when made on the sole authority of the President, still trump state authority.²⁰⁸ Admittedly, few executive agreements are the unilateral act of the President.²⁰⁹ But if and when they are, the question is whether the Executive acting alone is likely to protect state prerogatives. There is not much in the political process of electing a President that suggests any particular sensitivity to state concerns.²¹⁰

States find greater protection when the President acts in conjunction with Congress, which can happen in any number of ways. Executive agreements may be pursuant to congressional authorization, may be ratified subsequently, and may be pursuant to the treaty power.²¹¹ All these means call into play some of the protection *Garcia* says ostensibly is available to the states in the bicameral legislative process. In some instances states enjoy less protection, for example, when the President simply consults with Congress before signing an executive agreement. There are other instances when the protection is just as great, or perhaps greater in the conduct of foreign affairs than in domestic affairs, so long as the Executive and Congress work together. Indeed, history has shown that the treaty process—which requires a two-thirds vote of the Senate—may be more protective of state autonomy than the ordinary legislative process. One reason for this admittedly might be a certain number of jingoistic votes that often appear in the Senate to oppose treaties, especially when anything remotely involving human rights and social issues is involved.²¹² But whatever the reason, Senate consideration of treaties does seem to protect to some extent the prerogatives of the states.

The question is whether differences in the formal process of enacting foreign affairs laws that restrict state regulatory autonomy

208. For example, *Belmont*, 301 U.S. at 330-32.

209. See generally Dept. of State Circular 175: Procedures on Treaties, reprinted in 11 Foreign Affairs Manual 301, which discusses the instances in which executive agreements are appropriate. The circular states that "[t]he term 'executive agreement' is appropriately reserved for agreements made solely on the basis of the constitutional authority of the President," *id.* at 303, but lists international agreements made pursuant to treaty or legislation.

210. Although the Electoral College comes to mind, it has long since lost any value it might have had in promoting the concerns of states *qua* states. While electoral politics may require a President to play to certain large states, nothing about the College promotes neither state interests generally, nor, specifically, an interest in placing regulatory authority at the state level. Electors follow the decisions of the public at large, and that public will be pleased with a candidate based on performance or promises to perform in ways that please the public. Absent some sudden groundswell of public opinion in favor of transferring regulatory authority to the states, the President will seek to regulate actively in ways that promote approval in the public at large.

211. See note 209 (discussing Dept. of State Circular 175).

212. See notes 150-51 and accompanying text.

will occasion a deviation from *Garcia* by the Supreme Court. As indicated, differences in the lawmaking process might justify a deviation in certain circumstances; for example, if the Executive acts alone. That is because the rationale of *Garcia* seemed to take into account the entire domestic political process as a protection for state interests. But deviating from *Garcia* requires having some standard to apply, which is tricky enough that the Supreme Court no doubt will not be anxious to try. Moreover, judicial revision might require a return to the pre-New Deal game of figuring out whether commerce—international, this time—is affected by the conduct regulated by the national government. The Court has shown no inclination to engage in this inquiry domestically.²¹³ Particularly given the Court's resort to broad statements of national authority in the arena of international relations, there does not appear to be any great hope that the Supreme Court suddenly will step in to carve out areas of state autonomy—or limit national authority—in the global village.

Indeed, the lessons from other federal countries suggest that the Court will continue to grant greater deference in the foreign affairs area. In Australia, for example, the national Supreme Court gives a much narrower definition to the authority of the national legislature vis-à-vis other member states in the realm of domestic affairs.²¹⁴ Nonetheless, the Australian court has granted huge authority to the national government when legislation is enacted as an exercise of the foreign affairs power.²¹⁵

An examination of the formal law regarding allocation of regulatory authority fails even to begin to take into account the real problems of political accountability that occur when state autonomy is narrowed through internationalization. Difficult questions arise

213. Accord Leslie Zines, *Constitutional Change in the Commonwealth* 94 (Cambridge U., 1991) (discussing the problem of preserving state power in federal systems: "No general theory of federalism can assist in the determination of the distribution of powers between the central and regional governments").

