

# The Impact of Globalization on the United States



# The Impact of Globalization on the United States

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Edited by  
BEVERLY CRAWFORD

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# Preface

Over the past decade, bookshelves have begun to overflow with volumes describing the nature, origins, and impact of globalization. Largely and surprisingly absent from this literature, however, has been extensive discussion of the impact globalization has on the United States itself. We have launched this project to explore the nature and extent of that impact. This book series offers the first in-depth, systematic effort at assessing the United States not as a globalizing force but as a nation being transformed by globalization. Indeed, it is rarely even acknowledged that while the United States may be providing a crucial impetus to globalization, the process of globalization, once set in motion, has become a force unto itself. Thus globalization has its own logic and demands that are having a profound impact on the U.S. economy, on American society and culture, and on its legal and political system in ways that are often unanticipated.

While the companion volumes to this one address globalization's effects on American culture and society (volume 1) and business and economics (volume 3), the theme of this book is the impact of globalization on U.S. government and law. It examines the profound transformation of political processes and governmental institutions in the United States that globalization has produced, and it analyzes the resulting changes in the enactment, enforcement, and interpretation of the domestic law.

Identifying the consequences of globalization for the United States can be challenging, in part because it is not always clear which forces originate within the domestic sphere and which are associated with the process of globalization. For this reason, the volumes in this series draw upon the expertise of scholars and practitioners from the United States and from Europe and employ multiple disciplinary perspectives and a variety of research methods.

This has been a complex undertaking and would not have been possible without the support of many organizations and individuals. For financial

support, we would like to thank the Ford Foundation and several schools and programs at the University of California, Berkeley: the Fisher Center for Real Estate and Urban Economics at the Haas Business School, the Townsend Center for the Humanities, the Institute of Governmental Studies, the Institute of European Studies, the Department of Sociology, and the Program on Globalization, Religion, and Politics. Our thanks go to Michel S. Laguerre, who provided support, encouragement, and advice from the very beginning of this project. We would also like to express our gratitude to Sara Heitler Bamberger, Jessica Owen, Yana Feldman, Noga Wizansky, Charlene Nicholas, and Gia White-Forbes for their assistance with three meetings that brought the authors of these volumes together for discussion of early drafts of their chapters. We could not have completed a project of this magnitude without them. And we would like to express our heartfelt thanks to Ed Fogarty, who provided useful comments and criticism of the individual chapters and expert editorial assistance for all three volumes. Finally, we wish to thank Praeger Publishers and the excellent editorial advice and encouragement that we received from Hilary Claggett, Shana Jones, and Robert Hutchinson.

Beverly Crawford



# Abbreviations

<b>ABM</b>	Anti-Ballistic Missile Treaty
<b>ACLU</b>	American Civil Liberties Union
<b>ANSI</b>	American National Standards Institute
<b>APA</b>	Administrative Procedure Act
<b>CAA</b>	Clean Air Act
<b>CBD</b>	Convention on Biodiversity
<b>CBO</b>	Congressional Budget Office
<b>CEO</b>	chief executive officer
<b>CIA</b>	Central Intelligence Agency
<b>CID</b>	Citizenship, Involvement, Democracy (survey)
<b>CIT</b>	Court of International Trade
<b>CO</b>	carbon monoxide
<b>CPS</b>	Current Population Survey
<b>C-TPAT</b>	Customs Trade Partnership Against Terrorism
<b>CWC</b>	Chemical Weapons Convention
<b>DHS</b>	Department of Homeland Security
<b>DNI</b>	Director of National Intelligence
<b>EPA</b>	Environmental Protection Agency
<b>ESA</b>	Endangered Species Act
<b>ESS</b>	European Social Survey
<b>EU</b>	European Union
<b>FBI</b>	Federal Bureau of Investigation
<b>FDA</b>	Food and Drug Administration
<b>FISA</b>	Foreign Intelligence Surveillance Act

<b>FLSA</b>	Fair Labor Standards Act
<b>FOIA</b>	Freedom of Information Act
<b>FSIS</b>	Food Safety and Inspection Service
<b>FTC</b>	Federal Trade Commission
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GISP</b>	Global Invasive Species Program
<b>GSS</b>	General Social Survey
<b>HR</b>	human resources
<b>HRO</b>	high-reliability organization
<b>ICANN</b>	Internet Corporation for Assigned Names and Numbers
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>IEEE</b>	Institute of Electrical and Electronics Engineers
<b>IETF</b>	Internet Engineering Task Force
<b>ILO</b>	International Labor Organization
<b>IMF</b>	International Monetary Fund
<b>IP</b>	intellectual property
<b>IPR</b>	intellectual property right
<b>ISP</b>	Internet service provider
<b>IT</b>	information technology
<b>ITC</b>	International Trade Commission
<b>ITO</b>	International Trade Organization
<b>JEDEC</b>	Joint Electron Device Engineering Council
<b>LACSS</b>	Los Angeles County Social Surveys
<b>NAAQS</b>	national ambient air quality standards
<b>NAFTA</b>	North American Free Trade Agreement
<b>NATO</b>	North Atlantic Treaty Organization
<b>NCSL</b>	National Conference of State Legislatures
<b>NGO</b>	nongovernmental organization
<b>NIEO</b>	New International Economic Order
<b>NIS</b>	nonindigenous invasive species
<b>NLRA</b>	National Labor Relations Act
<b>NLRB</b>	National Labor Relations Board
<b>NO<sub>x</sub></b>	nitrogen oxides
<b>NSA</b>	National Security Agency
<b>NSS</b>	National Security State
<b>O<sub>3</sub></b>	ozone

## ABBREVIATIONS

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<b>OCB</b>	organizational citizenship behavior
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>OSCE</b>	Organization for Security and Cooperation in Europe
<b>OSHA</b>	Occupational Safety and Health Administration
<b>PA</b>	parliamentary assembly
<b>PCIJ</b>	Permanent Court of International Justice
<b>PM<sub>10</sub>, PM<sub>2.5</sub></b>	particulate matter
<b>PMC</b>	private military company
<b>ppbv</b>	parts per billion by volume
<b>R&amp;D</b>	research and development
<b>RA/CBA</b>	risk-assessment/cost-benefit analysis
<b>RAND</b>	reasonable and nondiscriminatory
<b>ROMS</b>	Russian Multimedia and Internet Society
<b>SAIC</b>	Science Applications International Corporation
<b>SEC</b>	Securities and Exchange Commission
<b>SO<sub>2</sub></b>	sulfur dioxide
<b>SSO</b>	standard-setting organization
<b>TCP/IP</b>	Transmission Control Protocol/Internet Protocol
<b>TQM</b>	total quality management
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>USAPA</b>	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)
<b>USDA</b>	United States Department of Agriculture
<b>VOC</b>	volatile organic compounds
<b>VoIP</b>	voice over Internet protocol
<b>WIPO</b>	World Intellectual Property Organization
<b>WTO</b>	World Trade Organization



## INTRODUCTION

# Globalization's Impact on American Government and Law

Beverly Crawford

The United States is the most powerful country in the world, yet the global trends it has unleashed are shaking its very foundations. Through the sheer strength of its economic, ideological, and military might, America has been the force behind the increasing permeability of national borders across the globe. And American borders are no exception. As the number of porous national borders multiplies across the world, markets have gone global and economic competition has reached unprecedented heights. This growing integration and global competition has revolutionary consequences: it not only subjects the choices and constraints facing all Americans to the impact of forces across the entire globe but also changes the very nature of America's political institutions and challenges the authority of its domestic law. Indeed, the United States has launched a boomerang that has come home to transform the very foundations of its legal and political order. This boomerang is called "globalization," and as it comes home to the United States, nothing less than democracy, civil rights, and the government's ability to protect its citizens are at stake.

Globalization is often characterized as the current vehicle for U.S. world dominance. America's global military reach, many argue, aims to ensure that there is no viable alternative to the spread of its power and the supremacy of its values. Many studies of globalization-as-Americanization focus on how globalization shapes the world *beyond* America.<sup>1</sup> The unspoken assumption in much of this literature is that the United States controls globalization and is *not* controlled *by* it.<sup>2</sup> We challenge that assumption: regardless of whether the U.S. government plays a role in generating or

sustaining globalization, we show that globalization has in fact transformed the very political and legal institutions that Americans hold dear.

A book about globalization's impact on U.S. government and law is long overdue. Ironically, while many observers claim that globalization undermines the power of governments *everywhere*,<sup>3</sup> they rarely look at the United States. This volume shows how the forces of globalization are transforming legal and political relationships in American society in ways that have drastically changed people's lives—how globalization “out there” transforms the lives of Americans “in here.”

We argue that globalization generates unprecedented pressures and constraints on American political and legal institutions. It challenges the U.S. government's *ability and willingness* to preserve the economic and social rights of its citizens, ensure the maintenance of liberal democracy, and protect American society from global “bads” such as terrorism, contaminated food, toxic toys, and environmental degradation. We argue that globalization shifts the balance of power among domestic political institutions and challenges domestic legislative, executive, and judicial authority. We admit that globalization offers many economic benefits and political opportunities to Americans, and we show that, so far, U.S. political culture remains resilient even in the face of global pressures such as immigration and foreign participation in the American economy. But globalization calls into question the very concept of American political, military, and legal sovereignty and shakes the pillars of American democracy. In this book, we not only explore how globalization challenges the long-standing legal authority and protection embedded in American institutions but also suggest ways in which policy makers can meet globalization's challenges.

## GLOBALIZATION DEFINED: NETWORKS, IDEAS, AND GOVERNANCE

The umbrella term capturing the trends that have triggered these pressures on American government is *globalization*, which Joseph Nye defines as “the growth of worldwide networks of interdependence.”<sup>4</sup> This book expands that definition to include the growth of not only these networks of interdependence but also the ideas that nourish them and the attempts to govern them. The *networks* of interdependence are only the visible manifestation of globalization. They have been unleashed by the power of neoliberal *ideas*, and they carry those ideas around the world. The unprecedented growth of these networks has created problems that have led to calls to govern them—to regulate them and rein them in. Below, I discuss these three facets—networks, ideas, and governance—that make up our definition of globalization.

### Networks of Interdependence

The most visible networks of interdependence are, of course, economic: those networks that have intensified world trade, expanded global capital

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flows, and facilitated labor mobility.<sup>5</sup> Corporations have expanded their operations abroad, displacing American employment and expanding the range of products available to American consumers. As obstacles to trade have disappeared, global networks of exporters, importers, distributors, and consumers have multiplied. Finance capital is free to roam the world, searching for profitable investments and giving entrepreneurs everywhere greater access to capital. Labor is less free to cross borders than goods or capital, but migration has nevertheless increased dramatically, creating diaspora communities across the globe.

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But globalization encompasses more than economic networks: It also includes the spread of communication and transportation networks of all kinds. It takes in growing networks of soldiers and military equipment, criminals, and terrorists. It embraces networks of advocacy nongovernmental organizations (NGOs), religious organizations, political organizations, doctors, families,<sup>6</sup> artists, musicians, and more. No single volume can examine all of these interconnections and their impact on American politics and law. But the work assembled here focuses on the impact of a few essential ones: communication networks, transportation networks, and the global networks of American military power.

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## Ideas

Globalization is more than networks of interdependence. Although technological innovation accelerated the growth of these global networks, they were unleashed because states adopted a particular set of ideas—the ideas of *neoliberalism*, which have now spread around the globe. Neoliberalism is the *belief* in market supremacy—the conviction that markets self-regulate and should be freed from the clutches of state and society. Furthermore, neoliberalism demands that most, if not all, state functions be transferred to private hands. This belief maintains that the only way to generate the productivity that will lead to prosperity is to expand the dominance of the market<sup>7</sup> and contract the governance of the state over the economy.<sup>8</sup> This idea was born long before the explosion of global networks, but it had always existed alongside alternative ideas—for instance, regulated capitalism and socialism. Now, after the demise of communist ideology with the fall of the Soviet Union, neoliberalism is the dominant idea, prying open markets and shrinking states around the globe.

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Neoliberal ideology also embraces political beliefs. Paired with a conviction in the virtues of markets (i.e., *economic* liberalism) is a faith in the superiority of *political* liberalism—principles of freedom, democracy, and human rights. By the early 1990s, the West's victory in the Cold War and the advance of communications technology had greatly reduced the cost of transmitting and receiving liberal ideas. The idea of "freedom" as the absence of economic and political restrictions has come to be regarded as universal; many believe that the realization of this idea—the global spread of individual freedom and the worldwide protection of that freedom as a human right—will be a sure foundation for world peace.<sup>9</sup> Ironically,

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however, as we shall see, this ideology has shaken the foundation of American democracy.

## Governance

Some enthusiasts claim that global networks and the liberal ideologies they spread have greatly benefited Americans. Skeptics, however, caution that their effects might be pernicious. Although globalization has brought more economic freedom, freer exchange of information, more opportunity to travel, cheaper consumer goods, and less oppressive government bureaucracies, it has also had harmful side effects. Millions of global networks give people access to goods and services from around the world, but they also facilitate illegal trade in arms, people, drugs, and money.<sup>10</sup> Container ships carrying cheap goods to insatiable Americans can harm consumers when the toys they transport are toxic, when the food they carry is contaminated, and when they unknowingly bring in invasive species of plants and animals.<sup>11</sup> Global communications networks and the ease of Internet access enable freedom of speech, but they can put pornography in children's hands and antiliberal ideas in everyone's heads. The Internet can connect people around the globe and at the same time facilitate reckless investments and intellectual theft. More commercial air travel permits Americans to visit to far-flung lands, but can quickly spread deadly diseases across the nation when those Americans come home. As Kenneth Bamberger reminds us in this volume, terrorists use "global financial networks to fund their attacks, global communication networks to coordinate their logistics, and cheaper transportation networks to extend their reach." Even the promise of globalization—global prosperity and the spread of freedom—depends on practices that pollute the air, alter the climate, and threaten the hard-fought gains of American workers.

One look at these harmful effects suggests that porous national borders have created an imbalance between the global scale of these networks and the national scale of traditional governance. Often it is beyond the capability of any single state—even the United States—to mitigate globalization's negative effects. Ironically, states' relative incapacity in these cases accords with neoliberal ideology: state borders dissolve as the global economy integrates. As this happens, national governments lose the capacity to protect their citizens when the market produces these negative outcomes—what we might call "global bads." Many observers have thus argued that we need new modes of global governance if globalization's harmful consequences are to be attenuated.<sup>12</sup>

Lacking both the legal and material capacity to effectively control global processes alone, most states have three choices if they wish regulate globalization: they can delegate authority *upward* to international institutions; they can delegate authority *downward* to those private actors who freely roam the globe, spinning their webs of interdependence; or they can rely on a *collective hybrid* of public-private governance partnerships.<sup>13</sup>

If states choose to delegate authority upward, they are forced to cooperate with other states and cede sovereign authority to international

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treaties, organizations, and rules that govern global networks in an attempt to diminish the destructive side effects of their activity. In the pages to follow, we shall see how the upward delegation of sovereign authority to international institutions has challenged various aspects of U.S. domestic governance—including the separation of powers, New Deal social protections, and the very notion of national sovereignty itself.

States can also choose to delegate authority downward to private actors. Private governance means that nonstate actors regulate globalization by creating their own governance networks. This can mean that NGO networks perform governance functions normally assigned to the market or to individual states, such as providing food where there is famine, protecting vulnerable populations where there is war, or producing and distributing transparent information where there is fraud and corruption.<sup>14</sup> A few examples suffice to illustrate: Oxfam International provides food to starving populations, Transparency International is the watchdog organization over potential corrupt practices of states and corporations; and Doctors without Borders delivers medical aid to people afflicted by natural disaster and armed conflict.

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Private governance can also mean the collective governance efforts of private firms to “police” their own networks. These private governance structures include principles and professional standards to attenuate market failures and codify specific codes of conduct.<sup>15</sup> For example, because national governments often lack the expertise to set technical standards for global communications technology, international private standard-setting bodies have stepped in to do so. Or, because governments have neither the power nor the skill to mitigate the risk of terror attacks in vulnerable sectors such as nuclear power, oil refineries, or chemical plants, they have enlisted private firms to assess, regulate, and manage that risk.

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Finally, states can delegate governing authority to a hybrid form of governance called “public-private partnerships.”<sup>16</sup> This means that international organizations, acting as their agents, enlist business enterprises, NGOs, and independent experts to develop codes of corporate and government behavior intended to reduce the effects of global “bads.” These codes, for example, address human rights abuses, attempt to ensure food safety, or promise to moderate resource exploitation.<sup>17</sup> Although they are neither treaty-based nor enforceable, they have become increasingly important because, as John Ruggie states:

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Not only is it beyond the capacity of states alone to respond effectively to the magnitude and complexity of globalization’s challenges, it is beyond *any* sector to do so alone. Governance involves drawing on the skills and capacities of different social sectors and actors, and getting them to pull in the same direction for the sake of creating public value.<sup>18</sup>

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For example, global health is now being administered as a public-private partnership of the World Health Organization, NGOs, and the pharmaceutical industry; global standards for food safety are set in public-private partnerships between the World Trade Organization (WTO) and private associations.

By the sheer dint of its overwhelming power, the United States has one more card up its sleeve if it wishes to curtail the negative effects of globalization: it can attempt to control globalizing networks on its own. Its leaders can, for example, attempt to wage a “global war on terror” single-handedly. They can pursue a strategy of “offensive liberalism,” mandating and enforcing neoliberal ideas in nations across the globe.<sup>19</sup> They can manipulate access to the vast U.S. market to alter the behavior of those who want to sell to it.<sup>20</sup> They can freeze the global assets of states who threaten to upset the international system. They can wield control over much of the globe’s communication and transportation flows. They can bend multilateral institutions to America’s will by withholding its contribution to their annual budgets or simply by refusing to cooperate with them. This choice—called “unilateralism” by its detractors—is not available to other, less powerful states.

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In sum, we define globalization as networks of interdependence, as the ideas that support them, and as public, private, hybrid, and unilateral attempts to govern them. In the pages to follow, we shall see that each of these facets of globalization challenges American politics, government, and law in a different way.

## THE IMPACT OF “UNGOVERNED” GLOBAL NETWORKS AND NEOLIBERAL IDEAS

### The Consequences of Government Privatization

“Privatization” is the neoliberal idea holding that governments should release some of their functions to the free market. As Ali Farazmand has written, the ideology of privatizing government is grounded in the idea of the supremacy of the market as an all-encompassing institution for a functioning society and the most efficient institution governing the economy.<sup>21</sup> In practical terms, this means that states put their governing tasks—which normally operate to the benefit of society as a whole—into the hands of private firms, who operate for their individual profit. This privatization takes the form of government contracts, outsourcing, and the selling off of entire economic sectors. Governments thus pass on to private firms a range of operations, from health care and telecommunications to prison management and even the military.

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The concept of privatization is not new. In fact, it extends back to the dawn of the industrial era and the “enclosure” of the commons—the process by which land held in common by the community was fenced (enclosed) and deeded or entitled to private owners, excluding all others. Privatization is a modern mechanism of enclosure, in which formerly collective goods become private goods—that is, in which goods (and assets) that government once provided to its citizens as “entitlements” are transferred to private parties, who produce these goods for profit and sell them to all or to some subset of the public.<sup>22</sup>

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What *is* new is that globalization and privatization reinforce and strengthen one another. The global spread of privatization ideology has

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driven the growth of international trade and investment. The exponential growth of global economic networks has accelerated the push for privatization. The dissolution of borders has made competitiveness in international trade and investment an essential factor in a nation's ability to create jobs, raise wages, and generate wealth. According to neoliberal ideology, competitiveness requires the state to free national resources and make them "productive" (i.e., available for investment in the private sector). The effect has been to "shrink" the state and outsource public responsibilities to private actors.

The promise of state-shrinking is that, by reducing costs, governments can also reduce taxes, putting more resources into the hands of private consumers and investors, who can make better decisions about how to allocate those resources. Growing private savings and investment spark national economic expansion and enable firms to innovate and become more productive, reducing the costs of services previously provided by the government. This economic growth, in turn, increases national power. Thus, the argument goes, private gain serves the public good.

Theodore Lowi has written that, because there has never been a very large sector of public ownership in the United States, there is very little room in America for privatization—that is, there is very little of the American state to shrink.<sup>23</sup> Alfred C. Aman, in chapter 1 of this volume, disputes this claim. The New Deal of the 1930s gave birth to an expansive administrative state, and Aman shows that globalization has led to privatization at all important levels of the U.S. government. He focuses specifically on the privatization of public service agencies such as welfare, prisons, and prison health care, arguing that when governments contract out significant public services to private firms, the profit motive can undermine rather than underwrite the public good. When the bottom line becomes the top concern, core values of American liberal democracy—transparency and public monitoring, in particular—are jeopardized. Furthermore, Aman challenges the core rationale of privatization when he argues that privatization of government services might *not* actually provide the promised improvements in government quality or cost-efficiency.

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In chapter 10, Beau Grosscup explores the ways in which private actors are even coming to carry out the central mission of the state: the provision of national security. Indeed, although the George W. Bush administration entered office inclined to limit the role of government to the essential task of national security, neoliberal ideology actually provided a rationale for the "privatization" of the national security apparatus. Grosscup documents how privatization affects functions that range from the provision of military housing to the operation of high-technology weapons and information systems. Private corporations secure sensitive port facilities and military energy facilities, run military hospitals, provide intelligence services, and even supply private armies to wage the war on terrorism. Indeed, by July 2007 at least 180,000 private contractors were providing "security services" in Iraq. Private actors even carry out terrorist threat assessment tasks: private data contractors are used to produce and assess terrorist threat levels and conduct public surveillance and monitoring.

Meanwhile, foreign multinationals now operate much of the U.S. national security apparatus. Grosscup cites a recent Pentagon study that identified seventy-three foreign suppliers that had provided parts to twelve of the most important weapon systems used by American troops, and he presents a detailed discussion of the British firm BAE, one of the top ten military contractors in the United States. Grosscup further asserts that foreign companies either own or run the majority of U.S. port terminals—though, as the 2006 controversy regarding Dubai Ports World suggests, this state of affairs has not entirely escaped the attention of Congress or the public.

If the goal is to make the economy and government more efficient, this growing privatization of national security makes sense, especially in the wake of the terrorist attacks of 9/11. Those who defend the privatization of national security argue that global sourcing for weapons systems reduces their cost because competitive bidding for private contracts means that the price tag for security services is lower, relieving the tax burden on American society. Furthermore, private companies can be mobilized more quickly than even national military forces, thus reducing the need for a large and expensive standing army. Grosscup argues, however, that if foreign firms control the security apparatus, and if the concept of security is broadened to include economic and social rights, privatization weakens *real* national security.

## The Growing Inadequacy of Public Law

While national security may be compromised by privatization, ungoverned global forces weaken the traditional legal protections of U.S. citizens. It is commonplace to note that the imperatives of the market may be inconsistent with the need to uphold the public interest; what has received less attention is *how* this trade-off manifests itself within the context of globalization. In the United States, federal rules that govern private behavior in the interest of the public good are the product of administrative agencies such as the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), and the Securities and Exchange Commission (SEC). Some have viewed these regulatory agencies—or at least some of their rules—as fetters on free market exchange and obstacles to the economic efficiency required to compete. Others see them as necessary pillars of public protection.

As noted above, globalization heightens the economic competition that renders regulatory “fetters” intolerable to those firms who must compete to survive. And its force has freed the domestic market from many regulatory constraints. Private firms, whose competitors are spread across the globe, are more anxious than ever to cut production costs and thus lower the price of their goods, making their wares more attractive in a ruthless global marketplace. Companies are caught in a dilemma that forces them to choose between obeying laws that protect workers, investors, and

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environmental quality, on the one hand, and sidestepping those laws in the interest of enhancing productivity, on the other. More often than not, they choose productivity. The restless search for cost reduction often leads firms to eschew government regulations and seek maximum flexibility in their operations.

Katherine V. W. Stone in chapter 2 examines the role of global competition in inducing the U.S. government to relax or repeal its protective labor legislation. Stone shows that no new labor laws have been enacted at the national level for many years, but—as a result of global competitive pressures encouraging the use of temporary and contingent workers—there have been major revisions in the interpretation and application of existing doctrines. The cumulative effect of these practices and enforcement revisions has been to diminish the protections the laws afford. This, she argues, has led to the deterioration of workers' bargaining power, the reduction of benefits such as retirement and health insurance, and the absence of any legal protection for independent contractors. Nevertheless, Stone says, U.S. policy makers could reinvigorate worker protections under conditions of globalization by undertaking measures that promote productivity, such as providing skills training or health insurance to working people. These measures would protect workers without imposing costs directly on firms.

But globalization creates other obstacles to government regulation. Even if firms do submit to laws that cut into their profits, many of those are simply inadequate because their power does not reach beyond U.S. borders. The safety of food sold to Americans depends on regulation in China and elsewhere. Environmental protection depends on controlling pollution that originates outside the bounds of U.S. law. Internet providers have offshore sites delivering free content to Americans without permission of the copyright holder, allowing many downloaders to sidestep U.S. intellectual property law. As Douglas A. Kysar and Ya-Wei Li note in chapter 3, "U.S. law reflects the traditional Westphalian conception of sovereignty, in which each individual nation-state is deemed to have nearly absolute authority over the space within its physical borders." Transnational flows—of goods, of pollution, of information, and the like—transcend national jurisdictions, pushing this conception of legal sovereignty beyond its breaking point.

Kysar and Li argue that American environmental law falsely assumes that America's territorial borders form a fortress, fending off pollution from abroad. Those laws—once robust and effective—are blind to global forces and are now woefully deficient. Indeed, two types of transnational flows—bioinvasive species and transpacific air pollution—demonstrate the invalidity of the law's assumption. More and faster trade brings more container ships transporting not only goods but also invasive species such as zebra mussels that invade the habitat of native wildlife, often killing them or devouring their resources—and ultimately affecting the U.S. economy and public health. Meanwhile, growing transboundary air emissions (e.g., air pollution and dust) from East Asia are polluting the air in North America. Neither the Endangered Species Act nor the U.S. Clean Air Act can

deal with these environmental dangers. Although stronger rules in the countries from which these global bads originate would be more effective than those within U.S. borders, countries in which these species originate have few laws that control their “export.”

In chapter 4, Anupam Chander examines the fate of two additional sets of U.S. regulatory protections—those protecting Americans investing in foreign securities and those that promise to protect U.S. copyright holders. While the SEC is a highly effective agency for regulating the stock market and preventing corporate abuses, Americans investing abroad via the Internet do so in countries that have no such protection. They therefore expose themselves to greater risks. Meanwhile, easy acquisition of copyrighted material over the Internet presents similar obstacles for U.S. intellectual property rights laws. The networked structure of the Internet—the absence of a central authority—makes it difficult for regulators to stem the illicit flow of movies, music, and other private goods that can now be distributed electronically as digital information. Chander argues that, although these cases of “regulatory leakage” show that existing U.S. regulations cannot ensure comprehensive protection of Americans’ rights in foreign jurisdictions, U.S. regulators can try to outsmart the forces of globalization by focusing on key choke points—search engines, website hosts, and Internet service providers and routers—which cannot escape the grasp of regulatory control. However, blocking the flow of information at such choke points is a blunt instrument that might ultimately involve high costs—notably, in the potential to curtail freedom of speech.

## THE IMPACT OF GLOBAL GOVERNANCE

### Public Governance and Challenges to the U.S. Constitution

One way to stop the import of invasive species, Internet piracy and fraud, illegal trade, and the activities of other harmful global networks is through global public governance: authoritative international organizations based on international treaties that give teeth to international law. Governments enter into treaty arrangements because their countries are interdependent with one another and because, as we saw above, their domestic laws are often inadequate to ensure their societies’ enjoyment of security, health and safety, and environmental protection in an interdependent world.<sup>24</sup> The United States has entered into treaties with other nations to slow the international arms race, ban chemical weapons, open regional trade areas, manage the Great Lakes, and complete countless other tasks that require the cooperation of other governments.

The rules for making, ratifying, and implementing these treaties are set out in the U.S. Constitution. Indeed, the Constitution consists of only seven articles—four of which pertain to treaties: Only the federal government is empowered by the Constitution to enter into treaties with foreign countries; individual state governments are prohibited from doing so. Only the president is empowered to negotiate treaties, but must do so with Senate approval. Federal courts are empowered and admonished to

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uphold international treaties. And finally, the Constitution states firmly that “all treaties shall be the supreme law of the land.”<sup>25</sup>

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But globalization has given the U.S. government an incentive to enter into treaties far more extensive and intensive than the framers of Constitution could have ever envisioned. When the United States was founded, treaties were largely bilateral; they were not governed by international organizations, and they were negotiated to regulate *interstate* relations, not relations between states and private citizens or firms. But because of the explosion of global networks, treaties that attempt to control them have undergone three significant changes:

1. They have become progressively more *multilateral* in character.
2. They have led to exponential growth in the number of international treaty organizations.
3. They have focused increasingly on regulating *private* behavior.

As we shall see below, each of these developments presents challenges.

Global public governance is nothing new. Multilateral treaties and institutions became important *before* the present age of globalization. In the wake of economic conflict in the 1930s that both deepened and widened the Great Depression, the United States after World War II led the way in creating multilateral institutions to provide stability and mutual benefit in international economic relations. Notably, Washington exercised leadership rather than dominance, making sacrifices to coax others into cooperating with these institutions. The General Agreement on Tariffs and Trade (GATT) emerged as a forum in which its members negotiated the collective reduction of tariff barriers in order to stimulate world trade and economic growth. The International Monetary Fund and the World Bank (agencies of the United Nations) gathered contributions from their member states to mitigate balance-of-payments crises, facilitate economic adjustment, and promote recovery and development in the wake of the war's devastation. Even the Bretton Woods dollar-exchange regime, which Washington *did* control, served the collective interests of stability and predictability in international exchange—all in the interest of achieving global prosperity.

Globalization, however, has changed the original character, intent, and substance of these and other institutions of international public governance. States have amended and expanded multilateral treaties, giving them increasing power to intrude into the territory of their members and usurp their domestic laws and practices. The GATT, for example, became the World Trade Organization, whose rules expanded from those that would lower tariff barriers to cover areas such as services, investment, and intellectual property, undermining domestic laws that have traditionally governed these issues. The International Atomic Energy Agency undertakes intrusive inspections of its members' nuclear facilities in an effort to govern the networks through which nuclear material flows across national borders. Although states originally created Interpol to facilitate *national* police efforts to catch criminals crossing national boundaries, the

organization has evolved to deal with what the international “*community*” deems to be global human rights abuses and transnational crimes such as drug trafficking, terrorism, slave trade, and weapons smuggling. The Kyoto Protocol of the United Nations Framework Convention on Climate Change now assigns mandatory emission limitations to all signatory states to reduce greenhouse gases—limitations that negate those set by domestic agencies. Countless other examples abound.

The United States is not always rendered powerless in the face of these profound changes. Due to its general preponderance and specific capacity to block others’ membership in multilateral organizations, the United States is often in a position to persuade others to cooperate with its domestic laws. In the intellectual property case discussed above, for example, Chander describes how the United States threatened to block Russian entry into the WTO if it did not enforce U.S. copyright law. The issue was a Russian website that—under Russian law—permitted individuals worldwide to download a huge catalog of songs at a fraction of the cost charged by licensed services. American officials called this “piracy,” and under the threat of having its WTO membership blocked, Russian authorities shut down the offending site. Although the United States is one of few that can credibly make these kinds of threats, it is ultimately the existence of public governance organizations that facilitates this kind of bargaining that can control the proliferation of these global bads.

While treaties and organizations were once confined to the narrow governance of diplomatic relations among states, under globalization they also have come to govern relations among states and private actors. WTO rules include some protections for multinational firms engaging in foreign direct investment, as do literally thousands of bilateral investment treaties among pairs of states. National governments created the International Criminal Court in the 1990s not only to resolve disputes among themselves (as under the International Court of Justice), but—as information about human rights abuses became increasingly available through global communication networks—to prosecute private individuals guilty of “crimes against humanity.” Meanwhile, these and other international institutions increasingly include procedures to permit multinational firms and NGOs to participate directly in multilateral decision making. Globalization in its various forms has encouraged this trend—and has fed the creation of more treaties and international organizations that reach “behind the border” to affect private U.S. firms and even individual American citizens.

Because treaties, once ratified, become the law of the land in the United States, global governance diminishes the role of the U.S. Congress in domestic governance and transforms the role of the American executive and the judiciary. Global public governance of private actors thus undermines the distribution of powers envisioned in the Constitution and can even infringe upon constitutionally guaranteed citizens’ rights. Finally, because global governance typically involves only a modest role for elected representatives, little transparency, and virtually no public accountability, it can be seen as a direct challenge to democratic governance. Each of these effects deserves a more detailed discussion.



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In the United States, Congress and the judiciary are the *guardians* of legitimate public authority. They exercise this authority through constitutional mandates, electoral processes, and congressional legislation. These mechanisms of authority are absent in treaty-based international organizations. This helps explain, as Edward A. Fogarty reminds us in chapter 5, why Congress has long been the most skeptical branch of the U.S. federal government when it comes to subjecting the United States to the decisions of other nations through participation in international treaties—and why it has sometimes rejected those treaties.

Yet Fogarty argues that as the United States becomes more interdependent with other countries on a variety of issues, the costs of simply rejecting treaties intended to manage this interdependence have grown. This shift puts Congress between a rock and a hard place. Elected representatives may accept treaties and membership in international organizations to mitigate globalization's harmful effects on their constituents, but in doing so they limit their own authority to pass laws to pursue related protections not sanctioned by those international treaties.

Meanwhile, according to Fogarty, the very requirements of effective global governance exacerbate this problem of democratic legitimacy. Global governance increasingly requires technical expertise: weapons inspectors must know what they are looking for, reducing global warming requires scientific knowledge, trade officials require international legal expertise, managing global finance requires accounting expertise, and so on. These experts are necessary for effective global governance, but they are often far removed from the messy democratic processes of legitimating public authority.<sup>26</sup> Therefore, in the absence of “legislation by legislators” at the global level, the proliferation of treaties to manage globalization weakens the power of Congress and domestic sources of legitimate public authority.

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In chapter 6, Julian G. Ku and John C. Yoo go even further than Fogarty, arguing that when international organizations interpret the application of treaties to the U.S. government and American citizens, they also usurp the president's executive role and the Supreme Court's judicial role. International law under globalization thereby undermines the doctrine of “separation of powers” that expresses the basic American system of government in the form of checks and balances. Three examples suffice to illustrate this point.

First, chapters 5 and 6 both cite the case in which the WTO overruled a U.S. law protecting sea turtles, with a three-fourths vote of its membership. Therefore, even if the United States opposed the interpretation, it was still required to obey it and thus cede some of its ability to pursue environmental protection policies, leaving sea turtles unprotected.

Second, Ku and Yoo cite the case of the International Court of Justice (ICJ) and Texas's administration of capital punishment. In 2003, Mexico sued the United States in the ICJ to block the execution of Mexican nationals facing the death penalty who had not been informed of their rights. In this case, the ICJ asserted its jurisdiction and ruled that the United States was required to suspend these executions—and in the

process, argue Yoo and Ku, essentially created a new treaty obligation that many argue is the equivalent of federal law and enforceable in U.S. courts. Indeed, President Bush ordered new state court hearings for the defendants based on the international court ruling.<sup>27</sup>

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Finally, some international organizations that once relied on member states to enforce treaty obligations have been empowered to directly enforce international law. For example, the Chemical Weapons Convention appoints international inspectors who are accountable to the United Nations but not (directly) to domestic governments. In the United States, this provision violates the Constitution's allocation of appointment powers to the president. Indeed, in each of these three cases, powers assigned to a particular branch of the federal government by the Constitution have been delegated away to an international institution.

James J. Varellas is also concerned with the impact of global governance on constitutional doctrines, both substantive and procedural. In chapter 7, he focuses on the ways in which free trade agreements such as the WTO and the North American Free Trade Agreement (NAFTA) impose conditions that contradict and undermine economic and social rights of U.S. citizens that the Constitution guarantees—an argument similar to but broader in scope than Stone's. Varellas begins from the perspective of the more expansive social and economic rights (and the social safety net they created) enshrined in the New Deal and its "second bill of rights." He argues that more recent free trade agreements, infused with neoliberal ideology, have significantly reduced the government's capacity for domestic intervention to protect these rights.

This state of affairs is maintained, Varellas argues, by the use of "congressional-executive agreements" (as opposed to formal treaty ratification procedures), in which Congress permits the executive branch to commit the United States to trade agreements without a two-thirds majority vote in the Senate. According to Varellas, these agreements usurp the role of Congress and place excessive power in the hands of the president—yet another avenue through which global governance may upset the balance and separation of governing powers enshrined in the Constitution.

All three chapters in part 2 argue that these developments endanger the institutional foundations of American democracy. Global governance is based largely on treaties, but it shuts out domestic legislators once those treaties come into force. Indeed, there is little role for elected representatives in global governance, *period*. When voting is required to reach a decision on specific issues, those who have a vote are not elected representatives, but rather delegates appointed by heads of state—in the United States, the president. In many international organizations, a majority of delegates from other countries can outvote the United States, creating laws and regulations that supersede and sometimes contradict domestic legislation or even the preferred policies of the U.S. government. In short, global governance undermines a basic requirement of democracy: that "the exercise of power be rigorously and democratically authorized by the people."

Can the United States both participate in international institutions to govern globalization *and* sustain democratic governance and constitutional

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guarantees for American citizens? Ku and Yoo provide a remedy in the doctrine of “non-self-execution.” This doctrine holds that, unless Congress passes a subsequent law to implement treaties, those treaties would not become binding U.S. law. This would preserve congressional control over the American legal landscape. In this way, an accommodation can be reached between globalization and constitutionalism that permits deeper international cooperation while maintaining basic constitutional values.

Fogarty believes that this will not work, however. Multilateral governance of globalization is here to stay, he argues. The language of treaties and articles of agreement already contain provisions for implementation. And because interdependence deeply affects all aspects of life in the United States, the costs of creating political barriers to U.S. participation in international organizations—both for the United States itself and for the world—are simply too high. Fogarty’s remedy would be to democratize international organizations. Key members of Congress, he argues, must participate more directly and assertively in global legislation (i.e., treaty negotiation) via transnational legislative networks—an informal “global legislature of national legislators.” In this way, members of Congress not only would represent American citizens directly in global governance but also would gain a greater understanding of global issues affecting U.S. citizens and “arrest the trend toward executive power in international organizations.”

In sum, the forces of globalization have sparked the proliferation of international laws and international organizations that attempt to control global networks and their effects. These three chapters all agree that this international institutional proliferation can vitiate the U.S. Constitution. When the spread of global public governance shuts out Congress, elected representatives legislate, the executive has to enforce international laws, and even the Supreme Court may have to bow to international judicial decisions that undermine American legal statutes and doctrines. American democracy is thus endangered. Unless a remedy is found, we can understand and expect a backlash against global governance in the United States and a turn toward private governance and unilateralism.

## The Dangers of Private Governance and Public-Private Partnerships

Those who decry the dangers of public international governance for U.S. politics and law often advocate private governance of globalization, or “governance without government.”<sup>28</sup> Indeed, as global networks have proliferated, authority to govern them is increasingly transferred from the public to the private sector. Private companies have both the knowledge and the capability to manage some of globalization’s harmful effects, and when they act together, the argument goes, there is little need for international or even national regulation. For example, despite U.S. refusal to sign the Kyoto Protocol, businesses are taking the lead in global environmental protection; many Fortune 500 companies have joined together in the Business Environmental Leadership Council to take early action

against global warming. Meanwhile, U.S. and Canadian chemical manufacturers, together with environmental NGOs, formed the Responsible Care Program to promote environmental principles in the global chemical industry.<sup>29</sup> Private governance conforms to key principles of globalization—freedom of commerce, voluntary regulation, privatization, and “state-shrinking”—while acknowledging its potentially detrimental effects.

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Philip J. Weiser in chapter 8 shows that such global private governance does, however, undermine U.S. administrative law. Looking at standard-setting for new communications technologies, he examines the conflict between the goals of international standard-setting bodies and national antitrust law. Network industries need their products to be interoperable, and standards facilitate interoperability. Global information technology (IT) firms have established their own standard-setting organizations (SSOs) to facilitate market development; their selection (or rejection) of particular standards is essential not only in creating a level playing field but also because they can make or break IT companies. Yet these SSOs exist in tension with U.S. antitrust laws: they advance exclusionary objectives that undermine American antitrust enforcement, while antitrust enforcement can undermine standard-setting and thus harm the competitiveness of U.S. firms.

As a remedy, Weiser recommends a market-based approach that aims to avoid the kind of antitrust litigation that can obstruct the competitiveness of American firms. He suggests more transparency to improve the oversight of antitrust agencies. For example, he recommends that international standard-setting bodies disclose patent rights that inhere in official standards. He further endorses the practice of requiring patent holders to commit to licensing terms before the patents are included in official standards. These measures can improve antitrust oversight, which will bolster the effectiveness of private standards bodies that might otherwise be less vigilant in ferreting out abusive conduct. Weiser supports private governance of globalization and argues that the principal goal for antitrust oversight should be to allow those bodies to develop their own strategies for addressing such conduct and preventing it from occurring.

In chapter 9, Kenneth A. Bamberger explores a case in which the private sector is enlisted to manage the risk of a particular global bad within the United States: terrorist attacks. Such attacks are likely to be directed at private firms: 85 percent of the United States’ critical infrastructure (energy, nuclear, water, and chemical facilities) is in private hands. Ironically, the terror threat has turned the “private” into a public security issue requiring governance in the form of risk assessment and regulation. But the government cannot take on these tasks. This is because the administrative processes of government are slow and static while terror networks are fast and dynamic. Furthermore, “one-size-fits-all regulation cannot easily account for the ways in which risk manifests itself differently across firms.” Therefore, the federal government has called upon private actors from at-risk industrial sectors to provide the essential public safeguards, response capacity, and network resiliency that can defend against a domestic terrorist attack.

When private actors are enlisted to govern terror risks, Bamberger argues, “policy makers must rely on private firms’ choices regarding risk assessment, and those choices are not always in the public interest.” Firms are likely to take only those precautions related to private costs to their facilities and, because the probability of an attack is low, they have little incentive to pay a high cost to attain adequate protection. For example, although a terror attack is likely to cause damage far beyond a single critical facility, private actors will take only the precautions that are determined by private costs to that facility—private “governance” will not reach far enough to deal with the fallout caused by damage to a nuclear plant or the spread of hazardous material from an attack on a waste facility.

Furthermore, private governance involves certain information problems: not only is the information that private firms possess proprietary and often inaccessible to the public or even to policy makers themselves, but monitoring is difficult both because of the diversity of terror risks and because effective “governance” is difficult to evaluate in terms of measurable outcomes.

Despite the efficiency gains of private governance, Bamberger, like Grosscup in chapter 10, worries that when private actors take over the provision of national security, they make public policy with dangerous consequences for liberal democracy. Both argue that the danger lies in the absence of public oversight: private actors are less accountable for their activities and for their use of public funds than public agencies. Liberal democratic practices become more difficult as private actors govern security for industries that are magnets for terror attacks.

In Bamberger’s view, as the protection of national security is privatized, we will see less protection of public safety. He therefore argues that *increased* government oversight and public-private coordination provide the necessary solutions. For example, government agencies can offer financial support for firms to take more protective measures in the face of terror risks and can collect information about vulnerabilities that firms will not share with competitors or the public “but that could be acted on in a coordinated manner.”

Until such solutions are implemented, however, the ultimate consequence of private governance—both of traditional government services and national security—is the weakening of certain cornerstones of liberal democracy. Liberal democratic practices become more difficult as private governance removes the public accountability, oversight, and citizen involvement needed to sustain it. As Aman argues in his chapter, “When public functions are carried out by private actors, the requirement of transparency and public participation—the keystones of administrative democracy—is often reduced or set aside.”

Public-private partnerships can also enable evasion of U.S. law and thus permit global bads to harm Americans and undermine the law. FDA food inspection, for example, has been cut by 80 percent since the 1970s as the agency has engaged in partnerships with private companies to monitor food safety. The FDA permits food importers to use private laboratories for foreign-sourced food testing, before that food—whether fish from

Vietnam, vitamin C tablets from China, or tomatoes from Mexico—enters the United States. If the food fails the test, the importer is allowed to find another laboratory to test the food. Importers thus can potentially seek out laboratories that are willing to give the tainted food a clean bill of health and still enter the consumer market.

Public-private partnerships are multiplying at the global level with similar potential risks for American consumers. Aman shows that the global standards for food safety lack “the type of administrative openness or procedural process that we have come to expect from domestic administrative bodies.” The central standard-setting organization is the Codex Alimentarius Commission, based in Rome. Codex officially comprises government delegations with active and formal assistance from official industry advisors, who serve as actual country representatives. WTO officials use Codex standards to determine whether national laws governing food safety represent a trade barrier. Once Codex standards are adopted, argues Aman, “the U.S. administrative agencies in charge of food safety will be in charge of administering and enforcing them.” In this way, global public-private partnerships supplant domestic administrative processes—and public oversight thereof—in the United States.

### The Dangers of Unilateral Governance

Unlike smaller countries, the United States can wield power within international organizations to preserve domestic law. But some observers believe that this approach is insufficient. They have suggested that U.S. power allows it to govern many issue areas touched by globalization unilaterally, without dependence on the cooperation of private actors or other states in international organizations.<sup>30</sup> Many observers go so far as to argue that in order to protect national security and ensure continued American power, the United States must resist all those attempts at global governance that do not specifically serve the American interest. Indeed, they argue, unilateral governance of globalization is the surest way to guarantee that *American* interests are protected.

The argument for resisting global public governance is that economic globalization can become a threat to American superiority if others “win” in global economic competition. When global market competition is fierce, international organizations—even, or especially, those that codify neo-liberal economic practices—can hamper the pursuit of U.S. national economic interests. For example, Chinese membership in the WTO not only improves its access to global markets and thus its prospects for export-led growth but also prevents the United States from undertaking measures to contain this growth (e.g., trade sanctions to compensate for an overly weak Chinese currency). If China succeeds, the United States loses in terms of relative economic power. For those who believe in unilateral global governance, the United States must control the processes of economic globalization that would permit others to be more competitive. Only then can it preserve its own political, economic, and ultimately military primacy in the world.

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Indeed, unilateralists believe that military superiority can be wielded to protect national security. With its superior military power, they say, the United States can issue credible threats to counter nuclear proliferation and protect its territory from attacks by other nuclear powers. From this perspective, reliance on arms control treaties actually *reduces* U.S. national security. They tie America's hands, so that it cannot achieve and maintain the superiority that will increase its security. Indeed, this was the reason the United States withdrew from the Anti-Ballistic Missile Treaty and rejected both the Comprehensive Test Ban Treaty and the Treaty Banning Antipersonnel Mines.

Do U.S. efforts to exert its military power unilaterally have an impact on American domestic politics? Grosscup argues that they do. He asserts that the effect of American unilateralism is to militarize American society and weaken the democratic protection of U.S. citizens from the encroachment of the state over their lives. He argues that Washington has increasingly globalized its military power to promote U.S. political and economic interests around the world. Within this context, the Bush administration's response to the 2001 terrorist attacks was to pursue a coordinated military program both abroad and within the United States. To execute this program, it expanded the "national security state"—those aspects of executive power that are immune to democratic oversight. According to Grosscup, the result has been the reallocation of public resources away from social priorities toward security services, the aggrandizement of executive power, and the erosion of civil liberties.

Not only can unilateral governance of this kind spur the growth of a state apparatus that undermines democratic practices, but it may not be adequate to control those global forces that can hurt the United States. Unilateralism, for example, cannot prevent environmental degradation, pandemics, or causes of global warming that originate beyond U.S. borders. Unilateralism is not an effective way to control invasive species, the spread of illiberal ideas, and risky investments. It is doubtful that the globalization of democracy can be promoted through the barrel of a gun. Furthermore, unilateral military expansion has deeply unsettled much of the world, and efforts to control terrorist activities can be counterproductive, giving birth to even more terrorist networks.<sup>31</sup>

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## GLOBALIZATION AND AMERICAN SOVEREIGNTY

As we have seen above, ungoverned globalization, neoliberalism, and global governance have transformed domestic governance in the United States. What does this transformation mean for American sovereignty? For those who treasure nationalist sentiments, the idea that globalization broadens U.S. national sovereignty verges on treason.<sup>32</sup> For others, to the extent that the processes described above undermine domestic governance, sovereignty is weakened. For globalization enthusiasts, sovereignty is an outdated and useless concept anyway, a modern Maginot Line.

A lively debate on sovereignty now rages between proponents and opponents of globalization. As Edward S. Cohen suggests in chapter 11,

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these debates “over the meaning and future of sovereignty in the United States are now common in areas such as trade policy, immigration, language and culture, and even constitutional interpretation.” The very fact that these debates have arisen indicates a fundamental shift in the strength and character of American government, and a wrenching transformation of the relationship between state and society. Those changes, however, are complex and uneven. Taken together, the arguments of this volume suggest that “sovereignty” is a seventeenth-century conceit that now serves as a useful myth, a normative marker of where one stands on the subject of globalization.

What is sovereignty? It is the claim by which states exercise power within strictly defined territorial boundaries.<sup>33</sup> Stephen Krasner makes a useful distinction among four ways that states claim sovereignty: They can claim *domestic* sovereignty (i.e., supreme political authority within their territorial boundaries); *interdependence* sovereignty (control over flows of goods, information, and people in and out of territorial boundaries); *international legal* sovereignty (mutual recognition of their exclusive jurisdictions); and what he calls *Westphalian* sovereignty (acceptance of the principle of noninterference of other states within their own territory).<sup>34</sup>

As this introduction has suggested, globalization has diluted all four of Krasner’s sovereignty types. Government policies that gave birth to globalization were a conscious surrender of interdependence and legal sovereignty. Privatization, Aman and Cohen remind us, cannot be separated from globalization as an instrument of state-shrinking; the result is a loss of sovereignty for many domestic democratic institutions. Furthermore, both terrorist networks and unilateral governance have compromised Westphalian sovereignty.

How have terrorists and unilateralism undermined American sovereignty? Although terrorist networks are not *state* actors, they are capable of launching invasions across national borders, violating the principle of nonintervention. And the United States has promised to intervene unilaterally in states that harbor those terrorist networks. This unilateralist pledge—and the doctrine of preemption that supports it—also threaten to breach the principle of nonintervention.<sup>35</sup> Each time that principle is violated without significant sanction, it is weakened, paving the way for others to defy it as well. In fact, Westphalian sovereignty has long been a bit of a myth; powerful states rely on their own power to defend against foreign invasion or to invade other states at will; weaker states join alliances to do so.

## Sovereignty and the Institutions of Governance

The sovereignty myth treats states as “black boxes” or unitary actors. That may have been accurate long ago when states were considered the possessions of “sovereign” kings and queens, but democracy, nationalism, and globalization have changed all that. The black box has been opened to reveal the many facets of sovereignty, each affected differently by globalization. In the United States, as in other democratic nations, state power



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is not monolithic. A number of governing institutions are legally imbued with sovereign powers; as we have seen, globalization has touched and transformed many of them.

Just as American government is divided into several branches and levels, the sovereignty of each government institution and its constituent parts is affected in a unique way by globalization. Executive institutions may have gained more sovereign power—at least in relative terms—while legislative and judicial institutions have lost some of their sovereign authority. Globalization currently affects federal institutions and laws differently than state and local institutions and laws. Some institutions of government are sheltered from globalization, retaining their sovereign authority, while others are more exposed to the sovereignty-sapping forces of global networks and governance.

The bundle of institutions and government functions that comprise domestic sovereignty are the focus of this volume. As we unpack that bundle in the chapters to follow, we shall see that it is the executive branch of government that sets and implements foreign and defense policy, negotiates treaties, and decides when to act unilaterally; it is also the executive branch that makes the tangible decisions affecting interdependence and judicial sovereignty. Because it holds the reins of foreign relations, its institutions—the presidency, the national security agencies, and the Department of Defense—have taken measures to ensure that they are not compromised by global forces. Indeed, Grosscup argues that this part of domestic sovereignty—the sovereign power of these institutions—has even been enhanced by unilateral overseas adventures. We shall see in the pages to follow that globalization has made congressional oversight of the executive increasingly problematic and has created international institutions as rival sources of legislation.

We shall also see that the judiciary has lost some of its sovereign power as its decisions have been subordinated to international law. In the aforementioned case of the Mexican man slated for execution in Texas, Chief Justice John Roberts remarked that what disturbed him about the argument for the defense was “that it seems to leave no role for this court in interpreting treaties as a matter of federal law.”<sup>36</sup>

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Administrative institutions of the state have also lost sovereign authority. Domestic regulation and its implementation are either no longer possible or must yield to public and private global governance mechanisms. And as we have seen, those global institutions are not accountable to the public in the same way that domestic regulatory agencies were designed to be.<sup>37</sup> When they are rendered impotent by global forces that know no national boundaries, they lose their *de facto* sovereign authority. When they must yield to the decisions of international treaty-based institutions, they lose their *de jure* sovereignty.

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## Sovereignty and the Functions of Government

Cohen posits that the responsibilities of government institutions that exercise domestic sovereignty include the provision of security and identity. In theory, a sovereign state provides protection for its members from both

internal and external threats. In return for providing security, citizens obligate themselves to their governments, permit them to have a monopoly on the legitimate use of force—within constitutional limits—and implicitly promise to obey their laws.

Chapters in this volume examine how globalization has affected the federal government's sovereign capacity to provide this security, both from external and internal threats. Grosscup's chapter argues that in its decisions on how to pursue national security through a globalized military force, the state has made society *less* secure. Bamberger comes to similar conclusions from a different perspective: when private firms take charge of providing for national security from the risk of external threats, private governance efforts do not make American society more secure. And finally, if internal security is understood as *economic* security, then Cohen joins Stone and Varellas in arguing that increased trade and economic integration have subjected Americans "to an unprecedented level of insecurity" by removing the social safety net.

### Sovereignty and American Political Identity

In Cohen's view, security and political identity are linked. He argues that when the state provides security from external threats, it "generates a sense of membership in one state ... and thus a relationship of political identity." Since the French Revolution, *domestic* sovereignty has been bolstered by national identity or a common political culture. The French Revolution ushered in the idea that sovereign states were not simply the property of their rulers but were supposed to represent the people who lived within their territory. Those people began to see themselves as a nation of people who have language, customs, political values, and a tradition in common. Those commonalities create ties that together form a national identity or a common political culture. And to the extent that any of these is absent, the others are likely to be stronger. Governments often find that if those living within the territory of a sovereign state have a common political identity and culture, their domestic sovereignty is stronger; they do not have to expend much military power to exert sovereignty—it is exerted through the population's loyalty to the state.

There are two related sources of threat to national identity: First, argues Cohen, an eroding social safety net decreases citizen loyalty to the government, which has traditionally provided what safety net there is. I would add that this exposure to the forces of economic insecurity causes citizens to retreat from national identity into ethnic and sectarian identities that may provide a stronger sense of belonging in multicultural societies.<sup>38</sup> When the government breaks its obligations to those living within its territory, the population retreats from its obligation to identify with that government. Its loyalty to the state is thereby weakened.

The second threat to national identity is immigration and the sweeping demographic changes that have followed. There are 33.1 million immigrants living in the United States today.<sup>39</sup> At 11.5 percent of the population, this is the highest proportion of immigrants in seventy years. Even at

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the peak of the great wave of immigration in the early twentieth century, the number of immigrants living in the United States was only 40 percent of what it is today (13.5 million in 1910). More generally, immigration accounts for two-thirds of U.S. population growth.