214. Leslie Zines, *The High Court and the Constitution* 37-58 (Butterworths, 1981); Andrew C. Byrnes, *The Implementation of Treaties in Australia after the Tasmanian Dams Case: The External Affairs Power and the Influence of Federalism*, 8 B.C. Int'l & Comp. L. Rev. 275, 281 (1985).

215. This was the result of the celebrated Tasmania Dams Case, *Commonwealth v. Tasmania*, 46 Aust. L. Rep. 625 (1983), in which the Australian High Court held that, under the national government's external affairs power, the government could "carry out treaty obligations by means of domestic legislation regardless of the subject matter of the treaty," Byrnes, 8 B.C. Int'l & Comp. L. Rev. at 294, that is, without regard to limitations on the national government's powers when acting purely in the domestic sphere. See generally Gary A. Rumble, *Federalism, External Affairs and Treaties: Recent Developments in Australia*, 17 Case W. Res. J. Int'l L. 1 (1985); Michael Coper, *The Role of the Courts in the Preservation of Federalism*, 63 Australian L. J. 463 (July, 1989).

when state regulatory authority is narrowed by internationalizing as opposed to nationalizing processes. One aspect of the GATT that has come under some criticism provides a good example. When one country challenges the regulation of another country as a trade barrier, the claim is litigated before a GATT panel. The panels operate in secrecy, beyond public scrutiny.²¹⁶ Moreover, states may not represent themselves, but must be represented by the United States government,²¹⁷ which may have state interests at heart, but may also have a different agenda. Thus, state interests may or may not be represented. Even if they are, the states may lose before a secret tribunal accountable to no United States citizen.²¹⁸ State compliance with a panel decision may be achieved through constitutionally mandated lawmaking precedents,²¹⁹ in which case the cause for concern is minimized, if not eliminated entirely. But the executive branch may instead decide to "encourage" state compliance in other ways, engendering greater concern about democratic values.²²⁰

Indeed, this example emphasizes the unique way in which internationalizing forces cause a subtle but definite shift of authority within the national government from the legislative to the executive branch, a shift that itself immunizes decision making from full political accountability. As domestic law more and more becomes a function of internationalizing forces, that law increasingly will be shaped by international agreements. But as we already have seen, once the

216. Schaefer and Singer, 26 J. of World Trade at 34 (cited in note 7) (noting that GATT panel "briefs are considered confidential").

217. "[T]here is no requirement for states to be made aware of, or participate in, the formation of the United States position when it is state regulations or other practices that are under challenge." *Id.*

218. See Jackson, *World Trade* at 187-89 (cited in note 63) (describing how GATT operates only through governments and does not have a direct relationship with private citizens).

219. Concededly, compliance with a GATT panel decision is not a foregone conclusion. As Farber and Hudec point out, however, there is no sense in taking the GATT seriously if compliance is not assumed. Farber and Hudec, 47 Vand. L. Rev. at 1407 (cited in note 15).

220. In the aftermath of the *Beer II* decision, the "federal government is working with the affected states to eliminate the laws found to violate GATT." Weiler, 20 Intergovernmental Perspective at 39 (cited in note 74). While the federal government has the constitutional authority to use its constitutional powers to secure compliance with the GATT by local governments, Schafer and Singer, 26 J. World Trade at 32 (cited in note 7), to the best of my knowledge "working with the affected states" does not mean passage of legislation pursuant to constitutional means. Nonetheless, absent a Twenty-first Amendment problem such legislation would be constitutional, and because under GATT "the federal government will be obliged to override the State measure in question if the state does not voluntarily comply with the ruling," *id.*, the threat of legislative preemption gives the executive branch tremendous power, exercised largely in a behind-the-scenes and thus relatively unaccountable fashion. See notes 207-10 and accompanying text discussing the enhancement of executive authority. See also Jackson, *World Trade* at 187-89 (cited in note 63) (addressing executive branch decision making as to whether to pursue a private citizen's claim).

forum for policymaking shifts from the domestic to the international, the Executive begins to play a paramount role.²²¹ Thus, as globalization proceeds, executive power will be enhanced simply because of the nature of the decisions being made. This has, in fact, been the experience in Western Europe as integration occurs there: executive authority has increased vis-à-vis the legislative bodies.²²²

Moreover, concerns about democratic accountability are heightened when domestic regulation is structured according to international standards. An example is a GATT challenge brought under the technical barriers or sanitary and phytosanitary agreements. Under those agreements, the baseline for regulatory authority is existing international standards.²²³ A state that seeks to impose regulations more stringent than prevailing international standards bears a heavy burden of justification.²²⁴ But this only compounds the questions raised above about unaccountable tribunals. After all, who is it that drafted these standards? Unlike domestic standards set by the Congress, there may be no democratic accountability for those standard-setters.²²⁵

221. See notes 207-10 and accompanying text.

222. Alberta M. Sbragia, *Thinking About the European Future: The Uses of Comparison*, in Alberta M. Sbragia, ed., *Euro-Politics: Institutes and Policymaking in the "New" European Community* 257, 274 (The Brookings Institution, 1992); Shirley Williams, *Sovereignty and Accountability in the European Community* in Keohane and Hoffmann, eds., *The New European Community*, 155, 158-59 (cited in note 6).

223. See note 86.

224. See note 87.

225. See Du Pont, 16 Harv. J. of Law & Pub. Pol. at 143 (cited in note 72) (stating that "[f]ederalization of our child support system, as unwelcome as it might be, at least leaves decisions in the hands of a federal government that is *our* government. It is something else again to turn over local power to enhance product safety and environmental quality to faceless GATTers in placid Geneva"). Professor Trimble thus levels sharp criticism at those who favor an international body to enforce GATT rules in favor of industry when domestic legal processes constrain implementation. See Phillip R. Trimble, *International Trade and the "Rule of Law,"* 83 Mich. L. Rev. 1017 (1985). Professor Trimble's comments come in the context of a book review of John H. Jackson, Jean-Victor Louis, and Mitsuo Matsushita, *Implementing the Tokyo Round: National Constitutions and International Economic Rules* (U. of Mich., 1984). The authors suggest that the ability to negotiate and implement free trade agreements is hindered by domestic politics and political institutions. Trimble makes the broad point that arguing for a way to circumvent domestic political processes to achieve free international trade is putting the cart before the horse. Even "[t]he authors of course recognize that free trade values are not the only concern of government." *Id.* at 1028. Trimble points out that the governments studied "are in one way or another representative governments. Their legitimacy and ability to maintain their authority depends on a measure of voluntary acceptance of their actions by their people." *Id.* at 1025. Trimble therefore takes issue with the suggestion of a "supercourt" to adjudicate GATT disputes over the heads of governments: "[t]he kind of international law making envisioned by the authors cannot easily be reconciled with American political tradition." *Id.* at 1027.

The phenomenon Trimble identifies is prominent. For example, discussing regional integration mechanisms ("RIM"), Frederick Abbott writes: "No single juridical mechanism will alone create a deep regional integration. According a self-executing character to RIMs may

This very transfer of authority from national governments and the concomitant loss of democratic control have been documented by commentators on the process of European integration. As Europe integrates, those commentators have observed a "democracy deficit,"²²⁶ in which power shifts from national legislatures to community bureaucratic entities electorally unaccountable to the public. It is at least less than obvious that this situation is desirable in the United States.

I do not want to overstate the case, for even disregarding rapid globalization, many national regulations (globalization aside) that curtail states' regulatory autonomy are implemented in a relatively unaccountable fashion. For example, many rules are made by civil servants serving almost for life, acting pursuant to broad delegations of congressional authority. Other state laws fall victim to decisions by the federal courts, whose judges also are not popularly elected or directly accountable. But at least there is in these other instances some indirect accountability.²²⁷ It is somewhat more difficult to see how the political process operates to preserve democratic values when general international agreements to harmonize lead to specific GATT panel decisions that declare state laws inconsistent with free trade.