Immigration serves as a challenge to national sovereignty because it appears to be a challenge to national identity—and to citizens' sense of economic security. Immigrants compete with citizens for low-skilled jobs.<sup>40</sup> They disproportionately apply for welfare benefits,<sup>41</sup> and they sometimes demand cultural and linguistic accommodation. Many Americans, argues Cohen, see immigrants as a threat to their political community and national culture and have expressed their fears in debates over globalization. These immigration foes have put the question of national identity on the public agenda and accused the government of reneging on its duty to protect the sovereignty of the national territory.

While Cohen analyzes the link between immigration and identity from the point of view of the current native-born citizenry, Jack Citrin looks at the political identity of immigrants in chapter 12. Do immigrants assimilate into the dominant political culture? Do they transfer their primary political loyalties to the U.S. government, thus bolstering the domestic sovereignty of the state? Citrin argues that the United States generally has been successful in integrating diverse immigrants, in part because the social and economic advantages of cultural integration have been overwhelming. His chapter presents extensive survey results, showing that individuals—both native and foreign born—generally identify themselves first as American and only second as a member of their particular ethnic group.<sup>42</sup> While globalization transforms many aspects of law and politics in the United States, ironically it does not touch the fundamental American political identity.

In sum, the authors in this volume problematize the notion of sovereignty under conditions of globalization. Sovereignty is fragmented among different institutions and government functions. Ungoverned globalization, public governance, private governance, and unilateralism affect those institutions and functions in different ways. State sovereignty is a myth, symbolizing the state's obligation to protect society, guard and defend its borders, and exercise legal jurisdictions within its territory. Fear of a loss of American sovereignty is a marker for the rising economic and social insecurity that globalization leaves in its wake. Fear of declining sovereignty strikes deeper fear in the hearts of Americans, and thus it is a useful myth in the hands of antiglobalization forces. What we argue here is that the notion of sovereignty and assessments about its strength or weakness in the face of globalizing forces is misguided. All of the chapters in this volume show, rather, that discussions of sovereignty mask the real impact of globalization: the changing relationship of the state to society, the changing structure of governmental power, and the changing role of government institutions.

## CONCLUSION

This volume makes three arguments charging globalization with altering the relationship between American government and American society.

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That relationship is hinged on both the substance and process of democracy. First, those authors who focus on *substance* see the spirit and letter of the New Deal as the legal font that has historically protected Americans' rights, their safety, their employment security, their health, and their environment. For these authors, globalization weakens the fabric of the American legal system and thus undermines these substantive protections. Second, those authors concerned with *democratic process* see globalization as a threat to the procedural democracy that is enshrined in the U.S. Constitution. From their perspective, globalization endangers the separation of powers that is the cornerstone of American government, specifically by weakening the role of the Congress and/or the judiciary.

It is abundantly clear, however, that the genie of globalization is out of the bottle. Technological advances have enabled the creation of global networks that are not likely to disappear any time soon. The third argument that emerges in this volume, then, is that these networks need to be governed in order to protect American democratic values—both substantive and procedural. We can argue about whether this governance should be global or national, whether it should be public or private, or whether some hybrid form would be best. But that argument must be attenuated by a commitment to fashioning governance structures and processes that offer transparency, accountability, and public accessibility even as they enhance efficiency and mobility. We must commit ourselves to governance that corrects for the blindness of the market so that we can protect American security, health, welfare, and freedom. We must commit ourselves to creating structures and processes that protect America's physical environment. This is a tall order, but it is only with such a commitment that globalization and global governance can uphold the values and institutions of American democracy. Indeed, we have shown that “what goes around comes around”; America may have let the globalization genie out of the bottle, but it has now come home, and it is imperative that Americans cope with the consequences.

## NOTES

1. See, among others, Ulrich Beck, Nathan Sznaider, and Reiner Winter, eds., *Global America* (Liverpool, UK: Liverpool University Press, 2007); Clark Judge, “Hegemony of the Heart,” *Policy Review* 110 (December 2001/January 2002), 3–13; David Barboza, “When Golden Arches Are Red, White and Blue,” *New York Times*, October 14, 2001; and James L. Watson, ed., *Golden Arches East: McDonald's in East Asia* (Stanford, CA: Stanford University Press, 1998).

2. This argument is not always made by critics of globalization or of American dominance. Thomas Friedman has written: “For globalism to work, America can't be afraid to act like the almighty superpower that it is. . . . The hidden hand of the market will never work without a hidden fist—McDonald's cannot flourish without McDonnell Douglas, the designer of the F-15. And the hidden fist that keeps the world safe for Silicon Valley's technologies is called the United States Army, Air Force, Navy and Marine Corps” (“What the World Needs Now,” *New York Times*, March 28, 1999).

3. See, among others, Kenichi Ohmae, *The End of the Nation-State: The Rise of Regional Economies* (London: HarperCollins, 1995); Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (London: HarperCollins, 1990); John Stopford and Susan Strange, *Rival States, Rival Firms* (Cambridge: Cambridge University Press, 1995); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996); Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997); and Jessica Mathews, "Power Shift: The Rise of Global Civil Society," *Foreign Affairs* 76 (January/February 1997), 50–66.

4. Joseph S. Nye Jr., *The Paradox of American Power* (New York: Oxford University Press, 2002), 83.

5. Total world exports grew by an average of more than 10 percent per year between 1950 and 2005. Flows of foreign direct investment increased almost thirtyfold between 1976 and 2004. Net immigration rates have more than doubled in the United States since the 1960s, even as immigration policy has become increasingly restrictive. More than 150 million people are on the move every year—one out of every fifty people worldwide. In addition to the increase in migration over the last fifty years, there has been a marked expansion in the flow of goods worldwide. For trade and investment statistics, see Edward A. Fogarty, "E Pluribus Pluribus? Multilateral Institutions in an Era of Nonstate Actors," Ph.D. diss., University of California, Berkeley, 2007.

6. Immigrants rarely arrive in their host countries without bringing with them ties to family and community in their homeland. These bonds heighten the importance of diaspora communities in the globalization process. With decreasing costs of transportation and communication worldwide, interactions within diaspora communities are increasing in depth. This intensity can be partially captured in the evidence of growth in cross-border remittances worldwide. For example, remittances to Latin America and the Caribbean from Latinos in the United States doubled in the last half of the 1990s. See Roberto Suro and Jeffrey S. Passel, "The Rise of the Second Generation" (Washington, DC: Pew Research Center, 2003).

7. Neoliberalism's notion of "market governance" begins from Friedrich Hayek's concept of a "spontaneous order"—an ordered system that emerges not from intentional coordination among political actors but rather from the unintentional and uncoordinated activities of self-interested private actors; see Friedrich Hayek, *Rules and Order*, vol. 1 of *Law, Legislation, and Liberty* (Chicago: Chicago University Press, 1973). In another classic text, Karl Polanyi cast doubt on the notion of the self-regulating market—that is, a stable spontaneous economic order; see Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 1944). For a comparison of spontaneous, negotiated, and imposed orders, see Oran Young, "Regime Dynamics: The Rise and Fall of International Regimes," in *International Regimes*, edited by Stephen D. Krasner, 93–114 (Ithaca, NY: Cornell University Press, 1983).

8. See Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*. (Cambridge: Cambridge University Press, 1996).

9. For a controversial account of how liberalism's triumph over the other major universal ideology, communism, heralded the "end of history," see Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

10. See, for example, Moises Naim, *Illicit: How Smugglers, Traffickers, and Copycats Are Hijacking the Global Economy* (New York: Doubleday, 2005); and Bartosz Stanislawski, "Transnational 'Bads' in the Globalized World: The Case of Transnational Organized Crime," *Public Integrity* 6, no. 2 (Spring 2004): 155–70.

11. The Food and Drug Administration (FDA) keeps an “import alert” list of companies that may be importing tainted food, but that food is tested by private laboratories that do not report contaminated food to the FDA but rather to the importer who pays for the test. If a shipment fails one laboratory’s test, some importers have been known to switch to another lab to get the tainted product through. See *New York Times*, “You’re Eating That?,” November 26, 2007; Rick Weiss, “Tainted Chinese Imports Common: In Four Months, FDA Refused 298 Shipments,” *Washington Post*, May 20, 2007.

12. See, among others, Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004); Philip G. Cerny, “Globalization and the Changing Logic of Collective Action,” *International Organization* 49, no. 4 (1995): 595–625; David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge, UK: Polity Press, 1995); Dani Rodrik, “How Far Will International Economic Integration Go?” *Journal of Economic Perspectives* 14, no. 1 (2000): 177–86; John Gerard Ruggie, “Taking Embedded Liberalism Global: The Corporate Connection,” in *Taming Globalization: Frontiers of Governance*, edited by David Held and Mathias Koenig-Archibugi (Cambridge, UK: Polity Press, 2003); Wolfgang H. Reinecke, *Global Public Policy: Governance without Government* (Washington, DC: Brookings Institution Press, 1998).

13. On “boundary-spanning” private actors, see Christopher Ansell and Steven Weber, “Organizing International Politics: Sovereignty and Open Systems,” *International Political Science Review* 20, no. 1 (1999): 73–93. On transnational governance partnerships and networks, see Slaughter, *New World Order*.

14. See, among others, Ann Florini, ed., *The Third Force: The Rise of Transnational Civil Society* (Washington, DC: Japan Center for International Exchange and Carnegie Endowment, 2000); Mark Edwards, “International Development NGOs: Agents of Foreign Aid or Vehicles for International Cooperation?” *Discourse* 2 (Summer 1998): 1–12; and Deborah Avant, “Conserving Nature in the State of Nature: The Politics of INGO Policy Implementation,” *Review of International Studies* 30 (2004): 361–82.

15. On global private governance networks, see Rodney Bruce Hall and Thomas J. Biersteker, eds., *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

16. A new cottage industry has recently sprung up on this topic. See, for example, Susan Stern and Elisabeth Seligmann, eds., *The Partnership Principle: New Forms of Governance in the 21st Century* (London: Archetype, 2004); Liliana B. Andonova, “International Institutions, Inc.: The Rise of Public-Private Partnerships in Global Governance,” paper prepared for the Conference on the Human Dimensions of Global Environmental Change, Berlin, December 3–5, 2005; Klaus Dieter Wolf, “Private Actors and Legitimacy of Governance beyond the State,” paper prepared for the Governance and Democratic Legitimacy workshop, European Consortium on Political Research joint sessions, Grenoble, France, April 6–7, 2001; Marina Ottaway, “Corporatism Goes Global: International Organizations, NGO Networks, and Transnational Business,” *Global Governance* 7, no. 3 (2001), 265–92; Tanja Börzel and Thomas Risse, “Private Actors on the Rise? Public-Private Partnerships in Global Governance,” paper presented at the annual meeting of the International Studies Association, Montreal, March 17, 2004; Philip G. Cerny, “Globalization and the Erosion of Democracy,” *European Journal of Political Research* 26, no. 2 (1999) 1–26; Robert O. Keohane and Joseph S. Nye, “Democracy, Accountability, and Global Governance,” manuscript, Kennedy School of Government, Harvard University, 2001.

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17. Andonova, "International Institutions."
18. John Gerard Ruggie, "Marriages of Convenience but Marriages Nonetheless," in Stern and Seligmann, *Partnership Principle*, 16 (emphasis added).
19. Benjamin Miller, "The Rise of Offensive Liberalism," paper presented at the annual meeting of the International Studies Association, Montreal, March 17, 2004.
20. Stephen D. Krasner, *Defending the National Interest: Raw Materials Investment and American Foreign Policy* (Princeton, NJ: Princeton University Press, 1978).
21. Ali Farazmand, "Privatization and Globalization: A Critical Analysis with Implications for Public Management Education and Training," *International Review of Administrative Sciences* 68, no. 3 (2002): 355–71.
22. Collective goods such as "the commons" or national security are not excludable—they are available for all to consume. By contrast, private (or privatized) goods *are* excludable—those that produce and own the goods can exclude some or all from consuming them.
23. Theodore Lowi, "Think Globally, Lose Locally," *Boston Review*, April/May 1998, 4–10.
24. For a classic treatment of international interdependence, see Robert Keohane and Joseph Nye, *Power and Interdependence*, 3rd ed. (New York: Longman, 2001).
25. Section 10 of Article I prohibits any individual state from entering into a "treaty, alliance, or confederation" with another country, thus empowering only the federal government to enter into international treaties. Article II, sections 2 and 3, assigns treaty negotiation power to the president, "with the advice and consent of the Senate . . . provided two-thirds of the Senators present concur." Article III, section 2, empowers U.S. courts to uphold international treaties to which the United States is a party. Article VI, paragraph 2, states that "all treaties . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby."
26. On this question of experts in international organizations and problems of democratic legitimacy, see also Michael N. Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press, 2004).
27. Associated Press, April 30, 2007. Hearing arguments on October 10, 2007, several Supreme Court justices were skeptical about enforcing the ICJ ruling, expressing concern that the Court might have to subordinate itself to an international tribunal in interpreting the impact of treaties on U.S. law. The Bush administration has sided with the ICJ. The Supreme Court was to rule on this case in July 2008.
28. On the concept of governance without government, see James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992).
29. Robert Falkner, "Private Environmental Governance and International Relations: Exploring the Links," *Global Environmental Politics* 3, no. 2 (2003): 72–87.
30. Neoconservatives have been the most influential American internationalist-unilateralists. Robert Kagan has been among the most eloquent proponents of this neoconservative perspective; see Robert Kagan, "Power and Weakness," *Policy Review* 113 (2002) 3–28; Robert Kagan, "America's Crisis of Legitimacy," *Foreign Affairs* 83, no. 2 (2004): 65–87; and William Kristol and Robert Kagan, "Toward a Neo-Reaganite Foreign Policy," *Foreign Affairs*, 75, no. 4, 18–32 (July/August

1996). Notably, this internationalist-unilateralist approach differs from a more venerable tradition of unilateralism in U.S. foreign policy, which sought to keep the world at bay rather than to “control” it; see Walter A. McDougall, *Promised Land, Crusader State: The American Encounter with the World since 1776* (New York: Houghton Mifflin, 1997).

31. Chalmers Johnson, *Blowback: The Costs and Consequences of American Empire* (New York: Henry Holt, 2000).

32. Moisés Naím, “Borderline: It’s Not about maps,” *Washington Post*, May 28, 2006.

33. See R. B. J. Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1993), 165.

34. Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

35. The United Nations Charter permits preemptive defense if authorized by the Security Council.

36. Linda Greenhouse, “Case of Texas Murderer Engrosses Supreme Court,” *New York Times*, October 11, 2006.

37. Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics,” *American Political Science Review* 99 (2005): 29–43.

38. See Beverly Crawford and Ronnie D. Lipschutz, eds., *The Myth of Ethnic Conflict* (Berkeley: University of California, International and Area Studies, 1998); and Helmut Anheier and Yudhishtir Raj Isar, “Globalization and Cultural Conflict: An Institutional Approach,” in *Conflicts and Tensions*, edited by Helmut K. Anheier and Yudhishtir Raj Isar, 19–28 (Los Angeles: Sage, 2007).

39. Because all children born in the United States to immigrants are by definition natives, the sole reason for the dramatic increase in the immigrant population is new immigration. While some immigrants die and others return home, the issuance of 800,000 to 1,000,000 permanent residency visas annually and the settlement of hundreds of thousands of illegal aliens each year greatly exceeds deaths and outmigration. See the articles by the Center for Immigration Studies at <http://www.cis.org/articles/index.html#backgrounders>.

40. The percentage of immigrants without a high school diploma is 30 percent, more than 3.5 times the rate for natives. Since 1990, immigration has increased the number of high school dropouts in the labor force by 21 percent, while increasing the supply of all other workers by 5 percent (*ibid.*).

41. The proportion of immigrant-headed households using at least one major welfare program is 24.5 percent, compared to 16.3 percent for native households (*ibid.*).

42. Immigrants also tend to seek citizenship. In 2002, 39.2 percent of immigrants age 18 and older were citizens, comprising 6 percent of all eligible voters (*ibid.*).



## PART I

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# The Impact of Ungoverned Globalization



## CHAPTER 1

# Globalization from the Ground Up: A Domestic Perspective

Alfred C. Aman Jr.

The institutional developments known in common parlance as globalization are conventionally understood as involving broadly transnational processes of market-oriented governance, as well as what are widely presumed to be their homogenizing effects.<sup>1</sup> Without gainsaying the importance of the international and transnational aspects of globalization, limiting discussion to the extraterritorial in this way tends to obviate a clear understanding of the domestic processes through which globalization was and continues to be institutionalized. Imagining globalization only in terms of international affairs tends to focus attention on the power of the executive branch, given the executive's constitutional responsibilities in foreign affairs. Improving an understanding of globalization's domestic front means broadening that focus to include not only the regulatory functions of the executive branch but also the other branches and levels of government—especially the legislative branch.

It is in those legislative and regulatory arenas that the politicization (and polemicization) of a particular construction of globalization—as a foreign economic threat coupled to a golden opportunity for global capitalism—is most evident, as well as its popularization and entrenchment in neoliberal terms. Those terms, however, are inadequate either to account for the current diversity of public-private arrangements or to convey the range of current debate in relation to privatization and the public interest. Globalization blurs the distinction between public and private, particularly when the state seeks to increase its cost-effectiveness by contracting out some of its domestic responsibilities to private actors.<sup>2</sup> Taking account of the domestic “face” of globalization is thus important as both a corrective to a flawed analysis of

its causes and effects and a necessary (if insufficient) step in addressing the “democracy deficit” inherent in globalization as it has developed in practice.<sup>3</sup>

Globalization is often understood largely in neoliberal, economic terms, as if it were a force of nature. For some, globalization is all about competition—a competition for markets and investments that is global in scale and more intense than ever before. For individual corporations to succeed, for example, they must become more efficient, taking full advantage of new technologies and moving various components of their operations around the world, so as to lower costs and expand their markets. States are expected to follow suit by deregulating their markets, privatizing governmental services, lowering taxes, and, in the process, becoming more effective in attracting new businesses and, of course, jobs to their geographic region. The viewpoint of globalization that forms this chapter, however, begins not in the inevitability of global markets, but in the role of domestic law and politics in producing certain market conditions (global or otherwise). In discussion, globalization is usually presented in a way that assumes a top-down phenomenon, emphasizing scale and homogeneity. By contrast, the perspective I take is from the bottom up, taking into account the areas where domestic law and local communities are caught up, and too often caught out, by globalization.

To illustrate what a bottom-up approach to globalization entails, it is necessary, first, to correct some prevailing myths about globalization, particularly those grounded in neoliberal discourse. The purpose of the first section, “Globalization, Neoliberalism, and the Democracy Deficit,” is to shift our perspective on the nature of globalization. “Rethinking Globalization” then deals with the domestic side of globalization, especially privatization, for reasons I will explain. In “Taming Globalization through Administrative Law,” I offer some ideas for reform in which administrative law is the centerpiece. This brings us full circle to the issue of how different understandings of globalization have implications for our understanding of state power, particularly when it enlists the private sector to carry out significant public responsibilities.

## GLOBALIZATION, NEOLIBERALISM, AND THE DEMOCRACY DEFICIT

Globalization as we know it today is inseparable from its domestic politicization as neoliberal reform and its promotion of world markets. This politicization (and its global export) followed the Reagan-Thatcher “revolution”<sup>4</sup> of the early 1980s: a broad political consensus around key terms (especially *privatization* and *deregulation*) and a claim to an inherent value in “disembedding” the market from the encumbrances of state and society (e.g., entitlements).<sup>5</sup> I argue that the usual understanding of globalization (at least in the United States) is unduly restricted—the legacy of the way globalization was produced out of a particular political moment. As an approach to governing, neoliberalism favors markets over law almost across

the board, and in the generation since the Reagan-Thatcher era, many new supranational and global institutions have been developed for the advancement of global markets.

But globalization is far more than these institutional arrangements. It is also a way of *thinking* and *representing* the relationships between the market, state, and society—that is, it is also a discourse, and this discourse has effects in that it makes some positions seem more obvious or easier to defend than others. In neoliberal discourse, markets and law tend to be treated as either/or options, law being thought of as if it were a human intrusion in an otherwise natural system of economic forces. The discourse also treats globalization as if it were “out there” in the world at large, while law is imagined as parochial or domestic. These claims result in a mythical view of globalization that is to a large degree shared by pro- and antiglobalization advocates—who are alike in ultimately seeing the global economy as a universal norm in relation to which local government is largely irrelevant.<sup>6</sup> This may seem to be an overstatement, but the fact remains that the discourse of neoliberalism so dominates our understandings that it is difficult to recognize it as something other than common sense, let alone conceptualize alternative accounts of globalization.<sup>7</sup>

Privatization, for example, is viewed as a perfectly natural, common-sense regulatory reform. Yet the history of the privatization movement’s key terms is recent, and their promulgation well choreographed.<sup>8</sup> Robert Poole, cofounder of the Reason Foundation (the leading think tank of the privatization movement in the United States) claims to have been the architect of the popularization of the term *privatization*<sup>9</sup> in the 1960s. *Competitive sourcing*<sup>10</sup> was subsequently crafted as a more neutral proxy term, after *privatization* became laden with partisan political associations.<sup>11</sup> The George W. Bush administration seems to prefer the even more neutral term *management*—as in the President’s Management Agenda (PMA).<sup>12</sup> The neutralization of these terms is one way in which neoliberalism—originally a partisan platform—came to be naturalized within a broad political consensus.<sup>13</sup>

This is one reason why critics of neoliberal globalization should not imagine that a swing of the political pendulum away from Reaganite terms, or a change of ruling party, will return us to an older liberalism. The effects of globalization on the relationship between states and markets and the technologies that drive it are by now too fundamental to be reversible with a change of administration—probably anywhere, but certainly in the United States. This, plus the fact that the discourse of neoliberalism represents the market as inherently democratic tends to accelerate globalization, paradoxically widening the democracy deficit.

What is the democracy deficit and how does it arise?<sup>14</sup> Democracy deficits can take many forms, depending on the institutional location and the substantive and procedural decisions involved, their vertical or horizontal nature, and the procedures to which they are compared. Democracy deficits may arise from decisions that have significant adverse affects on individuals but are inaccessible to affected citizens because they are made by jurisdictions or private entities not directly accountable to those affected.

Such democracy deficits often are the result of negative spillovers from one jurisdiction to another, such as acid rain, or they can arise from private decisions to move capital from one part of the world to another. Representation or direct participation in the decisions that lead to these spillovers usually is not possible for affected citizens in different countries and/or jurisdictions; nor is it even theoretically possible to participate at the international level if there is no treaty or relevant international organization with jurisdiction over the issues involved or if the decisions causing the adverse effects are made by private entities.

Democracy deficits can result from more directly vertical relationships in which decisions are made from above; for example, by supranational organizations like the European Union. In the EU context, some raise democracy deficit concerns regarding decisions made by supranational “Eurocrats” in Brussels who are far removed from affected citizens in a particular state.<sup>15</sup> Though one might argue that member states explicitly delegated this authority to the European Union, opposition to the unforeseen outcomes of these broad delegations of power is often expressed as a form of democracy deficit and in tension with principles of subsidiarity that argue for decision-making processes as close to the affected citizens as possible.<sup>16</sup> Of course, issues of domestic federalism are similar, when decisions are made at the national rather than state or local levels of government.

Still another kind of democracy deficit derives from the fact that the processes used to conform domestic law to an international ruling are substantially less democratic than those used to create domestic rules or laws in the first place. For example, pursuant to treaties negotiated within or judicial decisions rendered by the World Trade Organization (WTO), domestic law must often change to harmonize with these outcomes. The processes used appear to be democratic, but due to the prior commitments made in the treaties involved, the outcome of these processes usually is a foregone conclusion. The same processes used to promulgate a rule or pass a statute are employed to rescind the rule or amend the law, but the *fait accompli* nature of the processes means, in reality, that they have a rubber stamp quality to them.<sup>17</sup>

Fast-track legislative processes (i.e., processes that do not allow for amendments on the floor of the House or Senate) may also contribute to a democracy deficit. They represent a different kind of *fait accompli* law-making: amendments are not allowed, meaning that the fast-track mechanism attenuates legislative processes in a *de jure* rather than *de facto* manner. In this sense, the growing power of the executive branch in various global contexts in which, for example, issues previously thought of as domestic now appear to be within the broad foreign policy powers of the executive branch, also creates democracy deficit concerns, whether they result from the increased use of executive treaties or broad-based executive orders, such as those involved with establishing military tribunals.<sup>18</sup>

The deterritorializing effects of globalization make democracy deficits increasingly common, both at home and abroad. For example, some decisions that have substantial impact on citizens of a country are made by

private or quasi-private organizations, either domestic or multinational, that are beyond direct democratic control or influence. Transnational actors of all kinds have a need for rules for their operations to run smoothly. The transnational aspects of their operations place them beyond the control of any one jurisdiction and the rules and dispute resolution mechanisms that they develop are voluntary and, essentially, private in nature. Yet, these rules can and often do have transnational effects on various publics. Corporate codes of conduct governing labor conditions, voluntarily adopted, may or may not be the result of input by citizens in various countries who are concerned with child labor, low wages, or the right of freedom of association. It may seem that there is no democracy deficit in such contexts, because one might not expect the decision-making processes of private actors to be democratic, beyond their own shareholders. But this assumes that our concept of public and private remains the same, even in the face of denationalizing global forces. The horizontal nature of governance creates new issues of legitimacy and democracy that go beyond individual states. We must, therefore, also go beyond state-centric approaches and habits of mind when thinking about democracy in contexts such as these.

As a matter of interpretation, democracy deficits also turn on how one conceptualizes democracy. Democracy requires more than the involvement of a legislative or executive body or the participation of a member state. It also involves concepts of legitimacy, which include opportunities for participation in decision-making processes by stakeholders whose interests may not adequately be represented by a member state. Decisions made by judicial panels at the WTO, utilizing decision-making processes that are not particularly transparent and limit participation only to member states, are not likely to be seen as legitimate by those whose interests are not fully (or even partially) represented by formal state representation. The inevitable trade-offs that arise when free trade conflicts with environmental protection are likely to produce widespread participation demands from a range of nongovernmental organizations (NGOs) whose interests are more varied and diverse than any single state representative can be.<sup>19</sup> From their point of view, there is a democracy deficit if they are excluded from the relevant decision-making processes. From a broader public point of view, the quality of the decisions may suffer if the perspectives of diverse interests and parties are not considered. One might argue that such democracy deficits may exist only in the eyes of the beholders. If so, that would only underscore the point that the scope of democracy should be decided by democratic means.

Globalization processes complicate both the form and content of democracy. As they rearrange the lines between public and private entities, they also rearrange the public's role. The traditional statutory line between public and private, or markets and government, reinforces this displacement. For example, the statutes that spell out procedural and informational requirements restrict them primarily to state actors only.

When public functions are carried out by private actors, the requirement of transparency and public participation—the cornerstones of

administrative democracy—is often reduced or set aside. That is the essence of the democracy deficit. But even if this is not the case and the state action doctrine is able to reach certain private entities, the relevant public law remedies may not always be appropriate. The new mixtures of public and private power require new conceptions of administrative procedure in a democracy, conceptions unlikely to emerge in the context of a judicial proceeding focused on the rights of an individual. There is a need for the legislature to extend aspects of the Administrative Procedure Act (APA) or other administrative reforms to the private sector. There is room for a wider role for law in sustaining the contact between global institutions and local democracy.

I am not suggesting that neoliberalism and market reforms are inherently objectionable, nor that administrative law and neoliberalism are somehow inherently opposed. Quite the contrary, I turn to administrative law because its principles clarify the potential relationship between government and global markets and yield a more nuanced sense of democratic possibility. Administrative law focuses on administrative values—administrative justice—rather than on such a priori distinctions as public/private or domestic/international that are so important to neoliberal discourse—and so misleading as to how contemporary governance in a global era actually works.<sup>20</sup> This chapter seeks to reinforce the centrality of democratic values in administrative law and thus the implications for American democracy of (neoliberal) globalization's erosion of the state's administrative role.

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Another reason, however, to reconsider the neoliberal discourse of globalization is that it does not account for the facts on the ground. Even where neoliberal reform has been most actively embraced, considerable regulation is still in place, whether in the form of so-called managed competition or other forms of intervention designed to “help” the market take hold.<sup>21</sup> This is often the case in industries such as telecommunications, where advances in technology now make real competition possible, rendering the sector's prior natural monopoly characteristics essentially obsolete as a basis for state intervention. Where we tend to see neoliberal reform applied in a much purer fashion is in the area of social services, specifically services for vulnerable populations—the poor, the ill, the elderly, children or prisoners, groups that are almost by definition excluded from participation in the market and political life. Historically, the privatization movement took hold first at these margins.

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I concentrate on vulnerable populations not only because they inherently warrant our concern but also because they represent the fullest display of the contradictions between the discourse of neoliberalism and its effects in practice. In other words, their situation offers a prime example of the democracy deficit of globalization, along with a compelling portrait of globalization's “domestic face.” I will come back to the resources of administrative law in relation to the democracy deficit in this chapter's fourth section, but let us turn first to some other myths about globalization in the context of administrative law to lay the groundwork for that discussion.



## RETHINKING GLOBALIZATION

The conventional picture of globalization is of a global structure to which domestic legal regimes must inevitably adapt. But globalization is not a structure—it is a process in time. Taking the domestic face of globalization into account brings out its process aspects. Viewed in real time, we can see that globalization is produced by domestic political institutions, both public and private. This means that it can be shaped, influenced, and changed by them as well—unless a democracy deficit makes this impossible.

States function in relation to globalization in two principal ways. First, they are “globalizing states,” agents of globalization enacting policies designed to attract and retain investment, usually in the form of low taxes and minimal regulation. Second, they are also *products* of globalization, continually transformed by the very process of managing their own interests. This means that states are reshaped by the diffusion of their powers in relation to other states and nonstate actors—such as the multinational corporations they must engage. These emergent combinations of public and private power mean that some redefinition is in order as to what is public and what is private.

The globalizing state cannot avoid responding to the globalizing processes it helps create. Indeed, it transforms itself through its responses to these processes. When it relies on the private sector to carry out what were once public responsibilities, the outcome is not just economic (greater efficiency, perhaps) but also a different kind of state. The process of globalization therefore does not remain “out there”—foreign and distant; it is embedded in domestic institutions, both public and private, and the distinction between public and private does not always matter.

Globalization, then, does not begin in the inevitability of global markets but in the role of domestic law and politics that makes the market and the state mutually interdependent—even if they are theoretically independent. The interdependency that I am calling the “domestic face of globalization” is clearest in delegations of state power to administrative agencies and then to the private sector. The next sections examine the vertical and horizontal dimensions of delegations of state power.

### Delegating State Power Vertically

Imagine a vertical axis—first looking up (to global institutions), then down (to national and local institutions of government). Sometimes national states delegate power up to what commentators have called the “international branch” of government—international organizations such as the WTO, the International Monetary Fund (IMF), or the World Bank, or regional bodies such as the European Union or the North American Free Trade Agreement (NAFTA). The functioning of these bodies raises very directly issues involving what Richard Stewart and others call “global administrative law,” which Stewart defines as

the mechanisms, principles, and practices that promote or otherwise affect the accountability of diverse global administrative bodies, in particular by

ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions made.<sup>22</sup>

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There is an essential connection between a state's "upward" delegation of authority to international organizations and the "downward" effects on domestic administrative agencies. The procedures these international organizations use shape the ability of domestic bodies to have meaningful input into their policies, especially harmonization processes or other forms of incorporation at the national level. The processes of harmonization utilized by the WTO, for example, have great relevance to domestic law and procedure. At their strongest, they can turn domestic processes into mere rubber stamps for rules adopted at a higher level and incorporated without much opportunity for real citizen participation or change at the national level.<sup>23</sup>

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One interesting example of this can be found in the area of food safety. Standards for food safety adopted by the WTO are generally derived from private-sector organizations that are not open to the type of administrative transparency or procedural process that we have come to expect from domestic administrative bodies.<sup>24</sup> One such organization is the Codex Alimentarius Commission, based in Rome. The Codex prides itself on developing standards in a "science-based" manner that uses "experts and specialists in a wide range of disciplines."<sup>25</sup> These standards are adopted by the WTO and used to determine whether domestic food safety standards, which generally have been subject to public notice and comment, represent trade barriers that the violating WTO country will be required to change. In many instances, the WTO obliges its member countries to treat foreign country food inspection and safety systems "equivalent" to their own. Domestic food safety regulations that provide more stringent standards than the standards developed by groups like the Codex and adopted by the WTO are presumed to be a trade barrier, even if the domestic law submits domestic and foreign food products to exactly the same standards.<sup>26</sup>

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The Codex Alimentarius Commission has a U.S. office, U.S. Codex, located in the Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture (USDA). The U.S. Codex office is said to be the "point of contact in the United States for the Codex Alimentarius Commission and its activities," which its Web page states is the "major international mechanism for encouraging fair international trade in food while promoting the health and economic interest of consumers."<sup>27</sup> The U.S. Codex office is accessible via a Web page hosted on the USDA website, containing a link to information about the Codex and providing a schedule of public meetings for the U.S. Codex office, which it states are to allow the U.S. Codex delegates to "inform the public about the meeting agenda and proposed U.S. positions on the issues."<sup>28</sup> This gives the appearance of public feedback to the Codex standards, but it is feedback at least twice removed from the actual point at which the standards get set, and it is unclear that such public meetings have any impact on the

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standards-setting process employed by the Codex or the adoption of those standards by the WTO. Yet once those standards have been adopted, the U.S. administrative agencies in charge of food safety will be in charge of administering and enforcing them.

Similarly, decisions rendered by NAFTA tribunals can greatly affect domestic law, often without much opportunity for widespread participation. In the United States, we have seen several instances in which NAFTA decisions have conflicted with U.S. regulatory standards. One high-profile example involves the NAFTA-driven laws that lowered or relaxed transportation safety standards in order to open U.S. highways to Mexican trucking companies.<sup>29</sup> In 2001, we also saw the attempt by a Canadian fuel additive company to use the NAFTA tribunal dispute system to win compensation for damages that the company claimed it suffered from a California decision to ban the use of certain fuel additives that the state had determined were having an unhealthy effect on water supplies.<sup>30</sup>

The vertical axis also increasingly involves the devolution of federal power down to states and localities below the federal government. Globalization exerts a downward push when it comes to the exercise of federal and state power, providing incentives for more state autonomy as well as more local authority within states.<sup>31</sup> The federal/state dimension is particularly in play today in the United States as a debate is ongoing as to whether federal rules—usually market based—can preempt state laws and regulations.<sup>32</sup>

## Delegating State Power Horizontally

The conventional picture of globalization more or less aligns with the vertical axis. But that is only one of its dimensions. The domestic face of globalization in administrative law is primarily along a *horizontal* axis. There, we are dealing with delegations to administrative agencies that then seek to take advantage of the market either by deregulating or by outsourcing the agency's responsibilities by contract. Along this imaginary horizontal axis, privatization and deregulation are local policy responses to globalization. It is the horizontal axis that is especially important, at least from the point of view of U.S. law, and it is usually overlooked—or set apart from the topic of globalization.

Certain delegations to the market are de facto in nature. For example, some such delegations result from inadequate funding of the regulatory regime in place; absent resources for enforcement, it is in effect as if there is no regulation in place. There also are de facto delegations to private transnational entities, where regulation would most likely require a multi-lateral treaty approach. Without that, voluntary private regulatory arrangements prevail.

Of greater importance for our purposes are two other types of delegation central to the horizontal dynamics of globalization: deregulation and privatization. Both take many forms. Some forms of deregulation, such as those brought about by legislation, result in the outright repeal of regulatory structures and agency enabling acts. Others, however, instituted by

administrative agencies themselves, result in the repeal of some of their own rules and/or their replacement with rules that use markets and market approaches as regulatory tools, thereby replacing command-control regulatory approaches with incentive-based regulation.

It is important to remember that such uses of the market and market-based approaches to regulation are supposed to be a means to an end, not an end in itself. In the United States, such forms of deregulation are usually subject to the Administrative Procedure Act.<sup>33</sup> Under the APA, an agency's repeal or change of an existing rule,<sup>34</sup> for example, is treated the same, procedurally speaking, as the promulgation of a new rule. Under the APA, deregulation itself is a form of regulation. Since the New Deal, substitution of market approaches for more direct regulation has usually been upheld by reviewing courts, particularly when economic regulation has been involved.<sup>35</sup>

Privatization can also take many forms, each representing a different "degree of separation" between the public body delegating its responsibilities and the private actors to whom that delegation is addressed. As Lester Salamon has noted, privatization in the United States has meant the development of new forms of governance.<sup>36</sup> He uses the phrase "the new governance" for the variety of tools that governments at all levels now use in carrying out their public functions, including contract grants, tax expenditures, vouchers, direct loans, government corporations, and franchises.<sup>37</sup>

Like deregulation, some forms of privatization result from legislative action aimed at replacing a regulatory regime with a market. A legislature may, for example, sell off a government-owned entity to private parties, as was common in Europe in the 1980s.<sup>38</sup> Like the deregulation that results from the wholesale statutory repeal of a regulatory regime,<sup>39</sup> the market is intended to replace the government completely when government-owned assets are sold to private buyers. Government supervision ends with this kind of privatization.

The most common (and certainly the earliest) form of privatization in the United States is the use of the private sector to deliver what once were government-provided social services. The primary governance tool in these cases is the contract. The management of prisons, for example, has been increasingly outsourced to the private sector at both the federal and state levels.<sup>40</sup> Garbage and snow removal also are now commonly handled by private providers,<sup>41</sup> and various aspects of welfare administration,<sup>42</sup> such as eligibility determinations, are carried out by private entities. Contracting out, for such purposes, is akin to agency deregulation, in that government agencies remain responsible for the outcomes, but are no longer involved in the day-to-day management of the enterprise. Private actors acquire authority by virtue of their contract with the state, and unlike public agencies, they are usually not subject to statutes such as the APA or the Freedom of Information Act (FOIA). More important, the contracting process itself is usually some form of least-bid contract procedure, one that tends to focus on cost above all else.

Elsewhere, I have examined the contracting process used by the city of New York to outsource the health care of city prisoners to a for-profit

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firm.<sup>43</sup> Some generalizations from that study are relevant here. The use of contracts as legal mechanisms to carry out the state's responsibility to provide essential human services to prisoners can unduly insulate some key considerations (and potential deficiencies) from public view and debate. Implicit in outsourcing decisions of this type is the idea that entering into a contract involves a relatively private negotiation between a buyer and a seller, one that cannot be wholly public without seriously undermining the negotiation process. Such process as does exist at this stage is focused less on achieving the substantive goals of the contract, or even determining what those goals should be, and more on its costs in monetary terms. Sealed bids and variants of this approach seek to ensure that a low-cost, if not the least cost, provider is chosen and chosen in a way that is not susceptible to corruption.

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A key problem is that there is seldom a distinction made between standardized administrative duties that could be performed by anyone and the core regulatory responsibilities of a particular government agency. However, some services are so fundamental that they cannot be outsourced without taking into account political issues beyond cost. Indeed, the process is often based on the assumption that we are replacing a government monopoly with an open market. This, in turn, suggests that the competition for the contract will yield the most efficient and skilled provider—and that these are not competing goals.

There is an implicit assumption that there are likely to be many providers of the service sought, willing and able to contract with the government. This, however, is often not the case—at least with regard to prison health care. Evidence suggests that there are, in fact, very few competitors for such contracts.<sup>44</sup> In New York City's largest such contract, there was only one bidder. But even if a real competition had ensued, the primary basis of the competition would have been on cost and compliance, not on administrative efficiency—e.g., finding imaginative solutions to difficult problems.

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Cost, of course, is a factor in any governmental decision to hire a contractor or to perform the service itself. No one wants to waste tax dollars. At the same time, when legal frameworks such as those governing public contracts focus only on costs in economic terms, the human needs and the human consequences of resource decisions fade from public view. Put another way, those wishing to win a contract will have a strong incentive to make promises that they cannot keep. Quality checks in prison health stop at the agency level—or with the muckraking press. City and state review deal primarily with after-the-fact compliance issues.

Government contracting tends to privilege a least-cost economic discourse, keeping other kinds of values out of the conversation. They also further an assumption that private providers are superior to public providers in this regard, given the profit motive as a great motivator. In short, the shift to contract as the primary means of legislating in these areas tends to realign the public's ideas of its own responsibilities with regard to the means and ends of carrying out fundamental public responsibilities. Unless we recognize the new role that such contract processes play in

governance overall, such contracts are effectively separated from the social compact. The current political preference for the private sector and market ordering is too often insensitive to that possibility, resulting in the neglect of basic human needs. Effectively hidden from public view, prisoner health is commoditized in a manner tantamount to roads, bridges, and other natural things. How we label services and service providers as public or private has implications for substance, process, and participation—issues far more important than the abstract categories represented by the labels themselves.

## **TAMING GLOBALIZATION THROUGH ADMINISTRATIVE LAW**

Privatization today should be understood as a principal effect of globalization. In this sense, it is not merely one means among many for making government more efficient or for expanding the private sector. Nor is it just a reflection of current political trends and a swing of the regulatory pendulum from liberal to conservative. Rather, the increasing reliance on “the new governance” is indicative of a changing relationship between the market and the state, one characterized by a fusion of public and private values, rhetoric, and approaches—and integral to the integration of global and local economies. Privatization is the result of these fusions. It, in effect, increases the exposure of the state to external economic and political pressures that tend to accelerate globalization, largely because private actors fully exposed to the global economy now carry out the delegated tasks. The global political economy places great pressures on all entities—public and private—to be cost-effective if they wish to be competitive.<sup>45</sup> This encourages such delegations on the part of the state, and it raises concerns over whether the cost savings that result from such public delegations to private entities occur at the expense of democratic processes, legitimacy, and individual justice. Given the role that the public/private distinction plays in the U.S. administrative law, privatization within this global context tends to reduce the democratic public sphere in favor of other arrangements likely to be less transparent and accountable to the public and less exposed to competing value regimes.

The resulting democracy deficit comes with the application of a traditional conception of the public/private distinction that is likely to lessen considerably the public sector’s responsibilities for transparency and accountability when private actors perform certain tasks. Justifications often provided for such an approach begin with the assumption that policy making and administration can, in fact, be separated—an assumption that most commentators reject.<sup>46</sup> Even in privatized contexts, private actors inevitably make policy when they carry out their delegated tasks and interpret the contracts under which they operate. A new kind of administrative law can and should be created to respond to this particular democracy deficit associated with privatization. It need not rely solely on traditional procedural approaches, arguably designed for governmental agencies carrying out regulatory functions. At the same time, it is important to emphasize

that what is at stake is the values of public law: transparency, participation, and fairness. Various procedural approaches may be necessary to ensure the realization of these values. The values of the APA, though not necessarily the precise procedural devices it currently employs,<sup>47</sup> need to be extended to various hybrid public/private arrangements if we are to ensure the legitimacy of those partnerships.

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Thus, the globalizing state fuses in approach and in rhetoric the cost-consciousness language of the market with the public interest goals of the state, eliminating any bright line distinctions that once might have existed between “the state” and “the market.” The fusion between public and private that results is similar to the fusion that occurs between the global and the local as the local and the global become modalities of a single dynamic system. The combination of these fusions—public and private, global and local—exacerbates the democracy deficit. Indeed, the democracy problem in globalization arises from the disjunction between global socioeconomic and political processes, on the one hand, and local processes of democratic participation, on the other. The resolution of this disjuncture is usually left to the market, but when public responsibilities are delegated or outsourced to the private sector, the public is involved very differently in the decision-making processes. And when it comes to vulnerable populations such as prisoners, they are not likely to be involved at all.

Privatization is creating a terrain where a new administrative law might emerge, assuring public forums for input and debate and a flow of information that can help create a meaningful politics around private actors doing the public’s business. The democracy problem is and should be one of the primary concerns of a new administrative law.

It is with contracts and the contracting process that reforms are most urgently needed. Once an agency decides to contract out its primary functions, the proposed contract should be noticed to the public on the agency website as if it were a rule promulgated for public comment. The public should have a chance to comment on the goals of the contract, its mode of enforcement, the monitoring of its implementation (including what shall constitute monitoring), and all other issues deemed relevant. As with a rule in a regulatory proceeding, the agency need not adopt all or any of the suggestions made, but it should provide its own reasons for accepting the ultimate contract.

An important role for administrative procedure is to accommodate most if not all of these interests with a process that allows them to speak to one another as well as the ultimate decision maker. Once a contract is entered into, it is also important that these discussions occur with some frequency. The nature of the enterprise requires ongoing monitoring of the contract terms, as well as opportunities to comment on its administration, and provision for amendments regarding the duties of the private actor. Procedurally speaking, the privatizing agency should:

- treat the proposed contract more like a rule than a contract negotiated between two parties. It can be put up on the relevant agency’s website, calling for public comments, suggestions, alternative language, and ways

to achieve its substantive reform goals from whoever wishes to comment. In the prisons example, this would include prisoners and their representatives as well.

- provide extensive information on the track records of firms competing for the contract.
- ensure fair competition among the bidders. All of them should agree that if they are chosen, they will be subject to regular reporting requirements and a modified FOIA, allowing interested members of the public to make relevant inquiries about their operation while the contract is in place. That contract should be no more than three years, subject to renewal but only after another round of competitive bidding occurs.

The simplicity of notice and comment procedures when it comes to such public service contracts makes such transparency reasonably efficient, and transparency need not impose undue impediments to the bargaining process. A presumption in favor of the bargains struck in such contracts can be written into the governing statutes. Courts need not be involved unless there is corruption or an unconstitutional exercise of discretion. Indeed, the purpose of these citizen-oriented procedures is to ensure that public views and voices regarding private arrangements are heard. It is not just that there is a public dimension involved; it is that there are genuine public values at stake that necessitate debate and contest. The various positions are different formulations of democracy—as inherent in the operations of the market, or external to the market as a larger framework of critique and reform.

## CONCLUSION

My main goal in this chapter has been to shift our perspective on globalization away from a top-down, neoliberal conception of markets to one that sees the market and market forces generally, as regulatory tools, available to political controls. This, in turn, points to new uses of administrative law to improve globalization as a democratic endeavor. The initial step was to rethink two prevailing myths about globalization: first, that globalization is always or only a transnational or international phenomenon; second, that the public/private divide is or should be a bright line distinction. The second step was to respond to these myths—respectively describing the domestic face of globalization and the means through which the private sector does the public's work. The third step was to argue for both an application and reform of administrative law to extend it to the creation and monitoring of private contracts when private contractors are engaged in the public's business. Administrative law has great promise in terms of bringing democratic values into the relationship between the state, the market, and individuals. But that promise is inaccessible unless the domestic face of globalization is more widely recognized.

Imagining “the global” as something apart from “the local” fails to capture the extent to which privatization was (and is) driven by domestic



politics. This is not to dismiss it as partisan, but to point to its embeddedness in localized arenas. While it might seem intuitively indisputable that “the commercial environment is now global but legal sovereignties are still territorial,”<sup>48</sup> such formulations divert attention from the actual locals where “the global” is produced through particular understandings of commerce and markets, and the ways these are put into practice through domestic law.

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Historically, the administrative law process was an alternative to private law dispute resolution, increasing the expertise brought to bear on certain issues as well as, over time, tending to widen the variety of interests and actors involved in decision-making contexts.<sup>49</sup> Today, privatization and outsourcing offer creative alternatives to some aspects of the administrative process itself. Privatized and deregulated contexts introduce additional bargaining currencies beyond traditional adjudicatory or legislative policy-making procedures. When private providers carry out government responsibilities, though, or when market incentives are introduced to achieve particular regulatory outcomes, these approaches are not substitutes for regulation but rather the very means of regulation—part of the regulatory process itself. Private actors, private incentive structures, and markets in general are not separate and apart from regulation in the public interest, they are central to it. Addressing the democracy deficit means improving the engagement of the private sector with stakeholders and interested citizens. This would be a significant step toward reviving political discourse around the public interest in terms broader than the prevailing neoliberal discourse. It would greatly alleviate some of the democracy problems caused by a neoliberal form of globalization that has not only come home, but has done so with a vengeance.

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## NOTES

1. For an extended discussion of how globalization has been construed and understood in market oriented terms, see Alfred C. Aman Jr., *The Democracy Deficit: Taming Globalization through Law Reform* (New York: New York University Press, 2004), 1–14, 87–129.

2. “Contracting out” refers to the practice of government contracting with a private employer for the delivery of some good or service, where the ultimate responsibility for the success of the service or good delivery technically remains with the contracting government body; see Geoffrey Segal, testimony to the Utah Law Enforcement and Criminal Justice Interim Committee, September 21, 2005, available at [http://www.reason.org/commentaries/segal\\_20050921.shtml](http://www.reason.org/commentaries/segal_20050921.shtml).

3. Aman, *Democracy Deficit*.

4. The presidency of Ronald Reagan stands as the turning point in national power dynamics from the then-entrenched Democratic Party. The “Reagan Revolution” involved not only this shift in political fortunes but also a deliberate and sustained focus on economic reforms that included “deregulation, privatization, free market philosophy and a reduced role of government” (Joe Martin, “The Next Ten Years: A White Knuckle Decade with Nowhere to Hide,” *Business Quarterly*, March 22, 1989). A concerted attempt to move toward increased privatization of government was always central to the revolution’s ideological goals;

however, privatization efforts by the Reagan administration met with consistent opposition and prompted the Republican Party and other privatization advocates to move toward less confrontational tactics and to adopt less explicit language in an attempt to embed a privatization ideal in the political psyche. See Margaret E. Kriz, "Slow Spin-Off," *National Journal*, May 7, 1988 (describing privatization advocates as seeking to put forward ideas that would "continue to germinate" in future administrations, even if they were not Republican controlled). For a current perspective on the long-term effects on outcomes of the Reagan Revolution on the modern political, social, and economic landscape, see Dick Meyer, "Reagan's Revolution Plus 25," CBSNews.com, December 1, 2005, <http://www.cbsnews.com/stories/2005/12/01/opinion/meyer/main.shtml>.

5. David Harvey has noted that, for its modern advocates, the term *privatization* carries with it references to the political ideals of individual dignity and individual freedom that were deliberately incorporated into the founding of the modern neoliberal movement (David Harvey, *A Brief History of Neoliberalism* [Oxford: Oxford University Press, 2005], 5–6).

6. *Ibid.*, 87–128.

7. On the taken-for-granted validity of "laissez-faire ideology," see Margaret Jane Radin and R. Polk Wagner, "The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace," 73 *Chicago-Kent Law Review* 1295 (1998): 1295; see also Paul Schiff Berman, "How (If at All) to Regulate the Internet: Cyberspace and the State Action Debate; The Cultural Value of Applying Constitutional Norms to Regulation," 71 *University of Colorado Law Review* 1263 (2000): 1278.

8. Aman, *Democracy Deficit*. In addition, the Republican Party's economic agenda that was contained within the 1994 Contract with America, authored by Newt Gingrich, can be seen as an extension of this push, started in the Reagan years, to reconceptualize and reinforce a binary public/private divide. See "Republican Contract with America" (1994), available at <http://www.house.gov/contract/CONTRACT.html>. While the language used to promote the economic aims of the Contract with America appears to have contentiously avoided specific references to privatization, Gingrich's more recent writings have been much more explicit. In a recent book, he promotes what he calls the "principles of entrepreneurial public management" and unequivocally states that the government should "privatize more government functions. Many agencies or government services could be turned over to private companies that can deliver services more efficiently and at lower costs" (Newt Gingrich, *Winning the Future: A 21st Century Contract with America* [New York: Regnery, 2005], 170–73).

9. "Reason Co-founder Robert Poole ... is credited with popularizing the term 'privatization' to refer to the contracting-out of public services" (Reason Foundation, "20th Anniversary of Reason's Annual Privatization Report," <http://www.reason.org/privatization/index.shtml>).

10. "Competitive sourcing" calls for the identification of government activities that are "commercial" and therefore able to be done by the private sector and for the institution of a competitive bidding process to assign such activities to their most "efficient and effective" source; see Geoffrey F. Segal, "Competitive Sourcing: Driving Federal Government Results," Reason Foundation, [http://www.reason.org/commentaries/segal\\_compsourcing.pdf](http://www.reason.org/commentaries/segal_compsourcing.pdf).

11. For example, Mitch Daniels, governor of Indiana and former director of the Office of Management and Budget has said, "Personally, I never use the word 'privatization,' because it connotes an orthodoxy of its own" (Mitch Daniels, "Annual Privatization Report 2006: Reforming Government through Competition," Reason Foundation, April 2006, [http://www.reason.org/apr2006/apr2006\\_daniels.shtml](http://www.reason.org/apr2006/apr2006_daniels.shtml)).

Proponents of privatization also hailed the early efforts of the George W. Bush administration to expand the use of “competitive contracting” in order to “open more federal positions involving commercial activities to competition from the private sector” (Ronald D. Utt, “Improving Government Performance through Competitive Contracting,” Heritage Foundation, June 25, 2001, <http://www.heritage.org/research/governmentreform/bg1452.cfm>). The aggressive competitive sourcing strategies were pitched as a way to save \$10 billion to \$14 billion a year in program costs while at the same time improving basic public services (ibid.).

12. See Executive Office of the President, Office of Management and Budget, “Competitive Sourcing: Conducting Public-Private Competition in a Reasoned and Responsible Manner,” July 2003, available at [http://www.whitehouse.gov/omb/procurement/comp\\_sourcing\\_072403.pdf](http://www.whitehouse.gov/omb/procurement/comp_sourcing_072403.pdf). Scholars generally follow the early history of the movement in adopting privatization and using “the private sector” as the antonym for government action glossed as the public. I do the same, but fundamentally, imagining public and private as complements in a single field errs in making them alternatives, as if they were fungible through the commercial sector; however, as I shall argue, important elements of the public interest resist incorporation into the private commercial sector.

13. It is precisely the services to these populations that were among the earliest government functions to be outsourced to private contractors. See, for example, Matthew Diller, “The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government,” 75 *NYU Law Review* 1121 (2000).

14. This paragraph and the following two paragraphs are adapted from Alfred C. Aman Jr., “From Government to Governance,” 8 *Indiana Journal of Global Legal Studies* 379 (2001): 383–84.

15. See Dieter Grimm, “Does Europe Need a Constitution?” 1 *European Law Journal* 282 (1995); and Linda Bosniak, “Citizenship Denationalized,” 7 *Indiana Journal of Global Legal Studies* 447 (2000).

16. Martin A. Rogoff, “The European Union, Germany, and the Länder: New Patterns of Political Relations in Europe,” 5 *Columbia Journal of European Law* 415 (1999): 416.

17. See Sidney A. Shapiro, “International Trade Agreements, Regulatory Protection, and Public Accountability,” 54 *Administrative Law Review* 435 (2002). Many nations are not even involved in the original decisions at the WTO; see Steve Charnovitz, “The Emergence of Democratic Participation in Global Governance (Paris, 1919),” 10 *Indiana Journal of Global Legal Studies* 45, 49 (2003), describing the WTO practice that “officials leading a negotiation will invite selected governments into a room to hammer out a deal that is later presented to the entire membership as a fait accompli.”

18. See, for example, Tara L. Branum, “President or King? The Use and Abuse of Executive Orders in Modern-Day America,” 28 *Journal of Legislation* 1 (2002).

19. See, for example, Jacqueline Peel, “Giving the Public a Voice in the Protection of the Global Environment,” 12 *Colorado Journal of International Environmental Law and Policy* 47 (2001).