Concern about accountability and the impact of internationalization on domestic law is finding increasing statement by commentators.²²⁸ Vociferous attack on trade regulation has come from environmentalists who see health and safety swapped for elimination of trade restraints.²²⁹ Environmentalists argue that adhering to international

facilitate the process in several ways. First, if a RIM takes domestic effect without the requirement of implementing legislation, the tendency of national legislatures to interfere with or restructure the arrangement will be diminished, thereby increasing the prospect that the norms established by the RIM will be interpreted and applied consistently among the constituent member states." 1 *Ind. J. Global Legal Stud.* at 158 (cited in note 6)

226. See Williams, *Sovereignty and Accountability* at 162-64 (cited in note 222) (analyzing "democratic deficit"); Sbragia, *European Future* at 278 (cited in note 222) (reporting concerns that the "link between voter and policymaker" should be more direct); Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, in Robert O. Keohane and Joseph S. Nye, Jr., eds., *Transnational Relations and World Politics* 356, 367 (Harvard U., 1972) (discussing reduction of "democratic control").

227. A classic defense of the accountability of civil servants is found in Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale U., 1962). For a criticism of Bickel's argument, as well as an argument that even life-tenured judges are relatively accountable, see Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577, 612-13 (1993).

228. For example, Du Pont, 16 *Harv. J. Law & Pub. Pol.* at 16 (cited in note 72); Weiler, 20 *Intergovernmental Perspective* at 39-40 (cited in note 74); Schaefer and Singer, 26 *J. World Trade* at 32-34 (cited in note 7).

229. See, for example, the Symposium in the *Washington and Lee Law Review*, "Environmental Quality and Free Trade: Interdependent Goals or Irreconcilable Conflict?" 49

standards will lead to lowest-common-denominator regulation. Although one might disagree as to whether these arguments are somewhat intemperate or overstated,²³⁰ the validity of the underlying concerns is conceded even by free trade advocates.²³¹ They can offer no certain answer because at present there simply is none to be had. It simply is too early to tell what impact internationalizing processes will have.

In fairness, it is not as though globalization comes without its advocates and arguments. Globalization promises free trade, stronger economies, better times for many in need, closer ties, less conflict and strife, and, if none of these, then, at least a better economy at home.²³² It is difficult to be against these things. Moreover, in a sense, any debate about state (or even national) autonomy to protect citizens versus globalization and harmonization already has been fought and won. The future is upon us.

Nonetheless, globalization has its soft underside: the current enthusiasm to integrate may underestimate individual attachment to local community. As globalization proceeds, power shifts to higher-level national governments.²³³ Moreover, as we have seen, those national governments increasingly are making decisions in conformity with other decisions made in seats of power ever more remote from the people.²³⁴ In addition, because the entire regime of international decision making enhances executive power and executive action taken in conformity with international obligations,²³⁵ chains of accountability to individuals are noticeably weakened. The distancing of governance and weakening of accountability inevitably will lead to government increasingly remote from its citizens. My prediction—and predicting is all we can do at this point—is that the very immensity of the global village will serve in the long run to alienate its citizens. I mean alienation in a quite literal sense: estranged citizens will see the global community, and the national government that imposes

Wash. and Lee L. Rev. 1219 (1992); see generally the discussion in Farber and Hudec, 47 Vand. L. Rev. at 1409-10 (cited in note 15).

230. See Farber and Hudec, 47 Vand. L. Rev. at 1410.

231. See John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict*, 49 Wash. & Lee L. Rev. 1227, 1256-57 (1992) (agreeing conflict exists between trade and environmental goals, and noting concerns heightened by lack of participation options in international trade rule formulation).

232. See, for example, Abbott, 1 Ind. J. Glob. Legal Stud. at 157-58 (cited in note 6) (arguing that regional integration promotes social interaction, political cooperation, and wealth generation).

233. See notes 6-20 and accompanying text.

234. See notes 223-31 and accompanying text.

235. See notes 207-30 and accompanying text.

international rules, as alien from them, and from what they care about.