20. By “public” and “private,” I am referring to the colloquial (often zero-sum) distinction between government and the commercial sector in relation to privatization (among other terms), not the public/private divide theorized by legal scholars concerned with the relationship of the state to private ordering; see Berman, “How (If at All) to Regulate the Internet,” 1279–81.

21. In his writings about the telecommunications industry, for example, Hudson Janisch provides an example of this distinction. Writing about the telecom

downturn of the late 1990s and early 2000s in “Telecommunications in Turmoil,” 37 *University of British Columbia Law Review* 1 (2004), Professor Janisch posits that the regulatory environment actually worked to create a state of artificial competition that, while it provided artificially low prices to consumers, ultimately worked against consumer interests as it created an unhealthy dependence by telecom companies on government regulatory support. Another frequent commentator on the telecommunications industry, economist Alfred E. Kahn, is also a passionate advocate for competitive market approaches, but has also voiced similar concerns about the unintended consequences of regulatory attempts to create competition; see, for example, Alfred Kahn, “The Regulatory Tar Baby,” 21 *Journal of Regulatory Economics* 35 (2002). This critique of the application of administrative law, however, does not necessarily lead to the conclusion that administrative law cannot serve as a positive force within competition-based environments. Indeed, Janisch has observed that “freer markets” may in fact require *more* regulation—albeit regulation of a different sort and sophistication—than in a traditional regulated industry.

22. Richard Stewart, “The Global Regulatory Challenge to U.S. Administrative Law,” 37 *NYU Journal of Law and Politics* 695 (2005): 696. See also Dan Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law,” 115 *Yale Law Journal* 1490 (2006). These administrative law principles would apply, for example, to the WTO and other global institutions, but these issues are beyond the scope of this chapter.

23. See Aman, *Democracy Deficit*, 161–66.

24. Public Citizen, “The WTO’s Coming to Dinner and Food Safety Is Not on the Menu” (excerpted from Lori Wallach and Patrick Woodall, *Whose Trade Organization? A Comprehensive Guide to the WTO* [New York: New Press, 2004]), available at <http://www.citizen.org/trade/wto/articles.cfm?id=10445>.

25. United Nations Food and Agriculture Organization, “Codex and Science,” <http://www.fao.org/docrep/008/y7867e/y7867e06.htm>.

26. See Wallach and Woodall, *Whose Trade Organization?*

27. USDA, [http://www.fsis.usda.gov/regulations\\_&\\_policies/codex\\_alimentarius/index.asp](http://www.fsis.usda.gov/regulations_&_policies/codex_alimentarius/index.asp).

28. USDA, [http://www.fsis.usda.gov/regulations\\_&\\_policies/public\\_meetings/index.asp](http://www.fsis.usda.gov/regulations_&_policies/public_meetings/index.asp).

29. U.S. Department of Transportation, “U.S. Transportation Department Implements NAFTA Provisions for Mexican Trucks, Buses,” <http://www.dot.gov/affairs/dot10702.htm>.

30. “*Methanex Corp. v. United States of America*,” <http://www.state.gov/s/l/c5818.htm>.

31. See Aman, *Democracy Deficit*, chapter 2, for an extended treatment of a global perspective on federalism.

32. See, for example, Caroline E. Mayer, “Rules Would Limit Lawsuits,” *Washington Post*, February 16, 2006.

33. 5 U.S.C. § 551 et seq. (2000).

34. See *Motor Vehicles Mfrs. Assn. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

35. See Alfred C. Aman, Jr., *Administrative Law in a Global Era*, (Ithaca: Cornell University Press, 1992), note 146.

36. Lester M. Salamon, “The New Governance and the Tools of Public Action: An Introduction,” in *The Tools of Government: A Guide to the New Governance*, edited by Lester M. Salamon, 1–47 (New York: Oxford University Press, 2002).

37. Ibid., 33. In addition to tools for providing governmental services, agencies utilize similar market approaches, such as regulatory contracts, to carry out their statutory duties; see Jody Freeman, "The Contracting State," 28 *Florida State University Law Review* 155 (2000): 189–201. For excellent analysis of various public/private forms of governance and the relationships between public and private actions, see Jody Freeman, "The Private Roles in Public Governance," 75 *NYU Law Review* 543 (2000); and Jody Freeman, "Private Parties, Public Functions, and the New Administrative Law," in *Recrafting the Rule of Law: The Limits of Legal Order*, edited by David Dyzenhaus, 331–69 (Oxford, UK: Hart, 1999).

38. For an interesting discussion of the differences between privatization and deregulation in the United States and Europe, see Giandomenico Majone, "Paradoxes of Privatization and Deregulation," *Journal of European Public Policy* 1 (1994), 53–69.

39. Ibid.

40. See Shymeka L. Hunter, "More Than Just a Private Affair: Is the Practice of Incarcerating Alaska Prisoners in Private Out-of-State Prisons Unconstitutional?" 17 *Alaska Law Review* 319 (2000): 327–28. Hunter says: "Given the way the federal government and states like Alaska have supported the private sector's prison ventures and the booming market, it is perhaps not surprising that by 1996 there were more than one hundred private jails and prisons located across twenty-seven states. As of 1997, the private prison industry was grossing \$550 million annually; Alaska is among the twenty-five states that make use of private prisons. Thirty-one states, the Federal system, and Washington, DC, reported a housing total of 71,208 prisoners in private facilities in 1999. Specifically, Alaska housed 35 percent of its prison population in private facilities during 1999, making it second only to New Mexico's 39 percent."

41. Lewis D. Solomon, "Reflections on the Future of Business Organizations," 20 *Cardozo Law Review* 1213 (1999): 1216. According to Solomon, "Virtually any asset or service that a local government owns or provides has been privatized somewhere in the United States in some manner, including fire protection, police protection, waste water treatment, street lighting, tree trimming, snow removal, parking structures, railroads, hospitals, jails, and even cemeteries."

42. Diller, "Revolution in Welfare Administration."

43. See Alfred C. Aman Jr., "An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City," *Indiana Journal of Global Legal Studies* (Summer 2007), 301–25.

44. The 2000 contract competition to provide inmate health care to the New York City prison system involved only three bidders, two of which were local to the New York municipal area: Capital Health Management, based in Queens; St. Vincent's Hospital and Medical Center, based in Manhattan; and the Tennessee-based Prison Health Services, which was awarded the contract (Eric Lipton, "Company Selected for Rikers Health Care," *New York Times*, September 19, 2000). Consolidation of private providers may also be having a negative effect on competition. Government prison systems may drop a provider due to dissatisfaction with the medical care provided, only to find itself being stuck with the same provider again after a merger or acquisition of the new provider by the previously dropped company. For example, in 1999, Prison Health Services (PHS) purchased EMSA Government Services, a large competitor that had replaced PHS as the provider in Polk County, Florida, prior to the acquisition. The purchase had the effect of returning inmate medical care back to PHS, much to the displeasure of the county (Paul von Zielbauer, "Harsh Medicine: Dying behind Bars; As Health Care

in Jails Goes Private, 10 Days Can Be a Death Sentence,” *New York Times*, February 27, 2005).

45. For a discussion of the various ways that competition in a global economy can affect state entities, politics, and the law, see Alfred C. Aman Jr., “The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy” 31. *Vanderbilt Journal of Transnational Law* 769: 780–91.

46. Jody Freeman has described the actual cumulative process of policy making and subsequent implementation and enforcement as “fluid.” She explains: “Administrative law scholars tend to take ‘snapshots’ of specific moments in the decision-making process (such as the moment of rule promulgation) and analyze them in isolation. Rules develop meaning, however, only through the fluid processes of design, implementation, enforcement, and negotiation” (Freeman, “Private Roles in Public Governance,” 572). See also Michael Aronson, “A Public Lawyer’s Responses to Privatization and Outsourcing,” in *The Province of Administrative Law*, edited by Michael Taggart. (Oxford: Hart Publishing, 1997), 40, 50–58.

47. For the purposes of this chapter, references to the APA are intended to suggest the use of procedures for hybrid decision making that may or may not be the same as the procedures found in the APA. In many instances, if the APA is to apply, it must be amended to fit the needs of hybrid arrangements involved, such as the provisions dealing with contracting out agency duties; in others, it is important to determine which types of private entities should be affected by APA extensions. For a discussion of the scope and coverage of the Freedom of Information Act as it relates to the private sector, see, for example, Alfred C. Aman Jr., “Information, Privacy, and Technology: Citizens, Clients, or Consumers?” in *Freedom of Expression and Freedom of Information*, edited by Jack Beatson and Yvonne Cripps, 325–48 (Oxford: Oxford University Press, 2001).

48. See Radin and Wagner, “Myth of Private Ordering,” 1296.

49. See Richard B. Stewart, “The Reformation of American Administrative Law,” 88 *Harvard Law Review* 1667 (1975): 1669–70.

## CHAPTER 2

# In the Shadow of Globalization: Changing Firm-Level and Shifting Employment Risks in the United States

Katherine V. W. Stone

One of the most intensely debated questions in the labor relations field today is, what is the impact of globalization on labor standards? Many have predicted that globalization in general and increased global trade in particular will induce firms in developed countries to lower production costs by relocating work to countries that have lower labor standards. The prospect of a major flight of capital—what Ross Perot famously called the “great sucking sound”—has dominated most discussion of trade and labor in the United States over the past two decades. Others have suggested that trade affects labor standards primarily through political processes—that states engage in “regulatory competition” with one another, relaxing or repealing labor protections to attract firms and jobs. Still others suggest that the opposite will occur: global trade will trigger a race to the top. Some race-to-the-top theorists argue that large multinational firms will spread their labor practices and their high labor standards throughout the world because they value both consistent human resources (HR) practices and a reputation for having high standards. Other race-to-the-top theorists suggest that governments in developing countries will raise labor standards to emulate Western states as they engage with more developed economies through the process of trade.

These hypotheses are not merely of academic interest—they have important policy ramifications. They comprise the empirical underpinning of the normative and policy debates in the area of labor and trade. The answers shape our attitudes toward increased trade liberalism and toward the prospect of developing transnational institutions to regulate labor standards. In this chapter, I argue that there is a missing link, a factor that

has not yet been adequately identified or theorized in the labor-trade debates in the United States. I outline a framework for understanding this missing link and present evidence that the experience of the United States on this front is highly relevant to the evolution of labor standards in other developed countries.

The missing link—the variable omitted from the abovementioned hypotheses—is the impact of global trade on firm-level practices. Global trade affects firm-level practices, which in turn affect the domestic regulatory environment in which firms operate. Once we understand the mechanism by which globalization affects firms and the pressures this imposes on regulatory frameworks, we can frame some proposals for meaningful regulatory reform.

In brief, my argument is as follows: Globalization under the neoliberal institutions that have defined and dominated international trade into the early twenty-first century creates increased competition between firms in the product market. The intensified competition causes firms to seek flexibility in their labor relations—flexibility to hire and fire on short notice, to increase or shrink the overall size of their workforce, to adjust pay to short-term performance results, to redeploy workers within the firm and to outside production partners, and to retain workers with particular skills on an as-needed basis. Firms also seek competitive advantage by tapping into the talents, skills, and imaginative capacities of their employees. These practices are in tension with the labor law regimes throughout the Western world.

Until recently, most if not all developed countries had labor law regimes that were established to give workers protection for job security and steady incomes, social insurance, and other benefits. Despite numerous variations and many shortcomings, domestic labor law in the developed world has historically protected workers by making employment conditions stable, reliable, and predictable. However, the laws have also hindered firm operations by making labor practices rigid in many respects. Today, the intensified competition from increased global trade generates pressure on firms to make work more flexible. Thus pressures have emerged to dismantle labor protections and revise labor laws.

At the present time, the labor laws are being rewritten all over the world. For example, in Japan, the government has enacted a series of new labor laws in the past five years in an effort to bring some flexibility into the labor market, yet protect job security at the same time. These laws make it easier for firms to hire temporary workers by relaxing restrictions on worker dispatching firms.<sup>1</sup> In Australia, a new labor law went into effect in 2006 that introduced new types of decentralization and flexibility into labor-management relations. This law, the Australian Work Choice Act of 2005, threatens to undermine a century-long system of centralized interest arbitration that had helped Australia maintain one of the highest standards of living and systems of social protection in the developed world.<sup>2</sup>

Throughout Europe, the issue of flexibility and labor law reform is currently a subject of intense dispute, both within the European Union and



inside individual nations.<sup>3</sup> To give just one example, in Sweden, where industrial relations are primarily a matter of negotiated agreements rather than legislation, there have been attempts to enact legislation to permit more flexibility, especially by relaxing protection for job security. Further, the government has made changes in the Swedish employment law to permit increased use of fixed-term employment contracts, and it has made proposals to further liberalize the use of short-term temporary workers.<sup>4</sup> In addition, in cases decided in 2003 and 2004, the Swedish Labor Court held that an employer did not violate the Employment Protection Act or a collective agreement that banned fixed-term contracts by dismissing employees at the same time as hiring contract workers.<sup>5</sup>

In the United States, there have been no new labor laws enacted at the national level for many years, but there have been major revisions in the interpretation and application of existing doctrines, the cumulative effect of which has been to diminish the protections the laws afford. Since 2004, the Labor Board has reinterpreted the National Labor Relations Act (NLRA) in ways that effectively deprive many temporary, part-time, and low-level professional workers of legal protection, restrict the rights of all employees to engage in collective activity, and increase employers' latitude to thwart union drives.<sup>6</sup> As a result of these and numerous similar rulings over the past two decades, there has been a rising chorus of complaints that the labor law has become "ossified,"<sup>7</sup> that the law is failing to offer meaningful worker protection,<sup>8</sup> that the courts and Labor Board have abandoned the "core values of labor law,"<sup>9</sup> and that Congress has underfunded the labor protective agencies such as the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), and the Hour and Wage Division that administers the Fair Labor Standards Act (FLSA).<sup>10</sup> Indeed, some have contended that over the past two decades, there has been a passive repeal of the employment statutes.<sup>11</sup>

Throughout the developed world, employers' drive for flexibility and the resultant rewriting of the labor laws threatens the welfare of the working population. If left unremedied, the "flexibilization" of work will lead to a shifting of employment-related risks from firms and states to individuals. It will also lead to the deterioration of the bargaining power of workers both individually and collectively. In the United States, employers' drive for flexibility has fueled aggressive de-unionization efforts and has induced employers to increase their use of temporary workers and independent contractors and to restructure pension and benefit plans.

A crucial question for employment regulation thus becomes how to protect workers—how to mitigate their vulnerabilities and ameliorate the shifting risks that today's workplace practices impose. Some countries are attempting to devise new mechanisms to preserve security at the same time that they are relaxing their traditional labor protective regimes. It is an open question whether the U.S. federal government has the political will or the vision that would permit the kind of reinvention of the social safety net that would be necessary to protect working people from the dangers of globalization and flexibilization. It is also an open question whether and what kind of reinvention is feasible in an increasingly globalized world.

## THE HISTORIC ROLE OF LABOR LAW AND ITS RECENT DEMISE

Historically, the aim of labor law in the Western world has been to provide workplace fairness, employment security, decent living standards, and social justice. Labor laws were enacted throughout the Western world in the nineteenth and twentieth centuries in response to struggles by workers movements, and they represent an enormous achievement, comparable to the elimination of slavery and the emancipation of women. Labor law as a field is dedicated to shielding workers from the vicissitudes of the market and providing them a protective social safety net.

Just naming some of the most widespread types of labor and employment laws reveals their protective nature. Most developed countries have laws to provide minimum wage, unemployment insurance, old age and health insurance, collective bargaining rights, occupational health and safety protection, industrial accident protection, protection against discrimination, prohibition of child labor, and unfair dismissal protection. To be sure, some labor laws are more protective than others, and sometimes the laws are revised in ways that increase or decrease their protective bite, but the aggregate impact of the labor laws is to provide worker protection. One could contend that labor law is not about worker protection but is neutral as to outcomes between employees and employers. While technically that contention may be true, the field of labor law has a historical and a contextualized meaning. And in the sense of its historical meaning, the project of labor law is now at risk.

All over the world, legal scholars and labor activists describe the demise of labor law, both as a field of law and as a system of social protection. Almost universally, it is said that the field is dying—that the labor laws are being revised, repealed, or relaxed in their enforcement so as to render them virtually meaningless.<sup>12</sup> Furthermore, within businesses, the labor professionals have been marginalized; within government, labor ministries are being dismantled; and within the academy, labor studies has been all but eliminated at many of the leading universities and law schools.<sup>13</sup> Major firms have restructured their corporate chains of command to downgrade the status of HR departments from the vice president level to subunits of finance. One might interpret these developments as proof that the goals of labor law—fair labor standards and social justice for workers—have been achieved and that protection for labor is so universal that special labor departments and protective labor laws are no longer necessary. Regrettably, that is not the case. Rather, the dismantlement of labor laws and the marginalization of labor agencies are both symptoms of, and contributions to, the declining power of workers in the global economy.

## INDUSTRIAL-ERA LABOR LAWS IN THE UNITED STATES

The demise of labor law in the United States, as elsewhere, corresponds to a change in the nature of work. The labor law systems that emerged in

the United States were designed to provide steady jobs, decent income, social insurance, and a comfortable retirement. Together, these comprised a promise of stability and security for blue-collar workers. While the benefits were not universally available, the system was a tremendous achievement for those who participated in it. It was more than a legal system, however. It was also a production system, a system by which work and industry were organized to foster and fulfill the promise of stability and security.

The current labor laws emerged in the mid-twentieth century, amid an era in which firms' HR practices offered stability and job security. Large companies throughout much of the early twentieth century developed HR practices that valued and encouraged long-term employment. They took their guidance from industrial relations theorists such as Frederick Winslow Taylor and others in the scientific management and personnel management movements who counseled firms to seek long-term relationships with employees in order to foster loyalty, encourage the development of firm-specific skills, and discourage turnover. On the basis of such Taylorist theories, most large corporations reorganized their workforces into job structures in which individuals were bonded to their firms through pay and benefit structures, promotion prospects, retirement arrangements, and implicit promises of job security. These types of practices, termed "internal labor markets," were a major departure from the fluid and transitory work arrangements of the nineteenth century. In internal labor markets, jobs are broken down into minute tasks and then are arranged into hierarchical ladders in which each job provides the training for the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level and utilized internal promotion to fill all of the higher rungs.<sup>14</sup>

"Taylorism" became the dominant type of HR policy within large U.S. manufacturing firms over most of the twentieth century. Throughout corporate America, management reduced the skill level of jobs, while at the same time encouraging employee-firm attachment through promotion and retention policies, explicit or de facto seniority arrangements, elaborate welfare schemes, and longevity-linked benefits packages. Because employers wanted employees to stay a long time, they gave them implicit promises of long-term employment and of orderly and predictable patterns of promotion. These were the dominant job structures of the industrial era. While these systems had their origins in the blue-collar workplaces of the smokestack industrial heartland, by the 1960s they were adapted to large white-collar workplaces such as insurance companies and banks.<sup>15</sup>

The labor laws that emerged in the United States and throughout the developed world tracked and reinforced the internal labor markets of large corporations. In most countries, an essential feature of the labor laws has been job security. In Europe, laws were enacted making it difficult and cumbersome for an employer to dismiss an employee. There, employers have to prove just cause, provide a significant period of notice, and pay substantial severance pay if they want to dismiss an employee. In some countries, it is also necessary to obtain permission of a labor ministry. For example, in Spain, the statutory code governing employment dismissal is a tome of some three hundred pages.<sup>16</sup>

In Japan, job security was not mandated by statute, but instead by a powerful cultural norm that required large firms to give their employees lifetime job security. Japan has an Employment Security Law that requires employers who terminate an employee to give thirty days' notice, but the law does not prevent dismissal. However, the cultural norm, in conjunction with various judicial decisions, does.<sup>17</sup>

In the United States, job security has not been guaranteed either by statute or by cultural practice. However, it was an unstated condition in most large corporations that, absent extreme misconduct or severe business decline, a worker who was hired had a job for life.<sup>18</sup> This implicit promise of job security was an important part of the personnel practices and policies adopted by U.S. corporations in the early and mid-twentieth century.

Although the labor laws in the United States did not provide job security directly, they were tailored to the industrial-era job structures in other ways. For example, the primary objective of the NLRA was to promote the self-regulation of the workplace by workers and management, both of which were long-term players with an ongoing relationship to the firm. Under the Act, the unionized workplace was divided into discrete bargaining units, each a well-defined, circumscribed, and economically stable group. While the individuals in the unit could and did change, the bargaining rights and bargaining agreements applied to the unit. Unions negotiated agreements that specified wages, work rules, and dispute resolution systems for those individuals working in the unit. The terms and benefits applied to the job—they did not follow workers to other jobs when they left the unit. Job-centered benefits were not problematic in a workplace in which jobs themselves were stable and long-term.

The assumption of long-term employment also permeated union bargaining goals. Many of the benefits and work rules that unions negotiated rewarded long-term employment and were thus consistent with the implicit lifetime employment commitment. Wages, vacations, and sick leave policies, for example, were often based on length of service. Long vesting periods for pensions also assumed and reinforced the norm of long-term employment. Unions protected employees against employer breaches of their implicit promises of long-term employment by negotiating seniority systems and just-cause-for-discharge clauses. Unions also established grievance and arbitration systems to give workers an expeditious and inexpensive mechanism to enforce the implicit promises of the industrial-era workplace.

Thus there evolved an employment system comprised of rising job security, longevity-based wages, employer-based health insurance, and employment linked retirement security. For many unionized American workers, the employment system of the industrial era was the epitome of a good life.<sup>19</sup> However, the system was created within a framework that assumed the existence of strong firm-worker attachment, long-term jobs, and promotion ladders to define progress throughout a career. Indeed, for most of the twentieth century, the law and the institutions governing work in America were based on the assumption that workers were employed in

stable jobs by corporations that valued long-term attachment between the firm and the worker—that is, based on the internal labor market model of employment. Because the workplace is now changing, the twentieth-century regulatory framework is becoming increasingly out of date.

## THE NEW EMPLOYMENT RELATIONSHIP

Sometime during the 1970s, employment practices in the United States began to change. Since then, the use of temporary and contingent workers increased dramatically, and there have been widespread reports that large corporations no longer offer their employees implicit contracts for lifetime employment. Work has become contingent not only for atypical workers but also for “regular” employees, whose attachment to the firm has been weakened. The “recasualization of work” has reportedly become a fact of life both for blue-collar and for high-end professionals and managers. This was expressed eloquently by Jack Welch, the former chief executive officer of General Electric (GE), in an interview with the *Harvard Business Review* in 1989:

Like many other large companies in the United States, Europe, and Japan, GE has had an implicit psychological contract [with its employees] based on perceived lifetime employment. People were rarely dismissed except for cause or severe business downturns. . . . This produced a paternal, feudal, fuzzy kind of loyalty. You put in your time, worked hard, and the company took care of you for life. That kind of loyalty tends to focus people inward. But given today’s environment, people’s emotional energy must be focused outward on a competitive world where no business is a safe haven for employment unless it is winning in the marketplace. The psychological contract has to change.<sup>20</sup>

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Labor economists have documented the trend away from long-term firm-worker attachment and toward short-term employment relationships.<sup>21</sup> The U.S. Department of Labor’s Current Population Survey (CPS) found dramatic declines in job tenure between 1983 and 2002 for all men over the age of 20, with the most significant declines among men in the age groups over age 45. This is precisely the group whose members benefited from the old implicit employment contract for long-term employment. In addition to the job tenure data, the CPS found a significant decline in the number of men who had been with their current employer for ten years or more. Similar large declines occurred for men in every age group over 45.<sup>22</sup>

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The job tenure data are consistent with accounts by industrial sociologists and industrial relations practitioners. For example, noted sociologist Richard Sennett interviewed a number of younger employees about their experiences in the labor market, and he reports:

The most tangible sign of that change might be the motto “No long term.” In work, the traditional career progressing step by step through the corridors of one or two institutions is withering. . . . Today, a young American with at

least two years of college can expect to change jobs at least eleven times in the course of working, and change his or her skill base at least three times during those forty years of labor.<sup>23</sup>

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## Regular Workers in the New Employment Relationship

In the late twentieth century, U.S. employers began to dismantle their internal labor market job structures. Faced with rapidly expanding and increasingly competitive global product markets, they began to create new types of employment relationships that provided them flexibility to make quick adjustments in production methods, product design, marketing strategies, and product mixes. To respond to intense global competition, firms needed the ability to decrease or redeploy their workforce quickly as market opportunities shifted. Hence management theorists and industrial relations specialists developed what they call the “new psychological contract”<sup>24</sup> or the “new deal at work.”<sup>25</sup> In the new deal, the prevailing assumption of long-term attachment between an employee and a single company has been replaced by other implicit and explicit understandings of the mutual obligations of employees and the firms that employ them.

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While the new employment relationship does not depend upon long-term employment, attachment, or mutual loyalty between the employee and the employer, it also does not dispense with the need for engaged and committed employees. Indeed, businesses today believe that they need the active engagement of their employees more than ever before. They want not merely predictable and excellent role performance, but what has been described as “spontaneous and innovative activity that goes beyond role requirements.”<sup>26</sup> They want employees to commit their imagination, energies, and intelligence on behalf of their firm.

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Today’s valuation of employees’ cognitive contribution stands in direct contrast to the scientific management approach. Under scientific management, workers were not expected to gain or use knowledge in their jobs. Knowledge was a monopoly tightly held by management. Today, companies believe that they can acquire a competitive advantage by eliciting and harnessing the knowledge of their employees. According to *Fortune* magazine editor Thomas Stewart, “Information and knowledge are the thermonuclear competitive weapons of our time.”<sup>27</sup> Hence firms want employees to innovate, to pitch in, to have an entrepreneurial attitude toward their jobs. They want to encourage behavior that goes beyond specific roles and job demands and gives the business something extra. Organizational theorists characterize this something extra as “organizational citizenship behavior” (OCB).<sup>28</sup>

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Much of current HR policy is designed to resolve the following paradox: Firms need to motivate employees to provide the OCB and the commitment to quality, productivity, and efficiency that they value, while at the same time they are dismantling the job security and job ladders that have given employees a stake in the well-being of their companies for the past hundred years. Hence managers have been devising new

organizational structures that embody flexibility while also promoting skill development and fostering OCB.

A new employment relationship is emerging through such theoretical and experimental programs as total quality management (TQM), competency-based organizations, and high-performance work practice programs.<sup>29</sup> Despite differences in emphasis, the various approaches that comprise the new employment relationship share several common features.<sup>30</sup> First, firms no longer implicitly offer employees long-term job security. By explicitly disavowing a promise of job security, employers do not foster expectations of career-long attachment. However, employers give their employees implicit promises and understandings that provide a substitute for the job security of the past. Many employers explicitly or implicitly promise to give employees not job security, but “employability security”—that is, opportunities to develop their human capital so they can prosper in the external labor market.<sup>31</sup>

The new employment relationship also involves compensation systems that peg salaries and wages to market rates and individual performance rather than to internal institutional factors such as lockstep longevity wage scales, seniority, or job evaluation. The emphasis is on offering employees differential pay to reflect differential talents and contributions.<sup>32</sup>

The new employment relationship also involves companies giving their employees opportunities to interact with customers, suppliers, and even competitors.<sup>33</sup> Regular employee contact with the firm’s constituents is touted as a way to get employees to be familiar with and focused on its competitive needs, while at the same raising the employees’ social capital so that later they can find job elsewhere. The new relationship also involves a flattening of hierarchy, the elimination of status-linked perks,<sup>34</sup> and the use of company-specific grievance mechanisms.<sup>35</sup>

Another feature of the new relationship is a new emphasis on procedural justice at work. Researchers have found that employees’ subjective appraisal of their employer’s fairness is considered one factor in generating OCB. Employees who perceive their employer as unfair reduce their OCB, triggering a downward cycle in which the employees’ diminished OCB leads the supervisor to withdraw informal types of affirmation, causing the employee to experience additional feelings of unfairness and to further decrease her OCB.<sup>36</sup> Indeed, there is evidence that as firms disavow promises of job security, procedural fairness becomes more important than before.<sup>37</sup>

It is understandable that employees would focus on procedural fairness when they lack promises of long-term employment because, in this new employment relationship, employees are required to bear many of the risks that were previously borne by the firm. Because employees increasingly have to bear the consequences of a company’s failure or market fluctuations, they at least want to be confident that the incidence of the risks is fairly applied. Employers therefore have attempted to devise procedures for hearing complaints and resolving disputes, such as open-door policies, ombudsmen, management appeals boards, peer review, mediation, and arbitration.<sup>38</sup>

## The Atypical and Nonemployee Worker

Just as the employment contract for “regular” employees is changing, there has also been an explosion in new types of workers who are not employees in any conventional sense. Atypical workers—temporary workers, leased workers, part-time workers, trainees, and apprentices, and “dependent” independent contractors—are a growing portion of the labor force.

According to the Department of Labor, in 2005, nearly 4.5 million people in the United States—a full 3.6 percent of the workforce—were engaged in temporary work.<sup>39</sup> In addition, firms are subcontracting tasks not only to other businesses but also to individuals termed “independent contractors.” Some of those independent contractors work at the firms’ premises, but many others work at home, akin to nineteenth-century home-based piece-workers. As of 2005, there were more than ten million independent contractors, comprising 8.4 percent of the labor force.<sup>40</sup> In all, that year the Labor Department classified 16.2 million people—12.1 percent of the workforce—as contingent workers. In addition, in 2003 it found that there were more than five million involuntary part-time workers—those who want but do not have regular employment.<sup>41</sup> A survey of companies in all industries and of all sizes conducted by the Upjohn Institute in 2000 found that 78 percent of all private firms used some sorts of flexible staffing arrangements.<sup>42</sup>

Atypical workers are employees without employers. Some work under at-will contracts, and some have no employment contracts at all. *Temporary workers* move from firm to firm, often dispatched for short-term assignments by a temporary help agency. *On-call workers* are either retained by a specific employer to work on an as-needed basis or placed on call by a temporary help agency and required to be available for work without knowing their next place or hours of work. *Independent contractors* have none of the rights of employees, even though they often resemble employees in every respect. Many are unskilled workers who face “shape-ups” in ad hoc hiring halls on street corners every morning.<sup>43</sup> Neither atypical workers nor independent contractors have a reasonable expectation of long-term employment with a particular employer, even though they can spend years in the labor force doing the same kind of work in the same geographic area. Atypical workers receive significantly less pay than their regular employee counterparts and are less likely to receive health insurance or pensions from their employers. They also have very limited rights under the labor laws.<sup>44</sup>

## Why the World of Work Has Changed

The reason that firms are shifting their labor practices and dismantling their internal labor markets is that they are acting in response to increased global competition in the product market. The expansion of global trade opens up new opportunities for sales, but also creates new threats that foreign companies will outcompete existing domestic ones. With increased



trade, domestic market relations are destabilized and businesses' market shares are at risk. At the same time, they face the prospect of untold riches in the new global marketplace. In this Brave New World of trade, firms seek every possible competitive edge as they try to ward off competitors and capture the new markets. In the 1980s and 1990s, management theorists, business consultants, stock market analysts, and senior management officials determined that the path to success in the new global market was through the use of flexible work practices that elicited employee knowledge and commitment. Hence they repudiated Taylorism and the secure and comfortable arrangements that had persisted under the industrial era.<sup>45</sup>

Empirical evidence confirms that the new employment practices described above were first utilized in companies engaged in international trade or threatened by global competition.<sup>46</sup> For example, Paul Osterman conducted a survey of six hundred businesses of all sizes and in all sectors of the economy in 1992 to determine which were utilizing the various new work practices that comprise the new employment relationship. He reported that "firms most likely to adopt these systems were those with relatively highly skilled technologies, firms that competed in international markets, firms that placed a high value on product quality, and those that were large and part of multi-location organizations."<sup>47</sup> Other studies have similarly found that flexible wage practices are most frequently adopted by these businesses that are most exposed to foreign trade. Marianne Bertrand found that companies facing competitive pressures from the global marketplace are more likely to adopt flexible wage policies.<sup>48</sup> A study of British confectionary companies also found that those whose products competed in a global market were more likely to adopt boundaryless job structures.<sup>49</sup> That is, increasing global competition subjects many firms to increased market pressure, which in turn induces them to adopt the kinds of new work practices described above. Over time, the new work practices spread to all types of businesses throughout the economy.<sup>50</sup>

## RISKS AND VULNERABILITIES OF THE NEW EMPLOYMENT RELATIONSHIP

The new employment relationship shifts onto employees many risks previously borne by the firm. Foremost, employees now face a constant risk of job loss due to the continual workforce churning that characterizes the new workplace. In addition, the new employment relationship generates a level of wage inequality and uncertainty that was not feasible under the old internal labor market arrangements. In internal labor markets, wages were set by institutional factors such as seniority and longevity. Wages today are increasingly pegged to individualized factors and to the external labor market. One result is wage uncertainty for employees: they are experiencing more extreme income fluctuations than ever before.<sup>51</sup> Gone, too, are the days of reliable and steadily progressing pay levels along some pre-arranged or previously agreed-upon scale. Another result is increasing wage dispersion. Pay rates for similarly situated employees in different firms and even with a single firm have become markedly diverse.

In addition to job and wage uncertainty, the new employment practices place on employees the risk of losing the value of their labor market skills. When jobs are redesigned to provide greater flexibility, their skill requirements often increase.<sup>52</sup> Newly trained employees thus have an advantage over older ones, and ongoing training becomes not an opportunity for advancement but a necessity for survival. The new employment practices thus impose not only risks of job loss on employees but also risks of depreciation of one's own skill base. Rather than being able to count on a rising wage level and a comfortable retirement, many workers are anticipating a lifetime of retooling just to stay in place.

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Another type of risk generated by the new employment relationship involves the dissolution of stable and reliable old-age and social welfare benefits. In the United States, social insurance is generally linked to employment. Workers obtain health insurance, pensions, disability, long-term care, and most other forms of social insurance from their employers, when they can get them, rather than from the state. Even most forms of state-mandated insurance benefits, such as unemployment compensation and workplace accident insurance, require a worker to have a relationship with a specific employer to be eligible for benefits.

Because social insurance is tied to employment, as job security wanes and more people move from job to job, they usually lose whatever employer-sponsored benefits they once had. Therefore, even if one's new employer offers a health benefit plan comparable to those of one's former employer, most plans impose waiting periods for health coverage and exclusions for preexisting conditions that leave many effectively uninsured. Further, most pension plans do not vest for several years, so that mobile workers are often not covered.

The risks workers face today are not merely hypothetical. Since the late 1980s, as global competition became an increasing feature of U.S. economic life and as new flexible work practices began to permeate major industries, working conditions and job security have deteriorated. There has been a long slow decline in union density from a peak of 34.7 percent in 1954 to less than 9 percent in 2006, with the steepest decline occurring since the late 1980s. Private sector union density is now less than 7 percent of the private sector workforce and continues to decline.<sup>53</sup> This deterioration in union density is closely connected to falling wage levels and job security. Without unions to constrain them, firms have been free to improve their bottom line by lowering their labor costs. In the 1980s and 1990s, for the first time since World War II, wages began to decline in real terms. Real weekly earnings for all production and nonsupervisory workers declined from \$562 to \$544 between 1979 and 2005.<sup>54</sup> And the pay gap between the top and bottom quintiles of the workforce is the greatest it has been at any time since 1947, when the Department of Labor first collected such statistics.<sup>55</sup> Capital has increased its share of national income at the expense of workers and the underprivileged for the first time in sixty years. The result, as reflected in national income data, has been a dramatic rise in income inequality in the past fifteen years.

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In addition to declining unions and stagnating wages, there has been a marked decrease in benefit coverage. Health insurance in the United States is provided by employers, when it is provided at all. As worker-firm attachment has diminished, the proportion of employees who have coverage has declined sharply in recent decades. Between 1999 and 2006, the share of employers who offered health insurance to their employees declined from 69 to 60 percent.<sup>56</sup> Furthermore, according to a study by the Economic Policy Institute, the number of uninsured employees increased from 39.8 million in 2000 to 46.6 million in 2005.<sup>57</sup> According to the Congressional Budget Office (CBO), the number of individuals who are uninsured at any point in time is much larger than these numbers suggest. The CBO found that between 57 million and 59 million people lacked health insurance at some point in 1998, a number that amounted to about a quarter of the nonelderly population.<sup>58</sup>

At the present time, the fastest growing group within the American labor force is the working poor. These are temporary workers, contingent workers, and workers in industries such as fast food or consumer services who are paid the minimum wage. These are workers who often cannot afford to see a doctor or buy shoes for their children on their forty-hour-week paychecks. The working poor comprised 10.4 million people in 1993, according to the Bureau of the Census, and the numbers have been growing. A study conducted by the Working Poor Families Initiative of the Rockefeller, Ford, and Casey foundations reported that, as of 2004, one in four U.S. working families was earning below the poverty level.<sup>59</sup>

Also in the past decade, corporate takeovers and mergers have produced massive employee dislocation. The Bureau of Labor Statistics' Displaced Workers Survey in 2004 found that the rate at which workers experience involuntary job loss had risen substantially since 1999, even though since 2001 the economy had been officially in a "recovery."<sup>60</sup> Furthermore, those who lose manufacturing jobs are unlikely to ever get jobs that pay comparable wages or benefits. One study by Princeton economist Henry Farber found that of workers who lost their jobs between 2001 and 2003, one-third failed to find employment at all and 13 percent found only part-time jobs. Those who found full-time jobs earned on average 17 percent less than they had earned on the jobs they lost.<sup>61</sup> Thus despite soaring rates of corporate profits, workers have not fared well in the boom economy of the late twentieth and early twenty-first century.<sup>62</sup>

## THE FAILURE OF U.S. LABOR LAW TO PROTECT WORKERS IN THE WORKPLACE OF TODAY

U.S. labor law has proven ineffective in shielding workers from the risks and vulnerabilities created by the new flexibilized workplace. Rather, the changes in workplace practices described above have rendered many features of existing labor regulation obsolete. The former regulatory structure was based on the template of long-term employment relationships and

strong employer–employee attachment, and thus it is not well suited to the newly emerging employment system. Therefore, as internal labor markets decline in importance, many features of the regulatory framework need to be reconsidered. I describe some of these outmoded features briefly below.

## Employee Representation

First, the new employment relationship has been constructed in nonunion environments and has proven remarkably resistant to unionization efforts. In part, this is because many of the highest priority bargaining goals of unions, such as narrowly defined bargaining units and seniority systems, are antithetical to the new flexible work practices. They assume long-term attachment in narrowly defined jobs. As described above, jobs today are defined broadly in order to facilitate fluidity between jobs and departments.

In addition, there is a misfit between the new workplace and existing labor law. There are several respects in which the rights created and duties imposed by the NLRA do not comport with the workplace of today and hence make it difficult for unions to provide worker protection. For example, as mentioned above, the labor law is structured to provide representation to workers in a stable “bargaining unit.” Under the NLRA, unions exist only as representatives of a bargaining unit. However, bargaining units imply static job definitions and clear boundaries and thus are in tension with cross-utilization, broad-banding, and other practices that blur departmental boundaries.<sup>63</sup> The bargaining unit focus of the NLRA means that terms and conditions negotiated by labor and management apply to jobs in the defined unit rather than to the individuals who hold the jobs. As individual workers move between departments, units, and/or companies, their labor contracts do not follow them. In today’s world of frequent movement, bargaining-unit-based unionism means that union gains are increasingly ephemeral from the individual’s point of view. It is no surprise, then, that younger workers who expect to change jobs frequently do not find the prospect of union membership to be in their interest.

There are numerous other respects in which current labor law assumes clear and well-defined boundaries. To give another example, the secondary boycott prohibition assumes that union economic pressure should take place within a discrete economic unit—the bargaining unit—and should not spill over beyond its boundaries. The law attempts to confine economic contestation to the immediate parties in a bounded arena of conflict. The effort to limit economic warfare to “primary” participants further assumes that the unionized workplace has static borders and that disputes between the firm and its workers affect only those immediate and identifiable parties. In today’s network production and boundaryless workplace, the assumption that there can be discrete, bounded conflict with clear insiders and outsiders is becoming less and less plausible. Rather, unions are finding with increased frequency that efforts to bring economic pressure to bear traverses traditional bargaining units and corporate

boundaries. As unions seek to apply pressure on suppliers, joint venturers, co-employers, network partners, and subsidiaries, the secondary boycott laws have become an ever more serious hindrance to their success.<sup>64</sup>

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In these and other respects, Wagner Act unionism is job centered and/or employer centered, not employee centered. So long as jobs were relatively stable—that is, the same jobs were performed over time in the same location by the same employees—bargaining units were stable as to membership, size, and composition, and collective agreements were stable as to the scope of their coverage. This is no longer the case.

### Employee Benefits

The social insurance system in the United States was initially designed to complement job structures of the industrial era. In the early twentieth century, employers deliberately structured health insurance and pension plans to tie the worker to the firm. These arrangements fit well with the long-term commitment that employers were seeking. But now, when employers neither desire nor offer long-term commitment to their employees, the design of the plans is dysfunctional from workers' and employers' points of view. Workers who change jobs frequently risk losing their benefits, yet those who do not change jobs out of fear of losing benefits—a condition termed “job lock”—cannot succeed in the labor market.

Also, employers are restructuring their benefit plans just as they are restructuring their employment practices. In keeping with the ethos of the new workplace, the new benefit plans embody a retreat from the principle of risk sharing and an adoption of a principle of individual choice. Plans such as defined contribution plans for pensions and now health savings accounts for health insurance shift more risk of uncertainty onto employees, and by doing so, they weaken the social safety net.

### Regulatory Vacuum for Atypical Workers and Independent Contractors

The U.S. labor laws provide little protection to temporary workers, contingent workers, or independent contractors.<sup>65</sup> The labor law statutes apply only to employees, not independent contractors. Employees who have atypical employment relationships or weak attachment to an employer are often termed independent contractors and thus rendered ineligible for statutory protection. Unlike Europe and Canada, in the United States there have not been efforts to create an intermediate category between “employee” and “independent contractor” that would give atypical workers some of the employment protections available for standard workers.<sup>66</sup> Rather, in the United States there are only two categories—employee and independent contractor; the former gets employment law protections and the latter does not.

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Increasingly, employers attempt to reclassify employees and to vary their employment practices so as to transform their former employees into

independent contractors.<sup>67</sup> Many large companies have redefined low-wage employees such as janitors, truck loaders, typists, and building cleaners as independent contractors even when they retain them to work on a regular basis. As independent contractors, these employees are not covered by minimum wage, workers' compensation, unemployment compensation, occupational safety and health laws, collective bargaining laws, social security disability, anti-discrimination laws, or other employment protections.<sup>68</sup> Furthermore, even those temporary workers who satisfy the criteria to be classified as employees face significant limits on their employment rights by virtue of their temporary status. For example, the NLRB recently placed severe, almost insuperable, obstacles on the ability of temporary workers to unionize.<sup>69</sup>

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### Employment Discrimination

The new employment system potentially poses new obstacles to the capacity of women and minorities to achieve equality in the workplace. Much of current equal employment law is designed to help women and minorities move up orderly job ladders. Existing theories of liability assume that the discriminator is in a hierarchical relationship to the complainant. In a workplace without job ladders and with flattened hierarchies, discrimination takes different forms. For example, today discrimination often takes the form of cliques, patronage networks, and buddy systems that utilize tools such as ostracism and subtle forms of nonsexual harassment (as well as sexual harassment) to exclude and disempower newcomers. The harms caused can be devastating to the victim, yet they are not cognizable under existing theories of discrimination.<sup>70</sup>

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### Ownership of Human Capital

One legal issue that was invisible in the past but has become prominent today is that of who owns an employee's human capital. Because the new employment relationship relies on employees' intellectual, imaginative, and cognitive contributions to the firm, employers put a premium on human capital development and knowledge sharing within the firm. Yet the frequent lateral movement between firms that typifies the new relationship means that when an employee leaves one employer and goes to work for a competitor, there is a danger that proprietary knowledge will go too. Increasingly, the original employer, fearing that valuable knowledge possessed by the employee will fall into the hands of a competitor, seeks to prevent the employee from taking the job or utilizing the valuable knowledge. Yet employees understand that their employability depends upon their knowledge and skills, so that they assume that they can take their human capital with them as they move around in the boundaryless workplace. As a result of these conflicting perspectives, legal disputes about employees' use of intellectual property in the post-termination setting have increased exponentially. The enforceability of post-termination restraints is now probably the most frequently litigated issue in the employment area.

## DEVISING NEW APPROACHES TO EMPLOYEE PROTECTION

### Lessons from Abroad

In parallel to the trends in the United States, the pressure for flexibilization has undermined the employment regulatory systems throughout the developed world, eroding the legal protections for job security and other accoutrements of stable employment created over the twentieth century. Changes in the nature of work are also forcing policymakers around the world to rethink and reconstruct labor and employment laws. The resulting labor law reforms are generating substantial opposition because while employers want to devise more flexible systems of production, employees are concerned that hard-won gains in security and income will be undermined.

Some countries are devising new regulatory systems that attempt to provide protection for workers within the new flexible employment system. For example, in Japan, the newly revised labor laws give employers more flexibility and freedom to utilize short-term contract workers, while also enhancing the bargaining power and contractual rights of individual employees.<sup>71</sup> In the United Kingdom, there has been an expansion of employment protection to cover not merely those considered “employees” but also a broader category of “worker,” so that the employment laws can protect those independent contractors who are in fact economically dependent upon a single business entity.<sup>72</sup> Within the European Community, a group of scholars under the leadership of Alain Supiot produced a report with a comprehensive series of proposals to provide workers with “active security”—measures that would enable them to obtain training and maintain their livelihoods despite the vicissitudes of the current labor market.<sup>73</sup>

In the United States, we need to consider policy reforms that are adapted to the new reality at work and design meaningful employment protections that support workers as they move in and out of the changing, boundaryless workplace. In order for individuals to survive and thrive in the new decentralized labor market, they need more protections, not fewer—but protections of a different type than employment law provided in the past. The changing nature of work creates new opportunities for workers, but also new types of vulnerabilities. As employer–employee attachment is episodic rather than long-term, the problem of transitions has risen to the fore. Thus the challenge for regulation today is not to recreate the era of worker–employer attachment but to find a means to provide workers with support structures to enable them to weather transitions and gaps in their labor market experience.

Transition assistance can and must take many forms. For example, individuals today need retraining possibilities that are available throughout their working lives so they can learn new skills and upgrade old ones. They need child care for young children, after-school care programs for school-age children, and school vacation and snow-day coverage. They also need affordable, reliable, and portable health insurance, disability insurance, and old-age assistance. Furthermore, in the current era, it is inevitable that

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many will have periods in which they are not in the labor force. Sometimes these will be involuntarily periods of unemployment between jobs. Sometimes individuals will take time out of the workplace to care for a young child or an elderly dependent. Other times, workers will need to retool, learn new skills, or reposition themselves in relation to the changing requirements of work. Thus, one of the most pressing needs of workers today is to have income support for these times of transition. Furthermore, because workers today are forced to bear many new risks in the labor market—risks of job loss, wage variability, benefit gaps, skill obsolescence, and intermittent prolonged periods of unemployment—we need to design social insurance policies to help mitigate those risks. At present, the labor laws do not address these problems either for regular or for atypical workers.

### The Last Big Question

There is still one big question that must be addressed: Given the intensified competition of today's global trading regime, can nations revise their labor laws to provide worker protection in a sustained fashion? Or will any worker protective measure adopted at the national level be doomed to fail because it will lead domestic firms to either fail or move overseas? That is, is it possible to have labor law reform in one country?

In a recent essay entitled "Egalitarian Redistribution in Globally Integrated Economies," economist Samuel Bowles addresses this question. Bowles argues that globalization makes it more costly for nations to enact regulations that change relative factor prices—for example, by increasing wages—because capital can easily and instantly move to more profitable locations. However, he shows that the mobility of capital does not preclude all redistributive measures. Measures that promote productivity, such as those providing skills training or health insurance to working people, raise their labor market power yet do not impose costs directly on firms. Hence, he concludes, regulation that is redistributive toward workers can be effective if it operates to enhance productivity and does not raise the cost of labor to firms.<sup>74</sup>

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The Bowles analysis suggests that some measures can be undertaken within the United States that would provide worker protection without contributing to capital flight. My analysis suggests that the measures Bowles proposes—training and health insurance—are of vital importance today. I would extend the analysis to include other measures that aid transitions and thus can provide workers security in today's boundaryless labor market, measures to provide transitional income maintenance, lifetime educational opportunities, retooling allowances, child care, and portable benefits. I would also suggest we explore a proposal that has been widely discussed in Europe—a proposal for a workplace sabbatical. This would be a system similar to unemployment insurance that would permit individuals to take time away from the labor market in order to enhance their skills and ability to flourish in the labor market.<sup>75</sup>

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It is easier to devise proposals than to achieve them. With globalization, the political power of labor has been weakened at the same time that workers' economic welfare has declined. Thus, in order to enact measures that might ameliorate the risks that globalization imposes, we have to articulate a national agenda for reforms in the United States that are achievable and do not trigger capital flight—and we have to mobilize constituencies seeking to promote “fair globalization.” I hope that the analysis offered here can help us take that first step.

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## CHAPTER 3

# Regulating from Nowhere: Domestic Environmental Law and the Nation-State Subject

Douglas A. Kysar and Ya-Wei Li

Law reveals its own geography. Implicit within the layers of local, municipal, state, federal, and international rules that collectively comprise the United States' environmental law regime is a vision of what the world looks like, how its territories are differentiated, how they relate to one another, and whether they are surpassed by forces greater than their sum. The geography implicit in law is often strange, even to lawyers. Most U.S. environmental laws, for instance, do not suggest on their face that there is an environment beyond the nation's territorial borders. Instead, the geography of U.S. law reflects the traditional Westphalian conception of sovereignty, in which each individual nation-state is deemed to have nearly absolute authority over the space within its physical borders. Nation-states thus depict themselves, in their laws, as somehow ecologically autonomous. Apart from certain recognized sites of common heritage, such as Antarctica, outer space, and the deep seabed, and apart from certain pervasive media such as the vast international waters within which national territories are to be found, the starting principle of environmental law is that "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies."<sup>1</sup>

Occasionally, these hermetically sealed nodes of legal authority are recognized to be interconnected through paths of environmental impact, such as transboundary air or water pollution, that give rise to limited bilateral or regional agreements, such as the series of treaties that have long structured relations between the United States and Canada with respect to environmental matters, including North American air pollution and regional management of the Great Lakes. Although limited in practical

effect, these agreements do represent an effort to implement the often-forgotten corollary to environmental law's baseline condition of Westphalian sovereignty—namely, that “States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>2</sup>

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In some instances, the environmental laws of the United States and other nations have gone even further to recognize problems of a truly global scale, problems that demand an integrated, multilateral response. Among such cases, the legal regime to arrest the production and consumption of ozone-depleting substances is often heralded as a particularly effective example of international environmental lawmaking, having achieved nearly universal endorsement and contributed to a dramatic decline in the use of such substances during its two decades of existence. Accordingly, much of the agenda of promoters of international environmental law at present is intended to expand the list of problems that are recognized, like ozone depletion, to be global in nature. The hope of these advocates is that the geography implicit in law will, over time, come to resemble that of the earth sciences. As the legally acknowledged environmental pathways expand and diversify, and as their operations come to be seen as hemispheric or global in scale rather than national or regional, eventually the claims of deep interconnection that are so prominent in environmental science and so urgently pressed in environmental politics also will find concrete expression in environmental law.

In recent years, the United States has come to be seen as a serious impediment to this integrative agenda, evidenced most prominently by the nation's unwillingness to lead or even participate in multilateral climate change discussions, but also apparent in the U.S. stance on persistent organic pollutants, genetically modified agriculture, and other prominent international environmental issues. This widespread perception of U.S. recalcitrance is striking when juxtaposed against the commitment to international cooperation that once was demonstrated by the nation's environmental statutes. The United Nations Environment Program Participation Act of 1973, for instance, declared, “It is the policy of the United States to participate in coordinated international efforts to solve environmental problems of global and international concern.”<sup>3</sup> Earlier, in 1970, the U.S. Congress chose to “commend and endorse” an effort of the International Council of Scientific Unions and the International Union of Biological Sciences to study “one of the most crucial situations to face this or any other civilization—the immediate or near potential of mankind to damage, possibly beyond repair, the earth's ecological system on which all life depends.”<sup>4</sup>

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Both of these statutes pledged not only moral support to the international community but financial as well, as did amendments to the Foreign Assistance Act adopted in 1977. These amendments began with a congressional finding that “the world faces enormous, urgent, and complex problems, with respect to natural resources, which require new forms of cooperation between the United States and developing countries to



prevent such problems from becoming unmanageable.”<sup>5</sup> In light of these problems, the amendments directed the president “to provide leadership both in thoroughly reassessing policies relating to natural resources and the environment, and in cooperating extensively with developing countries in order to achieve environmentally sound development.”<sup>6</sup> Other examples of U.S. efforts to assert international environmental leadership included the Federal Water Pollution Control Act, which instructed the president to take action necessary to insure that other countries reduce water pollution even within their own borders, and the Ocean Dumping Act, which directed the secretary of state to seek effective international action and cooperation to promote protection of the marine environment.<sup>7</sup> Like U.S. environmental law more generally,<sup>8</sup> these various efforts to promote internationally cooperative arrangements received strong bipartisan political support at the time of their adoption, but have since tended to languish amid the politicized and polarized atmosphere of U.S. environmental politics since the beginning of the 1980s.

This chapter argues for a reinvigoration of U.S. global environmental leadership. It does so through an appeal to national self-interest, by demonstrating the globally interdependent nature of even those aspects of U.S. environmental law and policy that conventionally have been considered domestic in nature. If, as some legal scholars have argued,<sup>9</sup> a country’s participation in international law can be understood only as a manifestation of national self-interest, then better appreciation of how the activities of other nations affect domestic self-interest may open up wider space for international environmental cooperation. Thus, the chapter begins by examining mounting but underappreciated scientific evidence of global interdependency in two key areas of U.S. domestic environmental policy: endangered species preservation and air quality regulation.

As will be seen, the goal of endangered species preservation is threatened significantly by the introduction of nonnative species into domestic ecosystems, an event that frequently occurs through channels of international travel and commerce that are key elements of globalization. Although in theory such biological introductions could be eliminated through especially effective border controls—that is, through measures that remain primarily domestic in nature—the practical reality remains that coordinated international efforts to minimize bioinvasive species are a necessary aspect of any comprehensive program of species preservation. To date, the treaties and other instruments of international law that address biodiversity conservation have largely failed to respond to this need, leaving the challenge of invasive species regulation to fall on domestic environmental laws that have little potency in the harbors and hangars where they are needed most.

Even more apparent is the internationally interdependent nature of air quality regulation. This is the case not only for ozone-depleting substances and greenhouse gases—which, from the moment of their discovery, have been seen as obviously global problems—but also for air pollutants that traditionally have been addressed primarily from a domestic legal platform. In particular, as this chapter demonstrates, a surprisingly large body of

scientific evidence has arisen demonstrating the impact of East Asian pollutant emissions, such as ozone precursors and particulate matter, on domestic air quality in the United States. To be sure, like many other nation-states, the United States has periodically engaged in bilateral or regional negotiations regarding discrete problems of transboundary air pollution, most notably with its neighbor to the north.<sup>10</sup> The scientific evidence reviewed in this chapter, however, suggests that the problem of air quality regulation should be regarded as *definitionally* global in scope, much as the problems of ozone depletion and climate change have been so conceived. As industrialization continues apace, any program of air quality regulation, even for conventionally “domestic” pollutants, will come to depend critically for its success on the choices and activities of other nation-states. This looks to be the case not only with respect to obvious atmospheric partners, such as the United States and Canada, but also with respect to major industrialized centers across the globe.

By reviewing the evidence on bioinvasive species and transpacific air pollution, this chapter aims to demonstrate that the achievement of even domestic environmental goals can be deeply dependent on the coordinated activity, not just of multiple actors within a single nation-state or within two or more contiguous states but also of significant actors throughout the entirety of the global legal order. The chapter concludes by demonstrating an incompatibility between, on the one hand, the reality of environmental law’s polycentric, interdependent nature and, on the other hand, certain geopolitical assumptions that appear to be implicit within the risk-assessment/cost-benefit analysis (RA/CBA) policy framework that currently dominates U.S. thinking about how to guide environmental law and regulation going forward. In contrast to the collective self-consciousness demonstrated in early federal environmental statutes—which, as noted above, depicted the United States as a nation-state subject with responsibilities to foster and lead international dialogue concerning environmental protection—the RA/CBA framework denies the U.S. political community a view from within itself. In essence, advocates of RA/CBA ask policy makers and bureaucrats to *regulate from nowhere*, as if they perceive and respond to environmental policy issues from a privileged, detached, impartial viewpoint in which the fact of the government’s *particular* identity, agency, and responsibility is denied.<sup>11</sup> To RA/CBA proponents, such a viewpoint is believed both to encourage a comprehensive, technically sophisticated evaluation of relevant individual welfare consequences of policy decisions and to reduce opportunities for paternalistic, protectionist, alarmist, or otherwise misguided public policy choices.

However admirable the impartial and objective aspirations of such a conception, it does not provide an adequate vehicle for addressing the transnational dimensions of environmental issues. Most obviously, the conception does not allow the United States to recognize its own limitations and, therefore, its need to seek cooperative relations with other sovereigns, whose activities increasingly affect the ability of U.S. regulators to achieve domestic environmental goals. Rather than simply measure and accept the behavior of other political actors as an empirical given when fashioning

domestic environmental law and policy, the United States and its officials instead must engage their sovereign counterparts in reasoning toward shared environmental goals, a dialogic process that once clearly was recognized by American environmental law but now seems obscured by the pervasiveness of RA/CBA.

Although couched in terms of American self-interest, this argument in favor of nation-state subjectivity also has an outward-looking implication. Because the RA/CBA framework inadequately characterizes the intersubjective nature of relations between nation-states, it fails to encapsulate the meaning and significance of extraterritorial impacts of any sort, whether caused *in* or caused *by* the United States. Along with future generations and nonhuman life forms, citizens of foreign nations generally are not given full standing in the purportedly impartial and objective calculations of the RA/CBA policy mechanism, yet their well-being—indeed their very ability to survive—is undeniably at stake within environmental policy making. By insisting on a view from nowhere that either does not include or only awkwardly subsumes these missing interest-holders, the RA/CBA conception denies the United States an adequate basis for recognizing the moral and political significance of its actions and for appreciating the need constantly to consider its responsibilities to others, even when fashioning environmental laws that might traditionally have been considered to fall within the domain of America's sovereign prerogative.

## BIODIVERSITY, INVASIVE SPECIES, AND THE POROSITY OF BORDERS

Recognizing that rapid economic growth and development had begun to threaten the survival of dozens of species, Congress in 1973 approved an ambitious biodiversity law, the Endangered Species Act (ESA).<sup>12</sup> The ESA seeks to conserve endangered and threatened species, both as a matter of domestic preference and as an effort to make good on America's international commitments to protect wild fauna and flora within its territory.<sup>13</sup> Ultimately, the ESA aspires not merely to prevent the extinction of protected species but also to restore them to the point where they no longer require the statute's safeguards.<sup>14</sup> To realize these goals, the Act imposes some of the most extensive restrictions on human activities of any environmental law. With few exceptions, the statute prohibits any person, corporation, or state, or the federal government, from engaging in potentially harmful conduct such as importing, exporting, possessing, pursuing, or killing endangered species of fish or wildlife.<sup>15</sup> All federal agencies must also ensure that any action they authorize, fund, or carry out is not likely to jeopardize the existence of an ESA protected species or to destroy or adversely modify areas that have been designated as "critical habitat," that is, habitat deemed essential to the species' conservation.<sup>16</sup>

Despite the breadth of these restrictions, the goals of the ESA have been imperfectly realized. Various species have declined in population

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or become extinct since the ESA's enactment, in large because the departments of Interior and Commerce have been slow to comply with their obligation to evaluate species for listing as endangered or threatened, the threshold decision that establishes a species' eligibility for the ESA's stringent legal protections.<sup>17</sup> Even for species that have been listed as protected, officials have often failed to undertake the species' all-important critical habitat designation, despite the fact that the ESA permits delay in designation only under "extraordinary circumstances."<sup>18</sup>

To account for these failures, fingers have pointed in multiple directions. For instance, the U.S. Fish and Wildlife Service, the agency responsible for protecting a majority of listed species, has been accused of deploying various strategies to avoid or delay the indispensable but often controversial duty to list at-risk species. The agency sometimes declares that a petition to list a species is "warranted but precluded" by the necessity of reviewing other, higher-priority requests for listing decisions.<sup>19</sup> This finding effectively pigeonholes the petition by banishing it to review under unenforceable timelines.<sup>20</sup> For its part, Congress has woefully underfunded the ESA implementation budget, leading to a vast backlog of species that await listing decisions. According to critics, moreover, the Interior Department's problem in this respect is at least partially self-incurred, since it consistently requests an annual budget that critics call inadequate to alleviate the listing backlog. During 1998 to 2003, the department even invited Congress to cap spending on the protection of additional species.<sup>21</sup>

Regardless of the political explanation, the incongruity between the ESA's implementation and its stated goals has allowed numerous plant and animal species to drift below their minimum viable population size and into extinction—all without having ever appeared as a listed species. With an estimated six thousand imperiled species lingering outside the protection of the ESA,<sup>22</sup> this loss of biodiversity seems likely to continue, despite the presence of what the U.S. Supreme Court called the "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>23</sup>

Among the many reasons for the ineffectiveness of the ESA, one of particular relevance to globalization is that of biological invasions. Approximately fifty thousand nonindigenous species have been introduced to the United States and its territories, many inadvertently so through the transport of people and their goods across international boundaries.<sup>24</sup> A fraction of these species have become invasive, creating substantial social, economic, and environmental costs and imposing a threat to native species that ranks second only to habitat destruction in terms of contribution to imperilment.<sup>25</sup>

The threat of biological invasions to species conservation is significant because it suggests that, even assuming full compliance with the ESA's listing procedure, the United States still would be limited in its ability to combat biodiversity loss because it would be unable to control activities that occur abroad and that increase the risk of biological invasion. To be sure, the ESA does recognize international considerations to some extent, as it begins with an acknowledgment that the United States has pledged

its commitment to species conservation through various international agreements.<sup>26</sup> Those agreements, however, tend to promote conservation as a norm that is to be accepted and supported through domestic legislation affecting domestic flora and fauna. They contain only limited recognition of transnational ecological interdependence, such as in the case of an endangered species physically migrating of its own accord among different nations' territories or the species or its products becoming an actual article of international trade. With respect to the problem of unintentional biological transfer, the international environmental agreements referenced by the ESA are essentially silent.

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Moreover, many believe that the ESA does not apply to activities that occur in foreign countries,<sup>27</sup> a jurisdictional limitation that would severely impair the statute's ability to reach conduct that increases the risk of biological invasion at the point of origin. The ESA does entertain the idea that species may be listed as endangered or threatened regardless of whether their habitat exists within U.S. borders.<sup>28</sup> However, the premise seems to remain that U.S. support of biodiversity conservation internationally should consist solely of trade measures, border controls, development assistance, and other legal maneuvers that are consistent with territorial sovereignty. The problem of reaching conduct that occurs abroad but affects protected species at home simply does not seem to have been countenanced when the ESA was drafted. Even if the statute did apply extraterritorially such that risk-enhancing behaviors abroad could be reached, the United States still would be limited in its ability to enforce the statute's provisions against non-U.S. actors, in the absence of some strong reciprocal arrangement among relevant nation-states.

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Thus, the links between globalization, invasive species, and biodiversity impairment suggest the need for cooperative, multilateral efforts to control the unintentional spread of species. The Convention on Biodiversity (CBD), which entered into force in 1993, seeks to address precisely this need by committing contracting nations to, "as far as possible and as appropriate . . . prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species."<sup>29</sup> Significantly, the CBD obligates member nations with respect to both "components of biodiversity" that occur within their territorial borders and harmful "processes and activities . . . carried out under [their] jurisdiction or control," regardless of whether the effects of those processes and activities are felt at home or abroad.<sup>30</sup> The evidence reviewed in this section suggests that the United States should complete its long overdue ratification of the CBD, for the agreement contains at least the beginnings of the kind of reciprocal responsibilities that are necessary to address the challenge of biologically invasive species.

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## Global Trade and the Channels of Biological Communication

Biological invasions are carried out by nonindigenous invasive species (NIS). Although the terms *nonindigenous*, *nonnative*, *exotic*, and *alien* are

often used interchangeably and imprecisely,<sup>31</sup> the U.S. government uses *nonindigenous* to refer to a species that occurs outside of its historic or current natural range and *invasive* to refer to a species whose introduction harms or is likely to harm the environment, economy, or human health.<sup>32</sup> Most nonindigenous species never become invasive in this sense because they are unable to persist long enough in a novel ecosystem to cause harmful effects. A few nonindigenous species, however, find purchase in their unfamiliar environments and become established, sometimes with stunningly disruptive success.

The process of invasion thus begins when humans deliberately or inadvertently transfer a population of a species from its native range to a new locale.<sup>33</sup> The transfer mechanism, known technically as a *vector*, can be a cargo of fruit, the hull of an oceanic ship, or even the root ball of a tropical plant. Among inadvertently transferred organisms, most typically perish in transit, and any survivors might never be released to a new locale.<sup>34</sup> Of those released, merely a small fraction survives, reproduces, and establishes a population that can sustain itself without the immigration of additional organisms.<sup>35</sup> Only at the finale of this arduous process will some unknown percentage of the population become invasive.<sup>36</sup> What distinguishes successful invaders from unsuccessful ones is a host of factors associated with the biological, physical, and trade characteristics of a particular invasion. Researchers still do not fully understand the interplay among these factors, but the processes of invasion are becoming more evident as attention to the phenomenon increases.

Although improbable, invasions have increased in regularity due to the expansion of global trade, which affects the species transfer process in several ways that render successful invasions more likely. For example, as the frequency and size of international shipments increase, more organisms are transported beyond their native ranges.<sup>37</sup> At the same time, faster shipping methods improve both the survival rate of organisms in transit and their health condition upon release.<sup>38</sup> Similarly, expansions in the diversity of commodities transported through international trade offer new, potentially more suitable transfer environments for hitchhiking organisms.<sup>39</sup> Even packaging materials such as seaweed and wooden crates have been implicated in invasions.<sup>40</sup> Finally, as the number of regions supplying commodities increases, so too does the total number of species transferred, since each region contains a unique composition of species.<sup>41</sup>

These evolving patterns of global trade have made the United States host to a range of invasive species. A paradigmatic case is the transfer of aquatic organisms via the hull and ballast water of oceanic ships. In addition to the physical hull structure, which can provide an anchoring point for hitchhiking species, ballast containers on long-range ships are typically loaded with water from the ships' port of origin. This water stabilizes the ship at sea, but also contains an enormous supply and taxonomic range of organisms indigenous to the departure harbor. Upon arriving at their destination—often another harbor thousands of miles away from the original departure point—ships may then discharge their ballast water, along with any surviving organisms. Between 1925 and 2001, both hull and

ballast water vectors increased the number of newly detected NIS in coastal waters of North America approximately fourfold.<sup>42</sup> In addition, since the completion of the St. Lawrence Seaway in 1959, ballast water discharged into the Great Lakes has contributed to the presence of about two-thirds of the forty-three or more nonindigenous species established in these waters, including ten species that are characterized as high risk.<sup>43</sup>

Nonindigenous species also have arrived by way of land, air, and maritime cargo, although research on these vectors is less advanced than on hull and ballast water vectors. One study found that between 1997 and 2001, a new insect species was intercepted on average once every fifty-four inspections of refrigerated maritime cargo arriving at U.S. ports of entry.<sup>44</sup> Based on the conservative estimate that 2 percent of unintentionally introduced species become established within a new locale, approximately forty-two insect species were expected to have become established during these four years through maritime cargo, air cargo, and land cargo crossing the U.S.-Mexico border.<sup>45</sup> From 1984 to 2000, more than 725,000 pests from at least 259 different locations were intercepted at U.S. ports of entry and border crossings.<sup>46</sup> Among the trade vectors associated with these pests, 62 percent consisted of baggage, 30 percent cargo, and 7 percent plant propagative material.<sup>47</sup> In short, as transnational human activities continue to expand and diversify, the array of vectors for bioinvasive species expands and diversifies as well, thereby enhancing the overall risk of introducing NIS.

## The Impact of Invasive Species on Biodiversity and the Endangered Species Act

Although difficult to quantify, the threat that invasive species pose to native species is pronounced. From disease-causing parasites to predatory fish, invasive species have crippled entire populations of native species. Some invasives outcompete native species for resources, while others prey on native species that lack suitable defenses against such predators.<sup>48</sup> Still others disrupt entire ecosystems by consuming native vegetation or producing flammable material that nurtures more frequent or intense fires, as in the case of certain invasive grasses.<sup>49</sup>

These various modes of interspecies predation and competition impact native species that are endangered and threatened: Among 667 of the species protected under the ESA as of August 1992, more than half were negatively affected by interspecies interactions, particularly those associated with introduced species.<sup>50</sup> Similarly, among the 877 U.S. and Puerto Rican species protected as of August 1994, 35 percent were imperiled partly due to interactions with nonindigenous species.<sup>51</sup> One prominent example of such interactions is the impact of the Eurasian zebra mussel on North America's most endangered fauna group, freshwater mussels.<sup>52</sup> Zebra mussels smother the shells of freshwater mussels, impairing their hosts' normal activities and causing death by starvation.<sup>53</sup> Following the colonization of zebra mussels, various populations of freshwater mussels

have become extinct within four to eight years or have suffered a tenfold increase in extinction rates.<sup>54</sup> As zebra mussels continue to proliferate, scientists project that 12 percent of all species of freshwater mussels inhabiting the Mississippi River basin will become extinct each decade.<sup>55</sup>

Invasive species also weaken the effectiveness of the ESA by increasing the costs of managing endangered species. Of all species listed or proposed for listing under the ESA as of January 1996, 681 were deemed “imperiled to some extent” by nonnative species, a threat that requires more than thirty million dollars annually to combat.<sup>56</sup> It bears emphasizing that this estimate is surely conservative, both because many effective techniques for controlling invasive species have yet to be developed and because a substantial portion of species in the United States have not even been described, let alone assessed for viability. Thus, in addition to harming known endangered or threatened species, NIS also further the loss of biodiversity by threatening unprotected species, many of which already warrant or will warrant protection under the ESA. Although data on the plight of many unprotected species are lacking, one study found that competition with or predation by nonindigenous species affected 49 percent of the 1,880 protected and unprotected species considered in the study, all of which were deemed imperiled.<sup>57</sup> Islands are especially susceptible to invasions; one estimate, for instance, holds that 98 percent of birds and 99 percent of plants on the islands of Hawaii are threatened by NIS.<sup>58</sup> It is thus evident that the culprits behind the loss of biodiversity in the United States consist of not only domestic threats such as pollution and habitat loss but also unintended biological consequences of global tourism and economic integration.

## Domestic Legal Responses to Biological Invasions

In response to the mounting environmental, economic, and social costs associated with NIS, the U.S. government has enacted two executive orders and dozens of domestic laws and regulations. In addition, states such as Michigan and California have adopted increasingly aggressive legislation to combat the problem of NIS from ballast water discharge in their lakes and ports.<sup>59</sup> These measures, however, neither individually nor collectively establish the overarching legal framework necessary to effectively prevent or control invasions within the United States. Instead, they typically address vectors associated with certain NIS or authorize government agencies to deal with particular aspects of the invasive species problem, such as through regulation of certain commodities or establishment of targeted eradication programs.<sup>60</sup> Theoretically, if more comprehensive and stringent domestic laws were passed and implemented in a manner designed to intercept the numerous vectors of invasion, such laws could prevent a significant portion of new invasions. In actuality, however, purely domestic responses to NIS face a number of challenges that limit their ultimate efficacy and suggest the need for multilateral regulation.

To begin with, it remains difficult to determine, even in principle, the means and intensity with which regulators should pursue the interception



of incoming vectors. The challenge lies in our inability to understand how management-driven changes to the supply of arriving organisms affect the likelihood of ensuing invasions.<sup>61</sup> In particular, scientists are largely unable to predict whether increases in the supply of a species will result in no increase, a steady increase, or an exponential increase in its invasion success.<sup>62</sup> Even more perplexing is that the supply-response relationship for a species likely varies extensively depending on the type of vector, the supply and recipient regions, the time period between each stage of invasion, and the habitat or ecosystem being invaded. Indeed, information on the biology and ecology of invasive species in their native ecosystems does not always form a reliable basis for predicting the species' impact in its nonnative environment, one with novel biological and physical conditions.<sup>63</sup> Thus, without understanding these multifarious and uncertain supply-response relationships, regulators cannot reliably locate the appropriate level and manner of interception necessary to reduce the probability of invasions by a desired amount.<sup>64</sup>

Even if U.S. regulators could pinpoint appropriate interception strategies, solely domestic responses to NIS may face two additional setbacks. First, other nations that supply vectors contaminated with invasive organisms might adopt only partial or no measures to reduce contamination rates at the site of origin, thus shifting the costs of invasion management onto the United States, the recipient nation. An international coordinated response, in contrast, would provide a forum in which the United States could negotiate with other nations toward alternative, perhaps more symmetrical, cost- and responsibility-sharing arrangements. Second, and more importantly, the most effective strategies to prevent biological introductions into the United States might be those that can be implemented only outside U.S. jurisdiction. For example, one study on the transfer of insect pests onboard cargo flights from Central America to Florida concluded that the former was the best location to implement interception strategies.<sup>65</sup> Promising mitigation approaches included blocking insect access to cargo holds on aircraft and reducing the number of insects near aircraft during cargo loading<sup>66</sup>—measures that lie beyond the reach of domestic responses to biological invasions in the absence of cooperative efforts between the United States and origin nations.

The urgency of developing and sharing strategies on invasive species control prompted the global scientific community in 1997 to establish the Global Invasive Species Program (GISP). Among its programmatic objectives, the GISP aims to develop a worldwide information system on invasive species, ultimately affording a strong empirical basis for strengthened multilateral regulation of invasion vectors and pathways.<sup>67</sup> Nevertheless, few countries consider NIS a high priority or have coordinated plans to minimize invasions within their own borders, let alone those of other countries.<sup>68</sup> A nation's motivation for managing an invasion vector likely depends on a combination of factors, including the magnitude of domestic harm associated with invasions from the vector, socioeconomic judgments about the importance of the harm abroad, the costs of managing the vector, and political barriers to effective management action. Even nations

that consider NIS a high priority may lack the technological, scientific, and financial resources needed to prevent invasions.<sup>69</sup>

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Thus, if the United States desires to achieve the goals of the ESA, it must reengage with the international environmental lawmaking process. In practice, this means joining and strengthening the CBD, as well as committing substantial financial and knowledge-based resources to those nations that currently are unable to implement the convention's obligations concerning biological invasions. Ultimately, the largely aspirational language of the CBD must be supplemented by protocols or additional agreements that provide specific directives with respect to NIS, in terms of both minimizing the unintentional export of nonindigenous species and maximizing the likelihood that arriving nonindigenous species will not become invasive.<sup>70</sup>

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## AIR QUALITY, TRANSBOUNDARY EMISSIONS, AND THE ABSENCE OF BORDERS

In a manner similar to conservation of biodiversity in the face of NIS, regulation of air quality in the United States appears to be a problem that is unavoidably transnational in nature. To be sure, the international community has long recognized the problem of transboundary air pollution between some countries, such as the United States and Canada or the nations of the European Union. Indeed, the most significant international arbitral decision on transboundary air pollution arose between the United States and Canada and recognized the principle that a sovereign is prohibited from using its territory to emit fumes that cause substantial and clearly established harm to the territory of another sovereign.<sup>71</sup>

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Beginning in the 1970s, the world's nations also began to acknowledge problems of global atmospheric harm, including ozone depletion and climate change. In the past decade, however, emerging scientific evidence of transboundary air emissions from East Asia and their impact on air quality in North America has highlighted the fact that air pollution regulation is much more deeply affected by extraterritorial activities than had been previously appreciated, even with respect to those areas of concern that traditionally have not been treated as global in nature or made the subject of extensive bilateral or regional negotiation.

### The Clean Air Act

The primary authority on air quality regulation in the United States is the Clean Air Act (CAA), which was passed in 1970 with major amendments in 1977 and 1990.<sup>72</sup> The CAA requires the Environmental Protection Agency (EPA) to identify air pollutants whose presence results from numerous or diverse sources and is expected to endanger public health or welfare.<sup>73</sup> For each of these so-called criteria pollutants, the EPA must adopt national ambient air quality standards (NAAQS).<sup>74</sup> Currently the six criteria pollutants are ozone (O<sub>3</sub>), particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>),

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carbon monoxide (CO), sulfur dioxide (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), and lead. Primary NAAQS for these criteria pollutants are set at levels to protect the “public health,” allowing an adequate margin of safety to protect against unknown or disputed adverse health effects,<sup>75</sup> while secondary NAAQS are set at levels to protect the “public welfare,”<sup>76</sup> including effects on the environment, visibility, and climate.<sup>77</sup> In a nod to federalism concerns, each individual state decides how to achieve and maintain these standards by developing a state implementation plan, which is submitted to EPA for federal approval.<sup>78</sup>

In developing these implementation plans, states are handicapped by the fact that they must include within their planning anticipated emissions from transboundary sources, such as actors in other U.S. states or foreign nations,<sup>79</sup> yet they themselves have little authority to control or influence those extrajurisdictional sources. With respect to interstate emissions, various attempts have been made over the years to increase consideration by source states of downwind impacts, most recently through the EPA’s Clean Air Interstate Rule, which attempts to reduce emissions of SO<sub>2</sub> and NO<sub>x</sub> across twenty-eight eastern states and the District of Columbia.<sup>80</sup>

With respect to international emissions, the CAA provides two avenues of relief for states. First, states that demonstrate to the satisfaction of the EPA that they would have attained the relevant NAAQS “but for emissions emanating from outside of the United States” are exempt from various penalties and are entitled to have their state implementation plans approved, despite the plans’ actual failure to result in the requisite level of air quality.<sup>81</sup> Second, the CAA establishes a mechanism whereby foreign countries may indicate to the EPA that U.S. air pollution emissions are threatening to endanger public health or welfare in their territory.<sup>82</sup> Assuming that the administrator of the EPA accepts their claim, the agency can then force U.S. states to revise their implementation plans to mitigate the transboundary effects of their emissions. The procedure is only available to nations that have granted “essentially the same rights” to the United States,<sup>83</sup> a reciprocity requirement that may indirectly help states by prompting foreign nations to open their domestic air quality regulations to input from U.S. states that are harmed by foreign emissions. Despite its apparent breadth, however, this provision has been seldom invoked and, regardless, seems imperfectly designed for situations in which pollution drift patterns are not themselves reciprocal, such that source nations may be unlikely to extend legal privileges to U.S. states in the absence of some broader multilateral program.

One such nonreciprocal context of increasing significance involves East Asian pollution. Studies of transcontinental pollutant transport over the past decade reveal that several criteria pollutants emitted from East Asian countries affect U.S. air quality, most severely along the Pacific Rim. Rapid industrialization in East Asia has made the region a large and growing source of NO<sub>x</sub>, SO<sub>2</sub>, CO<sub>2</sub>, and other atmospheric pollutants.<sup>84</sup> Periodically, these pollutants are transported across the Pacific Ocean, a process that can begin when airstreams called “warm conveyor belts” lift pollutants approximately seven miles high into the upper troposphere.<sup>85</sup> From

there, the pollutants are transported rapidly across the Pacific Ocean and over the west coast of North America. In winter, the entire transport process can occur in as little as three days due to the presence of a strong jet stream in the upper troposphere.<sup>86</sup>

Scientists have observed various segments of this process using techniques such as satellite imaging and air quality sampling, and they also have estimated the extent to which transported pollutants impact air quality in downwind regions through highly sophisticated computer models.<sup>87</sup> The emerging picture is that, while our understanding of intercontinental transport is unmistakably deficient,<sup>88</sup> air quality in the United States nevertheless is impacted in nontrivial ways by activities that occur across the Pacific—activities that are only expected to increase in scope and intensity as China and other Asian nations continue to experience rapid growth and global integration of their economies. In that respect, the problem of intercontinental pollutant transport represents a particularly clear demonstration of why domestic environmental law must be more dramatically reconceived to account for global ecological and economic interdependence.

### **The Consequences of Transpacific Pollutants for Domestic Air Quality Regulation**

One U.S. criteria pollutant with increasing East Asian origins is low-level ozone, which affects the respiratory system and damages vegetation. Ozone is not emitted directly into the atmosphere but instead is produced from three ozone precursors—NO<sub>x</sub>, CO, and volatile organic compounds (VOC)—each of which has natural and anthropogenic sources, including fuel combustion.<sup>89</sup> Asian emissions of these precursors can increase ozone concentrations in the United States in two ways.

First, the United States receives periodic plumes of transpacific air containing relatively high concentrations of ozone in the spring, when storm and frontal activity in Asia is most prevalent.<sup>90</sup> For instance, measurements taken onboard aircraft off the coast of Washington State detected significantly enhanced levels of ozone and ozone precursors during springtime plumes of transpacific air.<sup>91</sup> While the current impact of plumes on ozone concentrations at low elevations where people live appears to be marginal, researchers note that the future impact could be considerable.<sup>92</sup> After 2020, for example, when Asian NO<sub>x</sub> emissions are expected to quadruple from 1990 levels, plumes could increase springtime ozone concentrations in California by 40 parts per billion by volume (ppbv).<sup>93</sup> To put this number in perspective, the current NAAQS for surface ozone concentration is 80 ppbv, averaged over eight hours.<sup>94</sup>

In contrast to the periodic nature of springtime plumes, the second method in which Asian emissions of ozone precursors influence domestic air quality is by steadily increasing the persistent “background” concentrations of ozone in the United States.<sup>95</sup> In particular, increased Asian emissions of the ozone precursor NO<sub>x</sub> is believed to have caused a 30 percent increase (10 ppbv) in background ozone concentrations along the western

United States since the mid-1980s.<sup>96</sup> This inference is supported by a computer model of global emissions, which calculated that if Asian anthropogenic emissions tripled from 1985 to 2010—an estimate based on the 5 percent annual increase in East Asian energy consumption during the late twentieth century—then monthly mean ozone concentrations would increase by 2–6 ppbv in the western United States and 1–3 ppbv in the eastern United States.<sup>97</sup> In western regions, such increases would more than offset the benefits of a 25 percent reduction in domestic emissions of NO<sub>x</sub> and hydrocarbons.<sup>98</sup>

Researchers have also observed and modeled East Asian transport of carbon monoxide. Periodic plumes of transpacific CO have been detected from ground-level observatories in Washington State and confirmed by computer models of global chemical transport.<sup>99</sup> Moreover, like lower-atmosphere ozone pollutants, the most significant impact of transpacific CO for domestic air quality, according to some researchers, is its contribution to persistent background concentrations of CO in the United States. Thus, even when plumes failed to produce observable spikes in CO levels at a northern California observatory station, some 33 percent of the background CO at the site was determined to have Asian origins.<sup>100</sup>

Finally, particulate matter is an additional criteria pollutant with significant connections to Asian sources, as dust storms originating from Asia periodically transport particulate matter to the western United States. Transpacific mineral dust is a naturally occurring phenomenon, originating from deserts or dry lakes in Asia.<sup>101</sup> In China, a combination of factors, including industrialization, population expansion, and land-use changes, are believed to have expanded the size of deserts by 2 to 7 percent since the 1950s.<sup>102</sup> Although the precise contribution of such anthropocentric desertification to the severity of transpacific dust plumes is unclear,<sup>103</sup> preliminary research suggests that the frequency of regional dust storms in China has increased by 10 to 40 percent since the 1950s.<sup>104</sup> Thus, as desertification continues, it could increase the amount of transpacific mineral dust that the United States receives.<sup>105</sup>

Currently, such dust periodically elevates particulate matter concentrations in certain regions of the United States above the NAAQS, even to the point of having triggered public air pollution advisory warnings in northwestern parts of the United States.<sup>106</sup> Moreover, transpacific dust undermines the goals of the Regional Haze Rule of the EPA, which requires states to improve visibility conditions at national parks and wilderness areas.<sup>107</sup> Computer models suggest that nationwide springtime elevations in fine dust concentrations, which affect visibility in these areas, are due principally to transpacific emissions that occur during April and May.<sup>108</sup> Researchers also calculated that in 2001, such dust accounted for 41 percent of the worst dust days in the western United States and for less severe but still detectable increases in dust concentrations in the eastern United States.<sup>109</sup>

If industrialization in East Asia continues on its present course, the extraterritorial impacts of East Asian ozone precursors, carbon dioxide, and aerosol dust particles will become only more pronounced. Increasingly

severe plumes could contribute to periodic violations of U.S. air quality standards, while background concentrations of pollutants could steadily rise and redefine the lower limits of domestically achievable improvements in air quality. In addition, scientists are only beginning to explore the impact of East Asian emissions of mercury—a bioaccumulative neurotoxin deemed “hazardous” under the Clean Air Act—on the global atmosphere and on mercury concentrations in the United States.<sup>110</sup>

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As more is discovered about the various environmental, social, and economic costs of Asian emissions, the need for U.S. regulators to seek cooperative relations with China and other countries will become increasingly evident. As the next section describes, however, this multilateral moment seems unlikely to arrive amid the predominance of a policy framework—the welfare economic framework of risk assessment and cost-benefit analysis—that fails to promote a level of national self-awareness commensurate with the demands of international dialogue.

## RISK, WELFARE, AND THE VIEW FROM NOWHERE

As noted earlier, discussions within U.S. academic and policy circles presently emphasize the RA/CBA policy framework as the surest route to desirable environmental law and policy choices. Put succinctly, the RA/CBA framework asks regulators to predict, weigh, and aggregate all relevant consequences of policy proposals in order to identify those choices that maximize collective welfare. Welfare consequences on the standard account can include anything that is of significance to human well-being, but must always be located within an individual citizen’s welfare function (as opposed to some collective entity such as a community, a generation, or a nation) and must always be converted in some fashion to a common and continuous quantitative metric (as opposed to some qualitative metric that would categorize certain rights or resources as inviolable). In this manner, with its semblance of comprehensiveness and uniform treatment, the RA/CBA procedure promises a method by which all relevant interests will be accounted for, objectively and even-handedly, in the determination of public policy.

Unfortunately, the RA/CBA exercise typically ignores or obscures from view a host of significant modeling assumption questions. How do we account for the actions and interests of other countries whose citizens both depend on and affect shared resources? How do we incorporate the needs of future generations whose circumstances and values are yet unknown? Should we consider nonhuman life forms as interest-holders in their own right, rather than merely as objects of valuation? Indeed, such questions of international, intergenerational, and interspecies responsibility can hardly even be posed within the language of the RA/CBA framework, given that it excludes any notion of a separate and distinct political community that could be charged with reasoning through those questions.

Put differently, because the RA/CBA paradigm implicitly suggests that environmental law and policy can be determined solely through empirical

assessment of individual welfare consequences, it leaves no room for the development of a *subject-relative* conception of environmental governance—one in which the U.S. government perceives itself as having a relationship of responsibility not just to its citizens but also to other countries, other generations, and, indeed, other life forms.

Steps in this direction—that is, the direction of a more reflective national self-awareness—were made under some U.S. federal court interpretations of the National Environmental Policy Act of 1969<sup>111</sup> and under a 1979 Carter administration executive order,<sup>112</sup> both of which encouraged consideration of extraterritorial environmental effects of major actions by U.S. government actors. However, those requirements have been only tepidly enforced and, thus, they have been inadequate to slow the shift in U.S. environmental law and policy away from a national self-conception of leadership and obligation.

It is worth noting that some authors argue that a separate or distinct notion of national subjectivity in the manner just described “may not even be intelligible” and is, at least, of “obscure” moral relevance.<sup>113</sup> They argue that it would be unwise to reify into the policy domain the “raft of baggage of personal attachments, commitments, principles and prejudices”<sup>114</sup> that help to give contour to an individual’s subjectivity. They argue instead that U.S. policy makers and institutions should be conceived of as merely passive implementers of policies that have been calculated to maximize welfare across individual members of the polity.

Such arguments, while correct to the extent that they recognize a larger scope of causal potential and moral obligation for policy makers to prevent suffering among the American citizenry, overshoot to the extent that they draw no distinction whatsoever between the U.S. polity and the larger causal order. After all, the same fundamental challenge that exists on the individual level—pursuing desirable outcomes when one has opportunities to act but also faces myriad constraints—also exists on the collective level. Even robust institutional actors such as the EPA and the U.S. government more generally confront a phalanx of forces that lie beyond their capacity to control or predict: natural systems that escape precise probabilistic understanding; foreign governments and actors that depend on and impact shared resources; and unborn generations whose future needs and circumstances are a necessary but unknowable feature of any policy decision.

Under such circumstances, the U.S. government must perceive itself as existing in a relationship of responsibility and dependency with others in the international community, all of which are collective subjects of a natural order beyond their capacity to manage individually. Washington must, in other words, govern its conduct according to carefully reasoned values and aims within a context of both enormous potential and constraint, while respecting others by appealing to *their* ability to reason and decide within that same unavoidably tragic context. Many promoters of RA/CBA, in contrast, defend their framework’s impartial welfare consequentialism precisely because it promises to *reduce* policy makers’ subjective discretion and judgment. They hope to eliminate such collective subjectivity precisely because they believe “regulation from nowhere”—attaching no

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special significance to the history, identity, or collective agency of the U.S. political community—is the best means to avoid paternalistic, corrupt, or otherwise misguided government action.

A number of studies and analyses suggest that this view is wrong, and that the U.S. government's RA/CBA framework simply changes the language within which policy is distorted, contested, and cajoled.<sup>115</sup> Nevertheless, by its nature, the RA/CBA framework tends to suggest that government policies are “hostage to what the facts turn out to show in particular domains,”<sup>116</sup> such that no distinctive notion of collective decision-making responsibility is deemed necessary or appropriate in the fashioning of public policy. Indeed, rather than emerging from collective deliberation by a political community, policies adopted under the RA/CBA approach are said to “inevitably and predictably” flow from the calculated effects of state action.<sup>117</sup>

So conceived, however, the RA/CBA methodology is unable in the end to account for the normativity of what the facts tell us. We are told, in essence, that government policies are desirable because they maximize welfare, but we no longer are able to perceive the political community that once decided, collectively, to create institutions designed to maximize welfare.<sup>118</sup> A better view is one that permits greater interaction between the policy-making apparatus and the American political community, enhancing in both a sense of shared values, goals, and responsibilities—and enabling both to recognize and consider the impact of their choices on the world outside.

Admittedly, this argument in favor of subjectivity in U.S. environmental policy making cuts against currently dominant arguments for giving advocacy groups, indigenous communities, business alliances, and other entities greater legal standing and prominence vis-à-vis states in international law.<sup>119</sup> The argument of this chapter, however, does not deny the need for a more inclusive policy-making discourse at the global level, nor does it contend that the nation-state is an unproblematic vehicle for recognizing and redressing policy problems with global environmental dimensions. Instead, the argument simply contends that successful global environmental governance requires at a minimum something more than RA/CBA can provide. Because the nation-state remains the primary geopolitical unit at the dawn of the twenty-first century, the personality of nation-states must be seen to encompass more than merely a set of instructions regarding risk-assessment and social welfare-maximization. Instead, the nation-state—and the U.S. government more specifically—must be seen as a reflective subject, capable of reasoning through its obligations not only to its own citizens but also to those who reside within other communities, whether geographically, temporally, or biologically dispersed.

## CONCLUSION

Globalization does indeed come home, but where is home and who are its denizens? Those entities or locations that appear to us as discontinuous—those “nations,” “territories,” and “persons” that become the conceptual



inhabitants of our legal geography—remain deeply embedded within biophysical and sociolegal systems that resist ready dissection, comprehension, and control. We are presented not with discrete natural environments connected only by certain global commons substrates, nor with discrete political communities connected only by certain channels of international commerce and environmental impact. Rather, we are presented with a “complicated tissue of events”<sup>120</sup> both biophysical and sociolegal, in which even conventionally domestic environmental problems must be viewed as global in scope and in which politics and law accordingly must adapt to the challenge of ineradicable interdependence among nation-states.

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As argued throughout this chapter, existing environmental laws, both domestic and international, are largely inadequate to deal with this challenge of deep ecological interdependence, especially as the rise of the RA/CBA paradigm continues to overshadow alternative languages for perceiving and refining the United States’ national environmental identity. When other nations appear within policy assessments merely as inputs to empirical calculation, environmental problems appear to be intractable; in such noncommunicative contexts, the only available brand of rationality appears to be that of purely strategic, self-interested behavior, a logic that seems to narrow dramatically the scope of possible resolutions. In turn, the sense of hopelessness accompanying this narrow instrumentalism leads naturally to the conclusion, expressed prominently by dissenting jurists in the U.S. Supreme Court’s first major climate change decision,<sup>121</sup> that domestic environmental law should not be interpreted to encompass harms caused by climate change and other global environmental processes, since unilateral action by the United States could at best mitigate only a small portion of those harms. The evidence reviewed in this chapter, however, suggests that the dissenters’ reasoning would not only block the EPA from undertaking to regulate greenhouse gas emissions but also would force the abandonment of all manner of domestic environmental programs, including species preservation and air quality regulation, since those programs no longer can be considered independently of the extrajurisdictional decisions that will in substantial part determine their efficacy.

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In the long run, the RA/CBA approach not only may prove disruptive to the project of reasoning through daunting moral issues that are not included within the RA/CBA framework, such as international and intergenerational environmental responsibility, but also may undermine even its *own* attractiveness as a standard of social choice. Because an essential premise of the RA/CBA framework is that collective choice should passively and impartially trace the results of an individualized welfare calculus, government policies on the RA/CBA account are not attached to any identifiable policy maker who bears responsibility for their content or effect. In this manner, the framework unintentionally denies the basis on which Americans perceive themselves as a distinct political community holding a particular identity, history, and agency. Only by affording such a basis for national subjectivity can the United States view itself as a responsible actor on the geopolitical stage, standing in relations of dependency and obligation with respect to other countries. And only through such a relational

viewpoint can the need for international leadership and cooperation—even with respect to conventionally domestic environmental policy issues—be fully recognized and addressed.

The view from nowhere *is* a view from home, and a myopic one.

## NOTES

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1. Rio Declaration on Environment and Development, principle 2, August 12, 1992, U.N. Doc. A/CONF.151/5.

2. Ibid.

3. U.S.C. 22 (1997), § 287 note.

4. U.S.C. 22 (1970), § 274a.

5. U.S.C. 22 (1977), § 2151p.

6. Ibid.

7. U.S.C. 33 (1972), § 1251(c); U.S.C. 33 (1972), § 1419.

8. Richard J. Lazarus, *The Making of Environmental Law* (Chicago: University of Chicago Press, 2004).

9. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

10. The most ambitious of these international agreements, the 1979 Geneva Convention on Long Range Transboundary Air Pollution, obligates its fifty-one member parties, including the United States, to “endeavor to limit and, as far as possible, gradually reduce and prevent air pollution including long range transboundary air pollution.” *ECE Convention on Long Range Transboundary Air Pollution, International Legal Materials* 18 (1979): 1442. Subsequent protocols to the convention have spelled out more specific air pollution reduction and prevention obligations, but have been ratified by fewer parties.

11. Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1989).

12. Endangered Species Act, U.S.C. 16 (1973), §§ 1531 et seq.

13. Ibid., § 1531(b). An *endangered* species is “any species which is in danger of extinction throughout all or a significant portion of its range,” while a *threatened* species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” (§ 1532).

14. Ibid., § 1532(3).

15. Ibid., § 1532(13), 1532(19), 1538(a)(1)(B).

16. Ibid., § 1536(a).

17. Of the 108 species known to have become extinct in the twenty-one years following the passage of the ESA, 85 were never listed, including 42 that became extinct during a delay in the listing process; Kieran Suckling, Rhiwena Slack, and Brian Nowicki, “Extinction and the Endangered Species Act,” Center for Biological Diversity, May 1, 2004, <http://www.biologicaldiversity.org/swcbd/Programs/policy/esa/EESA.pdf>. Even among all listed species, 78 percent are “endangered” by the time of listing, rather than merely “threatened”; J. Michael Scott, Dale G. Goble, Leona K. Svancara, and Anna Pidgorna, “By the Numbers,” in *The Endangered Species Act at Thirty: Renewing the Conservation Promise*, edited by Dale

D. Goble, J. Michael Scott, and Frank W. Davis (Washington, DC: Island Press, 2005), 22.

18. *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (D. Wash. 1991); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d. 9 (DC Dist Col 2002).

19. ESA, § 1533(b)(3)(B).

20. D. Noah Greenwald, Kieran F. Suckling, and Martin Taylor, "The Listing Record," in Goble, Scott, and Davis, *Endangered Species Act at Thirty*, 60.

21. *Ibid.*, 64.

22. This figure is calculated by assuming that all species listed by NatureServe as "critically imperiled" or "imperiled" as of November 2003 would also have been deemed "endangered" or "threatened" under the ESA; Scott et al., "By the Numbers," 22.

23. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978).

24. David Pimentel, Lori Lach, Rodolfo Zuniga, and Doug Morrison, "Environmental and Economic Costs of Nonindigenous Species in the United States," *Bioscience* 50, no. 1 (2000): 53.

25. David S. Wilcove, David Rothstein, Jason Dubow, Ali Phillips, and Elizabeth Losos, "Quantifying Threats to Imperiled Species in the United States," *Bioscience* 48, no. 8 (1998): 607.

26. ESA, § 1531(a)(4).

27. "I am persuaded that the Government is correct in its submission that [ESA] § 7(a)(2) does not apply to activities in foreign countries." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585 (1992) (Stevens, J., concurring).

28. ESA, § 1533(b)(1)(B).

29. Convention on Biological Diversity, art. 8(h), June 5, 1992, U.N. Doc. UNEP/Bio.Div./N7-INC5/4.

30. *Ibid.*, art. 4.

31. Gregory M. Ruiz and James T. Carlton, *Invasive Species: Vectors and Management Strategies* (Washington, DC: Island Press, 2003), xi–xii; Robert I. Colautti and Hugh J. MacIsaac, "A Neutral Terminology to Define 'Invasive' Species," *Diversity and Distributions* 10 (2004): 135–41.

32. This is the broader definition adopted by the U.S. government and the Global Invasive Species Program; see Executive Order no. 13,112, *Federal Register* 64, no. 25 (February 1999): 6183. The World Conservation Union (IUCN), on the other hand, has adopted a narrower definition: a species that occurs outside of its past or present natural dispersal range (the area it can reach using its own legs, wings, or wind-/waterborne dispersal system), that has become established in natural or seminatural ecosystems or habitat, that is an agent of change, and that threatens native biological diversity; Clare Shine, Nattley Williams, and Lothar Gundling, *A Guide to Designing Legal and Institutional Frameworks on Alien Invasive Species* (Gland, Switzerland: IUCN, 2000), 1–3.

33. Gregory M. Ruiz and James T. Carlton, "Invasion Vectors: A Conceptual Framework for Management," in Ruiz and Carlton, *Invasive Species*, 461–62; Richard N. Mack, Daniel Simberloff, W. Mark Lonsdale, Harry Evans, Michael Clout, and Fakhri A. Bazzaz, "Biotic Invasions: Causes, Epidemiology, Global Consequences, and Control," *Ecological Applications* 10, no. 3 (2000): 690.

34. Mack et al., "Biotic Invasions," 690.

35. *Ibid.*

36. *Ibid.* While these stages outline the full progression of an invasion, an organism can inflict ecological harm before reaching the final stage. The mere colonization of a nonindigenous species in a conservation reserve, for example, can directly harm endangered species and important features of the ecosystem.

37. Ruiz and Carlton, "Invasion Vectors," 463.
38. Ibid.
39. Ibid.
40. Audrey M. Colnar and Wayne G. Landis, "Conceptual Model Development for Invasive Species and a Regional Risk Assessment Case Study: The European Green Crab, *Carcinus maenas*, at Cherry Point, Washington, USA," *Human and Ecological Risk Assessment* 13, no. 1 (2007): 126.
41. Ruiz and Carlton, "Invasion Vectors," 463.
42. There were approximately twenty newly detected species between 1925 and 1949 and about eighty between 1975 and 2001; Paul W. Fofonoff, Gregory M. Ruiz, Brian Steves, and James T. Carlton, "In Ships or on Ships? Mechanism of Transfer and Invasion for Nonnative Species to the Coasts of North America," in Ruiz and Carlton, *Invasive Species*, 172. This study deemed a species "invasive" if it became established in a nonnative ecosystem (p. 154).
43. Igor A. Grigorovich, Robert I. Colautti, Edward L. Mills, Kristen Holeck, Albert G. Ballert, and Hugh J. MacIsaac, "Ballast-Mediated Animal Introductions in the Laurentian Great Lakes: Retrospective and Prospective Analyses," *Canadian Journal of Fisheries and Aquatic Sciences* 60 (2003): 740–56.
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46. Deborah G. McCullough, Timothy T. Work, Joseph F. Cavey, Andrew M. Liebhold, and David Marshall, "Interceptions of Nonindigenous Plant Pests at U.S. Ports of Entry and Border Crossings over a 17-Year Period," *Biological Invasions* 8 (2006): 611–30.
47. Ibid., 611.
48. Mack et al., "Biotic Invasions," 695–98.
49. Ibid.
50. Curtis H. Flather, Linda A. Joyce, and Carol A. Bloomgarden, "Species Endangerment Patterns in the United States," Forest Service General Technical Report RM-241 (Fort Collins, CO: U.S. Department of Agriculture), 9–10.
51. Brian Czech, Paul R. Krausman, and Patrick K. Devers, "Economic Associations among Causes of Species Endangerment in the United States," *Bioscience* 50, no. 7 (2000): 594.
52. Anthony Ricciardi, Richard J. Neves, and Joseph B. Rasmussen, "Impending Extinctions of North American Freshwater Mussels (*Unionoida*) Following the Zebra Mussel (*Dreissena polymorpha*) Invasion," *Journal of Animal Ecology* 67 (1998): 613–19. Among the 297 species of North American freshwater mussels, at least 12 percent are presumed extinct and 60 percent are threatened by habitat destruction and modification; *ibid.*, 613.
53. Ibid., 614.
54. Ibid., 613.
55. Ibid.
56. David S. Wilcove and Linus Y. Chen, "Management Costs for Endangered Species," *Conservation Biology* 12, no. 6 (1998): 1405–7; both alien species and fire suppression are listed in connection with this estimate.
57. Wilcove, Rothstein, et al., "Quantifying Threats to Imperiled Species," 608–9.
58. Ibid., 609.
59. For a summary of federal laws and other measures pertaining to invasive species, see USDA National Invasive Species Information Center, "Federal Laws and Regulations," <http://www.invasivespeciesinfo.gov/laws/publiclaws.shtml>.

60. Marc L. Miller, "The Paradox of U.S. Alien Species Law," in *Harmful Invasive Species: Legal Responses*, edited by Marc L. Miller and Robert N. Fabian (Washington, DC: Environmental Law Institute, 2004), 140–42.

61. Ruiz and Carlton, "Invasion Vectors," 465.

62. *Ibid.*, 465–66.

63. *Ibid.*

64. *Ibid.*

65. Barney P. Caton, Thomas T. Dobbs, and Charles F. Brodel, "Arrival of Hitchhiking Insect Pests on International Cargo Aircraft at Miami International Airport," *Biological Invasions* 8 (2006): 765–85.

66. *Ibid.*, 779.

67. Global Invasive Species Program, "GISP Mission," <http://www.gisp.org/about/mission.asp>.

68. Jamie K. Reaser, Brooks B. Yeager, Paul R. Phifer, Alicia K. Hancock, and Alexis T. Gutierrez, "Environmental Diplomacy and the Global Movement of Invasive Alien Species: A U.S. Perspective," in Ruiz and Carlton, *Invasive Species*, 367–68.

69. *Ibid.*, 368.

70. An example of a more specific behavioral directive is provided by the International Convention for the Control and Management of Ships' Ballast Water and Sediment, which, if eventually ratified by thirty-five signatories, will regulate the discharge of ballast water and set limits on the concentration of organisms allowed in ballast discharge; see International Maritime Organization, "International Convention for the Control and Management of Ships' Ballast Water and Sediment," [http://www.imo.org/conventions/mainframe.asp?topic\\_id=867](http://www.imo.org/conventions/mainframe.asp?topic_id=867).

71. *United States v. Canada*, 3 Reports of International Arbitral Awards 1938 (1941).

72. Clean Air Act, U.S.C. 42 (1963), §§ 7401 et seq.

73. *Ibid.*, § 7408(a)(1).

74. *Ibid.*, § 7409(b).

75. *Ibid.*; *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

76. CAA, § 7409(b).

77. *Ibid.*, § 7602(h).

78. *Ibid.*, § 7410(a).

79. Robert E. Lutz, "Managing a Boundless Resource: U.S. Approaches to Transboundary Air Quality Control," *Environmental Law* 11 (1981): 321–77.

80. Environmental Protection Agency, "Clean Air Interstate Rule," <http://www.epa.gov/CAIR/index.html>.

81. CAA, § 7509a. This provision was at issue in *Imperial Cnty. Air Pollution Control Dist. v. U.S. EPA*, 346 F.3d 955 (9th Cir. 2003). The court concluded that the EPA had improperly determined that the particulate matter standard would have been met by a county in Southern California but for transboundary emissions from Mexico, given that prevailing wind patterns on the days of observation did not support the inference that Mexico was to blame for the county's non-attainment.

82. CAA, § 7415.

83. *Ibid.*, § 7415(c).

84. Daniel Jaffe et al., "Transport of Asian Air Pollution to North America," *Geophysical Research Letters* 26, no. 6 (1999): 711.

85. Andreas Stohl and Sabine Eckhardt, "Intercontinental Transport of Air Pollution: An Introduction," in *The Handbook of Environmental Chemistry*, vol. 4, part G (Berlin: Springer, 2004), 7.

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87. Martin G. Schultz and Isabelle Bey, "Numerical Modeling of Long-Range Pollution Transport," in *Handbook of Environmental Chemistry*, vol. 4, part G, 199.

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91. Jaffe et al., "Six 'New' Episodes," 391–404.

92. Yienger et al., "Episodic Nature of Air Pollution," 26944.

93. Ibid.

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95. Background ozone includes ozone attributable to anthropogenic sources outside of North America.

96. For this work, background ozone is "air from the Pacific with O<sub>3</sub> levels not significantly influenced by North American emissions within the previous three days"; Daniel Jaffe, Heather Price, David Parrish, Joyce Harris, and Allen Goldstein, "Increasing Background Ozone during Spring on the West Coast of North America," *Geophysical Research Letters* 30, no. 12 (2003): 1613.

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109. *Ibid.*, 1251–66.
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112. "Executive Order 12114: Environmental Effects Abroad of Major Federal Actions," *Federal Register* 44 (January 4, 1979): 1957. Although the United States is not a party to the agreement, the Convention on Environmental Impact Assessment in a Transboundary Context, which entered into force in 1997, provides extensive extraterritorial impact assessment procedures for member parties; "Convention on Environmental Impact Assessment in a Transboundary Context," *International Legal Materials* 30 (February 25, 1991): 800.
113. Cass R. Sunstein and Adrian Vermeule, "Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs," *Stanford Law Review* 58 (2005): 709.
114. Robert E. Goodin, *Utilitarianism as a Public Philosophy*. Cambridge: Cambridge University Press 1995: 9.
115. For two examples, see Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: New Press, 2004), and Sidney A. Shapiro and Robert L. Glicksman, *Risk Regulation at Risk: Restoring a Pragmatic Approach* (Stanford, CA: Stanford University Press, 2003).
116. Sunstein and Vermeule, "Is Capital Punishment Morally Required?" 735.
117. *Ibid.*, 723.
118. As Samuel Scheffler observes, utilitarians, including proponents of cost-benefit analysis, must offer a "plausible and detailed account of utilitarian social and economic institutions and of the processes by which, in a society regulated by utilitarian principles, motives would develop that were capable of generating ongoing support for those institutions and principles" (*Boundaries and*

*Allegiances: Problems of Justice and Responsibility in Liberal Thought* [Oxford: Oxford University Press, 2001], 158).

119. For an early and insightful articulation of this viewpoint, see Philippe J. Sands, "The Environment, Community and International Law," *Harvard International Law Journal* 30, no. 2 (1989): 393–419.

120. Werner Heisenberg, *Physics and Philosophy: The Revolution in Modern Science* (New York: Harper & Row, 1958), 96.

121. *Massachusetts v. E.P.A.*, 127 S. Ct. 1438 (2007).



## CHAPTER 4

# Globalization through Digitization

Anupam Chander

In 1770, a Hungarian civil servant unveiled his “Mechanical Turk,” a chess-playing machine, at the Schönbrunn Palace in Vienna. Inside the machine was a chess master, who operated the machine through an ingenious mechanism that allowed him to see the board and move the pieces while remaining carefully hidden. The “Turk” of the title was a reference to the figure of “an oriental sorcerer” placed atop the machine.<sup>1</sup> The machine became celebrated through Europe and later America and intrigued Napoleon Bonaparte and Charles Babbage, who both challenged it to a match.<sup>2</sup> A quarter of a millennium later, Amazon would reprise this Hungarian’s feat, but with a contemporary technological twist. Its website, Mechanical Turk, would permit human beings to buy and sell “simple tasks that people do better than computers” and then deliver the completed task via the Internet.<sup>3</sup> Today, the ghost in the machine making it whirl could in fact be a Turk—or a Brazilian, Jamaican, Ghanaian, Indian, Chinese, or American.

Amazon’s website has yet to catch on, but it is merely the tip of the iceberg. Today, “an American family can outsource tutoring to an Indian engineer, tax preparation to an Indian accountant, and medical diagnosis to an Indian radiologist, and then sit for a portrait by an artist in coastal China.”<sup>4</sup> Globalization now means that one can interact with, and receive services from, people around the world nearly as easily as one could from a storefront downtown. All this becomes possible because of the digitization of information and the creation of digital communications networks.