It is within this possible alienation of government from the governed, therefore, that federalism might find its hope for the future. It could well be that our federal system will become, or already is, an anachronism. But by the same token, as people find government further away and less accessible, they may seek to find mechanisms of governance more accountable and closer to home. And in that event, the structures of the federal system—most notably the states—remain in place and available to meet the challenge.

Evidence of the strong attachment to local community is all about us, some of it quite painful. Others have observed that even as the world around us unites, there is a dreadful splintering going on.²³⁶ In the face of the collapse of the strong Soviet government, ethnic strife and nationalism are the currency of the day, with the news constantly full of national breakdowns along old tribal lines. The horrible events in Bosnia are perhaps the best-known or most followed examples of fragmentation in the face of a loss of strong central control. One can see in these events the weaknesses of global order.

One good example of the phenomenon I have in mind—internationalization prompting strengthened adherence to local community—is happening in the European Union even as integration is taking place. The whole idea of the Union teetered during the ratification votes, as the Maastricht treaty ran into stiffer opposition than expected.²³⁷ Experts in integration of the EU are still debating exactly what sentiment the voters were expressing, but the formal response is the idea of subsidiarity. Subsidiarity is the EU's slogan for what apparently is necessary to appease those jittery about the community; it generally holds that whatever needs to be done in the way of governance should occur at the *lowest* level of government possible.²³⁸ Attachments to local government understandably run

236. See Samuel P. Huntington, *The Clash of Civilizations?*, 72 *Foreign Affairs* 22 (Summer, 1993). A particularly poignant discussion of this trend, in an important article on the impact of globalization upon democracy, is Barber, 1 *Ind. J. Global Legal Stud.* at 121-24 (cited in note 5). For an informative and evocative account of the historical forces driving the process of re-Balkanization, see Robert D. Kaplan, *Balkan Ghosts* (St. Martin's, 1993).

237. See Patrick Oster, *New EC Dawns with a Yawn*, *Newsday* 20 (Nov. 3, 1993) (discussing how Maastricht ran into opposition and reporting that even after Maastricht was in effect, one commentator suggested, "People don't believe in Maastricht. . . . If we had a vote on it today, I don't think it would be approved").

238. Antonio Lo Faro, *EC Social Policy and 1993: The Dark Side of European Integration?*, 1 *Comp. Lab. L.* 1, 16-17 (1992); Colin Brown, *Britain to Challenge EC*, *The Independent* 1, 1 (April 21, 1992) (defining subsidiarity as "the doctrine under which member states have the right to take decisions at local level").

deep in the EU. Although the protests of French farmers easily can be attributed to economic self-interest,²³⁹ the protests expressing concern about, say, the loss of French culture²⁴⁰ speak to something quite different.²⁴¹

But the phenomenon is not limited to those abroad. We have evidence of it right here at home. As government emanates more and more from Washington, there is a sense of unease shared by many people. Even though its performance bore no relationship to its promise, this was, in part, what Ronald Reagan's New Federalism was all about. And if more evidence is needed, look to the startling popularity of Ross Perot as a third-party Presidential candidate in 1992.²⁴² At least one force driving that campaign was a sense that government had lost sight of the people it was governing, or perhaps that the governed were becoming just that, losing rein on their government.

The Framers understood all of this, its good side and its bad. This Symposium is primarily forward-looking, but as Larry Kramer has argued, we ought not to look ahead without glancing backward.²⁴³ The Framers understood the loyalties of people to local government, and in part sought to break the back of those attachments, forming new attachments to a new government that would not be as subject to parochial interests.²⁴⁴ But the Framers, or some of

George Bermann has written two excellent pieces on subsidiarity, George A. Bermann, *Subsidiarity and the European Community*, 17 *Hastings Int'l & Comp. L. Rev.* 97 (1993) and George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *Colum. L. Rev.* 331 (1994). Bermann makes the important point that the subsidiarity principle does not address "meaningfully . . . the states' capacity to deal adequately with a regulatory problem because the regulatory problem is not the issue." Bermann, 17 *Hastings Int'l & Comp. L. Rev.* at 109. Rather, "[t]he issue is whether and to what extent the Community's unquestioned interest in creating and improving the common market justifies restricting the states' otherwise unfettered right to regulate whatever regulatory problem is at hand." *Id.* at 109-10.