Digitization has become an engine of globalization more generally—speeding the cross-border mobility of goods, ideas, services, capital, and

even people. Digitization makes it possible to order goods from retailers around the world, dispensing with retail intermediaries. Ideas can spread from Brazil to Bangladesh, or anywhere, through the Web. Service providers in the developing world can now hope to compete with service providers in the developed world via electronic networks. Capitalists can more readily identify potential investments around the world, using the World Wide Web and electronic payment networks. Beyond goods, services, and capital, globalization through digitization is changing people. In the grandest vision, cyberspace may

support the project of modern cosmopolitans by bringing people all over the world into daily contact with one another. This kind of interaction will bolster the cosmopolitan goal of diminishing the importance of national borders in favor of an enhanced sense of our common humanity. Cyberspace may ultimately help make us think of ourselves as first and foremost “citizens of the world.”<sup>5</sup>

Using the Web, people can create transnational alliances focused on shared interests, perhaps even developing a cosmopolitan attitude in the process.<sup>6</sup>

But this quickening of globalization made possible by digitization creates pressures on law. The threat posed to intellectual property is well known, as material uploaded in one country can be readily downloaded throughout the world. More generally, globalization through digitization creates increasing opportunities for regulatory evasion and regulatory competition—evasion and competition that might at times be virtuous and at other times corrosive. That this might be a consequence of the globalization of information resulting from digitization should be expected. After all, much of law regulates the dissemination of information. For example, laws related to antitrust, securities regulation, consumer protection, intellectual property, free speech, defamation, civil procedure, and national security all control information flows. Even rules barring the unauthorized practice of law represent information regulation. Thus, the emergence of history’s most powerful platform for global information dissemination—a printing press on steroids—will undoubtedly leave its mark on law, with that mark only dimly perceptible today.

Take two examples: For a time in early 2005, it appeared that Canada’s then-ruling Liberal party’s fortunes might be endangered by a blogger just south of the border.<sup>7</sup> A Canadian court hearing allegations of corruption in the Liberal Party had barred disclosure of the trial proceedings. But ostensibly safe beyond the reach of Canadian Mounties, a Minnesota blogger could thumb his nose at the order by publishing the allegations.<sup>8</sup> Canadians could find the foreign blog readily through online links, newspaper stories, and Internet searches. “Every Canadian with a computer can sit down and read it,” an editor of the *Globe and Mail* observed, “but we can’t publish it.”<sup>9</sup>

From its Mountain View, California, headquarters, Google offers its services worldwide. Google allows individuals to build Web-based communities via its Orkut social-networking service. That service has proved

widely popular in Brazil, but a few have used it to create communities for racist and anti-Semitic messages and child pornography, actions illegal under Brazilian law.<sup>10</sup> When Brazilian prosecutors sought information from Google's Brazilian subsidiary about the identities of those supplying such information, Google's subsidiary said that it could not, because such information resided on Google's California servers, over which the subsidiary had no control. A Brazilian judge then reproached Google for evincing a "profound disrespect for national sovereignty."<sup>11</sup> Google reportedly maintains a "policy of keeping data about its users in the United States to protect it from disclosure to foreign governments."<sup>12</sup> Brazilian authorities readdressed the subpoena to Google's Silicon Valley headquarters, and Google promptly complied.<sup>13</sup>

Both these cases demonstrate the use of an offshore site to deliver content into countries where that content may be illegal. In each case, the United States was the offshore base for delivering such content. But consider a third case. The online gambling site PartyGaming, operating from its headquarters in Gibraltar, with its computer servers in a Mohawk Indian reserve in Canada, its marketing office in London, and a workforce based mainly in Hyderabad, India, allows anyone with Internet access around the world to gamble.<sup>14</sup> Although the U.S. Justice Department declares online gambling to be illegal under federal law, PartyGaming listed on the London Stock Exchange in 2005. The week the company went public, the *New York Times* business pages opened its story on the firm as follows:

As a rule, companies don't often draw attention to business practices that could land their executives in jail. But for PartyGaming PLC, potential illegalities aren't just a secret hiding in its business plan—they are the *center-piece of its business plan*.<sup>15</sup>

PartyGaming apparently has no assets in the United States, where it would risk forfeiture in the event of an adverse judgment, and none of its officers and directors live in the United States. Yet of its "\$600 million in revenue and \$350 million in profit in 2004, almost 90 percent came from ... American gamblers."<sup>16</sup> The *Times* noted that in 2004, "players in the United States make up three-quarters of the [online gambling] market."<sup>17</sup> By 2006, this number had fallen to half.<sup>18</sup> However, "American law enforcement argues that providing online poker is simply illegal."<sup>19</sup>

Globalization through digitization holds much promise for the United States and other countries. But it also brings us increasingly (if figuratively) face-to-face with foreign law—and thus leads to pressure on compliance with U.S. law. My claim here is that there will be increasing pressures on domestic law from globalization through digitization, but that countries have tools at their disposal to help manage (but not eliminate) such pressures. Of course, where regulation is oppressive and contrary to human rights, regulatory evasion should be encouraged, not condemned. Indeed, Google's policy of locating its servers on American shores might be conducive to exactly such subversion in the service of human rights (imagine

the impact of this policy on Chinese dissidents using Google's computers). But for liberal democratic states, the ability to exploit the Internet to perform an end run around local law is deeply troubling. Left unattended, footloose net-work providers might imperil domestic laws, replacing local law with the regulation, if any, of the ISP's home country. As I will describe, the United States, at least, has significant means to manage such pressures.

My argument proceeds as follows. The section titled "Globalization through Digitization: People" begins on a sanguine note, discussing some of the ways in which digitization spurs globalization by fostering communication, increasing global understanding, and deepening links among diasporas and other affinity groups. The ensuing sections temper this optimism by exploring some of the risks posed by globalization through digitization, taking the example of securities and services. "Globalization through Digitization: Capital" describes how the Internet imperils domestic securities regulation by providing ready access to foreign capital markets (and their accompanying foreign regulatory regimes). I describe the moderate response of the U.S. Securities and Exchange Commission (SEC) to foreign securities offerings made available by the Internet, noting how it insists on U.S. law for significant purchases, but allows for some level of regulatory leakage. "The Globalization and Digitization of Intellectual Property" examines the risks to intellectual property holders posed by globalization and digitization through case studies of Kazaa and AllofMP3.com, both Web-based services that allow for the distribution of copyrighted materials worldwide without appropriate licensing. The case studies reveal that countries are not entirely at the mercy of such companies and have varying abilities to assert their laws in the face of global information providers.

## GLOBALIZATION THROUGH DIGITIZATION: PEOPLE

The Internet has brought humankind together in ways heretofore impossible. Blogs, online chats, video conferencing, YouTube, Web pages, MySpace communities, VoIP (Internet telephony), multiplayer online games, and virtual worlds allow people to communicate instantaneously across political boundaries. The rise of the Internet has quickened the pace of the globalization of people dramatically. While geography has hardly become irrelevant,<sup>20</sup> political borders increasingly do not delimit the range of human interactions. Via the Internet, the world comes to our doorsteps, indeed inside our homes, every day. Globalization comes home—and changes us upon arrival.

Globalization through digitization affects, for example, the relationship of expatriates to their homeland.<sup>21</sup> On China.com, people of Chinese descent can find a community dedicated to their special concerns.<sup>22</sup> Tinig.com allows young Filipino "netizens" across the world to find each other, converse in Tagalog or English, and address the many issues of the Filipino diaspora.<sup>23</sup> Tsinoy.com focuses on Filipinos of Chinese descent.<sup>24</sup> People

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of Scottish descent might congregate online at ElectricScotland.com, which seeks to “bring Scots and Scots’ descendants together from around the world.”<sup>25</sup> The Irish diaspora might find information about “roots” and “traditions” at IrishAbroad.com.<sup>26</sup> Yahoo! lists more than a thousand websites devoted to “cultures” from Acadians to Zimbabweans.<sup>27</sup> Many of these sites allow chats among the participants, provide bulletin boards for discussion, and organize special community events.<sup>28</sup> People can read newspapers from their homelands on a daily basis and even listen to radio stations.<sup>29</sup> The Internet thus makes it easier for people living in diaspora to maintain ties to family and homeland.

This has changed how the expatriate is viewed in her homeland:

While once the emigrant was remembered in her homeland through yellowing photographs and eventually, perhaps, forgotten to history or even cursed as a traitor, the emigrant today is celebrated, reconfigured as heroine. *Los olvidados* became *los heroes*. This reconfiguration has arisen through a confluence of events, some technological, some economic, and some political.<sup>30</sup>

The Internet would not have had the same globalizing impact on people were it not for a fundamental design principle of the Internet: “end-to-end design.”<sup>31</sup> This principle holds that the intelligence in the network lies principally at its endpoints.<sup>32</sup> Rather than relying upon centralized authorities,<sup>33</sup> the Internet depends upon the contributions of its end users. The World Wide Web deepens this design principle: an important democratizing feature of the Web is that it enables anyone to become a content provider even with little capital equipment or technical knowledge.<sup>34</sup> Tim Berners-Lee, the inventor of the Web, insisted that an editor be built into the Web browser, thereby allowing the user not only to view websites but also to create them.<sup>35</sup> Moreover, unlike a specialty newspaper or magazine, the content of a website becomes relatively widely accessible because of the increasing ubiquity of the Internet. In this way, even minority communities that are not well endowed with resources can use the Web to communicate widely.<sup>36</sup>

The Internet and the Web thus allow an end user to make an end run around the mainstreaming of mass media intermediaries.<sup>37</sup> This is not to deny that much of the Web has come to follow a centralized, mass media content producer-consumer model,<sup>38</sup> with a few commercial websites receiving a large percentage of all visitors. Yet minorities who desire to find (or create) their own communities on the Web can readily do so. The Web thus brings us closer to the ideal of a “semiotic democracy,” in which all individuals have the power to participate in the process of meaning making.<sup>39</sup>

The digital globalization of people does not necessarily mean the disappearance of particularity in favor of a globally homogenized person. Instead, it will likely mean the increased interpenetration of the diverse peoples of the world. The Internet might prevent the erosion of their historical identity as these peoples cross borders. Online communities, such as Orkut, Facebook, and MySpace and community sharing sites such as YouTube provide opportunities for individuals and groups to spread their

message and their memberships around the globe.<sup>40</sup> Tamil youth in Canada have employed Facebook to organize a political walkathon from Toronto to Ottawa.<sup>41</sup> At the same time, “second and third-generation refugees in India are actively networking on sites like Orkut, Facebook, and Hi5.”<sup>42</sup> Tibetans in India have “spread their campaign for a free Tibet” via such sites, while Bangladeshi refugees in India have found “comfort and solace in each other’s company,” albeit virtually.<sup>43</sup> YouTube simultaneously hosts videos depicting atrocities in Ethiopia and others depicting Addis Ababa as a prime travel location.<sup>44</sup>

At its best, cyberspace assists in the cosmopolitan project of creating a brother- and sisterhood of humankind.<sup>45</sup> This may be part of the Web’s engineering: as Berners-Lee writes, “Hope in life comes from the interconnections among all the people of the world.”<sup>46</sup> Rather than being forced by geography to associate only with our physical neighbors, the Internet frees us, to some extent, of physical constraints in the friendships and personal relationships we maintain. Through such transnational interactions, the Internet might help to break down the differences between us and the “Other.” Through cyberspace, individuals might gain an increasing sense of common membership in the world and a respect for the common humanity of people all over the globe.

## GLOBALIZATION THROUGH DIGITIZATION: CAPITAL

Once an international trader himself, former U.S. treasury secretary Robert Rubin writes about the impact of fiber-optic cable on the movement of capital across borders:

Throughout most of the 1980s, emerging-market sovereign debt had been illiquid, changing hands only in privately negotiated transactions with large point spreads. In 1995, highly liquid capital moved at the speed of light through fiber-optic cables. Traders had an array of terminals on their desks, with complete information about all prices at all times. Orders could be executed at any hour. The result was that developments in markets in one place could have instantaneous effects in any other place, and crises could spread much more rapidly.<sup>47</sup>

Rubin understands the revolutionary impact of digitization on international finance. With real-time information about financial markets worldwide available at one’s fingertips, money zooms around the globe at ever-greater speeds.

Given the ease with which even an ordinary person, one without a Bloomberg or Reuters finance workstation, can now purchase and trade foreign assets, the possibility of direct investments by individuals in foreign assets has mushroomed. Some individuals seek foreign investments not to diversify their portfolios or to maximize return, but to act upon their attachments to a foreign land. Some invest in what I have elsewhere called “diaspora bonds,” “debt instruments offered by a homeland government to raise capital principally from its diaspora.”<sup>48</sup> Such activity itself is spurred by the greater connections to faraway lands enabled by the Internet.<sup>49</sup>

Investments in securities abroad by Americans raise a regulatory concern. Few jurisdictions have as well-developed a legal framework for regulating the securities markets as does the United States. Will the American investment bring with it American regulatory scrutiny—especially the awesome weight of the U.S. securities regulation regime? After all, the American regime is, on its terms, mandatory; investors may not opt out.<sup>50</sup> Yet, in a line of cases involving the Lloyd's insurance markets, seven circuit courts have been willing to enforce a waiver of U.S. securities law protection in favor of fraud actions under English law in English court.<sup>51</sup>

In 1998, the SEC suggested that American legal protections might be waived in yet another manner. In its interpretation of whether a securities offering conducted abroad but made available over the Web would require registration under the U.S. Securities Acts, the SEC concluded that it would require registration only where "Internet offers, solicitations, or other communications are targeted to the United States."<sup>52</sup> But is not a Web page by its very nature targeted at everyone equally around the world? The SEC itself notes, "Information posted on a Web site . . . is not sent to any particular person, although it is available for anyone to search for and retrieve." The commission explains that a Web offering would not be considered to "target" the United States if the issuer implemented "measures that are reasonably designed to guard against sales or the provision of services to U.S. persons." This, of course, leaves a loophole: as long as the foreign offering is not targeted at the United States, Americans might still invest in such offerings without those offerings being registered with the SEC. How could Americans do so? By evading the "measures that are reasonably designed to guard against sales or the provision of services to U.S. persons."

The SEC anticipated such manipulation: "We recognize that U.S. persons may respond falsely to residence questions, disguise their country of residence by using non-resident addresses, or use other devices, such as offshore nominees, in order to participate in offshore offerings of securities or investment services." But as long as the issuer was not "on notice" of the evasion, the SEC would not hold the issuer responsible for the sale of an unregistered security to an American investor:

In our view, if a U.S. person purchases securities or investment services notwithstanding adequate procedures reasonably designed to prevent the purchase, we would not view the Internet offer after the fact as having been targeted at the United States, absent indications that would put the issuer on notice that the purchaser was a U.S. person. This information might include (but is not limited to): receipt of payment drawn on a U.S. bank; provision of a U.S. taxpayer identification or social security number; or, statements by the purchaser indicating that, notwithstanding a foreign address, he or she is a U.S. resident.<sup>53</sup>

Thus, a determined U.S. investor can make investments in foreign securities via the Internet without the protections of securities registration with the SEC under U.S. law. She might do so by opening a foreign bank

account, using a foreign address, and denying that she is American. On the other hand, the determined issuer might seek to establish an investor's location independently through geolocation technology based on her computer's Internet Protocol address and other information, but this technology is imperfect and again subject to evasion by a determined person.<sup>54</sup>

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The SEC's willingness to forgo registration requirements for foreign securities offerings on the Internet as long as they are not targeted at Americans does not mean that American investors waive all U.S. securities law protections. The fundamental antifraud provision, Rule 10b-5 under the Securities Act, should still be available, just as it is in private placements, as long as there is sufficient nexus with the United States (namely, the use of a "means or instrumentality of interstate commerce"—which might be satisfied by the use of the Internet itself to facilitate an investment by an American from the United States). (A plaintiff bringing a claim would also have to hurdle limits on the exercise of personal jurisdiction imposed by the Due Process Clause of the U.S. Constitution.)

Why might the SEC be willing to allow many foreign issuers making offerings over the Internet not to register, knowing that there will some Americans who will invest without the benefit of the SEC's review of the company's disclosure? Two rationales seem especially compelling, though neither may be entirely decisive. First, there are practical limitations on the SEC's enforcement powers. The SEC would find its capacity strained to review all securities offerings around the world that employ the Internet, and many foreign companies might not comply with a demand that they viewed as excessive. Second, the SEC might recognize the threat that a leakproof rule might entail to the possibility of securities transactions via the Internet. If every state responded in kind, the burdens on any company planning such a method would be enormous. The Australian Securities and Investment Commission suggested as much when it declared that it would "not generally seek to regulate offers, invitations and advertisements that have *no significant effect* on consumers or markets in Australia."<sup>55</sup> It explained: "If every regulator sought to regulate all offers, invitations and advertisements for financial products that were accessible on the Internet in their jurisdiction, the use of the Internet for transactions in financial products would be severely hampered."<sup>56</sup>

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The example of securities regulation shows how countries are recognizing the threat that the Internet revolution brings to various local regulatory regimes. The United States has not opted for one important alternative in the face of such a challenge—individual choice in securities regulation regime. Individual choice would effectively become largely *laissez-faire*, leaving individuals to manage their own risks (with the hope that market professionals would assure that the risk factor of the selected legal regime was impounded in the price of the security). Scholars promoting this approach have proposed that the United States make its national securities regulatory regime optional rather than mandatory, permitting issuers and investors to safeguard their investment through alternative legal regimes.<sup>57</sup> Such an approach might create the most efficient regulatory system, though this conclusion has been contested.

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The SEC has adopted a middle position. It has rejected laissez-faire, but at the same time it has not insisted on perfect enforcement in the face of this threat. It has ceded some ground, accepted some regulatory leakage, but required compliance in the main.

## THE GLOBALIZATION AND DIGITIZATION OF INTELLECTUAL PROPERTY

The impact of digitization on intellectual property has been widely noted. The Internet makes it possible to disseminate copyrighted works around the world readily without permission of the copyright owners. Governments and intellectual property owners have employed an array of tactics to protect intellectual property. Most prominently, the United States pressed for adoption of a global substantive minimum intellectual property protections regime as part of the new World Trade Organization (WTO), which came into being in 1995. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) commits WTO member states to protect copyrights, trademarks, patents, and related rights. The threat of WTO-sanctioned retaliation against countries that fail to live up to their TRIPS commitments have led many nations to improve protections for intellectual property as it crosses national boundaries.<sup>58</sup> The United States has sought to supplement these WTO rules on intellectual property rights by including provisions in its various bilateral free trade agreements.<sup>59</sup>

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Two recent cases, one involving Kazaa and the other AllOfMP3.com, demonstrate the nature of the threat posed to U.S. protection of copyrights, as well as how those threats can be ameliorated. Both firms have employed foreign platforms to offer services that often violate the copyrights of the American music industry, though their level of culpability differs sharply.

Kazaa, a leading peer-to-peer file trading system, was founded in the Netherlands by a Swede and a Dane, but it is programmed from Estonia and now run from Australia and incorporated in the South Pacific nation of Vanuatu.<sup>60</sup> Kazaa was launched by the company Consumer Empowerment in the Netherlands in 2001, but the Dutch music-publishing body Buma/Stemra sued it for copyright infringement soon thereafter. After an adverse November 2001 trial court ruling, Consumer Empowerment sold Kazaa to newly incorporated Sharman Networks, headquartered in Australia and incorporated in Vanuatu.

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Ironically, Kazaa's flight may have been unwise. In 2002, a Dutch appeals court reversed the earlier ruling, holding that Kazaa provided a number of worthy uses and could not be held responsible for the members who used the service for copyright infringement.<sup>61</sup> The Dutch Supreme Court affirmed the appellate ruling the following year.<sup>62</sup> But the rulings came too late; the software's new owner, Sharman Networks, faced suits both in Australia and in the United States. Kazaa's location on the other side of the world did not guarantee immunity from due process in the United

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States. A federal district court in California ruled that it had personal jurisdiction over Sharman on either one of two separate grounds: the large number of California users of its service;<sup>63</sup> and the fact that Sharman “is and has been well aware of the charge that its users are infringing copyrights, and reasonably should be aware that many, if not most, music and video copyrights are owned by California-based companies.”<sup>64</sup> In 2006, Sharman reached a global settlement with the plaintiffs, agreeing to pay music studios \$100 million and another undisclosed sum to movie studios.<sup>65</sup> It promised as well to restructure its service to bar most copyright-infringing works.

Could Sharman not simply retreat to another jurisdiction from which to offer its powerful yet controversial service? Why would it choose to settle instead? The reason is that the American and Australian lawsuits threatened its ability to raise revenues through advertising and other services. If it hoped to avoid a never-ending cat-and-mouse game that would undermine its ability to make money, Sharman needed to eliminate the legal threat it faced.

Of course, the same will not be true of all such services. So-called darknets, for example, promise to allow individuals to share information but mask the identity of all the parties involved.<sup>66</sup> Such systems allow sharing among a group of trusted users. Some have suggested that darknets make futile the efforts to protect copyrighted works through digital rights management. But darknets require a significant degree of sophistication from users, thus eroding their user base. But the prospect of open-source, not-for-profit, peer-to-peer systems suggests that unauthorized distribution channels will long remain a thorn in the side of the copyright-protected industries.

Complicating governmental efforts to enforce their rules in cyberspace is the “end-to-end” nature of the Internet. Rather than relying on a central, top-down hierarchy for disseminating information like television, the Internet allows individuals worldwide to communicate directly with each other. The absence of a central authority to mediate information flows hampers regulatory efforts. Yet, perhaps alternative choke points for the Internet might yet be found.

One significant choke point for the Internet is the domain name system. Information is most readily accessible if it has a single, static address in cyberspace. The domain name system provides such a function. Just as in any property registry, the need for each Web address to have a unique translation to a particular computer requires a single authority to manage that translation.<sup>67</sup> Currently, that authority is the Internet Corporation for Assigned Names and Numbers (ICANN), a California nonprofit corporation, which receives that authority through a U.S. Department of Commerce contract. ICANN retains the power to set the rules for global domain name spaces such as “.com,” “.net,” and “.info,” but transfers authority over country domain name spaces to the appropriate governments of the countries themselves. ICANN has stayed largely aloof from individual complaints about particular websites.

An even more concentrated point of control turns out to be the “root server”—the computer database that serves as the registry of domain

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names. For “.com” and “.net” domains, the root server is maintained by VeriSign in Herndon, Virginia—in comfortable proximity to Washington, D.C. Accordingly, the local federal court has attracted a large number of domain name disputes—especially those where the claims are brought *in rem* against a domain name held by a foreign party. Thus, the ultimate power over the “.com” and “.net” domains rests with a federal district court in Virginia, the Fourth Circuit Court of Appeals, and (though it has never taken a domain name case) the U.S. Supreme Court.

The limit on this power is the ability of states and private parties to defect: “If any country becomes disaffected with [ICANN’s] management ... it could opt out of it in favor of a parallel Internet system.”<sup>68</sup> Of course, “because of network effects, opting out of the current domain name system would carry a high price.”<sup>69</sup> One might imagine the European Union or China mustering the will to offer an alternative system given a sufficiently noxious move by the United States to assert control, but the challenges would be enormous.

Consider the pressure points available to American studios alarmed at the growing popularity of AllofMP3.com, a Russian website that allowed individuals worldwide to download a huge catalog of songs at a fraction of the cost charged by licensed services:<sup>70</sup> “Sold by the megabyte instead of by the song, an album of ten songs or so on AllofMP3 can cost the equivalent of less than \$1, compared with 99 cents per song on iTunes.”<sup>71</sup> Some described AllofMP3 as an ideal music download site: as one technology website said, “From a consumer standpoint, AllofMP3.com was pretty close to the perfect music service—dirt cheap, easy to use, and the choice of how you wanted your music encoded. Oh, and no DRM [digital rights management].”<sup>72</sup> The fact that AllofMP3 did not bother to license its content from the content holders also meant that it could offer up a music catalog that covered music unavailable on many or all licensed services; for example, it offered the entire Beatles catalog long before any part of that catalog appeared on iTunes. What made AllofMP3 especially troublesome for record companies was its claim that its activities are legal under Russian law:

The availability over the Internet of the AllofMP3.com materials is authorized by the license # LS-3M-05-03 of the Russian Multimedia and Internet Society (ROMS) and license # 006/3M-05 of the Rightholders Federation for Collective Copyright Management of Works Used Interactively (FAIR).<sup>73</sup>

The Russian license arguably permitted the online sale of music upon the payment of a 15 percent royalty to the Russian collecting society, without requiring individual negotiation with copyright holders. The site’s parent company, MediaServices, declared through its director general, Vadim Mamotin, that the site “remunerates artists by paying 15 percent of its revenue to a collecting agency, the Russian Multimedia and Internet Society, or ROMS by its initials in Russian.”<sup>74</sup> ROMS offered its public support for AllofMP3; its general director Oleg Nezus said that “AllofMP3.com’s activity is quite legitimate.”<sup>75</sup> In fact, ROMS licensed

AllofMP3 (and later, it appears, that website's successor Mp3Sparks). According to one report, "ROMS says the Russian constitution gives it the right to license music to AllofMP3.com, even if it has not obtained permission from the copyright holders."<sup>76</sup> ROMS collected royalty payments from the download site on behalf of record companies and artists, but it apparently "had few takers" when it came to distributing the royalties obtained for AllofMP3 downloads.<sup>77</sup>

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The site's claim to legality in Russia gained some support from a Russian arbitral ruling that Visa International could not refuse to process credit card transactions for a similar site because that site was legal in Russia.<sup>78</sup> According to one report:

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Internet-Audit, the owner of alltunes.com, sued Rosbank, the Russian agent of Visa, the international payment system and its affiliate United Card Services, the acquiring center. The Moscow Arbitrary Court decided that Visa's unilateral refusal to accept the payment operations was illegal, considering that, according with the copyright law, neither IFPI or VISA were the right holders representatives.<sup>79</sup>

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Indeed, until the U.S. government's intervention, which I detail later, the Russian authorities seemed willing to let the company operate with impunity. By 2006, the website, which claimed five million subscribers,<sup>80</sup> had become one of the 1,000 most popular websites in the world.<sup>81</sup>

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The website eschewed its responsibility "for the actions of foreign users" and advised users to consult local counsel. However, it suggested that downloading such material may well be legal in the United States:

There are at least several statutes, each of which, should allow users to access our service in the U.S.; such as 17 U.S.C. §§ 602(a) (the "Importation for Private Use Exception"); 1008, 1001 (the "iPod Exception"); 109 (the "First-Sale Doctrine/Anti-'Double-Dip' Exception"); 107, 117 (the "Fair-Use/Backup Exception"); among others.<sup>82</sup>

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The references to an iPod Exception and a First Sale Doctrine/Anti-'Double Dip' Exception are entirely misleading. However, the website's backers were not entirely confident of the legality of the offering, refusing to list any contact person or physical address on the website. Indeed, the *New York Times* tracked down a responsible party to a Moscow address only by examining the site's domain name registration.<sup>83</sup>

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If Russian authorities refuse to test the proposition that Russian law permits this website to offer downloads across the world, what can American music studios do? The case of AllofMP3.com reveals that American studios were not entirely at the mercy of this foreign enterprise conducted from Russian soil. First, the U.S. government could use diplomatic pressure, including special leverage it had because of its effective ability to veto Russian admission into the World Trade Organization. Second, as we will see, AllofMP3.com's domain name proved to be that company's Achilles' heel.

In 2006, the U.S. government sought to use the bargaining chip of entry into the WTO to encourage Russia to shut down AllofMP3 and to

enforce foreign copyrights, especially copyrights held by American companies. U.S. Trade Representative Susan Schwab made the threat quite explicit: "I have a hard time imagining Russia becoming a member of the WTO and having a Web site like that up and running that is so clearly a violation of everyone's intellectual property rights."<sup>84</sup> Schwab described AllofMP3 as the "poster child" for illegal music sales over the Internet.<sup>85</sup> Neena Moorjani, the chief spokesperson for the Office of the U.S. Trade Representative, had even sharper words: "AllofMP3.com is the world's largest server-based pirate website," she declared.<sup>86</sup>

The pressure yielded some results. Russian prosecutors charged Denis Kvasov, a former owner of AllofMP3, with copyright infringement. If convicted, Kvasov faces a jail term of three years and a penalty of half a million dollars, payable to American music companies EMI, Warner, and Universal.<sup>87</sup> Russian prosecutors also filed a suit against MediaServices managing director Vadim Mamotin.<sup>88</sup>

In July 2007, AllofMP3 was shuttered. According to one report, "the Office of the U.S. Trade Representative in Washington said Russian authorities severed the connection between the company, Media Services, and its Internet service provider, Master Host, using a court order."<sup>89</sup> "This action follows months and years of the U.S. government, Congress and industry urging Russia to step up its protection of intellectual property," Gretchen Hamel, spokesperson for the U.S. Trade Representative, said in a statement.<sup>90</sup> Trade Representative Schwab was not entirely satisfied, however: "We are concerned that its piracy activities appear to have migrated to other Web sites based in Russia."<sup>91</sup>

Indeed, the American victory may have been somewhat phantasmal. AllofMP3's owners seem simply to have migrated their business to another domain name, Mp3Sparks.com. According to one report, "The victory ... was short lived: The same company behind AllofMP3.com has launched a similar site that resembles the shuttered service, provides the same legal disclaimers and sells songs at a fraction of the price of iTunes."<sup>92</sup> Mp3Sparks follows AllofMP3 in declaring its purported compliance with the letter of Russian law, citing a license from a Russian collective rights society (though the license number is different from the one cited by AllofMP3).<sup>93</sup> One presumes that the U.S. Trade Representative will not be entirely satisfied with the Russian authorities' forceful action against AllofMP3 if similar action does not follow against its successors.

What's more, the parent company, MediaServices, may itself have migrated. According to a lawyer for the international recording houses, the real owners "are hard to trace. We only know that a Cyprus-based company recently bought and now operates Mediaservices."<sup>94</sup> This move shares some similarity with the approach adopted by Kazaa's owners, who sold the software to a foreign company in the middle of their legal woes.

The domain name allows an alternative line of attack. Even a Moscow address may not prove an insurmountable obstacle for enforcement efforts entirely within the United States. When the recording industry filed a copyright infringement suit against AllofMP3 recently in federal court in New York City, it sought the usual statutory damages (amounting to

billions in this case, not the half-million sought by Russian authorities), but it also sought the *company's domain name*. While the RIAA may find it difficult to enforce any award of monetary damages, it will likely find VeriSign readily compliant when served with a federal court order to transfer the ownership of the domain name from a Russian to an American entity. Of course, following such a judgment, the owners of AllofMP3 would likely migrate its content to another domain name, but this would just recreate Kazaa's cat-and-mouse problem—which will prove painful for both the recording industry and AllofMP3's users.

A Whois registry search for Mp3Sparks.com reveals the following:

Domain Listing Agent mp3sparks.com@domainlistingagent.com

P.O. Box 927010

San Diego, CA 92192-7010

United States

Phone: +1 (858) 731-1701

Record last updated on 2007-07-04 00:00:00

Record created on 2006-08-15 00:00:00

Record expires on 2008-08-15 00:00:00

Domain servers in listed order:

ns1.abac.com 216.55.128.4

ns2.abac.com

Registration Service Provider: AplusNet(APRO)

apro-n4e-racc@abac.com

<http://www.aplus.net>

Registrar: NAMES4EVER, <http://www.names4ever.com><sup>95</sup>

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This information shows that the owner of Mp3Sparks purchased its domain name through a registrar, Names4Ever, owned by a California corporation, Abacus America.<sup>96</sup> In addition, the owner of Mp3Sparks did so through a service, domainlistingagent.com, that promises anonymity to the owner. According to Web host Aplus.Net (also owned by Abacus America), "Our sister company, domainlistingagent.com, enters its own contact information rather than yours into the Whois database. This allows you to manage your online Whois identity with complete privacy."<sup>97</sup> The servers used by the site are at abac.com, also run by Aplus.Net, which owns a large server facility in San Diego and has its headquarters in Kansas.<sup>98</sup> The choice of an American registrar and (potentially) American servers is especially surprising for a company that is actively engaged in violating U.S. copyright law. The selection of American entities will make it easier for a U.S. court to enforce any judgment enjoining Mp3Sparks's continued operation.

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While ".com" sites are ultimately under the jurisdiction of a Virginia court, sites with a country ending are typically not so easily subjected to

American jurisdiction. The website musicmp3.ru, for example, competes with Mp3Sparks, but does so from a Russian-controlled domain name and, according to a Whois inquiry, a Russian server:

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domain: MUSICMP3.RU
type: CORPORATE
nserver: ns.musicmp3.ru. 83.102.152.178
nserver: ns4.nic.ru.
nserver: ns8.nic.ru.
state: REGISTERED, DELEGATED
person: Vadim V Vasilyev
phone: +7 351 2354213
e-mail: V.V.Vasilyev@inbox.ru
registrar: RUCENTER-REG-RIPN
created: 2003.11.22
paid-till: 2007.11.22
source: TC-RIPN99
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The recording industry found another pressure point in the credit card services on which sites like AllofMP3 rely to obtain payment. In October 2006, Visa suspended its service to AllofMP3, citing “legislation passed in Russia and international copyright law.”<sup>100</sup> Of course, when AllofMP3 migrated to another site, the copyright owners had to ask Visa to extend its ban to that new site as well—and would need to do so repeatedly. Yet, thwarting a website’s access to financial intermediaries is one of the most highly effective methods of interrupting a service supplied from a foreign country.

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The recording industry pursued yet another approach: censorship at the Internet service provider on the user side of the download. A recent study by the Institute for Information Law at the University of Amsterdam describes the successful use of this approach in Denmark in 2006:

[The International Federation of the Phonographic Industry Denmark instigated] an action against the Danish ISP Tele2 concerning the Russian file-sharing AllofMP3 website. The City Court of Copenhagen ruled against Tele2 and ordered it to block all access to the site AllofMP3.com, judging that Tele2 was willingly infringing copyright if its customers use AllofMP3 to download music. Tele2 argued unsuccessfully that the temporary storing, which takes place in the router when the music files are sent via the Internet and which is completed in less than a millisecond, is so fleeting that it does not constitute a reproduction in the sense as is mentioned in section 2 of the Danish Copyright Act. The Court rejected Tele2’s attempt to invoke the right of temporary reproduction under section 11a of the Danish Copyright Act, since this provision presupposes that the reproduction is based on a legal copy. By establishing a connection between the lawfulness of a copy and the transient and incidental act of reproduction, the Danish decision strongly departs from the requirements set by the [European Union’s

Information Society] Directive. If confirmed on appeal, this decision could have very strong implications for ISPs in the future, for it clearly states that an ISP can be held liable for temporarily storing infringing data on their routers, contrary to what article 5(1)a) of the Directive prescribes.<sup>101</sup>

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Holding internet service providers (ISPs) liable for the ephemeral copying that takes place as a music file is downloaded is certainly a broad strategy. The worry is that such an approach will cause ISPs to police what flows through their wires aggressively—barring material excessively in the process.<sup>102</sup> In the United States, section 512(a) of the Digital Millennium Copyright Act is designed to immunize ISPs for “routing ... material ... if ... the transmission of the material was initiated by or at the direction of a person other than the service provider [and] the service provider does not select the recipients of the material except as an automatic response to the request of another person.”<sup>103</sup>

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One can identify a number of other points of control, including search engines, website hosts, and Internet routers. Federal and state governments in the United States have employed a number of these methods to target illicit activity, including a federal government agreement with credit card companies to prevent illegal online purchases of cigarettes via credit cards, a congressional initiative to block illegal online prescription sales, and a Pennsylvania statute, later held unconstitutional, that would have required ISPs to block child pornography sites.<sup>104</sup> Ronald Mann and Seth Belzley suggest that focusing on intermediaries (by placing liability on them) should be pursued only where cost-effective: “The key question for determining the propriety of intermediary liability is the plausibility that the intermediary could detect the misconduct and prevent it [economically].”<sup>105</sup> They explain:

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When intermediaries have the technological capability to prevent harmful transactions and when the costs of doing so are reasonable in relation to the harm prevented, they should be encouraged to do so, with the threat of formal legal sanction if necessary.<sup>106</sup>

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Many countries have sought to utilize such points of control to achieve their regulatory objectives. Recently, YouTube has attracted the attention of many governments. Thailand has objected to various videos posted to YouTube that are critical of the monarchy.<sup>107</sup> Even the United States has barred its military from posting videos to the site, citing bandwidth concerns.<sup>108</sup> This effort does not bar YouTube from posting videos from the U.S. military, but rather bars the U.S. government’s service members from posting videos to the site.

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The emergence of a community titled “We Hate India” on Google’s Orkut social networking service led to numerous efforts to respond, including attempts to block access to that community. The website includes a “picture burning the national tricolor, bearing an anti-India message.”<sup>109</sup> As if taking a cue from Justice Louis Brandeis, who promoted more speech as a response to false speech,<sup>110</sup> a few Orkut members established new

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communities titled “I Hate Hatred” and “We Hate Those Who Hate India.” Others, however, have sought to ban the anti-Indian community outright. A student group associated with a right-wing Hindu political party, the Shiv Sena, has asked Indian cybercafés to block access to the anti-India community, going so far as to vandalize those that do not.<sup>111</sup> The president of Bharatiya Vidyarthi Sena, one such student group, condemns Orkut, saying that it is “used by many destructive elements to spread canards about India, Hindus, our gods and cultural heritage.”<sup>112</sup> The complaint was even heard by a Mumbai court, though it does not appear that the complaint resulted in definitive action.<sup>113</sup>

In November 2006, Orkut was banned by Pune police in India after a series of violent events following the filing of a complaint by the Shiv Sena and related groups alleging that Orkut had allowed the posting of “slang, rude and vulgar language” about the Maratha warrior-king Chhatrapati Shivaji Maharaj.<sup>114</sup> The complaint centered on a 160-word posting on one of Orkut’s community Web pages.<sup>115</sup>

Indian authorities have also targeted ISPs in order to impede access to sites allegedly promoting hate or armed rebellion.<sup>116</sup> Unfortunately, the authorities’ effort to block a dozen or so blogs led risk-averse Indian ISPs to block access to *all* blogs hosted on various popular services, such as Blogger, Typepad, or Yahoo’s Geocities. After complaints, ISPs restored access to these services and provided more discriminatory censorship by blocking at the “subdomain” level. The OpenNet Initiative found that even the more refined attempts to block access to certain blogs were not entirely successful:

While ISPs are clearly blocking on the subdomain level (for example, the site <http://princesskimberley.blogspot.com/> is filtered on four ISPs tested), the reportedly banned Maoist Web site [www.peoplesmarch.com](http://www.peoplesmarch.com) was accessible in other forms (<http://peoplesmarch.wordpress.com/> <http://naxalrevolution.blogspot.com/>) on all ISPs at time of testing.<sup>117</sup>

The OpenNet Initiative reports that Indian authorities sought to block an anti-Islamic website, but that again proved only partially successful, as one ISP refused to abide by the order:

Another basis for filtering was demonstrated with the blocking of the site [www.hinduunity.org](http://www.hinduunity.org) on April 28, 2004, reportedly ordered by the Mumbai police on the grounds that it contained anti-Islamic inflammatory material. Police commissioners, who can exercise the powers of executive magistrates in times of emergency, can block websites containing material constituting a nuisance or threat to public safety under Section 144 of the Code of Criminal Procedure. While major and small ISPs immediately complied with the blocking request, one of the nation’s largest ISP[s], Sify, refrained from blocking the Web site, arguing that only CERT-IN had the authority to issue blocking orders.<sup>118</sup>

The registration details for [Hinduunity.org](http://Hinduunity.org) reveal that the name is registered to a person with a Post Office box in East Norwich, New York.<sup>119</sup>

Indian authorities have expressed concern that Orkut has become a breeding ground for illegal prostitution.<sup>120</sup> Yet, there remains uncertainty as to whether the act of advertising prostitution is illegal: the secretary of the Ministry of Information Technology for India, Dhirender Singh, indicated that the government is still investigating “what exactly is the contravention of law” surrounding these sex solicitation communities.<sup>121</sup> “While obscenity is banned, soliciting on the net that does not use obscene language or pictures is not,” says Rajan Bhagat of the Delhi Police.<sup>122</sup>

Efforts to utilize various control points to control information flow across the world will not prove uniformly successful. Determined Web surfers may find ways to access forbidden information. There are numerous methods for bypassing government blocks of websites such as Orkut. The most popular requires the Web surfer to access a website such as [www.kproxy.com](http://www.kproxy.com) to reach an anonymizing proxy server, “a proxy server that removes identifying information from the client’s requests for the purpose of anonymity.”<sup>123</sup> Kproxy.com itself states that its site cannot be used to “transmit any unlawful, harassing, libelous, abusive, threatening, harmful, or hateful material of any kind or nature” or “for any illegal purpose including but not limited to the transmission or receipt of illegal material.”<sup>124</sup> It will be difficult to stamp out entirely runaway information in cyberspace if there are determined disseminators and Web surfers eager for the information sitting at computers around the world. In a dispiriting lesson for copyright owners, Hollywood brought suit to ban linking to DeCSS code,<sup>125</sup> but that code is still widely available on the Internet.<sup>126</sup>

But yet another point is clear. The capacities of each state to regulate offerings from abroad will vary widely. Few countries will be able to hold accession to the WTO or some other international regime hostage to compliance with that country’s legal regime. Few, at least, will rival the United States’ capacity in this regard. Countries such as China and Saudi Arabia might find success through control over routers and the Internet backbone. Other states might target domain names. One common strategy will be to target Internet service providers as the locus for regulation.

## CONCLUSION

Digitization lessens the hold of geography on our lives and helps bring globalization home. There is much to celebrate in this development—from bringing us more efficient services to increasing our understanding of the world to the establishment of a global library of knowledge.

In this chapter, I have dwelled largely on one of the potentially adverse consequences of globalization through digitization—the threat to domestic law posed by information services supplied from distant shores. Because of globalization through digitization, efforts to enforce domestic regulations will require engagement with a global front. This is not cause for a retreat from either globalization or digitization, but rather occasion for us to collaborate with others around the world on protecting common values or, perhaps, to seek to protect each other’s values.

## NOTES

1. Tom Standage, *The Turk: The Life and Times of the Famous Eighteenth Century Chess-Playing Machine* (New York: Walker & Co., 2002), 23.
2. Ibid., 105–11, 140.
3. See <http://www.mturk.com>.
4. Anupam Chander, *NetWork: Globalization and Glocalization in Trade in Services* (draft dated January 9, 2007).
5. Anupam Chander, “Whose Republic?” 69 *University of Chicago Law Review* 1479 (2002): 1496.
6. Ibid. “The description of our world as a ‘global village,’ with its transnational circuits of travel and exchange, rings even truer through the Internet, which permits an intimacy usually unavailable without face-to-face encounters.”
7. Declan McCullagh, “U.S. Blogger Thwarts Canadian Gag Order,” CNET News.com, April 5, 2005, [http://news.com.com/2100-1028\\_3-5656087.html](http://news.com.com/2100-1028_3-5656087.html).
8. Rondi Adamson, “Borderless Blogs vs. Canada Press Ban,” *Christian Science Monitor*, April 13, 2005, available at <http://www.csmonitor.com/2005/0413/p09s01-coop.html>.
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10. Andrew Downie, “Google and the Pedophiles,” *Time*, September 6, 2006, available at <http://www.time.com/time/nation/article/0,8599,1531986,00.html>.
11. Ibid.
12. Richard Waters, “Brazil Lawyers Lean on Google,” *Financial Times*, August 24, 2006, available at <http://www.ft.com/cms/s/d2420942-32f9-11db-87ac-0000779e2340.html>.
13. Downie, “Google and the Pedophiles.”
14. Nils Pratley, “The Porn Princess, the Indian Computer Whiz, and the Poker Bet That Made \$10bn,” *Guardian* (U.K.), June 3, 2005.
15. Kurt Eichenwald, “At PartyGaming, Everything’s Wild,” *New York Times*, June 26, 2005 (emphasis added).
16. Ibid.
17. Ibid.
18. Matt Richtel and Heather Timmons, “The Gambling Is Virtual; the Money Is Real,” *New York Times*, July 25, 2006.
19. Eichenwald, “At PartyGaming.”
20. As Manuel Castells notes, the Internet has generated its own geography; Manuel Castells, *The Internet Galaxy: Reflections on the Internet, Business, and Society* (Oxford: Oxford University Press, 2001).
21. This paragraph draws upon Chander, “Whose Republic?” 1493.
22. See Gateway to China, <http://china.com>.
23. See <http://www.tinig.com>.
24. See <http://www.tsinoy.com>, which describes itself as the “global village of Chinese and Filipinos.”
25. See <http://www.electricscotland.com>.
26. See <http://www.irishabroad.com>.
27. See [http://dir.yahoo.com/society\\_and\\_culture/cultures\\_and\\_groups/cultures/](http://dir.yahoo.com/society_and_culture/cultures_and_groups/cultures/).
28. See, for example, GhanaForum.com, <http://www.ghanaforum.com>.
29. See, for example, Radio of India, <http://www.radioofindia.com>.
30. Anupam Chander, “Homeward Bound,” 81 *NYU Law Review* 60 (2006): 62.

31. This paragraph draws from Chander, "Whose Republic?" 1490.

32. For an outline of the architecture and consequences of end-to-end network design, see, for example, Mark A. Lemley and Lawrence Lessig, "The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era," 48 *UCLA Law Review* 925 (2001): 930–33, and Timothy Wu, "Application-Centered Internet Analysis," 85 *Virginia Law Review* 1163 (1999): 1192–93.

33. While standards-setting can be accomplished as a distributed, consensus-based project, the Internet does require a centralized root domain-name authority. For an introduction to the domain name system and associated problems, see Joseph P. Liu, "Legitimacy and Authority in Internet Coordination: A Domain Name Case Study," 74 *Indiana Law Journal* 587 (1999): 590–94.

34. Tim Berners-Lee describes the Web as "much more than a tool for scientists" (*Weaving the Web: The Original Design and Ultimate Destiny of the World Wide Web by Its Inventor* [San Francisco: HarperSanFrancisco, 1999], 38).

35. An "editor" is a computer program that allows one to compose content, rather than merely to passively receive content produced by others.

36. Eugene Volokh argues that new information technologies will "both democratize the information marketplace—make it more accessible to comparatively poor speakers as well as rich ones—and diversify it" ("Cheap Speech and What It Will Do," 104 *Yale Law Journal* 1805 [1995]: 1833).

37. Even Congress and the Supreme Court have recognized the Internet's role in fostering diversity in media. The Communications Act of 1996, 47 U.S.C. § 230(a)(3) (1994 & Supp. 1999) declares, "The Internet and other interactive computer services offer a forum for a true diversity of political discourse." In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (quoting *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 842 [E.D. Pa. 1996]), the Court stated:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

38. As Mark Lemley and Lawrence Lessig describe it, the architecture of cyberspace is protean—its end-to-end nature may be changing to a more centralized system controlled in large part by Microsoft and AOL Time Warner; see Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001), 172–73, 264–67, and Lemley and Lessig, "End of End-to-End," 939–40.

39. John Fiske defines *semiotic democracy* as a society in which all persons are free and able to participate in the generation and circulation of meanings and values; John Fiske, *Television Culture* (London: Methuen, 1987), 236–39. According to Fiske, all people should be able to participate in meaning making; William W. Fisher III, "Property and Contract on the Internet," 73 *Chicago-Kent Law Review* 1203 (1998): 1217–18. Compare Madhavi Sunder, "Cultural Dissent," 54 *Stanford Law Review* 495 (2001): 498 ("More and more individuals are claiming a right to dissent from traditional cultural norms and to make new cultural meanings").

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43. Ibid.
44. Ethiopian massacre, <http://www.youtube.com/watch?v=oiRv2jcaVH8>; Addis Ababa, <http://www.youtube.com/watch?v=od8ZP9oaxJE>.
45. This paragraph draws from Chander, "Whose Republic?" 1497.
46. Berners-Lee, *Weaving the Web*, 209.
47. Robert E. Rubin and Jacob Weisberg, *In an Uncertain World : Tough Choices from Wall Street to Washington* (New York: Random House, 2003), 18.
48. Anupam Chander, "Diaspora Bonds," 76 *NYU Law Review* 1005 (2001): 1013.
49. Ibid., 1024.
50. Securities Act of 1933, § 14, 15 U.S.C. § 77n.
51. Chander, "Diaspora Bonds," 1081–82.
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57. See Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 Yale L. J. 2359 (1998); Steven J. Choi and Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L.Rev. 903 (1998).
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60. See Anupam Chander, "Next Stop, Kazaakhstan? The Legal Globetrotting of Kazaa, the Post-Napster Filing Sharing Company," Findlaw.com, October 24, 2002, [http://writ.news.findlaw.com/commentary/20021024\\_chander.html](http://writ.news.findlaw.com/commentary/20021024_chander.html); Michael Tarm, "KaZaA! Youths from Cyber-Savvy Estonia Write the New Napster, Delivering a Blow to the Global Entertainment Industry," *City Paper*, March/April 2003, available at <http://www.balticsww.com/kazaa.htm>. Kazaa's founders would go on to follow a similar model to create Skype, incorporating their London-operated company in Luxembourg and relying on Estonians for programming; Ivar Ekman, "Skype Is 2nd Jackpot for Scandinavian Duo," *International Herald Tribune*, September 13, 2005.
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91. Sandoval, "Russian Prosecutors."

92. Paul Miller, "AllofMP3.Com Finally Shut Down, Replacement Already Launched," Engadget.com, July 3, 2007, <http://www.engadget.com/2007/07/03/allofmp3-com-finally-shut-down-replacement-already-launched>. Miller continued, "Unfortunately for copyright holders, the MediaServices folks behind AllofMP3 aren't exactly changing directions: they've merely opened up a practical mirror image of AllofMP3.com over at MP3Sparks.com, and are keeping up with their nefarious ways." Another report noted: "Within days of the closure of Allofmp3.com, a new site cropped up, Mp3sparks.com, which appeared operational on Tuesday. The new site is reportedly run by the former operators Allofmp3.com, although that fact could not be independently confirmed by CNET News.com" (Sandoval, "Russian Prosecutors").

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Is it legal to download music from Mp3Sparks.com?

The availability over the Internet of the Mp3Sparks.com materials is authorized by the license 31/ZM-07 of the noncommercial partnership Rightholders Federation for Collective Copyright Management of Works Used Interactively (NP FAIR). In accordance to the licenses' terms Regiontorg pays license fees for all materials downloaded from the site subject to the Law of the Russian Federation "On Copyright and Related Rights." All these materials are solely for personal use. Any further distribution, resale or broadcasting are prohibited.

The works available from Mp3Sparks.com are protected by the Law of the Russian Federation "On Copyright and Related Rights" and are for personal use of a buyer. Commercial use of such material is prohibited. Recording, copying, distribution on any media is possible only upon special consent of a Rightholder.

The user bears sole responsibility for any use and distribution of all materials received from Mp3Sparks.com. This responsibility is dependent on the national legislation in each user's country of residence. The Administration of Mp3Sparks.com does not possess information on the laws of each particular country and is not responsible for the actions of foreign users.

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## PART II

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# The Impact of Global Public Governance



## CHAPTER 5

# Disassembling the Assembly: Congress and the Legislative Gap in Global Governance

Edward A. Fogarty

Congress has long been the most skeptical branch of the federal government regarding U.S. participation in international agreements and institutions. Whether with the Treaty of Versailles after World War I, the Havana Charter in the late 1940s (which would have created an International Trade Organization), or, implicitly, the Kyoto Protocol, Congress has been unafraid to wield its primary source of authority over international claims on U.S. sovereignty—the rejection of agreements (formal treaties or otherwise) negotiated by the executive branch.

However, globalization has made this mechanism of congressional oversight of the executive's conduct of foreign affairs increasingly problematic. As the United States becomes ever more integrated into global markets and interdependent with other countries on a variety of issues, the costs of simply rejecting treaties intended to manage this interdependence have grown. At the same time, however, globalization in its current form has produced a political backlash against both the encroachment of international institutions on U.S. legislative authority and the absence of clear mechanisms to ensure democratic control of these institutions.

This chapter will look at the dilemmas globalization creates for existing mechanisms available to Congress to undertake legislative oversight of U.S. involvement in international institutions. It will argue that globalization has sharpened these dilemmas by creating tensions between the strong incentives to sustain American participation and leadership in international institutions and the capacity of Congress to sustain its constitutionally defined role of ensuring this involvement meets high standards of legislative oversight and democratic accountability. If we wish to sustain this role

for Congress, we need new ways of thinking about how it can meaningfully participate in—rather than simply submit to or reject—international institutions in ways consistent with American political and institutional priorities. Existing alternatives—such as a world parliament or more ad hoc parliamentary assemblies—do not offer realistic *substitutes* for the treaty ratification process, but may provide a core set of principles for how to establish a foothold for “legislation by legislators” in global governance.

## CONGRESS, “LEGISLATIVE GAPS,” AND THE RATIFICATION DILEMMA

Though not irreversible, globalization—defined here as a process of international economic integration spurred by technological change and enabled by political choices to support, or at least not hinder, this process—is a reality. Although the executive branch negotiates international economic agreements and the private sector drives international commerce, U.S. economic integration into the global economy is a result in part of a variety of congressional actions since World War II to support, or to not stand in the way of, this integration. Congress’s tacit or explicit approval of the postwar Bretton Woods monetary system, a large number of multilateral and other trade agreements, and a generally open capital account have provided an important and necessary legislative imprimatur on the ever-growing integration of the U.S. economy into the world economy.

Growing U.S. integration into the global economy and the international institutions intended to manage this global economy have exposed “legislative gaps” in the governance of the global economy at both the domestic (U.S.) level and the international level. These legislative gaps have raised questions about the oversight and democratic legitimacy of global governance and about the possible negative implications for the distribution of power between the executive branch and Congress within the U.S. federal government. Yet while Congress’s most powerful weapon to hold both the executive branch and international institutions to account remains its power to reject treaties and other agreements, the costs of wielding this power grow in concert with each step toward U.S. integration into the world economy.

To establish the logic of this argument, we need to address the nature of (1) congressional authority regarding U.S. involvement in international institutions, (2) the aforementioned legislative gaps at the national and international levels, and (3) the dilemma that arises when Congress has insufficiently sensitive instruments available to redress these gaps. Each will be addressed in turn.

### Congress and International Institutions

Two-thirds of the U.S. federal government is inclined to be “internationalist,” while one-third remains “sovereigntist.” The executive branch conducts foreign policy, making international agreements and sending

delegations to international institutions; and the Supreme Court, despite its domestic focus, increasingly takes into account foreign precedent in its decisions.<sup>1</sup> Meanwhile, the U.S. Congress, like peer legislative institutions in countries around the world, is resolutely sovereigntist. That is, Congress assiduously, even jealously, guards the sovereign authority of the U.S. government (including itself) from foreign encroachment. Because it has a constitutionally defined role as the sole legislative authority within the federal government, its members naturally look with a certain skepticism on rival sources of legislation that (unlike state legislatures) can override their own legislative authority—namely, international institutions and their associated treaties and agreements that, if ratified, become the law of the land within the United States. Institutionally, Congress does not have an incentive to encourage the executive branch to negotiate a large number of international agreements that circumscribe Congress's role as the supreme legislative authority.

Congressional sovereigntism also operates at the micro level in the incentives faced by its individual members. Members of the Senate and (especially) House of Representatives are elected specifically to represent the interests of their local constituents and can be punished electorally by these constituents for devoting energies to foreign affairs rather than “bringing home the bacon.”<sup>2</sup> While international economic agreements in particular can bring real benefits to these constituents, often they involve concentrated costs (to specific, locally based interest groups) and diffuse benefits (to consumers in general)—making it more likely that those bearing the costs will mobilize effectively to punish their representative in Congress for supporting such agreements.

In their role as representatives, it is also incumbent on members of Congress to represent their constituents' particular attitudes toward the U.S. role in the world. The strains of isolationism and mistrust of foreign entanglements that have occasionally characterized American opinions regarding foreign affairs since the founding of the republic thus have generally found their representation in Washington via Congress.<sup>3</sup> Up to World War II, this congressional sovereigntism helped sustain the U.S. foreign policy priority of keeping the world at arm's length—as seen most notably in the Senate's rejection of the Treaty of Versailles (and thus participation in the League of Nations) in 1919, after World War I.

Though its sway over U.S. foreign policy has generally weakened since World War II—thanks in large part to the dictates of U.S. leadership in maintaining international security and order and the rise of the “imperial presidency” at home—the U.S. Congress remains a uniquely strong legislative institution compared to those in other advanced industrial countries. Because it stands independent of the executive branch—unlike in parliamentary systems, in which the leading party (or parties) typically controls both simultaneously—Congress has the autonomous authority (and, in periods of divided government, inclination) to challenge the president's conduct of foreign affairs.

In one sense, Congress's unique strength lies not so much in its oversight of the executive's conduct of foreign affairs—this is a standard

legislative function in all countries, usually undertaken by opposition parties—but rather in its role in supplying such agreements with a stamp of legitimacy. In a country whose founding governing principles involve constraining executive power, Congress’s official imprimatur on international agreements negotiated by executive officials is essential to the functioning of American democracy as specified in the Constitution. This point is further underlined by the fact that Congress is more “democratic” than the elite-driven executive and judicial branches, meaning that, absent a national referendum on international agreements (which never happens), its approval comes closest to confirming that such agreements are consistent with the “will of the people.” Moreover, congressional ratification of international agreements may make American commitments to adhere to these agreements more credible to other countries than if no such ratification process were required.<sup>4</sup>

However, this last observation can be turned on its head: what if checks and balances within the U.S. government prevent the United States from being able to make commitments in the first place? The decision of the Clinton administration not even to submit the Kyoto Protocol, signed by President Clinton, to the Senate for ratification in the face of certain defeat is only one of many examples in which congressional hostility has torpedoed American involvement in important international agreements. Such a scenario becomes even more likely in times of divided government—that is, when Congress and the White House are controlled by different parties. Thus the need for Congress’s approval of U.S. participation in international agreements presents a relatively larger hurdle than it does in other countries, particularly those with a parliamentary system in which the executive is controlled by the party with a majority in the legislature.

Congress has several formal and informal mechanisms to provide or withhold approval from the executive’s commitment of the United States to observe international agreements. The two mechanisms of greatest interest in this chapter are the *delegation* of authority to negotiate agreements and the *ratification* of any resulting treaties or agreements.<sup>5</sup> The delegation of authority to negotiate—for example, providing the president “fast-track authority” to negotiate trade deals, as discussed below—is a temporary transfer of power from Congress to the executive to undertake negotiations that Congress, though the supreme lawmaking authority, is ill suited to undertake as a collectivity. Ratification involves an up-or-down vote in the Senate for treaties (requiring a two-thirds majority) or in both houses of Congress for international agreements (requiring a simple majority).<sup>6</sup> Other means of congressional influence over U.S. participation in global governance include the power of the purse (through which Congress funds—sometimes conditionally—the operations of international organizations such as the United Nations and World Bank); laws placing conditions on U.S. observance of international commitments (such as conditioning China’s enjoyment of World Trade Organization [WTO]—mandated “most-favored nation” status on its human rights record); its approval of presidential nominees to posts such as U.S. ambassador to the United Nations (who, as in the recent case of John Bolton, can have

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significant implications for U.S. relations with the organization); and other means of oversight such as holding hearings to bring key executive officials to account.<sup>7</sup>

With these mechanisms available to it, Congress has not simply rolled over as globalization has increased the incentives for the United States to attempt to manage its interdependent relationships with other countries at the global level. As of this writing, significant opposition remains in Congress (and the White House, for that matter) to binding commitments in any successor to the Kyoto Protocol, and Congress continues to withhold fast-track negotiating authority from the president despite ongoing negotiations in the WTO. These maneuvers involve certain costs to the United States, as discussed below, but they also call into the question the viability of global governance in these issues. Whether or not the United States is the “indispensable nation,” as Madeleine Albright called it, it remains the case that multilateral agreements in these areas are essentially meaningless without cooperative American involvement. In other words, other countries may bear the costs of congressional recalcitrance more than the United States itself.

The point here is that growing U.S. involvement in international institutions to manage globalization has resulted in not only a semipermanent delegation of legislative authority to the executive branch but also an increase in the potential costs for both the United States and the international community to rejecting commitments to participate in and be bound by international law. This situation has laid bare the aforementioned legislative gaps and the dilemmas they create.

## Legislative Gaps

The U.S. Constitution created a strong Congress to confer democratic legitimacy on national policies and more generally uphold a tradition of constraint on federal executive power in the United States. However, in the context of increasingly intensive globalization and global governance, gaps are emerging between a stable, constitutionally mandated status of Congress’s legislative supremacy in the United States and the decreasingly supreme authority it wields as the enactor of law applicable to Americans. Legislative authority is shifting from Congress in two directions: horizontally to the executive branch of the federal government, and vertically, via the executive branch, to international institutions.

Because this flow of legislative authority away from Congress is addressed in detail elsewhere in this volume (see chapter 6, “Globalization, Delegation, and the U.S. Constitution”), I do not do so here, except to make a few relevant points. Domestically, when Congress delegates power to the executive branch to negotiate international agreements, it does more than simply hand powers to the president temporarily. It also augments the executive branch’s status as a focal point for domestic interest group activity vis-à-vis those agreements—which, as they constrain American law and regulation in areas as diverse as investment, the environment, and intellectual property, have increasingly important consequences for

these groups. In other words, the executive branch is able to use its position as negotiator as a means to design international agreements that reward its political supporters and/or “winning coalitions” of interest groups.<sup>8</sup> Of course, this privileged (and privileging) role for the executive is not new, but as the United States negotiates and becomes party to an ever-increasing number of international agreements, the delegation of authority from Congress to the executive has increasingly permanent implications for the centrality of executive power in American politics.

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Perhaps less well understood is how Congress’s delegation of legislative authority to the executive at the domestic level deepens a particular legislative hole at the international level: *the absence of legislation by legislators*. International organizations such as the WTO or World Bank have their own sources of executive and judicial authority: regulatory experts within their secretariats wield (limited) authority to draft and monitor international law, and legal experts within their arbitration mechanisms wield authority to resolve disputes among national members and/or private-sector actors regarding compliance with this law. But international institutions in general do not have standing legislative bodies that are populated by legislators. That is, while the WTO, World Bank, and other international organizations do have forums for the creation of international law and other agreements, they are populated by national delegations that consist of executive branch officials of their member states. Among the world’s myriad international institutions, only the European Parliament features “supranational” legislators with an authoritative role in international cooperation—and their authority is quite limited.

The absence of legislation by legislators at the international level has a significant effect on the nature of negotiating international law: it is less messy, because it is less democratic. This claim of “tidiness” might seem odd in light of several high-profile failures in recent international negotiations—in various WTO negotiations and finding a successor agreement to the Kyoto Protocol, among others—but in fact the absence of legislators generally facilitates international consensus. As Anne-Marie Slaughter has argued, transnational networks have formed among executive officials—both appointed and career officials—whose shared professional and principled norms and beliefs (which transcend national boundaries) facilitate consensus in international bargaining in their areas of expertise.<sup>9</sup> By contrast, the one professional norm legislators around the world share is one of creating *dissensus* (particularly when in the minority)—of exposing governments and governing ideas to the greatest possible scrutiny. At a domestic level, members of Congress and other legislators around the world perform this task to keep executive policy makers, regulators, and technocrats honest. At the international level, legislators are not present to perform this role—which means that agreements become easier to reach, but that they also place the entire burden of democratic oversight and approval on countries’ national ratification processes.

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The absence of legislation by legislators, then, is a major contributor to what has often been referred to as the “democratic deficit” in global governance—the absence of accountability mechanisms to make international

institutions more responsive to their member states and private-sector constituents.<sup>10</sup> The past two decades have seen an increase in “transnational civil society” protests, conducted by networks of international nongovernmental organizations (NGOs), against this lack of accountability; international organizations have responded by increasing their transparency (via greater information available on public websites), accessibility (especially to NGO consultation), and responsiveness to feedback (via semiautonomous internal evaluation offices).<sup>11</sup> For better or worse, these attempts to redress the democratic deficit in international institutions may simply reinforce the absence of legislation by legislators, substituting these accountability mechanisms for the traditional role of legislators in providing oversight.

Yet even if such mechanisms in international institutions do align well enough with American traditions of pluralism and government accessibility to interest groups, they may conflict with the core constitutional principle of a strong and autonomous legislature underpinning a more general separation of powers. The framers of the U.S. Constitution wanted lawmaking to be difficult, slow, and messy—because this is the essence of deliberative democracy and limited government. To the extent that U.S. policy makers view global governance through the prism of their principles of domestic governance, the negotiation of international agreements should be similarly deliberative—and similarly difficult, slow, and messy. But because negotiations regarding the creation of standard international law are *not* particularly deliberative, Americans are increasingly subject to laws whose creation offends one of their basic constitutional principles.<sup>12</sup>

This last point is not meant to denigrate the value or quality of international law, whether in general or in particular cases, as a source of international order that provides benefits to Americans as consumers of global public goods. If anything, the reverse is true: this chapter starts from the assumption that extensive and intensive multilateral cooperation to provide global public goods is increasingly essential in an era in which globalization makes Americans ever more dependent on stable and mutually advantageous relationships with those beyond our borders. Moreover, given the complexity and interrelated nature of the problems arising from interdependence—problems related to trade, foreign investment, development, the environment, and the like—there is good reason to encourage leading roles for those experts best able to understand these problems, such as the Nobel Prize-winning Intergovernmental Panel on Climate Change. Instead, the upshot is that if such international agreements are necessary—and thus continued congressional delegation of authority to the executive to create and sustain such agreements is necessary—then the abovementioned legislative gaps, at both the domestic and global levels, become ever more difficult to bridge.

## The Dilemma of the Ratification Process

More specifically within the United States, these gaps create a sharpening dilemma for the other mechanism of congressional control over U.S.

participation in international institutions—the ratification process. The up-or-down vote on international agreements negotiated by the executive is a blunt instrument: in general, Congress is forced to either accept or reject an agreement *in toto*, despite the fact that its members are likely to endorse some provisions of the agreement but not others. This binary yes/no choice imbues Congress's constitutionally defined role in enacting and legitimating international agreements with a categorical rigidity that contrasts sharply with the flexibility of the domestic legislative process within Congress.

This portrait of the ratification process as a blunt instrument is, of course, something of a simplification. Executive officials neither enter into nor sign international negotiations without some notion of the agreement's likely level of support within Congress, which in turn informs these officials' negotiating position.<sup>13</sup> Congress may at times be able to demand that the executive reopen closed negotiations to add provisions that it deems acceptable (though at a significant costs to the United States' reputation as a reliable and desirable partner in cooperation). Moreover, through the delegation mechanism, Congress can place certain constraints on executive officials' negotiating authority as a condition for granting that authority—as is sometimes the case when Congress grants the executive “fast-track” authority to negotiate trade deals. The Bush administration currently lacks this delegated authority, and if Congress does choose to delegate this power to this or a subsequent administration, it may include the condition that any trade agreements include strong labor and environmental protections to be observed by all parties to the agreement.

But while Congress can influence negotiations in these ways without actually participating in them, the up-or-down vote remains the primary basis of its power regarding international agreements—and one whose categorical nature presents real costs to Americans (and foreigners) whose enjoyment of global public goods is dependent on congressional approval. If Congress rejects free trade agreements, it may protect some domestic jobs or industries, but it also deprives both American and non-American consumers of the lower prices and greater availability of goods that generally result from such agreements. If Congress rejects environmental agreements—or, in the cases of the UN Law of the Sea Convention and the Kyoto Protocol, signals an intention to reject them—it may avoid constraining economic growth, but it also deprives both Americans and non-Americans of better stewardship of the global commons (and potentially incurs huge costs down the line in responding to environmental crises that may have been preventable). And if Congress rejects collective security agreements—as in the case of the League of Nations—it may avoid the “entangling alliances” George Washington warned of, but it also deprives both Americans and non-Americans of the benefits of U.S. leadership in maintaining international security and order.

Of course, some agreements are better than others—and none is perfect—in actually providing these global public goods. It would require a very complex counterfactual analysis to say for sure whether Americans (and others) would have been better or worse off if Congress had not

rejected the Treaty of Versailles in 1919 or the Havana Charter in 1948. But what we can say is that as the United States becomes more interdependent with other countries around the world—a condition driven forward by globalization—the costs to *not* having sustained cooperation with these countries rises, both for Americans and for everyone else.

In sum, although the ratification process provides a necessary legislative stamp of legitimacy on international agreements, this process's status as the main source of congressional power over U.S. involvement in international institutions involves increasing costs in an era of globalization and global governance. Before considering different means to augment Congress's role in international institutions, we will briefly consider three examples to demonstrate different ways in which the delegation and ratification processes can be a flawed means to managing U.S. involvement in international institutions.

## DELEGATION AND RATIFICATION FOR TRADE AND ENVIRONMENTAL AGREEMENTS

This section briefly discusses three cases relevant to the question of the utility of the ratification and delegation mechanisms, all of which center on matters of trade and/or the environment. The first, involving the World Trade Organization and U.S. environmental regulations, is a case in which congressional ratification of multilateral trade agreements ultimately had domestic environmental costs. The second, involving the Kyoto Protocol, is a case in which congressional nonratification of a multilateral agreement on climate change has incurred domestic and international costs. The third, involving Congress's fitful delegation of fast-track authority to the president to negotiate trade deals, is a case in which a more flexible delegation mechanism still generates significant domestic and international costs.

The intent of these case discussions is not to give a detailed description of events, but rather to provide a general illustration of how the rigidity of Congress's primary mechanisms—even in their most flexible incarnation, as in the fast-track case—affects Americans' capacity to enjoy national and global public goods, underlining the point that existing U.S. legislative processes are insufficient to cope with the growing American involvement in globalization and global governance.

### The WTO and U.S. Environmental Regulations

The United States was a founding member of the 1947 General Agreement on Trade and Tariffs (GATT), the predecessor to the World Trade Organization (1995), and since the late 1940s has negotiated and ratified a series of multilateral trade deals that have established a global regime based on the principles of free trade (i.e., liberalization), nondiscrimination (most-favored nation trading status), and reciprocity.<sup>14</sup> These principles, and the specific rules they generated via these serial agreements, generally

have reflected American commercial interests and priorities. Largely as a result, Congress has never rejected a multilateral trade agreement that emerged from the GATT/WTO framework.

Another result was a tremendous expansion in world trade—world exports grew by an average of more than 10 percent between 1950 and 2005<sup>15</sup>—which in turn begat tensions between free trade and the GATT/WTO rules designed to uphold it on the one hand and a particular American priority, environmental protection, on the other. In the early 1990s, a GATT dispute panel ruled that an American law banning the import of tuna from countries whose fishermen used nets that also snagged dolphins was illegal under international trade rules, because it discriminated against countries at similar levels of development. This ruling generated an outcry from U.S. environmental groups, which both marched in protests in Washington and lobbied members of Congress to protect valued American environmental laws and regulations from a “GATTzilla” bent on destroying them. Yet while Congress did successfully insist on including environmental standards in a different free trade agreement the Bush and then Clinton administrations were simultaneously negotiating—the North American Free Trade Agreement (NAFTA)—no such provisions were added to the agenda in the closing stages of the ongoing Uruguay Round of GATT negotiations. Congress passed the Marrakech Agreement establishing the WTO in 1994, *sans* labor and environmental standards.

Whereas the GATT had a nonbinding arbitration mechanism—meaning that there were few implications if the United States chose not to change its law regarding dolphin-safe nets—the new WTO had a binding dispute-settlement system that authorized retaliation against countries failing to comply with its rulings. Indeed, the creation of such a binding arbitration mechanism had been a key American demand in the negotiations. Although potential conflicts between WTO trade rules and countries’ environmental regulations had since reached the international agenda, in 1998 the WTO once again ruled against a similar U.S. environmental law, this one banning the import of shrimp caught in nets that also trapped sea turtles.<sup>16</sup>

The point of this example is not to argue that international trade rules gravely threaten U.S. environmental laws and regulations. Rather, the point is that, by ratifying GATT/WTO agreements in full in an up-or-down vote, Congress opened up aspects of popular U.S. law to challenge from unelected international tribunals. In the absence of countervailing environmental protections at the international level—whether in the WTO or via some other institution—both Congress and Americans more generally paid a significant cost to ratification in terms of their freedom of action to implement publicly supported environmental protections.

### The Kyoto Protocol

The United States (and Congress in particular) fits less easily into the role of environmental victim of international institutions with respect to climate change. The United States was a leading force behind the 1992 Rio “Earth Summit” and the nonbinding targets for reducing carbon

emissions that came out of the conference. However, five years later, when the agenda turned to binding targets for carbon emissions in the Kyoto Protocol—and some differential application of these targets to industrialized and developing countries—Congress balked. Although the Clinton administration signed the agreement, it did not submit it to Congress for ratification because members of Congress had signaled unequivocally that it would not pass.<sup>17</sup>

This is a case in which, in retrospect (and to many at the time), Congress's unwillingness to ratify the agreement generated various costs—both for Americans and others—that might well outweigh those of attempting to limit carbon emissions. First, nonratification ensured that the United States as a whole, and its businesses and consumers individually, would continue their overreliance on fossil fuels. Although many businesses and individuals have voluntarily sought to reduce their “carbon footprint,” often in anticipation of future regulations, they will likely face higher costs of adjustment once those regulations arrive than they would have if they had been required to alter their behavior earlier. Second, nonratification sustained regulatory inconsistencies for business—whether from country to country or across states within the United States—that increase their costs of operations. When a firm operates in different jurisdictions with different regulations of any type, it faces costly adaptation of its operations to comply with these different regulatory standards.<sup>18</sup> Third, and less tangibly, the United States may face reputational costs for standing in the way of consensus among the world's major powers on the climate change issue. Although some aspects of American reluctance to sign on to binding targets have a defensible rationale—initially, the absence of a clear scientific consensus on global warming, and later the argument that large developing countries like China and India are necessary participants in a meaningful solution—Washington is beset by the impression of shirking its obligations as a wealthy country that has been the primary source of global carbon emissions. Widespread international frustration with U.S. foot-dragging was palpable in the December 2007 climate talks in Bali, in which the U.S. delegation was booed and shamed into joining a consensus for action achieved among the other attendees.

Once again, the point is not to blame Congress (or the Bush administration) for its inaction. Rather, it is to demonstrate that, when faced with an international agreement that had some provisions that its members had deep reservations about, Congress had only two choices: up or down. This stark choice not only incurred the costs noted above but also prevented the U.S. government from finding a more nuanced solution to dealing with U.S. carbon emissions—leaving the job of innovation to the states and the private sector.

### Fast-Track Authority

The first case discussion addressed the costs of U.S. ratification of international trade agreements, but we can also consider the delegation mechanism—fast-track authority—through which Congress influences the executive's

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trade negotiation agenda. Although this mechanism gives Congress influence over the trade agenda at the beginning of the process (i.e., prior to trade negotiations),<sup>19</sup> it too is insufficiently flexible and creates significant costs for the United States with respect to international trade agreements.<sup>20</sup>

Recognizing that U.S. trade partners were wary of negotiating trade agreements with the United States if Congress were to decide to add conditions after the negotiations closed, Congress created the fast-track mechanism in 1974 to delegate authority to the president (and the U.S. Trade Representative) to negotiate agreements that it would then accept or reject as a whole—that is, without adding conditions. Congress delegates fast-track authority for a fixed period of time—typically but not necessarily in conjunction with multilateral trade negotiations in the GATT/WTO. However, there have been periods—notably during the second Clinton and Bush administrations—when this trade negotiating authority has lapsed and Congress has, at least in the short term, declined to renew it—even though the United States was in the process of negotiating new agreements.

Although fast track ensures that the executive does not (and cannot) negotiate trade deals without addressing congressional concerns, it nevertheless creates complications for the United States in both its external trade relations and domestically. One problem with fast track is that it makes the United States a less reliable or desirable partner in trade negotiations. It is less reliable because the lapse of this authority can generate sizable swings in a U.S. administration's positions in the negotiations and in its relative flexibility to make certain compromises, because Congress can inject new conditions as the price for renewed negotiating authority. It is less desirable a trade partner because Congress increasingly insists not simply on escape clauses to allow protection of certain vulnerable or strategic industries within the United States—which can often be justified on a temporary basis—but also on using U.S. power to project American priorities onto other countries. Although Congress's recent enthusiasm for inserting labor and environmental provisions into trade agreements is defensible as a response to fears of a "race to the bottom" in standards in these areas, the developing countries that are the ones that Washington is attempting to strongarm into changing their domestic regulatory regimes have understandably viewed this tactic as cultural or regulatory imperialism. Though smaller developing countries lack the leverage to parry U.S. (and congressional) demands on this front in bilateral negotiations, developing countries' collective dissatisfaction with U.S. (and European) demands along these lines has been a key stumbling block to progress in WTO negotiations over the past decade.<sup>21</sup> Deepak Lal referred to U.S. and European promotion of environmental standards through the WTO as "a green variant of the nineteenth century white man's burden."<sup>22</sup>

The fast-track mechanism—and its use by Congress as a lever against the executive—is also problematic specifically within the United States. As noted earlier, if we accept the basic premise that American consumers and the U.S. economy benefit in the aggregate from global free trade, congressional refusal to delegate power to the executive to negotiate free trade

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deals (especially multilateral deals), for reasons that may reflect partisan politics more than legitimate concerns about the domestic costs of international competition, may lead to higher prices for goods and slower employment growth in dynamic industries.<sup>23</sup> Alternatively, Congress grants fast-track authority to the president for a specific period of time rather than to negotiate specific trade deals. Therefore, the fast-track mechanism offers Congress the leverage to influence the executive's international trade agenda in general—particularly with respect to multilateral negotiations—but less so with respect to other trade negotiations that the executive might undertake while it has such authority. For instance, Congress granted the Reagan, Bush, and Clinton administrations fast-track authority to negotiate a multilateral deal in the GATT's Uruguay Round, but during this period these administrations also negotiated free trade agreements with Canada (CUSFTA) and then Mexico (NAFTA). In these latter circumstances, Congress had to rely primarily on the blunt instrument—the possibility of nonratification—to influence these administrations' negotiating agenda.

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As these brief case discussions suggest, in the context of U.S. international trade and environment policy, Congress's existing mechanisms for managing executive negotiating authority and legitimizing U.S. participation in international agreements optimize neither Americans' provision nor their consumption of global public goods. Of course, some of these costs derive from the inherent tensions between, say, free trade and environmental regulation. Nevertheless, relegated to the sidelines, Congress sees its legislative authority gravitate toward the executive branch and international institutions. And yet when it seeks to exercise this authority, its involvement often ends up being clumsy or unhelpful.

Hence, what remains are the aforementioned legislative gaps and a set of existing delegation and ratification mechanisms that are insufficient to allow Congress to undertake a more positive role in engaging international institutions. So, if innovation is the order of the day, what new institutional mechanisms are available?

One option for injecting more popular legitimacy and accountability into U.S. participation in international agreements would be to submit international agreements to a national referendum rather than congressional ratification. Other countries have chosen this route with respect to important international agreements in recent years: Costa Rica submitted its participation in the Central American Free Trade Agreement to a popular vote, and many European countries held referenda regarding participation in the EU constitutional treaty. The result of these European referenda—including rejection by French and Dutch voters—points to one problem with this option: hard-fought compromise agreements can easily fall prey to narrow national concerns, often related to a single aspect of the agreement, or to scare tactics by affected interest groups. Meanwhile, the United States has no tradition of national referenda because it is a *representative* democracy—the American people delegate their authority to decide such issues to their elected officials. It is not clear that complex

international agreements—regarding which individual citizens have little information or direct experience—are well suited to be exceptions to this representative tradition.

So, what seems necessary is a new set of mechanisms to permit Congress to engage more directly with international institutions—not to challenge executive management of U.S. foreign affairs at the national level, but rather to redress the growing legislative gaps at the national and international levels. One such option involves parliamentary assemblies.

### **PARLIAMENTARY ASSEMBLIES: POTENTIAL, PITFALLS, PROSPECTS**

Parliamentary assemblies (PAs)—international forums in which national legislators meet to address a particular shared agenda—are the closest thing to legislation by legislators in global governance. International institutions such as the North Atlantic Treaty Organization (NATO) and the Organization for Security and Cooperation in Europe (OSCE) feature standing parliamentary assemblies, and others such as the Organization for Economic Cooperation and Development (OECD) and the WTO hold forums for parliamentarians on an ad hoc basis. In addition, there are freestanding PAs unaffiliated with any specific international organization, such as the Parliamentarians for Global Action and the Inter-Parliamentary Union, which seek to build transnational networks among national legislators. These assemblies do not constitute anything like a standing “world parliament,” but rather forums available to national legislators to meet occasionally and to ensure their voices are heard alongside those of their executive branch counterparts in setting agendas for international agreements.

One must begin consideration of PAs with a note of skepticism: they are rather underdeveloped mechanisms of global governance, perhaps for the reasons—noted above—that legislators in general and members of Congress in particular are inclined toward sovereigntism and representation of their local constituencies and do not share professional norms in the same way that technocrats and regulators do. Nevertheless, given the democratic deficit in global governance both internationally and within the United States, could PAs be an idea whose time has come?

#### **Potential**

Though parliamentary assemblies have not been a focus of much attention among scholars of international cooperation, some are comparatively bullish on them.<sup>24</sup> We can consider their potential from two angles: from the perspective of increasing legislative involvement at the international level, and from that of the benefits to the United States in general and Congress in particular.

As argued earlier, global governance suffers from a legislative gap in that “international lawmaking”—the negotiation of treaties—is conducted by executive officials. While this fact is unlikely to change—nor should we

necessarily desire that it do so—one can identify several benefits to having legislators interact within PAs. For one, because they are and are likely to remain relatively low-key affairs—especially compared to, say, summit meetings—the absence of an intense spotlight may facilitate compromise on difficult issues. Second, if legislators’ lack of direct involvement in international institutions reinforces a somewhat provincial outlook, then increasing their involvement via PAs—thus giving them a direct voice and stake in global governance—might alternatively reinforce a more global outlook. Some scholars and practitioners have acclaimed the “glocalist” vision of international NGOs that operate at both the global and local levels;<sup>25</sup> a similarly glocalist turn by legislators could lend a similar—and more official—legitimacy to global governance. Third, creating an international network of legislators could generate mutual support that could boost the prospects of parliamentary democracy around the world.<sup>26</sup> For example, members of Congress have served on and led missions from the OSCE and other international institutions to monitor democratic elections in countries such as Ukraine and Georgia.

Greater participation in parliamentary assemblies could serve the interests both of Congress and U.S. policy priorities. Most importantly, it could reduce Congress’s reliance on the blunt instrument of the ratification process as a means to influence the negotiation of international agreements. If members of Congress participated in a PA during talks to establish, say, the agenda for a WTO round, they could better communicate the preferences of Congress at the outset of the process, perhaps reducing their need to threaten nonratification—or to simply swallow—a deal that did not adequately reflect those preferences. Alternatively, as members of Congress learned more about the preferences of legislators elsewhere, they might be more inclined to accept that a deal that does not perfectly represent their preferences may be the best deal possible under the circumstances. More generally, congressional participation in PAs could help add a new dimension to American promotion of democracy abroad, both in generally supporting parliamentary democracy as noted above and as a bridge to more direct activities, such as monitoring elections (which could perhaps be a task for congressional staffers).

Although these potential benefits to congressional participation in an expanded menu of PAs are speculative, it is worth noting that the creation and mobilization of legislative networks is not foreign to Americans. Within the United States there is the National Conference of State Legislatures (NCSL), which generates networks among legislators from individual states and promotes collaboration on professional development and technical assistance.<sup>27</sup> Although, like PAs, the NCSL is not a locus of major institutional influence, there is perhaps a greater need for bottom-up legislative mobilization globally than there is within the United States.

## Pitfalls

Parliamentary assemblies are far from a magic bullet solution to the legislative gaps in U.S. and global governance. One needs only compare

Congress—sovereigntist, democratic, and contentious—and the typical workings of international institutions—internationalist, elite-driven, and consensus-oriented—to see the mismatch. Moreover, it is difficult to envision PAs, whether attached to specific institutions or freestanding, attaining real influence over the either agenda setting or negotiations for international agreements.

This mismatch seems particularly salient with respect to Congress. The House of Representatives in particular not only is localist by orientation (due to its members' relatively small constituencies and frequent elections) but also reciprocally features a strong anti-internationalist strain. Some of its members boast about not traveling outside the country or even possessing a passport, reflecting a previously noted tradition of American skepticism toward foreign entanglements and, at the extreme, isolationism. Such is not fertile ground for direct participation in global governance. Of course, the more relevant chamber is the Senate, which ratifies treaties and is less localist than the House (with its statewide constituencies and less frequent elections). One could imagine leading members of relevant Senate committees—the Foreign Relations Committee as well as those for agriculture, labor, and the environment, among others—participating in either PAs or even U.S. delegations to negotiate certain international agreements. The problem here, however, is time and availability: while there are executive officials specifically employed to perform these tasks, senators and their staffs simply lack the time and resources to make open-ended commitments to PAs or similar bodies. While participation in a small number of closed-ended forums might be possible, the fact is that members of Congress already have a full-time job representing their constituents (and getting reelected).

More generally, any move toward congressional involvement in PAs is likely to reflect political and institutional divisions at home rather than an earnest desire to bring legislative influence to global governance. Periods of divided government seem most likely to produce support in Congress for participation in PAs, specifically as a means to constrain executive power when the other party holds the presidency. The only major figure to support PAs in recent years was Newt Gingrich, who championed the idea as Speaker of the House. While the ostensible rationale behind this (now defunct) project was to promote democratic procedures globally, one suspects that a key motivation was to rein in the Clinton administration's conduct of foreign policy. Alternatively, one hears few calls for the development of PAs when the same party is in power at both ends of Pennsylvania Avenue—and little support for the idea from the executive branch at any time. It is possible that congressional involvement in PAs launched for partisan purposes could also help redress legislative gaps over the long term, but one is left to wonder whether members of Congress would be as active in PAs in a period of unified government.

### *Prospects*

Based on this analysis, it is difficult to be optimistic about the prospects of parliamentary assemblies. But it would be a mistake to judge them in

terms of the level of influence they have over formal international agreements. Simply put, they are never likely to drive international negotiations, but what they might do—effectively—is to act as forums for global norm building, conferring legitimacy on negotiations whose agendas specifically respond to concerns raised by these legislators.

Nevertheless, because globalization is the background force that we are interested in here, three points bear mention on this front. First, a particular phenomenon associated with globalization—the proliferation of multinational firms and NGOs<sup>28</sup>—may generate demand for more legislative representation at the global level. These actors are transnational interest groups, and they engage international institutions directly in an attempt to move these institutions' rules and practices in their desired direction. The more they focus their lobbying and advocacy activities at the global level, the greater the incentive for Congress to establish a presence at this level as well—to ensure that it is not bypassed as a focal point for interest group representation.

Second, globalization is a complex process that is breaking down barriers between previously segmented issue areas (e.g., trade, the environment, human rights). International institutions have traditionally been organized along the lines of segmented issue areas, which has privileged the role of experts in these particular issues. However, if these issues are indeed becoming “desegmented,” then there may be increasing space for generalists, which legislators necessarily are, to help solve problems of how to manage and establish priorities among rules in these converging issue areas—as in the case of the WTO and U.S. environmental regulations.

Third, globalization and global governance reaches ever further “behind the border,” affecting not just U.S. national politics but also individuals and organizations at the local level. As a result, they create a new demand for the sort of glocalists mentioned previously—political actors that are sensitive to the relationship between global forces and local politics. Once again, members of Congress are well placed to respond to this demand—though whether they *will* is another matter entirely.

## CONCLUSION

The United States faces two options as it confronts globalization's effect on the status of the legislative authority of Congress. It can retain this authority as intended in the Constitution by shutting itself off from globalization and global governance. Or it can continue to integrate itself into the global economy and international institutions, knowing that doing so leaches legislative authority from Congress and makes Congress's delegation and ratification mechanisms for constraining executive authority vis-à-vis international institutions more costly to use.

The choice is, of course, not quite this stark. No matter how U.S. policy evolves with regard to globalization and global governance, it is highly unlikely that there will be any tectonic shift in the constitutionally prescribed powers of the executive and legislative branches. Nevertheless, as

this chapter has argued, there is reason to be concerned about the emerging legislative gaps, both at home and in global governance—gaps that expose limits on democratic accountability and the separation of powers. Though they have promise, parliamentary assemblies are not the answer, at least not for the foreseeable future. For now, perhaps the proper response is not to seek overarching institutional solutions but rather to practice vigilance—which may be the price not only of liberty, to paraphrase Thomas Jefferson, but also of the maintenance of the institutions that uphold it.

## NOTES

1. For example, in a 1999 death penalty case, Justice Stephen Breyer cited foreign courts' decisions against executions, and in 2004 Justice Anthony Kennedy cited British law regarding the decriminalization of sodomy. Notably, several members of Congress protested that the justices were attempting to "substitute foreign law for American law or the American Constitution." See Tom Curry, "A Flap over Foreign Matter at the Supreme Court," MSNBC, March 11, 2004, <http://www.msnbc.msn.com/id/4506232>.

2. According to Anne-Marie Slaughter, for members of Congress, "remaining resolutely 'national,' or even parochial, is their job" (Anne-Marie Slaughter, *The New World Order* [Princeton, NJ: Princeton University Press, 2004], 105).

3. On variations of the tradition of isolationism in U.S. foreign policy, see Walter A. McDougall, *Promised Land, Crusader State: The American Encounter with the World since 1776* (New York: Houghton Mifflin, 1997), and Walter Russell Mead, *Special Providence* (New York: Routledge, 2002).

4. See Douglas North and Barry Weingast, "Constitution and Commitment: The Evaluation of Institutions Governing Public Choice in Seventeenth-Century England," *Journal of Economic History* 49 (December 1989): 803–32, and Peter Cowhey, "Elect Globally, Order Globally: Domestic Politics and Multilateral Cooperation," in *Multilateralism Matters*, edited by John Ruggie, 157–200 (New York: Columbia University Press, 1993).

5. Both mechanisms derive from Article II, Section 2, of the Constitution, which declares that the president "shall have the power, with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

6. On some implications of the difference between treaties and agreements, see chapter 7 in this volume.

7. These mechanisms, of course, are not exhaustive of all the means Congress has to influence U.S. foreign policy. Rather, they are the primary means through which Congress affects U.S. participation in international institutions specifically.

8. On the executive's privileged role as a player at both the domestic and international levels of this "two-level game," see Robert Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization* 42, no. 3 (1988): 427–60, and Andrew Moravcsik, "Integrating International and Domestic Theories of International Bargaining," in *Double-Edged Diplomacy*, edited by Peter Evans, Harold Jacobson, and Robert Putnam, 3–42 (Berkeley: University of California Press, 1993).

9. Slaughter, *New World Order*.

10. On the role of legislatures in providing legitimacy to international agreements, see, among others, Slaughter, *New World Order*, and Ian Hurd, "Legitimacy and

Authority in International Politics,” *International Organization* 53, no. 2 (1999): 379–408. For a variety of perspectives on the “democratic deficit” in global governance, see David Field and Mathias Koenig-Archibugi, eds. *Global Governance and Public Accountability*. (Oxford: Blackwell, 2005). For a skeptical view of the democratic deficit, see Andrew Moravcsik, “In Defense of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union,” *Journal of Common Market Studies* 40, no. 4 (2002): 603–24.

11. On NGO challenges to international institutions and these institutions’ attempts to respond, see, among others, Robert O’Brien, Anne Marie Goetz, Jan Aart Scholte, and Marc Williams, *Contesting Global Governance* (Cambridge: Cambridge University Press, 2000); Sidney Tarrow, *The New Transnational Activism* (New York: Cambridge University Press, 2005); Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics,” *American Political Science Review* 99 (2005): 29–43; Sanjeev Khagram, James Riker, and Kathryn Sikkink, eds., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002); Alexandru Grigorescu, “Internal Investigative Units in Intergovernmental Organizations: Tools of Accountability?” paper presented at the American Political Science Association annual conference, Chicago, August 30, 2007; and Edward A. Fogarty, “*E Pluribus Pluribus?* Global Governance in an Era of Nonstate Actors,” Ph.D. diss., University of California, Berkeley, 2007.

12. Of course, many international institutions—both traditional intergovernmental institutions such as the UN Security Council and new, nonstate-actor-driven mechanisms such as the Global Compact, which tries to build consensus on corporate social responsibility—are quite deliberative. However, these mechanisms of global governance are more geared toward norm building than the creation of formal international law, which still generally takes place among experts and national delegates behind closed doors.

13. Congressional opposition to certain demands made by other parties to a potential agreement, and thus Congress’s likely nonratification of any agreement in which U.S. negotiators give in to those demands, can serve as a source of power for these U.S. negotiators. These negotiators can credibly claim that their “hands are tied”—they would like to accede to their interlocutor’s demands but cannot do so because of congressional opposition. On this “tying hands” strategy, see Moravcsik, “Integrating International and Domestic Theories.”

14. On the principles and norms underpinning the multilateral trade regime, see Kenneth Dam, *The GATT: Law and International Economic Organization* (Chicago: Chicago University Press, 1970), and Jock A. Finlayson and Mark W. Zacher, “The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions,” in *International Regimes*, edited by Stephen D. Krasner, 273–314 (Ithaca, NY: Cornell University Press, 1983).

15. World Trade Organization, “International Trade and Tariff Data,” [http://wto.org/english/res\\_e/statis\\_e/statis\\_e.htm](http://wto.org/english/res_e/statis_e/statis_e.htm).

16. Neither the dolphin-tuna and shrimp-turtle rulings were specifically intended to take away the right of the U.S. (or any other) government to enact such laws or regulations. The rulings more narrowly invalidated the *discriminatory application* of such laws—i.e., applying the law to some countries but not others, particularly countries at similar levels of development.

17. This was not the first time that the United States participated in international environmental negotiations but did not submit a resulting agreement for ratification. The United States did not even sign the 1982 UN Law of the Sea Convention because, according to *The Economist*, “some senators fear[ed] a loss of

American sovereignty" ("Drawing Lines in the Melting Ice," *Economist*, August 18, 2007).

18. This logic underlies the Bush administration's decision in January 2008 to not grant California a waiver from federal air quality standards (which as of this writing do not recognize carbon dioxide as a pollutant, despite a 2007 Supreme Court ruling requiring the Environmental Protection Agency to redress this omission) to enforce stricter controls on carbon dioxide emissions.

19. According to John Jackson, "When Congress grants [fast-track] authority ... it usually extracts some price, requiring certain procedural or judicial restraints on executive action or mandating certain trade policy activity which may have important consequences" (John Jackson, *Restructuring the GATT System* [London: Royal Institute of International Affairs, 1990], 32). See also Cowhey, "Elect Globally, Order Globally."

20. Michael Bailey, Judith Goldstein, and Barry Weingast argue that the transfer of agenda-setting power in international trade policy from Congress to the executive, beginning with the passage of the Reciprocal Trade Agreements Act of 1934 and through the establishment of the U.S. Trade Representative in 1962, came as a result of a political choice by leading Democratic leaders to strengthen support for free trade within their party; see Michael Bailey, Judith Goldstein, and Barry Weingast, "The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade," *World Politics* 49, no. 3 (1997): 309–38.

21. Indeed, a key cause of the collapse of the Seattle WTO ministerial in November 1999 was developing countries' refusal to accept Western countries' (and many NGOs') demands that labor and environmental provisions be on the agenda for negotiations toward a new multilateral trade agreement.

22. Deepak Lal, "Trade Blocs and Multilateral Free Trade," *Journal of Common Market Studies* 31 (1993): 349–58.

23. For a variety of perspectives on the effects of free trade in the United States, both in the aggregate on prices and at the micro level on employment in particular industries, see volume 3 of this set, *The Impact of Globalization on the United States: Business and Economics*.

24. See Slaughter, *New World Order*.

25. See John Gerard Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection," in *Taming Globalization: Frontiers of Governance*, edited by David Held and Mathias Koenig-Archibugi, 93–129 (Cambridge, UK: Polity Press, 2003); and Thomas Princen and Matthias Finger, *Environmental NGOs in World Politics* (New York: Routledge, 1994).

26. Slaughter, *New World Order*.

27. See the NCSL website, <http://www.ncsl.org>.

28. Between 1970 and 2003, the number of international NGOs grew from roughly four thousand to more than twenty-eight thousand, and the number of multinational firms grew from approximately eight thousand to more than sixty-four thousand. See *Yearbook of International Organizations* (Munich: Union of International Associations [Brussels], 2006), and *Economist*, "A Taxing Battle," January 31, 2004, 72.



## CHAPTER 6

# Globalization, Delegation, and the U.S. Constitution

Julian G. Ku and John C. Yoo

U ntil recently, constitutional and international law scholars tended to pay little attention to the foreign affairs aspects of constitutional law. Indeed, few discussed the potential for conflict between the American principles of separation of powers and federalism and the ever more complex conduct of foreign affairs. Casebooks and monographs scarcely address the subject.<sup>1</sup> This chapter outlines an approach to evaluating the effects of globalization on constitutional law. Rather than pretending that constitutional problems do not exist, we hope in this chapter, which is part of a larger project,<sup>2</sup> to propose ways of accommodating globalization within American constitutional structure and law.

In this chapter, we consider one example of how globalization has placed new and relatively unexplored pressures on the American constitutional system: the delegation of federal government authority to international institutions and agencies. We will first consider how changes in the modern nature of international law have created greater pressures for delegation by the U.S. government to international institutions. We will then describe examples of how such delegations occur and then evaluate some of the legal issues raised by such delegations. Finally, we will consider ways in which such delegations can be accommodated while remaining consistent with traditional constitutional principles.

### GLOBALIZATION AND THE NEW INTERNATIONAL LAW

We begin by examining one of the most important consequences of globalization—the explosion of international lawmaking and international

institutions. An increasingly dense network of international law and norms supporting and facilitating rapid growth in world trade is coming about as a consequence of globalization. The end of the Cold War stalemate encouraged the growth of new multilateral entities that seek to govern more than mere diplomatic relations between states. Instead, the new international laws being written and interpreted by independent international entities attempt to regulate such traditionally domestic topics as individual rights, criminal punishment, environmental protection, and family relations. This new international law has spurred many leading scholars and advocates to theorize that a system of global governance is necessary and desirable.<sup>3</sup> Critics of this point of view usually object on the grounds that global governance diminishes U.S. sovereignty.<sup>4</sup> We do not disagree with this critical perspective. However, we consider a more difficult issue, from a constitutional law perspective: excessive delegation of national power to international bodies contravenes our understanding of the proper sources of such power that is enshrined in our nation's Constitution.

The rise of a new international law is characterized by three noteworthy qualities. First, international organizations have begun to replace nation-states as the major, if not primary, administrators of international law. Second, international law has become increasingly "codified" through wide-ranging "positive law" contained in multilateral treaties and is far less dependent on custom and state practice. Finally, international law's modern emphasis on human rights has increasingly concerned itself with the regulation of a state's relationship with its own citizens, an area of regulation traditionally understood as exclusively within the sovereignty of individual nation-states. These characteristics of the new international law have created, and will continue to create, pressures for the delegation of federal powers to international organizations.

## Traditional International Law

International law has an ancient pedigree, and reviewing its long historical development is beyond the scope of this chapter. Nevertheless, a brief discussion of how the term *traditional international law* is used will help clarify the claims made about the "new international law." Used here, *traditional international law* refers to the dominant understanding of international law in the eighteenth century and existing up to the establishment of the United Nations in 1945. The classic statement of the traditional approach to international law is found in the S.S. *Lotus* opinion of the Permanent Court of International Justice (PCIJ): "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."<sup>5</sup>

The pillar of traditional international law is the absolute sovereignty of nation-states, or as the PCIJ put it, their own "free will." Under this approach, international law binds a state only by those rules that a state has voluntarily accepted. A state may express this acceptance either

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through formal treaty or through practice and custom. In this system, there is no central organization that may enforce rules on states that have not voluntarily accepted them. Moreover, in this system, the nation-state is the only actor because international law applies exclusively to relations between sovereigns: “the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law.”<sup>6</sup> Therefore, private actors are largely excluded.

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Traditional international law rarely develops rules for the purpose of regulating private rights or activities. Such matters are presumed beyond its reach, and private parties have no independent rights to assert in the intercourse between sovereigns. Indeed, a violation of international law affecting a private individual, such as the unlawful detention of an ambassador, is seen as a violation of the sovereign’s right not to have his agents detained. A private individual seeking vindication of his rights against another sovereign must convince his own sovereign to seek some sort of diplomatic settlement. The International Court of Justice (ICJ) articulated this view as late as 1970 when it rejected the right of individual shareholders to seek remedies under international law against a state.<sup>7</sup>

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[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.<sup>8</sup>

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This understanding clearly conforms to a traditional international law perspective, focusing on developing rules for states in their relations with one another and not between private individuals and states.

If an individual seeks help in domestic court, that court can use international law as a source of guidance or persuasive authority. Courts will apply rules of general international law only when no other rules of decision, in the form of treaties or executive declarations, are provided by the executive branch. As Justice Horace Gray explained in the *Paquete Habana* case, decided at the turn of the last century, “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators.”<sup>9</sup>

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Thus, traditional international law assumes the absolute sovereignty of nation-states, relies on formal treaties, and looks to custom as developed through state practice for its development. It is relatively uninterested in matters affecting private parties except to the extent such rules affect the intercourse between sovereign states. In this regime, the executive plays the most important role in developing international law through its control of diplomatic and military organs. International agreements affect the development of international law only to the extent that they bind the United States to specific (usually bilateral) agreements. The power to make international agreements does not usually lead to rules of general applicability. Indeed, such agreements are often made to alter the application of

a general customary rule. Because traditional international law rarely affects the private rights of individuals—and if it does, it does so only incidental to its regulation of intercourse between states—the traditional international law system has rarely been concerned with recognizing private party rights.

### The New International Law

More recently, commentators have been observing the rise of a new kind of international law. Indeed, some commentators have begun using a different term for this sort of law: *supranational law*. This chapter will continue to refer to this new law as “international law” because it still retains many features of traditional international law and because the term *supranational law* has often been used to refer to regional organizations.<sup>10</sup> More important than terminology, however, are three noteworthy features of this new international law.

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First, the new international law has been developed in large part by the rise of a new legal creature: the international organization. These organizations have varying levels of authority, ranging from technical administrative coordination to regulation of political interaction among states. Their establishment, however, has changed one of the fundamental assumptions of traditional international law. Whereas traditional international law continued to accord states absolute sovereignty, some of the new international organizations have the legal authority to encroach on that sovereignty.

Second, the new international law has become less dependent on custom and state practice as a source of development. Instead, the new international law is often created via large multilateral treaties. While some of these treaties are intended to codify existing customary law, many of them are self-consciously intended to “legislate” new rules of international law. As one commentator explains, these treaties serve as “the substitute in the international system for legislation, and they are conveniently referred to as ‘lawmaking’; their number is increasing so rapidly that [the new treaty-created international law] has taken its place beside the old customary law and already far surpasses it in volume.”<sup>11</sup>

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These multilateral treaties cover a wide variety of subjects, and some of them are intended only to prescribe norms or default rules. Moreover, few of these agreements have independent international organizations to enforce their terms. Still, many of these multilateral agreements are self-consciously establishing a set of generally applicable rules through positive and not customary law. In this way, they do in fact perform the function which legislation performs in a state, though they do so only imperfectly; and ... they are the only machinery which exists for the purposive adapting of international law to new conditions and in general for strengthening the force of the rule of law between states.<sup>12</sup>

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Finally, and perhaps not surprisingly given its new character, the new international law has moved away from its exclusive focus on state-to-state relations and is openly concerned with the regulation of private rights and

actions. The new international law's interest in regulating private conduct represents an important shift from the traditional international law. The Restatement (Second) of the Foreign Relations Law of the United States, approved in 1965, did not take a position on whether international law related to any matter other than state-to-state relations. Twenty-five years later, the Restatement (Third) unequivocally states that international law includes rules and principles governing "states' relations with persons, whether natural or juridical."<sup>13</sup> This represents a significant shift from the ICJ's assertion that individuals "have no remedy in international law."<sup>14</sup> If the Third Restatement's view is accepted, the rules of international law will apply to the rights of individuals against states as well as those of states against other states. The ability of individuals to claim international law rights creates pressures for international institutions to directly administer and adjudicate these rights.

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In sum, the new international law is increasingly centered around newly powerful international organizations that are sometimes empowered to impose binding international obligations on sovereign states. Moreover, the rules these organizations impose are often developed through a formalized, multilateral treaty process. In this way, the new international law is created via a process of "international legislation" rather than through state practice and custom. Finally, the goals of the new international law have expanded far beyond traditional international law's exclusive focus on regulating state-to-state relations. Indeed, the new international law has expanded widely into areas involving a state's relations with individuals and even a state's relations with individuals within its own jurisdiction.

These characteristics of the new international law create pressures on the allocation of powers within the federal government in two ways. First, the rise of independent international organizations means that nonstate organs are increasingly charged with interpreting and adjudicating international obligations. The organization may have a voting rule that allows a majority of the members to amend the terms of the agreement and impose obligations against the will of the United States. This type of mechanism means that the power to impose international obligations on the United States, previously limited almost completely to the power to make international agreements, may be wielded by an international organization via a majority vote. Further, as international agreements take on broader "legislative" characteristics by creating rules of broad applicability, the international organization authorized to administer the vaguer, more broadly worded agreements acquire greater discretion when interpreting the obligations. An international organization's power to define or interpret a broadly worded agreement can effectively decide whether the United States has an international obligation. Moreover, its "third party" role makes it far less amenable to the normal motivations of bilateral diplomacy.

Second, and perhaps more importantly, the expansion of the new international law into the regulation of private-party conduct creates pressures for a more direct role for the international organizations. Thus, not only does it seek the discretion to effectively create international obligations, but the subject matter of these obligations increasingly deals

with matters of private-party conduct. To ensure compliance with these individual obligations, it is not surprising that international organizations have sought a direct role in administering these agreements within the domestic jurisdiction.

It is important to keep in mind that this development is not driven purely by factors endogenous to international law. Globalization itself has driven, in part, the change in the nature of international law. Problems that once were wholly domestic, such as crime or pollution control, have assumed transnational dimensions. A single nation-state, no matter how large or powerful, will face difficulty in attempting to control these problems. Nations have responded by seeking supranational forms of cooperation to more effectively regulate effects caused by phenomena that have a large component outside their borders. Expansion of regulatory power to regulate affairs that themselves have grown beyond existing governmental capabilities mirrors the growth in federal regulatory authority in response to the nationalization of the American economy and society at the turn of the twentieth century. As with nationalization a century ago, globalization today has spurred regulatory efforts that seek to expand governmental power and has called forth new forms of institutional organization. Just as the regulatory efforts of the New Deal caused substantial change in the nineteenth-century understanding of the Constitution, so too, we believe, globalization is causing stress on current constitutional structures.

## INTERNATIONAL DELEGATIONS

Because the new international law creates pressures to transfer powers away from the federal government, this section focuses on the constitutional theory and doctrine surrounding delegations. For the purposes of this chapter, a *delegation* is any transfer of constitutionally assigned powers away from the constitutionally designated branch. An *international delegation* is the transfer of constitutionally assigned powers to an international organization. In each of the examples discussed in this section, some federal power—whether it be treaty-making, legislative, executive, or judicial power—has been shifted to an international organization.

### The Separation-of-Powers Framework

Delegation has most often been analyzed within the separation-of-powers framework because it usually involves the transfer of powers among the three branches of the federal government. Therefore, any discussion of an international delegation approach must begin with the way that delegation fits into the Supreme Court's understanding of separation of powers. Chief Justice William Howard Taft summarized the basic formula for separation of powers in this classic passage:

The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the

actual administration of the government Congress or the Legislature should exercise the legislative power, the president or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power.<sup>15</sup>

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There is reason to believe that the Framers intended the separation-of-powers structure to protect individual liberty because each branch would check the other from exercising too much governmental power. On the other hand, there is also evidence that the Framers sought to create a more effective national government than the previous Articles of Confederation regime and hoped that the new Constitution's system of separated branches would also work together. Extending this line of thought, Taft believed that the separation of powers did not preclude interbranch cooperation and advised, "In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."<sup>16</sup>

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Not surprisingly, "common sense" has failed to easily resolve such questions, and courts have struggled to parse between permissible and impermissible interbranch cooperation. In doing so, courts have identified two categories of impermissible transfers of constitutional powers that could threaten the separation-of-powers scheme to such an extent as to justify judicial intervention.

First, courts have found separation-of-powers problems in cases where one branch appears to be aggrandizing power from another branch to itself. The classic example of such aggrandizement occurred when Congress took over appointments of members of the original Federal Election Commission in *Buckley v. Valeo*.<sup>17</sup> The notion in *Buckley* is that the basic separation-of-powers structure, which seeks to keep powers divided among different branches, is undermined when one branch begins collecting all these constitutionally assigned powers for itself.

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Second, courts have also scrutinized delegations—transfers of power away from constitutionally designated branches that do not necessarily benefit the transferring branch. The classic case of delegation is Congress transferring its Article I legislative powers to the president or the judicial branch, a situation that Chief Justice Taft said would create a "breach of the National fundamental law."<sup>18</sup> Courts have repeatedly stated that such delegations would also undermine the separation of powers, although they have rarely found any delegations worthy of judicial intervention.

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Delegations can be distinguished from aggrandizements because they involve the transfer of constitutionally assigned powers between branches without directly bolstering the power of the branch making the transfer. Cases like *Buckley* involve direct confrontations between the political branches with one branch gaining power at the direct expense of the other. In a delegation case, the transferring branch, Congress, is either giving away its own power voluntarily or taking power from one of the other branches and giving it to a third branch or to a nonfederal entity. In either case, Congress is not directly strengthening its own position.

Understood in this context, the Court has recognized three types of constitutionally suspect delegations. First, Congress may try to transfer its legislative power to some other entity. This is the classic form of delegation that has drawn the vast majority of academic commentary.

Second, Congress may attempt to transfer powers conferred on the president under Article II. One famous example of this type of delegation was raised when Congress transferred the president's power to appoint a prosecutor of the United States to a three-judge panel in *Morrison v. Olson*.<sup>19</sup> The plaintiffs claimed that this transfer constituted an impermissible delegation of the president's power to appoint executive officials. While upholding the Independent Counsel Act, the Court's analysis implied that if the independent counsel was not an "inferior officer" within the meaning of the Appointments Clause, an impermissible delegation of executive powers would have occurred.

Third, Congress may decide to create "courts" administered by the executive branch or independently constituted. This would effectively transfer some part of the "judicial power" assigned to the judiciary in Article III. According to the Supreme Court's case law, "Article III, § 1, safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."<sup>20</sup>

These three types of delegations do not necessarily constitute the universe of all possible delegations. The next section will argue that the power to make treaties and international agreements can also be effectively delegated away from Congress and the president. The Court has never considered delegation in the treaty and international agreement context, but the framework is the same: a power assigned to Congress and to the president is being effectively transferred to another organization.

Because Congress is not directly aggrandizing itself when it delegates, courts have been reluctant to conduct extensive judicial review of congressional delegations. In particular, because Congress is assumed to protect its own interests, its decision to delegate away its own power is given less scrutiny. Its decisions to transfer powers that the Constitution gives to the president or the courts, however, raise a different set of issues than delegations of its own legislative powers. Even so, delegations of presidential or judicial powers to states or private parties are still more likely to be upheld than aggrandizements that bolster Congress's own powers.