239. For example, Eugene Weber, *French Pride Gunned Up the GATT Talks*, *Newsday* 32 (Jan. 9, 1994) (discussing French farmers' protests to protect economic well-being).

240. For example, *Hollywood Fighting European Effort to Curb U.S. Films*, *Chicago Tribune* 3 (Nov. 22, 1990) (discussing U.S. response to French arguments about influx of U.S. culture).

241. Accord Barber, 1 *Ind. J. Global Legal Stud.* at 136 (cited in note 5) (stating "[t]o the degree that the new Europe has ignored political participation in favor of commercial and technological integration, it too risks long-term failure").

242. For a discussion of Perot's popularity during the 1992 Presidential campaign, see, for example, Walter Shapiro, *He's Ready, But Is America Ready for PRESIDENT PEROT?*, *Time* 26 (May 25, 1992); Howard Fineman, *Throwing a Mighty Tantrum*, *Newsweek* 28 (April 27, 1992).

243. Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1493, 1560-61 (1994).

244. For example, Federalist No. 10 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 77, 81-84 (Mentor, 1961) (describing how expanding the sphere of government counteracts faction).

them—particularly those who lost—also understood that good citizenship involves participation, and that it is awfully difficult to participate in a government whose seat is far away.²⁴⁵ Imagine the reaction of the anti-federalists to seats of decision making—if not power—not in the national capital, but across oceans, on foreign shores.

It is not necessary to enter the debate on the merits of regional or global integration in order to see my point, which is only that as the process of globalization progresses, and as people find decisions made for them by governments and decision makers farther away and less accountable, they are likely to become discontent. It is possible that by the time of discontent we also will be so comfortable with our shiny space cars and our modern homes, that we will do no more than grumble occasionally. But it is equally possible, and perhaps highly desirable, that discontent with remote government will reinvigorate local governance as well.

Indeed, a revitalization of federal principles may be perfectly consistent with globalization.²⁴⁶ Many argue that the best governance is one that optimizes the governing abilities of each level of government. Even as the world gets smaller, and government more global, there will remain some things better done at home. Better might mean more efficiently, such as registering voters or seeing that the trash is collected and the streets paved. But better also might mean “more accepted by the public.” Public school curricula come to mind here. A national curriculum might be a useful thing for education, but will the local communities have it?²⁴⁷ It is these areas of local regulation that hold the promise for federalism.

What is significant about this bottom-up return to federal values is that it does not depend so heavily on the legal order and questions such as whether *Garcia* will be overturned. What will revive and remake federalism, if it is to happen, is action by the People. The

245. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L. J. 1539, 1555-57 (1988) (discussing republican values of citizenship and participation, most available in small local assemblies).

246. Benjamin Barber is particularly optimistic in his assessment of the good some form of federal assembly can do in parts of the world that are fragmenting politically due to ethnic or cultural difference. See Barber, 1 Ind. J. Global Legal Stud. at 132-34 (cited in note 5) (discussing utility of federalism and confederalism as means of bringing disparate peoples together politically).

247. Interestingly, in discussing European integration, Professor Williams suggests that ties to the broader community might be fostered in schools, “but many member states fiercely defend their own turf when it comes to education, which is not within the Community’s jurisdiction.” Williams, *Sovereignty and Accountability*, in Keohane and Hoffman, eds., *The New European Community* at 170 (cited in note 222).

very flip side of my view regarding the alienation that global government will engender is that from the ground up people will begin to act at the state and local level.²⁴⁸ People frustrated with national education standards will get elected to school boards and work for local autonomy. People unhappy with internationally mandated food labeling maxima will agitate for the authority to make these decisions at the local level. People will pay more attention to Town Hall and City Hall, and to the State House. And if this happens, *then* federalism will find its own new center.

And if not, then it will not.

248. An idea of areas in which state control might properly predominate could be taken from the European Community: "Other issues that most closely engage individuals and families, like health, housing, social services, and school education, remain firmly within national jurisdiction." *Id.*