Overall, the Supreme Court has recognized that impermissible delegations may occur when legislative, executive, and judicial powers are transferred away from their constitutionally assigned branches. It is true that the Court has not erected rigid barriers blocking all reallocation of these powers. For instance, Congress has been given broad discretion to delegate its legislative powers, the definition of "inferior officer" has been liberally expanded to cover a wide range of executive officials, and non-Article III courts have handled a huge number of important legal disputes. But the Court has never explicitly abandoned Chief Justice Taft's basic understanding that some constitutional limitations constrain the delegations of federal powers away from their respectively assigned branches.



## Examples of International Delegations

International delegations occur when powers assigned by the Constitution to a particular branch of the federal government are transferred to an international organization. International delegations do not fit exactly within the Court's standard separation-of-powers framework because transferring power to international organizations does not necessarily affect the balance of powers between the federal branches. Nonetheless, this section explores ways in which these delegations to international organizations can still create conflicts with the Constitution's basic structural requirements.

### *Treaty-making Powers*

The Constitution vests the power to make international agreements in the president, subject to the approval of two-thirds of the Senate. Additionally, courts and some commentators have generally accepted that the president enjoys the power to make certain international agreements under his own authority and other kinds of agreements with the consent of both houses of Congress. At any rate, the power to make international agreements on behalf of the United States is vested in one of these entities:

1. the president alone
2. the president acting with two-thirds of the Senate
3. the president acting with a majority of both houses of Congress

The Constitution restricts the states from making any kind of international agreement without the consent of Congress, but makes no other reference to how the power to make international agreements should be exercised.<sup>21</sup>

Not surprisingly, the Constitution's text and structure relating to international agreement making provides little guidance for the challenges posed by the new kind of international law. For instance, it makes no reference to international organizations, and it is not likely that the Framers contemplated multilateral treaties seeking to legislate universalistic norms. Nevertheless, the rise of the new international law has created pressures to delegate the international agreement-making power away from the political branches of the U.S. government and toward neutral international organizations.

This problem was anticipated by U.S. government officials who participated in the creation of the first great wave of international organizations established in the aftermath of World War I. In the process of negotiating the constitution of the International Labor Organization (ILO), U.S. representatives objected to giving the proposed ILO the authority to declare law, citing several constitutional grounds, including that

the Senate has, under the Constitution, the power and the duty of giving its advice and consent in the matter of treaties. To permit a foreign body to conclude a treaty binding upon the United States would be equivalent to

delegating the power of making treaties in the measure of the provisions of the treaty in question.<sup>22</sup>

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In other words, the creation of an international organization empowered to create international obligations on the United States could essentially delegate the power to make international agreements to an international organization. This argument was recognized at the time by some commentators, but did not receive significant attention. One possible reason is that few of the international organizations created in the wake of World War I were given meaningful legal authority, and the issue of delegation remained almost purely theoretical.

In the modern era, however, international organizations have begun to gain new prominence as well as substantial legal power. Perhaps the best-known example of an international organization that has acquired the legal authority to impose international obligations is the World Trade Organization (WTO). The WTO Agreement has led to the effective transfer of the power to make international agreements by permitting a three-fourths majority of the member states to adopt an interpretation of the terms of the various trade agreements falling under the WTO jurisdiction.<sup>23</sup> Because the trade agreements comprising the WTO often set out broad principles to promote global trade rather than giving specific detailed obligations, an interpretation adopted by three-fourths of the WTO membership could effectively create a new obligation on a member state against the will of that member state.

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In the famous “sea turtle” case, a WTO appellate body used a disputable interpretation of broadly framed language to rule against U.S. regulations restricting shrimp importations from countries whose practices harm sea turtles. Article XX of the General Agreement of Trade and Tariffs (GATT), the pre-WTO trade agreement incorporated into the WTO regime, lists the exceptions that permit countries to depart from general WTO free trade obligations. The provision reads, in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries ... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... necessary to protect human, animal or plant life or health.<sup>24</sup>

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The WTO panel went on to find that the U.S. policy restricting sea turtle importation improperly favored some nations over others. The key to the decision was its view that the policy of exemptions in favor of Caribbean nations who had signed separate regional agreements on sea turtle protection constituted “unjustifiable discrimination.”

The merits of the case under the WTO rules are not important here. Rather, it is simply worth noting that the WTO Council also has the power to make this interpretation permanently binding on the United States with a three-fourths vote. Therefore, even if the United States opposed the interpretation of an important term such as *unjustifiable*

*discrimination* (as it did in this case), it could still be held responsible for obeying the interpretation if three-fourths of the other member states voted against the United States.

The policy merits of this voting procedure are obvious. In the old GATT regime, any decision on an interpretation had to be reached by unanimous consensus, giving any member state an effective veto over the interpretation process. A three-fourths majority still requires strong consensus, but it avoids allowing individual holdouts to hamstring the whole organization.

For U.S. constitutional purposes, however, the three-fourths majority procedure raises the theoretical possibility that three-fourths of the WTO membership could vote to create a new international law obligation on the United States. Moreover, this obligation could be imposed over the explicit objections of the U.S. government. In other words, the United States has prospectively committed itself to agree to whatever interpretations are adopted by three-fourths of the WTO membership or a WTO dispute panel. To the extent such interpretations turn on broad phrases such as “unjustifiable discrimination,” the power to interpret these agreements can become, effectively, the power to amend the terms of the original agreement without further participation by Congress. When ratifying the WTO’s terms for unjustifiable discrimination, did Congress really agree that it would cede some of its discretionary ability to pursue environmental protection policies? This is one way that the WTO has been delegated some portion of the U.S. government’s international agreement-making power, and it raises the exact same delegation concerns expressed by the U.S. delegation to the ILO.

The United States may always withdraw from the WTO Agreement if it opposes a WTO interpretation or panel decision. Moreover, under the terms of the WTO implementing legislation, none of the panel determinations are directly enforceable in U.S. courts.<sup>25</sup> But the fact that the United States can withdraw from an international obligation—and that those obligations cannot be directly enforced in U.S. courts—does not mean that the constitutional procedures creating that obligation are unimportant. Rather, the Constitution contemplates that the power to enter into any important international agreement is to be held by the U.S. government and exercised only in accordance with certain constitutional procedures. As the U.S. representatives at the original ILO conference argued, allowing a non-U.S. entity to interpret or effectively create new obligations circumvents this basic constitutional design.

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### ***Legislative Powers***

The Constitution vests the power to legislate in Congress. While there are no specific prohibitions on delegating this legislative power to other parts of the government or even to nongovernment entities, courts have consistently held that Congress cannot voluntarily transfer this power to legislate absent constraining principles without violating its constitutional

duties. As the Supreme Court famously declared, “Congress cannot delegate legislative power to the president to exercise an unfettered discretion to make whatever law as he thinks may be needed or advisable.”<sup>26</sup>

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There are two methods by which Congress may transfer legislative powers to international organizations. First, and more commonly, Congress may delegate the power to create legislation via a self-executing treaty or international agreement. Second, Congress may assimilate international or foreign law by using normal legislation to incorporate international or foreign laws as “laws of the United States” for the purposes of Article III and Article VI of the Constitution.

### *Delegation by International Agreement*

Under Article II, treaties are made by the president with the concurrence of two-thirds of the Senate. Many international agreements are also made by executive agreement and the approval of both houses of Congress. No matter what the process, the Constitution plainly intended the creation of international obligations to be exercised by one, or both, of the federal political branches. Because such agreements, if deemed self-executing, can have the status of federal law and are equivalent to normal legislation, they must be enforced by the president and the courts just like any other federal law.

The rise of international organizations and multilateral agreements means that the power to make international agreements, assigned by the Constitution to the president and the Senate, is no longer exclusively a tool of diplomacy between equal and sovereign states. Rather, the international agreement power can place the United States under the authority of an international organization that is itself empowered to create and possibly enforce new international obligations and norms.

For instance, just as a legislative act raises delegation concerns if it does not specify standards constraining an agency’s discretion, a broadly worded international agreement could effectively transfer the power to make international agreements, which is sometimes also the power to make binding federal law, to an international organization empowered to interpret and enforce the terms of the agreement. In other words, international obligations, previously exclusively imposed through recognition of custom or voluntary acceptance by agreement, can now be created by an international organization acting under the broad authority of a general multilateral agreement. Moreover, because these agreements increasingly seek to regulate areas of private-party conduct, these agreements can serve as an alternate mechanism for domestic legislation.

This kind of delegation of legislative power via international agreement can be seen in a case involving the ICJ and Texas’s administration of capital punishment. In 2003, Mexico sued the United States in the World Court seeking to block the execution of various Mexican nationals facing the death penalty in the United States on the grounds that such Mexican nationals were not advised of their rights to see consular officials pursuant

to the Vienna Convention on Consular Relations. The ICJ is authorized by the Statute of the ICJ, a treaty of the United States, to decide questions of international law within its jurisdiction including:

1. the interpretation of a treaty
2. any question of international law
3. the existence of any fact which, if established, would constitute a breach of international law

Moreover, the Vienna Convention specifically gives the ICJ compulsory jurisdiction over disputes about the interpretation or application of the convention itself. The ICJ therefore asserted jurisdiction pursuant to this Article and held that the United States was required to suspend executions of those Mexican nationals pending a new hearing on the prejudice they suffered as a result of the treaty violations.<sup>27</sup>

For the purposes of this discussion, the important question is: What is the domestic legal status of the ICJ's judgment? In its petition in *Sanchez-Llamas v. Oregon*, a subsequent case before the Supreme Court, attorneys for other foreign nationals who had similarly suffered treaty violations argued that the ICJ judgment is a self-executing treaty obligation enforceable by a court under U.S. law.<sup>28</sup> The petitioners asked the Supreme Court to treat an order interpreting a treaty, in this case the Statute of the ICJ, as equivalent to the original treaty itself as a matter of U.S. law. Thus, the ICJ has, under this argument, been delegated the power to overrule the judgments of the Supreme Court, because the Supreme Court had previously refused to give foreign nationals the remedies under the treaty now required by the ICJ's judgment.

The *Sanchez-Llamas* case highlights the collision between a creature of the new international law, the ICJ, and the basic structure of the U.S. Constitution. In this case, a multilateral treaty, the Statute of the ICJ, designated an independent international organization to interpret the statute's obligations as well as the obligations imposed by other treaties. In the process of interpreting the obligations, the independent international organization, in this case the ICJ, essentially created a new treaty obligation that many argue is the equivalent of federal law and enforceable in U.S. courts. If this view is accepted, the ICJ has potentially garnered the power to create treaty obligations that are equivalent to the "law of the land."<sup>29</sup>

The ICJ, however, is not Congress acting pursuant to its Article I powers. It is also not the president and Senate acting pursuant to their Article II powers. Rather, it is a nonfederal entity acting pursuant to a delegation, via an Article II treaty, to interpret and create the equivalent of new Article II treaties that might be enforceable in U.S. courts. This is a delegation of Congress's power to legislate, normally exercised via Article I or Article II, and it creates a tension with the Constitution's allocation of "all legislative power" to Congress.

Another constitutional issue is whether, through the exercise of the treaty power, the national government may regulate matters that would otherwise rest outside its enumerated powers, were only domestic affairs involved. This tension was also on display in the dispute over the ICJ's

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ability to order a halt to the Texas execution of foreign nationals. Under current understandings of the Constitution, it is questionable whether the federal government could enact a statute requiring states to follow procedures in their criminal trials that went beyond the provisions of the Bill of Rights. The *Sanchez-Llamas* case, however, raised the possibility that a federal treaty could do so, which would normally be outside the power of the political branches of government. Thus, international delegation raises the possibility of not just a change in the locus of decision making but also an expansion in the authority of government brought about by international law and institutions.

### *Executive Powers*

The new international law's ambitions have also increased pressures for international organizations to directly enforce international law, rather than relying exclusively on national government enforcement. Acquiring the power to directly enforce international obligations has an obvious appeal to international organizations that seek to maintain uniformity and fairness in the enforcement of the new international law. This section reviews examples of how such delegations of executive powers have already begun to occur.

The president is entrusted with the power to "take care" that the laws passed by Congress are properly executed. He is also provided with the power to appoint officers of the United States, with the advice and consent of the Senate.<sup>30</sup> These appointment powers have been understood to be an important tool for maintaining the president's control of the executive branch and crucial to preserving the president's constitutional authority as chief executive.

These appointment powers, however, serve as a stumbling block to efforts to provide independent international oversight of certain multilateral agreements. Most prominently, arms control agreements, especially the Chemical Weapons Convention (CWC), rely on verification of treaty compliance through the use of international inspectors who are not accountable to domestic governments.<sup>31</sup>

The CWC creates an ambitious verification regime intended to maintain a complete prohibition on the stockpiling and production of chemical weapons. In order to detect cheating, the CWC empowers an independent international organization, the Organization for the Prohibition of Chemical Weapons, to enter and search suspect sites. Unlike previous arms control agreements, the verification measures will likely require searches of private sites because many nongovernmental sites also have the capability of producing chemical weapons materials.

The Technical Secretariat inspection teams are empowered, under the CWC's implementing legislation, to conduct inspections of any U.S. facilities suspected of involvement in the production of illegal substances. Refusing such inspections is a violation of federal law. Thus, the inspection teams are empowered by the federal government to directly search private facilities without seeking permission from officials of the U.S. government.

The members of the CWC inspection teams are not appointed by the president or any U.S. official. They are also not accountable to or removable by any U.S. official. Although they are required to notify U.S. officials when they begin a search, they do not take orders from any U.S. official.<sup>32</sup>

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As one of the authors has pointed out in greater detail elsewhere, this CWC inspection regime creates tensions with the Constitution's allocation of appointment powers to the president. The Appointments Clause serves to ensure that any officials exercising the power to execute and enforce federal law are responsible to the president, who is in turn accountable to the general electorate. While the analysis of the Appointments Clause's application to the CWC regime has been criticized for not focusing on the inspectors' status as nonemployees of the federal government, his broader point about the inherent tensions between independent verification regimes and the Appointments Clause is persuasive.<sup>33</sup>

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To the extent that international agreements require independent verification regimes—and in the arms control area, such verification is crucial—officials empowered to conduct such verification procedures must be independent of member states that might prevent the effectiveness of their searches. On the other hand, the U.S. Constitution squarely contemplates vesting the power to execute federal laws in officials who are appointed by the president alone. Any future international regime dependent on effective verification procedures will run into the same competing goals: independent verification versus constitutionally mandated accountability.

### *Judicial Powers*

The recognition of private-party rights under international law has created pressures to shift adjudication of such rights away from domestic courts and toward international tribunals. As international law increasingly affects private-party rights, it is not surprising that pressures for neutral transborder adjudication of these private rights lead toward the displacement of national courts. The best example of this trend in the United States can be found in the dumping-case dispute resolution panels created by the North American Free Trade Agreement (NAFTA).

Dumping cases involve challenges by U.S. parties to a foreign company's alleged sale of goods in the U.S. market at a price below the sale of the same goods in the foreign company's home market. Prior to NAFTA and its predecessor agreement, the Secretary of Commerce and the International Trade Commission (ITC) had the sole authority to impose duties on foreign companies found to be dumping. Such determinations were reviewable in the Court of International Trade (CIT), a court created to exercise the judicial power found in Article III of the Constitution. The CIT, in turn, was reviewed by the Court of Appeals for the Federal Circuit and by the Supreme Court.<sup>34</sup>

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Under NAFTA, the ITC and the Secretary of Commerce still retain initial jurisdiction over dumping claims. However, if a U.S. party seeks appeal of an ITC decision, the foreign party may remove the case to a NAFTA

arbitral panel. Under the terms of NAFTA, such removal eliminates any possibility of further judicial review by an Article III court. Thus, at least one commentator has forcefully argued that this structure violates the Article III requirement that “the judicial power of the United States shall be vested in” courts meeting Article III’s requirements of life tenure and guaranteed income.<sup>35</sup>

Furthermore, under Supreme Court doctrine, the NAFTA arbitration panels might be upheld because the private-party dumping challenges could be considered “public rights” not requiring Article III judicial review.<sup>36</sup> But the larger trend is what matters, because the pressures of the new international law are not limited to dumping rights. For example, the International Criminal Court requires member nations to turn over suspected international criminals to its jurisdiction.

In order to promote neutral adjudication of international rules in favor of free trade policies, the new international law creates pressures to shift judicial review of private-party challenges away from domestic courts. Leaving such adjudication to domestic judicial review and federal court litigation threatens to disrupt the smooth flow of international trade rules. From the standpoint of international law development, such neutral and independent adjudication is obviously desirable because it prevents each member country from allowing private-party lawsuits to block implementation of international trade rules. From the standpoint of constitutional structure, however, the elimination of an Article III court’s power to review a federal question lawsuit is far less attractive.

These examples illustrate how the new international law has already begun to create pressure for the transfer of the international agreement, legislative, executive, and judicial powers to international institutions. Because substantial portions of the federal government’s constitutionally assigned powers are being transferred to international organizations, these transfers may be called “international delegations.”

In contrast to traditional international law, the aspirations of the new international law are to develop general positive rules of broad applicability and create pressures on states to delegate the authority to administer these rules to independent international organizations such as the WTO and the ICJ. Moreover, the international law’s ambition to create a uniform law independent of national government interference, as well as its expansion into areas affecting private-party rights, has led to the transfer of enforcement and adjudication powers to such independent agencies as the CWC Secretariat and NAFTA arbitration panels. In each of these cases, powers assigned to a particular branch of the federal government by the Constitution have been delegated to an international institution.

## RECONCILING INTERNATIONAL DELEGATIONS AND THE CONSTITUTION

Although not all international delegations necessarily fail to pass constitutional muster, in our view all do raise difficult and important questions



of constitutional law. Yet, for the most part, international delegations have not undergone serious scrutiny. *Internationalism* is how we term the widespread but hitherto almost unexamined idea that the rulings or proclamations of international bodies subsume or preempt all “lower” levels of power such as the laws of nation-states. International lawyers, perhaps as an artifact of too much disciplinary compartmentalization, have traditionally overlooked constitutional and federalism issues. In this final section, we outline our alternative approach to reconciling the need for greater international cooperation with the constitutional problems raised by such delegations.

### Internationalism

In our parlance, *internationalism* describes scholarship that advocates expansion of power and effectiveness by international institutions. Such scholarship generally welcomes, and even advocates, the delegation of legislative, administrative, and especially judicial power to international institutions. For many of these scholars, the favored method of improving the compliance of countries, in particular the United States, has been the enforcement of international institution actions as domestic law by U.S. courts. Such scholars support the formal incorporation of international law obligations, as interpreted by international tribunals, and generally reject constitutional obstacles to such incorporation. For example, liberal internationalist scholars have argued that judgments of the ICJ, including orders of provisional measures, should be directly enforced by U.S. courts, even though such an approach could raise difficult questions about the delegation of “judicial power” to the World Court.<sup>37</sup>

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More generally, the leading scholars to consider this question have simply refused to take seriously the importance of constitutional limitations on certain forms of international cooperation. The author of the leading monograph in the field, Louis Henkin of Columbia University, for instance, has written, “It is difficult to accept that United States participation in contemporary forms of multinational cooperation should depend on ‘technicalities’ about ‘delegation,’ ‘judicial power’ and ‘case or controversy,’ and on forms and devices to satisfy them.”<sup>38</sup>

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### Accommodating Globalization: Non-Self-Execution

In our view, however, domestic constitutional law doctrines such as the separation of powers are not a mere set of cumbersome technicalities. They express the basic American system of power in the form of checks and balances and a strong requirement that the exercise of power be rigorously and democratically authorized by the people. The separation of powers may, at times, make it more difficult for the government to act or may even prevent the government from acting altogether.

Rather than ignore the constitutional questions raised by international delegations, we believe scholars should look for legal doctrines that

accommodate globalization and the Constitution. Adherence to one such doctrine, for instance, would eliminate almost all of the constitutional difficulties, while at the same time permitting most forms of international cooperation: The *doctrine of non-self-execution* holds that many treaties do not have any legal effect in U.S. law absent implementation of that treaty by a subsequent law passed by Congress. The doctrine has a long and well-established pedigree in U.S. jurisprudence. Chief Justice John Marshall recognized the doctrine as early as 1830, and long-standing historical evidence suggests that the Framers of the Constitution approved of the application of the doctrine to many if not most treaties.<sup>39</sup>

Non-self-execution has been sharply criticized by many legal academics, however, because it appears to sharply limit the legal effect of many treaties, especially as they are invoked by private individuals. But those scholars have also largely failed to consider one of the constitutional benefits of adhering to non-self-execution of treaties, especially treaties allocating some authority to international organizations.

By requiring Congress to enact legislation before giving legal effect to the action of an international organization, non-self-execution preserves congressional control over the domestic legal effect of an act by an international organization. Thus, non-self-execution would prevent a decision of the World Court from reversing a U.S. court judgment absent a statute by Congress specifically recognizing the decision or the rule of that decision.<sup>40</sup>

Non-self-execution is not a cure-all for constitutional infirmities created by globalization, but it offers at least one way to accommodate the flows of globalization. Rather than simply ignore traditional doctrines such as separation of powers, applying the non-self-execution doctrine sharply limits the authority of any international organization that has been allocated authority by the U.S. government. Such an organization must continue to work with Congress and the president in order to exercise its powers directly within the U.S. legal system, thus preserving the intermediary foreign policy role of the federal government. Non-self-execution also allocates responsibility for the conduct of foreign affairs to the branches with the greatest political accountability and functional expertise—the president and the Congress.

## CONCLUSION

The problem of international delegations is only one example of the types of pressure imposed by globalization on the U.S. constitutional system. In future work, we plan to fully discuss the difficulties posed by globalization to the U.S. federal system of state governments and some of the ways in which these difficulties can be avoided. Non-self-execution, for instance, can also help to alleviate the pressures on federalism, just as it can for separation of powers and delegation.

As our discussion of the problem of international delegations suggests, globalization is a real and powerful force in the development of U.S. constitutional law. In contrast with many internationalist legal scholars, we

think that the problem of excessive delegations of legal authority to international institutions cannot simply be dismissed as technicalities. Instead, we believe international delegations pose a serious danger to the traditional separation of powers structure underlying the U.S. Constitution.

Our preferred approach seeks to reach an accommodation between globalization and constitutionalism that permits deeper international cooperation while maintaining basic constitutional values. Non-self-execution, which shifts basic decision making on the means and methods of international delegations to Congress and the president, is one example of how this accommodationist approach could serve as the basis for a twenty-first-century Constitution.

## NOTES

Parts of this chapter draw on Julian G. Ku, "The Delegation of Federal Powers to International Organizations: New Problems with Old Solutions," 85 *Minnesota Law Review* 71 (2000). The authors are grateful to the *Minnesota Law Review* for permission to publish portions of that work here.

1. Indeed, a leading constitutional law casebook devotes a mere nineteen out of sixteen hundred pages to the constitutional law of foreign affairs; Geoffrey R. Stone et al., *Constitutional Law*, 2nd ed. (Boston : Little, Brown, 1991): 406–13, 461–70.

2. Some of the ideas and issues raised here will be developed in a forthcoming book by the authors under contract with Yale University Press tentatively entitled *Globalization, American Sovereignty, and the U.S. Constitution: A Constitution for the 21st Century*.

3. The most recent and important work in this genre is provided by Anne-Marie Slaughter of Princeton University's Woodrow Wilson School: *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

4. The leading critic of global governance from a sovereignty perspective is Jeremy Rabkin of Cornell University; see his *The Case for Sovereignty* (Washington, DC: AEI Press, 2004) and *Law without Nations: Why Constitutional Government Requires Sovereign States* (Princeton, NJ: Princeton University Press, 2005).

5. The *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ (ser. A) No. 10, at 18 (Sept. 7).

6. Malcolm N. Shaw, *International Law*, 2nd ed. (Cambridge, UK: Grotius, 1986), 126 (quoting H. Lauterpacht).

7. *Barcelona Traction, Light, and Power Company, Limited, (Belg. v. Spain)*, 1970 I.C.J. 3, P 78 (Feb. 5).

8. *Ibid.*

9. *Paquete Habana*, 175 U.S. 677, 700 (1900).

10. See Peter Hay, "Supranational Organizations and United States Constitutional Law," 6 *Virginia Journal of International Law* 195 (1966): 195–96 (describing criteria for supranationalism), and Patrick Tangney, "The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany," 21 *Yale Journal of International Law* 395 (1996): 399–404 (describing supranational law and the rise of supranational organizations).

11. J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed., edited by Sir Humphrey Waldock (Oxford, UK: Clarendon Press, 1963): 58.

12. Ibid.
13. Restatement (Third) of the Foreign Relations Law of the United States, § 101, note 1 (1986).
14. *Barcelona Traction*.
15. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).
16. Ibid.
17. 424 U.S. 1 (1976).
18. Ibid. at 90–91.
19. 487 U.S. 654, 654 (1988).
20. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850 (1986) (quoting *Nat’l Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 [1949] [Vinson, C. J., dissenting]). The Court further noted that Article III “not only preserves to litigants their interest in an impartial and independent federal adjudication of claims . . . but also serves as an inseparable element of the constitutional system of checks and balances.”
21. Article II, § 2, declares that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur,” and Article I, § 10, states: “No State shall enter into any Treaty, Alliance, or Confederation. . . . No State shall, without Consent of Congress . . . enter into any Agreement or Compact with . . . a foreign Power.”
22. Pitman B. Potter, “Inhibitions on the Treaty-making Power of the United States,” 28 *American Journal of International Law* 456 (1934): 456.
23. Agreement Establishing the World Trade Organization, 33 I.L.M. 9 (1994).
24. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4. (1998).
25. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(b) (2)(B)(i), 108 Stat. 4815 (1994) (codified at 19 U.S.C. § 3512), which prevents a WTO panel decision from being “binding or otherwise [being] accord[ed] deference” by federal courts.
26. *A.L.A. Schechter v. United States*, 295 U.S. 495, 537–38 (1935).
27. 126 S.Ct. 2669 (2006).
28. See *Reply Brief for Petitioner Sanchez-Llamas, Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006), (No. 04-10566), 2006 WL 598180; *Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners, Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (No. 04-10566), 2005 WL 3597806.
29. Although the Supreme Court rejected this approach in *Sanchez-Llamas* itself, it did not foreclose other efforts to enforce ICJ judgments in the face of contrary domestic precedent. It eventually concluded that the treaties delegating authority to the ICJ do not give ICJ judgments such effect, but did not foreclose the possibility that other treaties could do so. See *Medellin v. Texas*, 552 U.S. \_\_\_\_ (2008).
30. U.S. Constitution, Art. II.
31. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, S. Treaty Doc. No. 21 (1993), 32 I.L.M. 800 (1993). See also the Chemical Weapons Convention Implementation Act of 1998, P.L. 105-277, 112 Stat. 2681, 2681–856 (codified at 22 U.S.C. §§ 6701–71 [Supp. IV 1999]).
32. “Any duly designated member of an inspection team of the Technical Secretariat may inspect any plant, plant site, or other facility or location in the United States subject to inspection pursuant to the Convention. . . . It shall be unlawful for any person willfully to fail or refuse to permit entry or inspection, or to disrupt,

delay, or otherwise impede an inspection, authorized by this Chapter”; 22 U.S.C. §§ 6723(b)(1), 6726 (Supp. IV 1999).

33. John C. Yoo, “The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause,” 15 *Constitutional Commentary* 87 (1998): 116–30.

34. See Jim C. Chen, “Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review under the United States–Canada Free Trade Agreement,” 49 *Washington & Lee Law Review* 1455 (1992): 1456–58; he argues that binational panel arbitration of antidumping petitions violates constitutional guarantees of federal judicial adjudication.

35. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589–93 (1986). Chen disputes the application of the “public rights” doctrine to antidumping cases because the United States is not a party to a dumping case and such cases do not create compelling interests requiring unreviewable administrative discretion; Chen, “Appointments with Disaster.”

36. See Rome Statute of the International Criminal Court, art. 89 P 1 (adopted July 17, 1998), 37 I.L.M. 999 (1998); “State Parties shall . . . comply with requests for arrest and surrender.”

37. See Lori Fisler Damrosch, “The Justiciability of Paraguay’s Claim of Treaty Violation,” 92 *American Journal of International Law* 697 (1998): 703.

38. Louis Henkin, *Foreign Affairs and the U.S. Constitution*, 2nd ed. (Oxford: Oxford University Press, 1996), 272.

39. John C. Yoo, “Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding,” 99 *Columbia Law Review* 1955 (1999): 2091–94.

40. For an elaboration of this position, see Julian G. Ku, “International Delegations and the New World Court Order,” 81 *Washington Law Review* 1 (2006), and Curtis A. Bradley, “International Delegations, the Structural Constitution, and Non-Self-Execution,” 55 *Stanford Law Review* 1557 (2003).



## CHAPTER 7

# Globalization as Constitutional Counterrevolution

James J. Varellas

If there is a unifying theme to the most prominent accounts of globalization, it is that of “freedom.”<sup>1</sup> By the last years of the twentieth century, free international flows of investment, goods, and services—the hallmarks of economic globalization—were the centerpiece of new regional trading blocs, such as the North American Free Trade Agreement (NAFTA), and new multilateral institutions, such as the World Trade Organization (WTO). As advocates of economic liberalization recommended states don a “golden straightjacket” so that international investors might reward their restraint with a tide of investments that would lift the boats of their citizens, powerful skepticism about this conception of freedom emerged.<sup>2</sup> Concerns about this straightjacket—and especially about the capacity of states to engage in domestic social protection—contributed to the failure of other proposed international agreements, such as the Multilateral Agreement on Investment and the Free Trade Area of the Americas.<sup>3</sup> Those concerned about economic and social justice in this new age of free investment and free trade might find apt Janis Joplin’s classic line: “Freedom’s just another word for nothing left to lose.”<sup>4</sup>

Some of these skeptics start from the premise that globalization is better understood as a project of directed state policies than as an inevitable trend of technological advances in communication and transportation.<sup>5</sup> According to Chantal Thomas, the international agreements that institutionalize globalization have introduced “a considerable body of international law” regulating the domestic economy through “legal rules that affect our everyday lives—the food we eat, the clothes we wear, the price of medicine, and the taxes we pay.” She concludes, “the change is so deep

that it is constitutional.”<sup>6</sup> Stephen Gill agrees that globalization has created a “new constitutionalism,” which he defines as “the political project of attempting to make transnational liberalism, and if possible liberal democratic capitalism, the sole model for future development.”<sup>7</sup> Surprisingly, this new global constitutionalism, which seeks to use international agreements and institutions to permanently “lock in” a new liberal international economic order reaching deep into domestic political economies, has spurred little constitutional debate in the United States. This chapter seeks to develop a political economy framework for assessing the constitutional challenges posed by the new freedoms and “unfreedoms” that characterize globalization.

In the previous chapter, Julian Ku and John Yoo argued against the current lack of scrutiny given to constitutional issues raised by globalization. Similar to Edward Fogarty’s chapter, they argue that globalization raises serious questions about sovereignty and the Constitution’s separation-of-powers provisions. This chapter joins Ku and Yoo in questioning the present neglect of the question of what the U.S. Constitution has to say about globalization. Instead of grounding its argument in concerns about sovereignty and separation of powers, however, this chapter will focus on fundamental rights and the Constitution’s substantive provisions to show that it has more to say about globalization than is commonly understood. Through its effect on the domestic political economy—and consequently on the capacity of the state to attend to domestic concerns—globalization has a profound impact on the distribution of wealth and entitlements in society, issues that are properly the subject of constitutional scrutiny.<sup>8</sup>

The chapter begins with an examination of the major shifts in the architecture of the international economy—specifically, from an initial post-World War II emphasis on allowing states to intervene in their domestic economies to a subsequent emphasis on reining in this intervention. Next, it addresses what the U.S. Constitution has to say about issues of political economy in general, with particular emphasis on substantive constitutional provisions. A historical examination of what legal historian William Forbath calls “constitutional political economy” will reveal that, in the wake of the New Deal’s constitutional revolution, the Constitution has much more to say about economic and social rights than is commonly understood. Because the architecture of the world economy deeply affects national governments’ capacity to protect and enforce the economic and social rights of their citizens, these questions of constitutional political economy take on a special significance in understanding the constitutional implications of globalization.

The final section will consider how a full understanding of the constitutional political economy of globalization informs a debate about a technical issue of considerable importance: whether it is constitutionally acceptable for international commercial agreements, such as NAFTA and the WTO agreements, to be passed as “congressional-executive agreements,” which require the approval of simple majorities in both houses of Congress, or whether such agreements must be approved as treaties (which require a two-thirds vote in the Senate). The conclusion—that the



form required for the agreement turns on whether it enhances or diminishes the capacity of the domestic government to protect economic and social rights—provides a new way forward on a constitutional debate characterized by irreconcilable positions on the contemporary relevance of the Treaty Clause.

## INTERNATIONAL POLITICAL ECONOMY SINCE WORLD WAR II: FROM EMBEDDED LIBERALISM TO NEOLIBERALISM

“Globalization” is a label used to describe a number of different phenomena, from transnational trade and investment flows to cultural diffusion to harmonization of domestic regulatory frameworks. This chapter uses a relatively narrow sense of globalization as the *project* of constructing a framework of orthodox global liberalism—commonly referred to, especially outside the United States, as “neoliberalism”—privileging so-called free market economic relations.<sup>9</sup> This analysis grows out of the view that a significant change in the architecture of the world economy occurred during the turbulent period of the 1970s and has contributed significantly to drastic changes to the international and domestic economies.<sup>10</sup> Accordingly, the first part of this chapter will focus on this shift from “embedded liberalism,” the organizing principle of the initial post–World War II and post–Great Depression era, to neoliberalism, the organizing principle of the world economy during the current period of globalization. From this examination will emerge a picture of two very different phases of political-economic management of the world economy, each with profound implications for governments’ ability to manage their domestic economies and provide their citizens with economic and social rights.

Writing in *Foreign Affairs* in 1947, Jacob Viner declared, “There are few free traders in the present-day world, no one pays attention to their views, and no person in authority anywhere advocates free trade.”<sup>11</sup> By the 1990s, this state of affairs had been turned on its head. In 1992, Bill Clinton spent considerable time during his first campaign for the presidency lecturing labor unions on the benefits of free trade.<sup>12</sup> Once in office, Clinton during his first term oversaw the establishment of the WTO, the passage of NAFTA, and the granting of “permanent normal trade relations”—or, in the international trade argot, permanent “most-favored nation” trading status—to China. This apparent shift in the elite view on free trade coincided with a shift in the central organizing principle of international political economic governance from “embedded liberalism” to “neoliberalism.”

### Embedded Liberalism

As New Right leaders such as Ronald Reagan and Margaret Thatcher were putting the final nails in its coffin, John Ruggie coined the term *embedded liberalism* in reference to the initial post–World War II international

political economy.<sup>13</sup> Ruggie characterized this period as carefully balancing a general international inclination toward free trade against an interest in allowing national governments to intervene in the domestic economy to provide domestic “public goods” and thus political stability and legitimation. Lately, Ruggie’s term has enjoyed a resurgence of interest from legal scholars.<sup>14</sup>

In recent decades, political economists working outside the narrow framework of neoclassical economics<sup>15</sup>—which is inspired in large part by Milton Friedman and his Chicago School colleagues and, through the discipline of “law and economics,” has profoundly shaped legal analysis and doctrine<sup>16</sup>—have developed a sophisticated and holistic understanding of the development of the international political economy since World War II. In addition to embedded liberalism and neoliberalism, scholars variously refer to these periods as, for example, the “Keynesian welfare state” and the “Schumpeterian workfare state”<sup>17</sup> or “Fordism” and “post-Fordism.”<sup>18</sup> These latter terms seek to capture the essential characteristics of how states have managed their political economic affairs during these two distinct periods. For present purposes, however, the terms *embedded liberalism* and *neoliberalism* are most helpful because they focus on the architecture of the international economy instead of domestic political economic management.

To understand the shift from embedded liberalism to neoliberalism, it is first essential to understand the context of the Bretton Woods system that established the international political economy of embedded liberalism. In the wake of the self-destruction of the free trade system of the 1920s and the economic protectionism and isolationism in the 1930s—and the subsequent World War—the architects of the postwar system at Bretton Woods in 1944 (led by Harry Dexter White of the United States and John Maynard Keynes of the United Kingdom) sought to address the shortcomings of both periods: “Unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism.”<sup>19</sup> Thus, Bretton Woods ushered in a system that rejected crude economic nationalism while supporting multilateralism and domestic stability.

To make this balancing act work, the negotiators at Bretton Woods ensured the compromise of embedded liberalism also addressed the “dilemma between internal and external stability.”<sup>20</sup> To resolve this dilemma, both White and Keynes brought to Bretton Woods proposals for “inter-governmental collaboration to facilitate balance-of-payments equilibrium, in an international environment of multilateralism and a domestic context of full employment.”<sup>21</sup> The outcome was a compromise that, according to Ruggie, represented the fusion of “power and legitimate social purpose” in the international economic system.<sup>22</sup> In the postwar international institutions that emerged, “the principles of multilateralism and tariff reductions were affirmed, but so were safeguards, exemptions, exceptions, and restrictions—all designed to protect the balance of payments and a variety of domestic social policies.”<sup>23</sup> While the U.S. Congress expressed some

intransigence by refusing to ratify the International Trade Organization (ITO), in “the more traditional subjects of commercial policy, the conjunction of multilateralism and safeguarding domestic stability that had evolved over the course of the ITO negotiations remained intact.”<sup>24</sup>

Under the ITO’s successor, the General Agreement on Tariffs and Trade (GATT), the hallmark of multilateralism in trade was the principle of non-discrimination. This principle took form in the GATT’s most-favored nation rule, under which a country must treat the products of any one “contracting party” the same as those of another.<sup>25</sup> The GATT also generally prohibited quantitative restrictions (i.e., quotas), although they “were deemed suitable measures for safeguarding the balance of payments—*explicitly* including payments difficulties that resulted from domestic policies designed to secure full employment.”<sup>26</sup> There were a variety of other exceptions, including those for “emergency actions,” escape clauses, and agricultural trade, so long as they were used to facilitate a domestic price-support program.<sup>27</sup>

In light of the many exceptions built into the postwar trading regime, Ruggie concludes, “multilateralism and the quest for domestic stability were coupled and even conditioned by one another... [They] reflected the shared legitimacy of a set of social objectives to which the industrial world had moved, unevenly but ‘as a single entity.’”<sup>28</sup> Consequently, the tendency, especially in modern economics and “law and economics” literature on international trade “to view the postwar regimes as liberal regimes, but with lots of cheating taking place on the domestic side, fails to capture the full complexity of the embedded liberalism compromise.”<sup>29</sup>

Intrinsically related to the consensus on trade embodied in the embedded liberalism compromise was a new system for regulating international financial flows. Under the Bretton Woods system, the U.S. dollar, backed by gold, served as the world reserve currency to which all other currencies would be pegged, thus ensuring a stable international financial system and a “cushion [for] the domestic economy against the strictures of the balance of payments.”<sup>30</sup> The new institutional design had several elements:

Free exchanges would be assured by the abolition of all forms of exchange controls and restrictions on current transactions. Stable exchanges would be secured by setting and maintaining official par values, expressed in terms of gold. The “double screen” would consist of short-term assistance to financial payments deficits on current account, provided by an International Monetary Fund, and, so as to correct “fundamental disequilibrium,” the ability to change exchange rates with Fund concurrence. Governments would be permitted to maintain capital controls.<sup>31</sup>

Capital controls and stable exchange rates provided national governments the latitude to promote multilateral trade within a context of relative international financial stability, allowing them to intervene as necessary to provide for social stability.

The design of the financial regulatory system created at Bretton Woods took into account what political economists refer to as the “trilemma” or

“irreconcilable trinity”<sup>32</sup> of international monetary policy. As Robert Gilpin puts it:

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Nations may want stable exchange rates to reduce economic uncertainty, but they may also desire discretionary monetary policy in order to promote economic growth and steer their economies between recession and inflation. In addition, governments may want freedom of capital movements to facilitate the conduct of trade, foreign investment, and other international business activities.<sup>33</sup>

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While all of these things may be desirable, Gilpin explains, “Unfortunately, no international monetary or financial system can accommodate all three of these desirable goals (fixed exchange rates, national independence in monetary policy, and capital mobility).”<sup>34</sup> The Bretton Woods system chose fixed exchange rates and national independence, a combination that “promotes economic stability and enables a government to deal with unemployment,” but at the cost of freedom of capital movement.<sup>35</sup> According to Ruggie, this choice, perhaps the most important made at Bretton Woods, reflected a “fusion of power and legitimate social purpose” by providing domestic economies insulation from the vagaries of the international economy to pursue the domestic social protection at the heart of embedded liberalism.<sup>36</sup>

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When it came time for the United States to enact the agreements codifying the embedded liberalism compromise, President Harry Truman presented the Bretton Woods agreement to both houses of Congress as a congressional-executive agreement requiring simple majorities for approval.<sup>37</sup> At the time, this form was unusual, but as the final section will document, the overwhelming majority of international agreements in the second half of the twentieth century would come to take the congressional-executive agreement form. Importantly, Truman’s action did not seek to make irrelevant the Treaty Clause, as he simultaneously presented the United Nations Charter—which included the Universal Declaration of Human Rights (UDHR)—as a treaty, requiring a supermajority in the Senate.<sup>38</sup> The lens of political economy provides a way of making sense of this loosening of the constitutional requirements spelled out in the Treaty Clause: Truman’s evasion of the Treaty Clause for the Bretton Woods agreement acknowledged the need for flexibility in the regulation of international commerce.

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Presenting the UN Charter as a treaty emphasized that the purpose of this new flexibility was to provide a stable and peaceful international environment for commerce and the protection of human rights—including the economic and social rights found in the UDHR.<sup>39</sup> This commitment was perhaps best captured by President Franklin Roosevelt’s “Second Bill of Rights,” which he announced in his State of the Union Address on January 11, 1944, when he declared:

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In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis

of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens.<sup>40</sup>

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Later in this chapter, it will be shown that Truman's approach to the approval of Bretton Woods and the UN Charter represented the fulfillment of a constitutional imperative resulting from the New Deal's commitment to economic and social rights. First, however, it is necessary to turn to the story of globalization as the betrayal of this commitment.

## Neoliberal Globalization

While it is difficult to identify precisely the moment when the project of embedded liberalism was lost, it is reasonable to say it was finished by the time of the electoral victories of New Right leaders such as Margaret Thatcher in 1979 and Ronald Reagan in 1980. These victories, however, were many years in the making.

The ongoing international political economic crisis of the late 1960s and early 1970s threw into question the viability of the embedded liberalism compromise in the United States. First, the simultaneous costs of the Vietnam War and Great Society programs forced the United States to borrow heavily, which, through the Bretton Woods system of pegging other currencies to the dollar, passed on inflationary pressures to other countries and thus compromised Washington's leadership role in the international financial order.<sup>41</sup> After the collapse of the Bretton Woods monetary system and the formal adoption of floating exchange rates in 1973, the United States, Europe, and the rest of the world were faced with the reemergence of an unregulated international financial system and its attendant instability.<sup>42</sup>

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The end of the Bretton Woods monetary regime was one of many systemic shocks affecting the U.S. and international economies in the 1970s. The Organization of Petroleum Exporting Countries' oil embargo, launched in 1973 in the wake of the Yom Kippur War, put massive pressure on the economies of oil-importing countries, including the United States.<sup>43</sup> At the same time, new "efficiencies" realized by "lean production" techniques first pioneered in Japan<sup>44</sup> and advances in supply-chain management put increasing pressure on the primary forms of industrial organization in the United States and Western countries more generally.

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Meanwhile, traditional postwar political coalitions that had supported the postwar bargain, particularly on the left, began to break down. The events of 1968—including May's student strike in France and August's protests at the Democratic Party's nominating convention in Chicago—came to symbolize this fragmentation. Major events elsewhere in the world, such as the October massacre of hundreds of students at Tlatelolco in Mexico City just before the start of the 1968 Summer Olympics, still reverberate to this day. In the United States, the progress of Lyndon Johnson's Great Society, already groaning as the costs of the Vietnam War spiraled out of control in the wake of military setbacks epitomized by the Tet Offensive, came to a screeching halt with the triumph of Richard Nixon's "Southern strategy" in the 1968 election.

Initially, there was no consensus at the international level or in the United States about how to react as this "perfect storm" continued to ravage the international political economy. However, Third World countries that were members of the Non-Aligned Movement had a plan: at their Algiers summit in the fall of 1973, they tabled a sweeping proposal for a New International Economic Order (NIEO).<sup>45</sup> This proposal, which grew out of discussions at the UN Conference on Trade and Development, included the following categories of demands:

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- (a) reforms in the terms of trade and in access to the markets of the advanced industrial countries;
- (b) reforms in the major global economic institutions, particularly the IMF;
- (c) recognition of the burgeoning problem of Third World debt;
- (d) greater economic assistance and recognition of the issue areas of technology transfer; and
- (e) recognition of the rights pertaining to economic sovereignty of states, particularly with regard to nationalization and the control of the activities of multinational corporations.<sup>46</sup>

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Stephen Krasner argues that the NIEO was an attempt by Third World countries to change the "existing goals and institutional structures" of the international economic system and that the implications for neoliberals were apparent: "The [NIEO] program should be rejected."<sup>47</sup> In the end, the NIEO gained little traction.<sup>48</sup> Some scholars even suggest that it provided a useful negative reference point for what would become the neoliberal blueprint.<sup>49</sup>

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At the same time, the set of ideas that would eventually carry the day had been fermenting for several decades at the University of Chicago. Since

the end of World War II, scholars such as Milton Friedman and Friedrich von Hayek (among the “few free traders in the present-day world” to whom Viner had referred in 1947) had developed their ideas<sup>50</sup> in relative obscurity.<sup>51</sup> Beginning in the 1970s, however, their counterproject began to draw increasing interest from those concerned with what Samuel Huntington called the “crisis of democracy”<sup>52</sup> and others referred to as “the fiscal crisis of the state.”<sup>53</sup> A number of think tanks and foundations (for example, the Hoover Institution, the American Enterprise Institute, the Heritage Foundation, the Cato Institute, and the Olin Foundation) emerged to support academics and activists who sought to promote a new free market orthodoxy.<sup>54</sup> Their success has been phenomenal, especially in the field of law. For instance, by the time the Olin Foundation spent the last of its funds and closed its doors in 2005, it had disbursed nearly \$400 million.<sup>55</sup> The *New York Times* opened its piece reporting on Olin’s closing thus:

Without it, the Federalist Society might not exist, nor its network of 35,000 conservative lawyers. Economic analysis might hold less sway in American courts. The premier idea factories of the right, from the Hoover Institution to the Heritage Foundation, would have lost millions of dollars in core support. And some classics of the conservative canon would have lost their financier, including Allan Bloom’s lament of academic decline and Charles Murray’s attacks on welfare.<sup>56</sup>

One could say the same thing about numerous other foundations with ongoing operations.

Future Supreme Court justice Lewis Powell’s memorandum to the U.S. Chamber of Commerce in April 1971 provides an excellent illustration of how this neoliberal project moved into elite policy-making circles. In his memo, he urged the Chamber to help promote the emerging project,<sup>57</sup> calling for “the wisdom, ingenuity, and resources of American business to be marshaled against those who would destroy it” and noting:

Strength lies in organization, in careful long-term planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.<sup>58</sup>

By the end of the 1970s, American business had indeed marshaled its wisdom, ingenuity, and resources to promote and create what Sol Picciotto calls a “minimalist” or “market-friendly state”<sup>59</sup> and what much of the world knows simply as “neoliberalism.”<sup>60</sup>

Neoliberalism, as David Harvey explains, finds expression in policies such as “deregulation, privatization, and withdrawal of the state from many areas of social provision.”<sup>61</sup> In Harvey’s words:

Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.<sup>62</sup>

With business support and the U.S. government's blessing, neoliberalism has taken hold as the organizing principle of the world economy since the 1970s. International agreements have increasingly emphasized liberalism at the expense of its "embeddedness" by limiting governments' freedom to intervene in markets for trade and finance. These agreements have sought to impose market discipline progressively in areas in which state intervention to ensure social protection and stability was thought to be essential after the Great Depression and World War II. Notably, this reformed architecture now supporting global neoliberalism has advanced free trade in the absence of meaningful labor, social, and environmental protections,<sup>63</sup> and free movement of capital without concern for the concomitant and predictable limiting of states' powers for domestic intervention.<sup>64</sup>

While countries have adopted a number of different individualized strategies for coping with the era of the "competitive state" ushered in by neoliberalism, even those countries most concerned with preserving social democracy and the welfare state, such as Scandinavian countries, have made concessions to the pressures of neoliberalism's global market.<sup>65</sup> As the late Susan Strange put it, deliberate policy choices and key "non-decisions" created what she called the "casino economy"—an economy characterized by high volatility and little concern for aims such as social protection and stability.<sup>66</sup> In this way, the emergence of neoliberalism and an international architecture supporting it have seemingly made obsolete the social concerns—and thus the legitimization concerns—at the core of embedded liberalism. As Stephen Gill notes, the "new constitutionalism" of neoliberalism is a project that privileges the rights of investors over all others, in contrast to "traditional notions of constitutionalism," which "are associated with political rights, obligations, and freedoms, and procedures that give institutional form to the state."<sup>67</sup> Indeed, as the next section will demonstrate, this new global constitutionalism runs afoul of the U.S. Constitution.

## CONSTITUTIONAL POLITICAL ECONOMY

### The Constitutional Revolution of 1937

Like Chantal Thomas, William Forbath argues that political economy may intersect with U.S. constitutional law to the extent that we must consider "constitutional political economy."<sup>68</sup> The indeterminate nature of constitutional political economy was laid bare by the constitutional revolution of 1937, when the Supreme Court sharply reversed course and began upholding the constitutionality of New Deal programs similar to ones it had been striking down for several years. In the words of contemporary legal thinkers inclined toward neoliberalism, this reversal resulted in the "exile" of the "Constitution of Liberty."<sup>69</sup> This conception of constitutional liberty and due process reached its peak during the Gilded Age through cases such as *Lochner v. New York*, which struck down a New York law setting a maximum of sixty hours per week or ten hours per day for bakers in order to prevent the debilitating ailment known as "baker's



lung” on the grounds that it violated the liberty interest of bakers to contract to work more hours.<sup>70</sup> During this period, the Supreme Court used the federal Constitution to strike down myriad economic and social regulations, a practice Justice Clarence Thomas suggested resuming in a 1995 concurring opinion.<sup>71</sup>

Cass Sunstein describes the momentous shift in constitutional political economy occurring in 1937 as a resetting of the “common law baseline” away from the “status-quo neutrality” of the *Lochner* era, which refused to inquire into the preexisting distribution of wealth and entitlements in society that always serves as a background to the legal system.<sup>72</sup> To illustrate the contingency of this common law baseline, Sunstein contrasts the Supreme Court’s view of minimum wage laws in two cases, one before and after the shift. In *Adkins v. Children’s Hospital*, the Court argued, “To the extent that the sum fixed [by a minimum wage statute] exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no particular responsibility.”<sup>73</sup> In 1937, the Court revisited this issue in *West Coast Hotel v. Parrish*, arguing that, if allowed by the government, the “exploitation of a class of workers who are in an unequal position with respect to bargaining power ... is in effect a subsidy for unconscionable employers.”<sup>74</sup> As Sunstein notes, these cases demonstrate that the “notion of subsidy is of course incoherent without a baseline from which to make a measurement.”<sup>75</sup> It is the setting of this baseline with which constitutional political economy is primarily concerned, and 1937 saw as radical a resetting of this baseline as there has been at any point in the history of the United States.

The principal challenge 1937 presents for constitutional law is one of legitimacy. How can this shift in constitutional political economy, occurring in the context of President Franklin Roosevelt’s threatened “court-packing” plan, be understood as anything but the exercise of raw politics? Bruce Ackerman responds by putting forward a theory of constitutional amendment outside of the formal amendment process outlined in Article V, arguing the post-1937 expansion of federal power was justified by a New Deal “Constitutional Moment,” a deliberative process culminating in Roosevelt’s crushing reelection victory in 1936. “We the People” practiced “higher lawmaking” outside the rules of the formal amendment process, Ackerman says, enacting constitutional changes as profound as those seen during the Founding (the Articles of Confederation did not provide for the Constitutional Convention) and Reconstruction (extraordinary steps were taken to prevent Southern states from blocking the Reconstruction amendments).<sup>76</sup>

In his reexamination of Ackerman’s account of the New Deal Moment that gave birth to the expansive administrative state and, through Bretton Woods, a new architecture for international commerce after World War II, Forbath observes, “Prior to the assertion of enlarged governmental powers was a redefinition of national citizenship, which entailed those expanded powers.”<sup>77</sup> Forbath moves beyond Ackerman by suggesting that, in addition to constitutionalizing the exercise of federal power in

national economic and social regulation, the New Deal Constitutional Moment also acknowledged a new vision of “social citizenship,” requiring the “recognition of new rights and new rights-bearers.”<sup>78</sup> Forbath notes Roosevelt and his followers in Congress repeatedly won both presidential and congressional elections campaigning on an expansive platform that eventually included the Second Bill of Rights.<sup>79</sup>

Forbath’s insight that the New Deal Moment was about both the constitutional legitimization of the expansive administrative state and recognition under the Constitution of “social citizenship” helpfully recasts the question of the constitutionality of the administrative state and related questions of international governance. In the past few decades, legal scholars such as Frank Michelman have focused on abstract philosophy to locate economic and social rights in the Constitution.<sup>80</sup> With the rise of neoliberalism, their approach has achieved little traction in the courts, Congress, or even the general populace. Consequently, at this point, Forbath’s focus on history seems much more promising (in addition to being more convincing): instead of an esoteric constitutional law debate about first principles of moral philosophy and the permissible scope of federal power, setting a baseline of fundamental rights in the economic and social realm becomes a question of the people’s role in interpreting the Constitution and restructuring the state in the wake of the Great Depression.

### **Economic and Social Rights, Rights and the New Deal Constitution in Exile**

Contrary to those bent on resurrecting the “Constitution of Liberty,” Forbath argues it is actually the “New Deal Constitution” that is in exile.<sup>81</sup> Unlike Western Europe, the United States never developed an extensive welfare state capable of ensuring the realization of the rights enumerated by Roosevelt in his Second Bill of Rights and entailed by the social citizenship vision. Forbath argues that the “tangled knot of race and class” that has plagued the United States since its founding intervened to sabotage the New Deal Constitution at its inception. Progress on class issues through enacting what Roosevelt called the “general welfare constitution” was sacrificed as conservative Southern Democrats, committed to maintaining the “separate southern labor market and its distinctive melding of class and caste relations, its racial segmentation, and its low wages,” made common cause with Republicans to include significant carve-outs and excessive grants of state-level autonomy in the New Deal’s major framework statutes, such as the Social Security, Agricultural Adjustment, National Recovery, National Labor Relations, and Fair Labor Standards acts.<sup>82</sup> With the start of World War II, the Dixiecrats moved into open revolt against the New Deal, joining with Republicans to block efforts to “complete the New Deal” by implementing the Second Bill of Rights.<sup>83</sup>

In addition to the failure to realize the promise of the New Deal and the Second Bill of Rights, the economic and social rights on which the legitimacy of the constitutional revolution of 1937 rested were also never

formally recognized as a matter of constitutional law. Recognition of these rights might have occurred through Supreme Court decisions upholding the rights contained in the Second Bill of Rights or the passage of statutes by Congress declaring passage represents fulfillment of Congress's constitutional obligation to enact various economic and social rights. Recognition, however, is only half the battle because, it is only realization, or "objective enjoyment," that actually improves people's day-to-day lives.<sup>84</sup> Still, recognition can serve as an impetus for realization,<sup>85</sup> and many scholars now emphasize that "rights talk,"<sup>86</sup> which occurs in the realm of recognition, can be an important means to this end by providing a moral imperative<sup>87</sup> or framework<sup>88</sup> for working toward the realization of rights, even when not legally enforceable.

The late Charles Black, in his final book, argued that the failure to recognize that the Constitution itself already contains provisions recognizing a full slate of economic and social rights, such as FDR's Second Bill of Rights, is "one of the most outrageous actions of our Supreme Court."<sup>89</sup> Black contends:

A sound and satisfying foundation for a general and fully national American law of human rights exists in three imperishable commitments—the Declaration of Independence, the Ninth Amendment, and the "citizenship" and "privileges and immunities" clauses of Section 1 of the Fourteenth Amendment (as those clauses ought to have been and still ought to be interpreted).<sup>90</sup>

Such an approach, of course, would require resurrecting constitutional provisions that have long lay dormant. For example, investing meaning in the Privileges or Immunities Clause of the Fourteenth Amendment<sup>91</sup> would require overruling the *The Slaughterhouse Cases* of 1873, which imposed a very narrow reading on this clause.<sup>92</sup> As Sunstein notes, however, the Supreme Court was on a path to recognizing the Second Bill of Rights as part of the Constitution without a formal amendment until Nixon appointed four new justices to the Court—including Lewis Powell, the author of the aforementioned "Powell Memo."<sup>93</sup>

Before the constitutional counterrevolution in the area of economic and social rights effected by Nixon's appointments, the Warren Court seemed to be following Black's path to the Second Bill of Rights. For example, in *Griswold v. Connecticut*, the Court found a privacy right encompassing the right to use contraceptive in the "penumbra" of certain rights in the Bill of Rights (Justice Arthur Goldberg concurred in the judgment but located the right in the Ninth Amendment),<sup>94</sup> and in *Shapiro v. Thompson*, the Court struck down minimum time-of-residency requirements for receipt of welfare benefits on the grounds such restrictions would impinge on the fundamental right to interstate travel.<sup>95</sup> To the argument that economic and social rights as "positive rights" did not have obvious mechanisms for enforcement, Forbath notes that advocates at the time of the New Deal "responded first that 'legal invention [could] develop new procedures' and second that, in any case, 'immediate judicial enforceability' was not the

right test of a right.”<sup>96</sup> Consequently, the reformers’ pragmatic vision had room for both the political branches and the courts.

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As a practical matter, the most promising approach may be to stand *Lochner* on its head and use substantive due process to locate economic and social rights in the Constitution. As Black notes, “The ‘due process’ clause is being made to carry the load that would far more naturally have been assigned to the ‘privileges and immunities’ clause of the Fourteenth Amendment, jointly with the two ‘citizenship’ clauses of that Amendment.”<sup>97</sup> The famous “footnote four” in the 1938 decision of *United States v. Carolene Products Co.*, a decision that set out a broad interpretation of Congress’s power to enact legislation regulating interstate commerce, provides the basis for heightened constitutional scrutiny in cases where fundamental rights are at stake, stating in relevant part:

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There may be a narrower scope for operation of the presumption of constitutionality [under the Commerce Clause] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.<sup>98</sup>

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Moreover, in *Palko v. Connecticut*, the Court outlined its general approach to questions of fundamental rights—rights that “have been found to be implicit in the concept of ordered liberty” and whose abolition would “violate a principle of justice so rooted in the traditions of and conscience of our people as to be ranked as fundamental.”<sup>99</sup> As Forbath has shown, after 1937 the historical argument that the economic and social rights enumerated in Roosevelt’s Second Bill of Rights “are implicit in the concept of ordered liberty” and thus “to be ranked as fundamental” is strong.

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## CONSTITUTIONAL POLITICAL ECONOMY AND NEOLIBERAL GLOBALIZATION

### International Political Economy and Economic and Social Constitutional Rights

As a basis for international institutions, neoliberalism is inherently hostile to attempts by domestic governments to protect and enforce economic and social rights. First, in the area of international monetary policy, the trilemma resolved under embedded liberalism through the choices of fixed and stable exchange rates and domestic autonomy in monetary policy (to allow domestic social protection) over capital mobility has been reworked. Under neoliberalism, the mobility of international capital has led the U.S. government to choose floating rather than fixed exchange rates in order to maintain autonomy in monetary policy. Second, the drive for free trade undermines the conditions that encourage the private sector to pay living wages, making it less likely a job can provide sufficient remuneration to purchase key economic goods such as housing, health care, and education. By effecting an international division of labor and an international labor

market pitting workers against each other in a global competition for employment, neoliberalism creates a “race to the bottom” that puts downward pressure on wages and worker protections globally.<sup>100</sup>

This shift to a “competition state” in the area of monetary and trade policy under neoliberalism constricts the state’s capacity to act domestically. Economist Dani Rodrik explains: “Governments today actively compete with each other by pursuing policies that they believe will earn them market confidence and attract capital inflows: tight money, small governments, low taxes, flexible labor legislation, deregulation, privatization, and openness all around.”<sup>101</sup> Thomas Friedman refers to this choice as donning a “golden straightjacket,” which has the following result: “your economy grows and your politics shrinks.”<sup>102</sup> Or, in Rodrik’s words, “The price of maintaining national jurisdictional sovereignty while markets become international is that politics have to be exercised over a much narrower domain,”<sup>103</sup> and within the lexicon of modern economics, “political” aims such as protecting and enforcing economic and social human rights fall outside its concern.<sup>104</sup> This new orientation in the realm of monetary and trade policy is the hallmark of Gill’s new constitutionalism.

With the rise of neoliberalism, and thanks in part to advancements in transportation and communications technology, the scope of international trade agreements have expanded significantly. Rodrik notes, “International trade agreements began to reach behind national borders; for example, policies on antitrust or health and safety, which had previously been left to domestic politics, now became issues of international trade disputes.”<sup>105</sup> Perhaps even more importantly, these new trade agreements pay little heed to labor concerns.<sup>106</sup> The result is lower wages, fewer labor protections, and less stability for workers in this key area. Concern for such outcomes is not new; as Chantal Thomas notes, the constitution of the International Labor Organization (ILO) provides that “the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions of their own countries.”<sup>107</sup> While the ILO’s power is limited to investigating and issuing reports, however, the WTO has the power to levy penalties and authorize significant trade retaliation against states that it determines have violated its rules. Unregulated international financial flows, Friedman’s “electronic herd,” similarly discipline national governments considering engaging in domestic intervention.

The combined result of neoliberalism’s monetary and trade policy orientation is a significant curtailment of the government’s ability to protect and enforce economic and social rights. Thus the new global constitutionalism of neoliberalism is inherently hostile to economic and social rights, rights that should be acknowledged under the Constitution if the legitimacy of the constitutional revolution of 1937—which also constitutionalized the national-level regulatory schemes with which most large businesses have grown quite comfortable—is to be upheld. This state of affairs is maintained by a constitutionally controversial procedure, known as the “congressional-executive agreement,” by which Congress approves most neoliberal agreements that have served as building blocks of the new

global constitutionalism without the two-thirds majority in the Senate required by the Treaty Clause.

## RECLAIMING INTERNATIONAL CONSTITUTIONAL POLITICAL ECONOMY

Article II of the U.S. Constitution provides that the president “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur.”<sup>108</sup> In recent decades, this provision has usually been sidestepped for international commercial agreements. Instead, a procedure not provided for in the Constitution, the “congressional-executive agreement” procedure, which requires only a majority vote in both the House and the Senate, is often used.

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The last seventy years have witnessed an explosion of congressional-executive agreements. John Yoo notes that, while over the course of the Constitution’s first fifty years (between 1789 and 1839) the nation entered into sixty treaties (including the Louisiana Purchase and the Jay and Pinckney treaties) and twenty-seven nontreaty international agreements, over the fifty-year period from 1939 until 1989 the nation entered into 702 treaties and 11,698 nontreaty international agreements, and between 1946 and 1972, 6.2 percent of international agreements were treaties while 88.3 percent were not.<sup>109</sup> Unfortunately, it appears no one has studied whether certain subjects are more likely to receive treaty treatment than others.<sup>110</sup> Still, the reality remains that the congressional-executive agreement procedure is now a—and perhaps *the*—major cornerstone of the international economic relations of the United States.

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Chantal Thomas argues that permissive use of congressional-executive agreements over the past few decades has led to the construction of a distinct “international branch” of the federal government that is of constitutional concern.<sup>111</sup> Just as the “fourth branch” of the federal government—the administrative state—resulted from the “massive legislative delegations of the 1920s and 1930s” as restricted by the Administrative Procedure Act of 1946,<sup>112</sup> Thomas argues, “the construction of the international branch began with the massive delegations of the 1990s to the WTO and NAFTA.”<sup>113</sup> In fact, there is a “double delegation”: Congress first grants the president “fast-track” or “trade promotion authority” by restricting its ability to amend agreements negotiated by the executive, and second, the agreements themselves delegate to, for example, the WTO, the prerogative to enforce rules that govern the domestic economy. This same logic applies to both multilateral agreements and bilateral or regional trade agreements.

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While many on both the right and the left criticize this abrogation of sovereignty, this criticism may be inapposite. If it is accepted that the nationalization of the economy resulting from constitutional revolution of 1937 established that the prerogative of the national government to protect and enforce rights trumped the sovereignty concerns of the individual states, it could also be that the prerogative of international institutions to do the same similarly trumps national sovereignty.<sup>114</sup> Therefore, the

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principal problem of the new international organizations would be that, by promoting the interests of investors over all others, they are enforcing the wrong rights. This proposition, which could also mitigate the concerns with self-executing international agreements mentioned by Ku and Yoo in chapter 6, deserves a fuller treatment than it can receive here.

On the problem of congressional-executive agreements, a consensus view has developed over the decades since World War II that they are fully interchangeable with treaties, thus rendering the Treaty Clause virtually a dead letter. The general statement of the black-letter law on this matter is that “the prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”<sup>115</sup> While there are three types of agreement covered by this consensus,<sup>116</sup> the focus here will be on congressional-executive agreements negotiated by the president and then approved by Congress, because they most directly implicate the Treaty Clause and are the form agreements such as NAFTA and the WTO traditionally take. Moreover, as Yoo notes, agreements of this type do “not involve the delegation of authority from Congress to the president, but instead [seek] to replace the treaty process with a statutory one.”<sup>117</sup> Regardless of their status under the U.S. Constitution, the choice of the treaty or congressional-executive agreement form has no consequence under international law, which considers both types of agreements to be treaties.<sup>118</sup>

The reigning consensus on interchangeability showed some signs of strain in the debates over approval of the WTO and NAFTA. Bruce Ackerman and Laurence Tribe respectively argued for “complete interchangeability” and “treaty exclusivity” in front of Congress<sup>119</sup> and then in the pages of the *Harvard Law Review*,<sup>120</sup> with Congress ultimately choosing complete interchangeability in approving the agreement as a congressional-executive agreement.<sup>121</sup> The federal courts have consistently invoked the “Political Question Doctrine” to sidestep the issue of whether the congressional-executive agreement is permissible or all international agreements must pass through the requirements of the Treaty Clause. For example, a federal appeals court in 2001 held that a challenge to the use of the congressional-executive agreement form for NAFTA “presents a nonjusticiable political question, thereby depriving the court of Article III jurisdiction in this matter,”<sup>122</sup> effectively punting the issue to Congress and the president.

Forbath argues those interested in a return from exile for the New Deal Constitution should focus their energies on Congress. Unsurprisingly, his argument seems largely based in history: the “great reform movements” around the New Deal “sought to replace the [Supreme] Court with elected lawmakers in the role of the nation’s ‘authoritative’ constitutional political economist.”<sup>123</sup> As the most representative branch, focusing on Congress makes sense, at least in the context of making space for domestic protection and enforcement of economic and social rights by reorienting the architecture of international commerce. Were members of Congress, and senators in particular, to acknowledge their obligation to promote an international framework permitting domestic enforcement of economic and

social rights in the wake of the constitutional revolution of 1937, the Political Question Doctrine would become irrelevant. Congress could demand that the executive present them with neoliberal international agreements, such as the WTO and NAFTA, only in the form of treaties, while permitting international economic agreements designed to facilitate a reasonable scope for domestic social protection, such as the original Bretton Woods Agreement, in the form of congressional-executive agreements.

Congress's role in policing its own procedures for approving international agreements is somewhat straightforward, if problematic for the time being due to Rhenquist Court decisions that seek to strip Congress's jurisdiction under provisions such as Section Five of the Fourteenth Amendment.<sup>124</sup> If international economic agreements affect fundamental rights in the economic and social realms, however, the courts also have a role. While Forbath rightly takes Ackerman to task for his failure to explore fully the implications of the New Deal Constitutional Moment, Forbath himself does not adequately consider the role the courts have played since the New Deal's constitutional revolution in recognizing, protecting, and enforcing fundamental rights. Indeed, another aspect of the New Deal's constitutional revolution, besides the general expansion of federal power in the economic and social realms,<sup>125</sup> was a recognition that the courts have a role to play when fundamental rights are at stake.

Recognition by the Supreme Court of economic and social rights as fundamental rights protected by the Constitution would require a major reversal of the direction of the Court's jurisprudence of the past several decades. As Sunstein argues, however, the outcome of the 1968 election by itself brought to a halt the trend in the Court's decisions many thought would lead to recognition of the full spectrum of economic and social rights as fundamental rights.<sup>126</sup> Future elections (and appointments) could produce another reversal. Such a re-reversal could solve many of the post-1937 legitimacy concerns by recognizing the economic and social rights for which federal power in the economic and social realms was expanded in the first place.

In addition to acknowledging the capacity of Congress and the courts to act as constitutional political economists, it also makes sense to make a few initial observations about what international commercial agreements that leave room for domestic protection and enforcement of economic and social rights might look like. Enacting significant changes in the rules of international trade and finance would require significant political will. As has already been mentioned, aside from a new Bretton Woods-style agreement on international finance, changes such as imposition of a "Tobin tax" on international currency transactions could have a large effect.<sup>127</sup> Still, conceiving of possible actions by the U.S. government in the area of the regulation of international finance is difficult and deserves more attention from scholars.

Alternatives are more often mentioned in the area of trade policy, and two are immediately apparent: "deglobalization" and "linkage." The deglobalization approach would seek to decrease the degree to which the domestic economy is dependent on international trade.<sup>128</sup> Linkage would require trade agreements to include certain basic labor and environmental standards to



prevent the all-too-familiar “race to the bottom” dynamic from developing.<sup>129</sup> While such approaches might not have the far-reaching implications of a new major framework agreement for the international political economy along the lines of Bretton Woods, they could still have a profound effect on the capacity of the government to enact programs and industrial policies that would better protect and enforce the economic and social rights of Americans.

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## CONCLUSION

While Forbath laments the general failure to realize the mandate of the constitutional revolution of 1937 with the exile of the New Deal Constitution, he fails to note the significance of the Bretton Woods system as a precondition for realizing its promise. The Bretton Woods system established an international framework conducive to domestic policies aimed at realizing economic and social rights such as those laid out by Roosevelt in his Second Bill of Rights speech, even if the domestic political realities in the United States were such that it was not possible to realize such rights. The successes of European social democracies during this period underscore the potential of an international architecture of embedded liberalism to allow for the realization of economic and social rights.

The United States, as the possessor of the largest economy in the world, is uniquely situated to serve as a leader in enacting changes directed at reforming international finance and the trading system and beginning the dismantling of the new global constitutionalism of neoliberalism. International markets could not punish the United States for enacting policies to lessen the negative impact of international financial flaws and cushion the domestic economy in the way they could smaller countries. Similarly, as evidenced by its ongoing trade negotiations all over the world and the continuing passage of new trade agreements, the United States is the key player in the international trading system. By simply changing the terms it seeks in trade deals, the United States could radically alter the character of international trade.

There is no doubt the United States has the power to rework important aspects of the architecture of the international political economy—the power to turn back, at least in part, the constitutional counterrevolution of economic globalization. Moreover, as shown above, because neoliberal globalization is inimical to economic and social rights, rights properly understood as protected by the Constitution, this capacity triggers a constitutional *requirement* that the United States actually do something to reshape the architecture of the international political economy to encourage the realization of economic and social rights.

## NOTES

Portions of this chapter draw on James J. Varellas, “The Constitutional Political Economy of Free Trade: Reexamining NAFTA-style Congressional-Executive

Agreements.” 49 *Santa Clara Law Review* \_\_ (forthcoming). The author is grateful to the *Santa Clara Law Review* for permission to republish portions of that work here.

1. David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2006), 2.

2. Thomas Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus, and Giroux, 1999): 87. Friedman argues, “Once your country puts on the Golden Straitjacket, its political choices get reduced to Pepsi or Coke—to slight nuances of tastes, slight nuances of policy, slight alterations in design to account for local traditions, some loosening here or there, but never any major deviation from the core golden rules” (ibid.).

3. Chantal Thomas, “Constitutional Change and International Government,” 52 *Hastings Law Journal* 1 (2000): 1 (“Seattle shattered the conventional wisdom that only policy wonks are interested in trade barriers”).

4. Harvey, *Brief History of Neoliberalism*, 5.

5. Phillip McMichael, “Globalization: Trend or Project?” in *Global Political Economy: Contemporary Theories*, edited by Ronen Palan, 103–17 (London: Routledge, 2000).

6. Thomas, “Constitutional Change,” 2.

7. Stephen Gill, “Globalization, Market Civilization, and Disciplinary Neoliberalism,” *Millennium* 24 (1995): 412.

8. See Cass Sunstein, “Lochner’s Legacy,” 87 *Columbia Law Review* 873 (1987): 874.

9. This use of the term *globalization* is narrower in scope than some other uses in the sense that it focuses solely on economic globalization. It also focuses on a much shorter time period than some scholars; for example, some scholars argue that globalization has been under way in some form for five thousand years; see Andre Gunder Frank, *ReOrient: Global Economy in the Asian Age* (Berkeley: University of California Press, 1998): xxi–xxii, 36.

10. See, for example, Ronen Palan and Jason Abbott, with Phil Deans, *State Strategies in the Global Political Economy* (London: Pinter, 1998); Evelyne Huber and John D. Stephens, *Development and Crisis of the Welfare State: Parties and Policies in Global Markets* (Chicago: University of Chicago Press, 2001); Harvey, *Brief History of Neoliberalism*; Alain Lipietz, *Towards a New Economic Order: Postfordism, Ecology and Democracy* (New York: Oxford University Press, 1992).

11. Jacob Viner, “Conflicts of Principle in Drafting a Trade Charter,” *Foreign Affairs* 25 (January 1947): 613, quoted in John Ruggie, “International Relations, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order,” *International Organization* 36 (1982): 396.

12. See John R. MacArthur, *The Selling of “Free Trade”: NAFTA, Washington, and the Subversion of American Democracy* (New York: Hill & Wang, 2000).

13. See Ruggie, “International Relations.”

14. See, for example, Andrew Lang, “Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime,” 9 *Journal of International Economic Law* 81 (2006): 81–82.

15. See, for example, Emma Colman Jordan and Angela P. Harris, *Beyond Rational Choice: Alternative Perspectives on Economics* (New York: Foundation Press; Thomson/West, 2006): 164, 254–55 (introducing both internal and external critiques of neoclassical economics).

16. See, for example, Martha McCluskey, “Law and Economic Justice: Toward a Critical Field Guide,” paper presented at the ClassCrits Workshop, which suggests

the “law and economics” approach might better be called “law and economic injustice” or “law and economic subordination.”

17. See, for example, Bob Jessop, “Towards a Schumpeterian Workfare State? Preliminary Remarks on Post-Fordist Political Economy,” *Journal of Political Economy* 40 (1993): 9: “In abstract terms, the distinctive objectives of the [Keynesian Welfare State] regarding economic and social reproduction were to promote full employment in a relatively closed national economy primarily through demand-side management, and to generalize norms of mass consumption through welfare rights and new forms of collective consumption.”

18. See Ash Amin, “Post-Fordism: Models, Fantasies, and Phantoms of Transition,” in *Post-Fordism: A Reader*, edited by Ash Amin (Oxford, UK: Blackwell, 1994), 1.

19. Ruggie, “International Relations,” 393.

20. Ibid.

21. Ibid., 394–95.

22. Ibid., 382–83.

23. Ibid., 396.

24. Ibid.

25. General Agreement on Tariffs and Trade, art. I, October 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

26. Ruggie, “International Relations,” 397 (emphasis in original).

27. Ibid.

28. Ibid., 398.

29. Ibid.

30. Ibid., 395.

31. Ibid.

32. See Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton, NJ: Princeton University Press, 2001), 248–49. See also Dani Rodrik, “How Far Will International Economic Integration Go?” *Journal of Economic Perspectives* 177 (2000): 180–81.

33. Gilpin, *Global Political Economy*, 248–49.

34. Ibid., 249.

35. Ibid.

36. Ruggie, “International Relations,” 385.

37. Laurence Tribe, “Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation,” 108 *Harvard Law Review* 1221 (1995): 1283.

38. Ibid.

39. For the full text of the UDHR, see <http://www.un.org/Overview/rights.html>.

40. For a reprint of the speech in its entirety, see Cass Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 235–44.

41. Palan and Abbott, *State Strategies*, 134.

42. The Eurodollar market exploded in the wake of the collapse of the Bretton Woods system. This market, already firmly established by 1973, initially emerged from the response of boutique investment houses in the City of London stockpiling dollars for South American investments in the wake of the United States’ decision to use its role in the Bretton Woods system to punish Britain for its role in the Suez Crisis by pressuring the pound sterling. See Ronen Palan, *The Offshore World: Sovereign Markets, Virtual Places and Nomad Millionaires* (Ithaca, NY: Cornell University Press, 2003): 26–32. Palan details the history of the emergence of the Eurodollar

market and notes its significant contribution to the “serious problem” of “the volatility of a largely unregulated global financial market of such magnitude, and its concomitant capacity to subvert policy aims of even the largest states,” 32.

43. Recently disclosed British intelligence reports reveal that the United States saw the crisis as so dire that it made preparations to invade Saudi Arabia, Kuwait, and Abu Dhabi in response to the 1973 crisis “in order to restore the flow of oil and bring down prices” (Harvey, *Brief History of Neoliberalism*, 27).

44. See John Tomaney, “A New Paradigm of Work Organization and Technology?” in Amin, *Post-Fordism*, 164–70; Tomaney surveys arguments about the “Japanization” of production and concludes that it constitutes a significant “form of work intensification.”

45. Graham Evans and Jeffrey Newnham, *Penguin Dictionary of International Relations* (London: Penguin Books, 1998), 368.

46. *Ibid.*, 368–69.

47. Stephen D. Krasner, *Structural Conflict: The Third World against Global Liberalism* (Berkeley: University of California Press, 1985), 21.

48. John H. Jackson, William J. Davey, and Alan O. Sykes Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations*, 4th ed. (St. Paul, MN: West Group, 2002), 1194.

49. See Kees van der Pijl, “A Lockean Europe?” *New Left Review* 37 (2006): 23–24: “The response to the movement for social and economic democracy then produced the ‘opposite thesis,’ namely that ‘rationally organized’ capitalism is possible only as the restriction of democracy. It was this restricted democracy that initially enabled the neoliberal turn of the European integration process” (emphasis in original). See also Kees van der Pijl, *Global Rivalries from the Cold War to Iraq* (London: Pluto Press, 2006): 122–32.

50. See Friedrich von Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), arguing that regulation of the economy necessarily leads to socialism, impoverishment, and unfreedom; and Milton Friedman, with Rose Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), arguing that a free market economy is necessary for the realization of human freedom.

51. According to Yves Dezalay and Bryant Garth, “the sixties witnessed a tremendous growth in the education of economists and the official consecration of Keynesian doctrines along with the triumph of mathematical techniques—notably, in the elite institutions of the Ivy League” but an effective promotional strategy for the University of Chicago’s “fresh-water economics,” combined with the “return of inflation and budgetary deficits, exacerbated by the expenses of the Vietnam War, underscored the limits of Keynesian regulation. The portrait of Friedman on the cover of *Time Magazine* in 1969 (and the cover of the *New York Times Magazine* in 1970) attests to the success of the strategy of vulgarization—made also in strict alliance with the financial milieu, which had never accepted Keynesian doctrine” (Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* [Chicago: University of Chicago Press, 2002]: 80–81).

52. See Michel Crozier, Samuel Huntington, and Joji Watanuki, “The Crisis of Democracy,” *Report on the Governability of Democracies to the Trilateral Commission* 13 (1975): 164–65, quoted in Gary Teeple, *Globalization and the Decline of Social Reform* (Atlantic Highlands, NJ: Humanities Press, 1995), 124. Huntington wrote the section on the United States, decrying the realization of “too much democracy” that had resulted in an “overload” on government, financial and otherwise, and that required the limiting of social expectations and, ultimately, social outcomes.

53. James O'Connor, *The Fiscal Crisis of the State*, 2nd ed. (New Brunswick, NJ: Transaction, 2002).
54. Dezalay and Garth, *Internationalization of Palace Wars*, 73–82.
55. Jason DeParle, “Goals Reached, Donor on Right Closes Up Shop,” *New York Times*, May 29, 2005, available at <http://www.ncrp.org/goalsreachedNYT.asp>.
56. Ibid.
57. Harvey, *Brief History of Neoliberalism*, 43.
58. “Powell Memo,” quoted in Harvey, *Brief History of Neoliberalism*, 43.
59. Sol Picciotto, “What Rules for the Global Economy,” in *Regulating International Business: Beyond Liberalization*, edited by Sol Picciotto and Ruth Mayne (New York: St. Martin’s, 2001), 4.
60. See generally Harvey, *Brief History of Neoliberalism*.
61. Ibid., 3.
62. Ibid., 2. Margaret Thatcher, whose government cemented the triumph of neoliberalism in the United Kingdom, famously remarked, “There is no such thing as society: there are individual men and women and there are families” (ibid., 23).
63. See Chantal Thomas, “Should the World Trade Organization Incorporate Labor and Environmental Standards?” 61 *Washington & Lee Law Review* 347 (2004), noting the lack of effective labor and environmental protections at the WTO.
64. See Gilpin’s discussion of the trilemma of international monetary policy in *Global Political Economy*.
65. “Despite . . . the beginnings of a neoliberal erosion of various areas of the welfarist model, the shielders have proved to be remarkably resilient. . . . It is clear then that the shielders’ strategy has been under attack in recent years. However, the fact [the welfare state] has survived bears testimony to the desire by large swathes of voters, public servants and other interest groups to maintain a form of integration with the world economy that protects and shields society from the more harmful effects of market forces” (Palan and Abbott, *State Strategies*, 119).
66. Susan Strange, *Mad Money: When Markets Outgrow Governments* (Ann Arbor: University of Michigan Press, 1998): 4–7. See also Susan Strange, *Casino Capitalism* (Oxford, UK: Blackwell, 1986).
67. Gill, “Globalization,” 413.
68. See William Forbath, “Class, Caste, and Equal Citizenship,” 98 *Michigan Law Review* 1 (1999), and William Forbath, “The New Deal Constitution in Exile,” 51 *Duke Law Journal* 165 (2001).
69. See Jeffrey Rosen, “The Unregulated Offensive,” *New York Times Magazine*, April 17, 2005, 42; Rosen uses Judge Douglas Ginsburg’s reference to the “Constitution in Exile” to describe the right-wing movement of those advocating a return to a *Lochner*-era view of economic liberty and limitations on the power of the federal government.
70. *Lochner v. New York*, 198 U.S. 45. The Supreme Court in *Lochner* declared, “The freedom of master and employees to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution” (64). The Court held that such a law would conflict with the bakers’ liberty interest in their freedom to contract (64) and noted, “Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours per week” (57). Justice Oliver Wendell Holmes famously retorted in dissent: “This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics” (75, Holmes, J., dissenting).

71. *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., dissenting), arguing that “[i]f anything, the ‘wrong turn’ was the Court’s dramatic departure in the 1930s from a century and a half of precedent” in overturning cases such as *Lochner*.

72. See Sunstein, *Second Bill of Rights*, 874.

73. *Adkins v. Children’s Hospital*, 261 U.S. 525, 557–58 (1923).

74. *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937).

75. Sunstein, *Second Bill of Rights*, 875.

76. See generally Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 1999).

77. Forbath, “Class, Caste, and Equal Citizenship,” 67.

78. *Ibid.*

79. *Ibid.*, 73–75.

80. See Frank Michelman, “On Protecting the Poor through the Fourteenth Amendment,” 83 *Harvard Law Review* 7 (1969): 29–30, advocating a reading of the Constitutional as protecting Rawlsian “just wants.”

81. *Ibid.*

82. Forbath, “Class, Caste, and Equal Citizenship,” 76–77.

83. With the outbreak of war, the Dixiecrats joined “ranks with the minority-party Republicans to defeat those 1940s legislative programs and structural innovations and institutional reforms in the executive branch that looked toward ‘completing the New Deal’ by enacting and implementing FDR’s ‘second Bill of Rights’” (*ibid.*, 78).

84. See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, NY: Cornell University Press, 2003): 8–10. “We should be careful not to confuse possessing a right with the respect it receives or the ease or frequency with which it is enforced” (*ibid.*, 9).

85. See David Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), 14, arguing that “hard,” black-letter human rights law is not necessary to realizing rights.

86. See generally Don Mitchell, “State Restructuring and the Importance of ‘Rights Talk,’” in *State Devolution in America: Implications for a Diverse Society*, edited by Lynn A. Staeheli, Janet E. Kodras, and Colin Flint (Thousand Oaks, CA: Sage, 1997), 118–39, critiquing pragmatist philosopher Richard Rorty’s negative assessment of the potential of “rights talk.”

87. See Paul Farmer, *Pathologies of Power: Health, Human Rights and the New War on the Poor* (Berkeley: University of California Press, 2003). Farmer argues that “human rights scholarship has [wrongly] been largely the province of lawyers and judicial experts” and should be deployed by victims and their advocates and allies against the gross human rights violations—especially violations of economic and social rights—that are “abetted by existing legislation” (*ibid.*, 7, 11).

88. Harvey, *Brief History of Neoliberalism*, 248–52, puts forward a modern framework for those interested in realizing human rights, including economic, social, and cultural rights.

89. Charles L. Black Jr., *A New Birth of Freedom: Human Rights Named and Unnamed* (New Haven: Yale University Press, 1999): 87.

90. *Ibid.*, ix (note that the text of the Fourteenth Amendment actually mentions “privileges or immunities”).

91. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” (§ 1).

92. *The Slaughterhouse Cases*, 83 U.S. 36 (1873). The Court held that the only “privileges or immunities” protected by the Fourteenth Amendment are the

rights to petition the government, freely access the seaports, and use the courts and other government agencies of the federal government; protection by the federal government of life, liberty, and property when on the seas or abroad; the right of peaceful assembly; the writ of habeas corpus; and the right to use the country's navigable waters (*ibid.* at 79–80).

93. See generally Sunstein, *Second Bill of Rights*, 235–44. For discussion of the Powell Memo, see Harvey, *Brief History of Neoliberalism*, 43.

94. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). See also *id.* at 486–87 (Goldberg, J., concurring).

95. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

96. Forbath, “Class, Caste, and Equal Citizenship,” 75. See also Owen Fiss, “The Supreme Court 1978 Term: The Forms of Justice,” 93 *Harvard Law Review* 1 (1979); Fiss describes adjudication as “the social process by which judges give meaning to our public values” and rights and remedies as “but two phases of a single social process—of trying to give meaning to our public values,” and says that the 1960s “were an extraordinary period in the history of the judiciary in America [when judges found themselves] . . . forever straddling two worlds, . . . the world of the Constitution and the world of politics. He derives his legitimacy from one, but necessarily finds himself in the other” (2, 52, 58). On the issue of the trend toward innovation in the enforcement of social and economic rights internationally, see generally Jeanne Woods, “Emerging Paradigms of Protection for “Second Generation” Human Rights,” 6 *Loyola Journal of Public Interest Law* 103.

97. Black, *New Birth of Freedom*, 93.

98. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

99. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

100. “In many countries comparative advantage is constituted significantly by a cost advantage that results partially from the relative absence of government restrictions on business, such as minimum wage rates, maximum hour rates, workplace regulations, environmental regulations, and so on” (Thomas, “Constitutional Change,” 43–44). See also Gilpin, *Global Political Economy*, 137–38.

101. Rodrik, “How Far,” 182–84.

102. Friedman, *Lexus and the Olive Tree*, 87.

103. Rodrik, “How Far,” 182.

104. In describing this phenomenon, Angela Harris references James Ferguson's work, which describes orthodox economics' discourse about economic development as an “anti-politics machine” that restricts the legitimate scope of discussion about economic policy and castigates social protection into the realm of “politics” exercised by “special interests”; Angela Harris, “From Stonewall to the Suburbs? Toward a Political Economy of Sexuality,” 14 *William & Mary Bill of Rights Journal* 1539 (2006). See also James Ferguson, *The Anti-Politics Machine: “Development,” Depoliticization, and Bureaucratic Power in Lesotho* (Minneapolis: University of Minnesota Press, 1994).

105. Rodrik, “How Far,” 184.

106. “Apart from language in the preamble affirming ‘full employment’ and ‘raising standards of living,’ WTO law contains no provisions that set out affirmative labor standards” (Thomas, “Should the World Trade Organization,” 368).

107. *Ibid.*, 381 (citing Constitution of the International Labor Organization, Treaty of Versailles, June 28, 1919, Part XIII, § 1, 49 Stat. 2713, 2714, 225 Consol. T.S. 189, 373).

108. Article II, section 2, clause 2.

109. John Yoo, “Laws as Treaties? The Constitutionality of Congressional-Executive Agreements,” 99 *Michigan Law Review* 757 (2000): 766, citing Congressional Research Service studies.

110. "As far as I can tell, no legal scholar has attempted to conduct an empirical survey of the use of treaties versus congressional-executive agreements to regulate different subjects" (ibid., 762n16).

111. Thomas, "Constitutional Change," 2.

112. Administrative Procedure Act of 1946, 5 U.S.C. § 500 *et seq.*

113. Thomas, "Constitutional Change," 40.

114. See Neil Siegel, "International Delegations and the Values of Federalism," 70 *Law and Contemporary Problems* \_\_ (forthcoming), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=971066](http://papers.ssrn.com/so13/papers.cfm?abstract_id=971066), at 4 ("when international human rights obligations are implicated, moreover, federalism values are properly overridden.")

115. Restatement (Third) of the Foreign Relations Law of the United States § 303, cmt. e.

116. Jackson, Davey, and Sykes, *Legal Problems of International Economic Relations*, 48.

117. Yoo, "Laws as Treaties?" 765–66.

118. Jackson, Davey, and Sykes, *Legal Problems of International Economic Relations*, 92.

119. See "GATT Implementing Legislation," *Hearings on S. 2467 before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2nd Sess., 285–339 (1994) (statements and testimony of Laurence Tribe and Bruce Ackerman).

120. See Bruce Ackerman and David Golove, "Is NAFTA Constitutional?" 108 *Harvard Law Review* 801 (1995), and Tribe, "Taking Text and Structure Seriously."

121. The WTO agreement, but not the NAFTA agreement, did in fact pass the Senate by more than the two-thirds majority required by the Treaty Clause, so as to the WTO agreement, this debate may be merely academic. However, NAFTA did not gain the support of two-thirds of the Senate. See Tribe, "Taking Text and Structure Seriously," 1227.

122. *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1319 (11th Cir. 2001).

123. Forbath, "Class, Caste, and Equal Citizenship," 4–5.

124. U.S. CONST. amend 14, §5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.")

125. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

126. Sunstein, *Second Bill of Rights*, 153–54.

127. See Kavaljit Singh, *Taming Global Financial Flows: Challenges and Alternatives in the Era of Financial Globalization; A Citizen's Guide* (2000), 197–200.

128. See generally Walden Bello, *Deglobalization: Ideas for a New Global Economy* (London: Zed Books, 2005).

129. A number of international trade scholars have commented on linkage in recent years. See, for example, Thomas, "Should the World Trade Organization?"; Michael Trebilcock and Robert Howse, "Trade Policy and Labor Standards," *Minnesota Journal of Global Trade* 14, no. 2 (2005): 261–300; Jeffrey Dunoff, "Rethinking International Trade," 19 *University of Pennsylvania Journal of International Economic Law* 347 (1998); and Andrew Guzman, "Trade, Labor, Legitimacy," 91 *California Law Review* 885 (2003).



## PART III

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# The Impact of Private Governance and Public-Private Partnerships



## CHAPTER 8

# Making the World Safe for Standard-Setting

Philip J. Weiser

Globalization has created a fundamental challenge for antitrust enforcement: How do governments regulate U.S.-based firms when corporate operations are transnational, but antitrust authorities in different jurisdictions exercise independent oversight? One emerging trend is a multiheaded competition regime, in which mergers or potentially anticompetitive activity involving U.S.-based companies must pass muster with not only U.S. competition authorities but also those of other countries (such as the European Union's competition authority).<sup>1</sup> Meanwhile, the United States has acceded to strong global rules in areas such as intellectual property (IP) and trade law. In the case of the World Intellectual Property Organization (WIPO), national authorities are required to adopt laws in compliance with international treaty obligations. As to the World Trade Organization (WTO), that body enjoys independent dispute resolution authority. In the case of antitrust law, however, no such international institution appears to be in the offing.

In the face of overlapping and potentially inconsistent regimes, the principal response by U.S. and foreign antitrust agencies to globalization and multijurisdictional oversight is to encourage convergence of national antitrust standards and a dialogue on antitrust approaches. Yet globalization presents particularly significant challenges for oversight of information-based industries that are, by definition, operating in international markets. Increasingly, information technology (IT) firms operate in an international environment in which collaboration across countries and industry segments promises greater market opportunities and procompetitive innovation. One significant development among these global IT

firms is the establishment of standard-setting organizations (SSOs) to facilitate the development of new markets and to enable companies to work together effectively. Increasingly, such bodies are international by design, using the power of the Internet to involve engineers from all over the world in the development of new standards. Consequently, SSOs both facilitate the development of industry standards, which “are widely acknowledged to be one of the engines of the modern economy,”<sup>2</sup> and represent a challenge to the traditional national oversight of competitive activity.

These standard-setting bodies, particularly with regard to how they regulate the use of intellectual property in official standards, are both mindful of and greatly affected by antitrust oversight. For instance, consider that the effort to develop a standard for third-generation wireless communications has sparked an international round of antitrust and IP litigation. In the United Kingdom, as an example, Qualcomm filed a legal action against Nokia, alleging that the Finnish firm had infringed “two Qualcomm patents in GPRS (General Packet Radio Service) and EDGE (Enhanced Data Rates for GSM Evolution) phones.”<sup>3</sup> Nokia responded by filing its own suit in the United States (in Delaware state court), claiming that Qualcomm had failed to comply with a standard-setting body’s requirement that it license certain patents on fair, reasonable, and nondiscriminatory terms.<sup>4</sup> Commenting on the matter, Nokia alluded to the possibility of multiple jurisdictions getting involved in this dispute, explaining, “This action seeking resolution through the Court follows the European Telecommunications Standardization Institute (ETSI) dispute resolution process.”<sup>5</sup> Finally, Nokia and other firms have complained to the European Union’s antitrust authority that Qualcomm has failed to live up to its commitment—made as part of its participation in a standard-setting body—to license its patented “technology on fair, reasonable and [non]-discriminatory terms.”<sup>6</sup>

As illustrated by the Qualcomm-Nokia dispute, the challenges of globalization include the need to develop an effective enforcement strategy for an environment where different jurisdictions could potentially decide matters related to IT standard-setting differently from one another. Particularly in high-stakes disputes emerging from intellectual property rights (IPRs) and standard-setting, firms are likely to seek favorable forums wherever they can find them around the world. As of yet, however, standard-setting bodies have not developed effective strategies to prevent such forum shopping, leading to lawsuits around the world aimed at defining and enforcing SSO IPR licensing rules.<sup>7</sup> Unlike some aspects of antitrust oversight (say, the essential facilities doctrine),<sup>8</sup> different jurisdictions cannot adopt different approaches on SSO IPR policies without creating considerable confusion and undermining the globalized nature of the IT marketplace. In particular, because producers focus on international markets and users seek to benefit from economies of scale and network effects,<sup>9</sup> standard-setting in the information industries is an inherently international activity, and participants in this process cannot easily comply with different rules in different parts of the world.

The disputes related to standard-setting are only now emerging in full bloom because of the increased role that intellectual property (and, in particular, patents) plays in official standards. As recently as the early 1990s, patents were largely irrelevant in the software context, mostly large firms dominated standard-setting, and SSOs operated based on an ethic of cooperation, without the need for formal policies on matters such as IP licensing. Indeed, as with the development of the basic Internet standards, standard-setting efforts emerged out of a quasi-academic and cooperative environment dedicated to developing effective technologies. Today, most standard-setting efforts must deal with conflicting business objectives and a series of pitfalls, including IPRs that must be managed effectively in order for a standard to succeed. And such battles involve high stakes, as the selection (or rejection) of particular standards can make or break IT companies.

This chapter explores and explains the emerging issues related to anti-trust oversight of standard-setting in a globalized economy. The first section outlines how standard-setting bodies have emerged as an important force in the information economy. The second section traces the evolution of antitrust law as it applies to SSOs, explaining how it has changed from a posture of skepticism to one of presumptive endorsement. The third section explains how SSOs have adapted to the challenges of managing IPRs related to official standards. The fourth section returns to the question of how international antitrust oversight should address official standard-setting, followed by a brief conclusion.

## **THE EMERGENCE OF STANDARD-SETTING IN THE GLOBALIZED INFORMATION ECONOMY**

On many accounts, the first notable national standard was the development of a uniform standard for railroads during the American Civil War.<sup>10</sup> This standard not only helped the North win the war (on account of its superior supply-chain management) but also helped to spur the success of the railroad industry. In so doing, it underscored the importance of interoperability in network industries. Over the last twenty-five years, as the digital revolution has picked up steam, economists have increasingly studied such issues, developing new models of “network economics.”

For the information economy, standards are uniquely important to facilitating the success of many new products and enabling different forms of interoperability on a global scale. In particular, different forms of interoperability range from enabling compatibility between rival products (e.g., enabling two telephone networks to communicate with one another), between platform products and complementary ones (e.g., enabling different products, such as modems, to plug into the telephone network), and between new products and old ones (e.g., enabling old software programs to work with a new computer operating system). Given the importance of interoperability in the information industries, it is not surprising that controversies and possible solutions related to interoperability issues have

proliferated, with the increasing development of interoperable (and open) standards being one notable development. As one commentator noted more than ten years ago, “If all industries set standards at the same rate, one might expect fewer than one percent of standards pages to relate to information technology,” yet—as early as 1996—“more than 50 percent of all new standards pages [were] related to information technology.”<sup>11</sup> More than ten years later, the standards-intensive nature of the information industries show no signs of receding, and the Internet has greatly fueled standards development activity, making clear that such standards set the framework for international markets in IT products in both hardware (e.g., wi-fi routers) and software (e.g., instant messaging).

As an economic matter, standards are important and sometimes difficult to develop because they resemble, at least in many cases, a “public good.”<sup>12</sup> As classically defined, a public good is a resource that is nonrivalrous (A’s consumption of the good does not diminish its availability to B), nonexcludable (A cannot keep B from consuming it), and nonexhaustible.<sup>13</sup> Many standards, such as the size of paper used in copy machines or the TCP/IP standard that facilitates global Internet communications, share these qualities. In general, the production of public goods creates a dilemma because individuals have an incentive to “free-ride” (i.e., not contribute to their production) rather than to help make the necessary investments. In the standard-setting context, the fundamental question is why customers or producers of a particular product would support a standard-setting effort if they can enjoy the benefits—facilitating the emergence of new products, enabling interoperability between related products (either competitive or complementary ones), or ensuring product quality—without investing time or resources in that effort.

Reflecting the public significance of many standards, governments traditionally viewed standard-setting as a function that they could and should assist. In terms of the Internet, for example, the U.S. government initially subsidized the development of TCP/IP as well as the Internet Engineering Task Force (IETF) that oversaw its evolution. In the telecommunications arena, regulatory authorities also have played an active role in standard-setting for any number of reasons. In particular, regulators engaged in standard-setting matters due to the presence of a dominant firm that required regulatory oversight; a belief that a fractured marketplace would not adopt important standards; or a desire to attain industrial policy goals.<sup>14</sup>

In today’s global marketplace, the case for national standard-setting is often difficult to make. After all, there is a premium on international cooperation and, to the extent that one country’s efforts succeed, it may well facilitate benefits that will be shared widely. Reflecting both the international pressures and the criticisms of government standard-setting,<sup>15</sup> the emerging attitude of policy makers is that the private sector should lead in standard-setting.<sup>16</sup> Indeed, the EU Commissioner for Information Society and Media recently explained that “for governments to make a viable case for choosing any standard is much more difficult” than it was when the European Union took a more active role, such as the setting of the GSM

mobile telecommunications standard.<sup>17</sup> Similarly, the Clinton administration praised the model of private standard-setting and concluded that it was “unwise and unnecessary for governments to mandate standards for electronic commerce.”<sup>18</sup>

For standard-setting that takes place in the private sector, many engineers and engineering societies have traditionally viewed that activity as a form of public service whereby engineers act in their professional capacities and do not represent the interests of private firms. In the development of the Internet, for example, the IETF viewed itself as a quasi-academic body whose mission was to develop new standards based on “rough consensus and running code.”<sup>19</sup> Over the last ten years or so, the more romantic vision of standard-setting has clashed with the reality of a more contentious process that is fraught with business implications.<sup>20</sup> Consequently, even IETF working groups are now heavily comprised of industry representatives, a development underscored by the organization’s acceptance of patented technologies as part of its standards and the increased delays in agreeing upon official standards.<sup>21</sup> Nonetheless, it is still admirable that standard-setting bodies are able to maintain a “quasi-idealistic mission that succeeds through group synergy,” enabling their participants to “strive against long odds in what, at times, seems to be opposed to common sense and reality.”<sup>22</sup>

Given the dynamic and globalized nature of the information industries, the continuing development of new markets helps to explain the dramatic growth in standard-setting over the last decade.<sup>23</sup> To be sure, the engineering ethic of contributing to technological development for its own sake is still important, but more fundamentally, many companies believe that they cannot refrain from participating in standard-setting because “architecture wins technology wars.”<sup>24</sup> As a collective matter for involved companies, new standards initiatives tend to provide important business opportunities because they “typically expand the total size of the market and may even be vital for the emergence of [a new] market in the first place.”<sup>25</sup> In practice, because standard-setting bodies generally set “lowest common denominator” standards that leave room for proprietary extensions,<sup>26</sup> firms are potentially advantaged or disadvantaged by their understanding (or lack thereof) as to how the technological architecture is developing.

Another force that is raising the profile of standard-setting around the world is the increasing importance of patented technologies in official standards. In particular, if a standard includes patented technology controlled by a single firm, that firm can charge royalties to all users of the standard. To be sure, such royalties may well be regulated by a commitment to license the technology at “reasonable and nondiscriminatory” (RAND) terms, but this limitation—as discussed below—may only be minimally restrictive.

For smaller firms that cannot easily compete in an often global market where they must spur the development of a network based on their product, an established and well-accepted standard that welcomes compatible applications may well provide them with an ability to compete.<sup>27</sup> Stated

differently, standard-setting bodies can overcome collective action problems—that is, the need to signal to complementors and distributors the importance of supporting a new product—that might otherwise destroy a product’s chance of success despite its high quality.<sup>28</sup> As standards have grown in importance and become more international, an increasing number of firms now participate in the standard-setting process and often seek to patent technologies related to official standards,<sup>29</sup> making standard-setting less “clubby,” more political, and increasingly marked by adversarial business objectives (as opposed to a cooperative and problem-solving ethos). To address the challenges of managing “patent thickets,”<sup>30</sup> standard-setting bodies have responded by sometimes requiring the disclosure of relevant IPRs and often mandating that they be licensed at RAND terms.<sup>31</sup>

Managing claims for patent royalties is important because doing so can ensure that open standards remain inexpensive and can be adopted widely. Take, for example, the case of Wi-Fi, which is thriving because it is inexpensive.<sup>32</sup> By contrast, “if the cost of the technology goes up to pay for the license, even a little bit, it could throw off the economics.”<sup>33</sup> Not only would royalty payments jeopardize the proliferation of Wi-Fi technology, but it would increase the price of Wi-Fi equipment and thereby undermine the ability of this technology to thrive (as opposed to would-be rivals such as Bluetooth).

In short, SSOs, as one survey of cited patents suggested, “not only select important technologies but also may influence their future.”<sup>34</sup> Like formal standard-setting bodies, informal consortia can also be very important in establishing new technologies.<sup>35</sup> Formal standard-setting bodies (at least in the United States) are generally associated with the American National Standards Institute (ANSI) and commit to follow due process-like procedures.<sup>36</sup> Bodies such as ANSI and the Institute of Electrical and Electronics Engineers (IEEE) emphasize open participation and eschew any requirements of undue financial contributions or limitations on voting. By contrast, informal consortia, such as the Bluetooth Special Interest Group, generally operate with a considerable degree of proprietary control by the founding members or are limited to specific participants that make a financial commitment to the standards organization.<sup>37</sup> Such consortia initially were created to respond to the lack of focus and speed on the part of formal standard-setting bodies, but some have suggested that they have increasingly failed to live up to such aspirations.<sup>38</sup> In any event, both formal SSOs and consortia aspire to develop standards and face challenges such as how to regulate the use of intellectual property in approved standards, and thus I shall not differentiate between the two types of organizations, using the term *SSO* to refer to both of them.<sup>39</sup>

## THE LAW AND ECONOMICS OF STANDARD-SETTING

Standard-setting bodies present a challenge for antitrust law in a global economy. As noted at the outset, the challenge for antitrust oversight of



standard-setting in a multijurisdictional environment is to develop a rough consensus so that SSOs do not face different antitrust rules across the world. In general, antitrust law is developing a more hospitable attitude toward the cooperation among competitors necessary to facilitate new standards. In particular, based on insights from network economics and the recognition that new forms of cooperation have given rise to new products, antitrust enforcers have become increasingly tolerant of standard-setting activity. Nonetheless, as explained below, courts and commentators have yet to coalesce on a well-defined strategy for evaluating the competitive effects of standard-setting.

### Standard-Setting and Antitrust Law

The initial stance of U.S. antitrust law toward standard-setting bodies reflected the received wisdom that collective decision making by industry participants undermined competition.<sup>40</sup> In an early case involving a standardized container for milk, for example, the Seventh Circuit upheld the Federal Trade Commission's (FTC) condemnation of an agreement on the ground that it was used to facilitate collusion on pricing.<sup>41</sup> In so doing, the court declined to consider the procompetitive aspects of uniform container sizes, ruling that the purpose and effect of the standardized container was not to comply with government health regulations, to create economies of scale in packaging, or to prevent consumer confusion, but that it was designed and implemented because it was "easier to reach the goal of uniform prices on a standard product than on one which was not."<sup>42</sup> Over time, courts have reassessed their initial skepticism of standard-setting, recognizing that some efforts represent "praiseworthy effort[s] at self-regulation [rather] than a device for facilitating supracompetitive pricing."<sup>43</sup>

The traditional skepticism of concerted conduct by industry participants was certainly overly broad, but it also reflected legitimate concerns about exclusionary arrangements. In the famous *Allied Tube* case, for example, the Supreme Court ruled that an SSO's refusal to certify as safe the use of plastic conduit constituted an illegal restraint of trade designed to exclude entry from an equally efficient competitor.<sup>44</sup> In that case, the SSO's action had an anticompetitive effect because many government agencies adopted its recommendations on safety regulation.<sup>45</sup> Consequently, *Allied Tube* provides that standard-setting activity that both is motivated by an exclusionary purpose and creates such an effect is legally suspect. In so doing, *Allied Tube* followed earlier decisions (such as *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*)<sup>46</sup> in concluding that biased and discriminatorily enforced standards can give rise to antitrust liability.

To respond to the concerns of antitrust courts, many standard-setting bodies have established procedural safeguards and have sought to avoid playing a quasi-regulatory role. In *Eliason Corp. v. National Sanitation Found.*, for example, the Sixth Circuit turned away an antitrust challenge to a standard-setting program that tested products in a patently nondiscriminatory fashion and made no attempt to exclude disapproved products from

the market.<sup>47</sup> This approach avoids evaluating the merits of the standard or judgments about the SSO itself—matters upon which antitrust courts (and particularly juries) are unlikely to be able to render effective judgments.<sup>48</sup> Instead, it emphasizes procedural safeguards, such as whether the SSO's decisions are likely to injure competition and whether its membership includes customers or only competing producers.<sup>49</sup> By so doing, it recognizes the important point made in *Allied Tube*: when standards are set based upon “objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages.”<sup>50</sup>

The emerging antitrust stance on standard-setting continues to harbor some of the traditional skepticism that collective decision making largely advances exclusionary objectives. Consider, for example, the recent decision in *Golden Bridge Technology, Inc. v. Nokia, Inc.*,<sup>51</sup> which rejected a motion to dismiss a claim that an SSO's decision about a particular technology constituted a per se illegal group boycott—even without any allegation that the decision necessarily created an anticompetitive effect. In that case, unlike *Allied Tube*, the SSO's decision merely failed to include a firm's proprietary technology—notably, it did not shun that technology as unsafe nor knowingly signal to governmental authorities that it should be barred from use.<sup>52</sup>

Policy makers increasingly recognize that the traditional skepticism of collective decision making on matters involving product standards for quality, safety, or interoperability purposes can be counterproductive.<sup>53</sup> In particular, many standard-setting efforts—like the one in *Golden Bridge*—merely facilitate the development of new products. By contrast, cases like *Allied Tube* raise distinct concerns insofar as they represent efforts by an incumbent firm to use standard-setting forums backed by government authority to prevent new forms of entry.<sup>54</sup>

## The Law and Economics of Interoperability

The establishment of a standard to promote interoperability presents regulators with an apparent opportunity to promote economic efficiency. Viewed statically, interoperability increases competition and therefore should lower prices to consumers. Such a static perspective, however, does not take into account that the opportunity to charge supracompetitive rates for a period of time is often what motivates the development of new technologies in the first place. In honor of Joseph Schumpeter, the late Austrian economist who heralded the importance of technological innovation and described economic progress as driven by forces of “creative destruction,”<sup>55</sup> the concept of dynamic efficiency is often equated with “Schumpeterian competition.” From the Schumpeterian perspective, it is the competition *for* the market and not *within* the market that really matters.<sup>56</sup>

The theory behind patent law's guarantee of a temporary monopoly on the use of an invention is in line with Schumpeter's theory of innovation. To that end, the patent system offers innovators an unrestrained hand—and

protection from competition—in how they price their invention. For industries requiring significant upfront investments in research and development (R&D), the incentive of a patent, along with its prospect of charging supra-competitive prices (often referred to as “monopoly rents”), is critical to spurring innovation. As Thomas O. Barnett, assistant attorney general in the Bush administration, put it, “Where innovation requires substantial up-front research and development costs, a rational firm will elect not to innovate if it anticipates a selling environment that too quickly resolves to marginal cost of production.”<sup>57</sup> Highlighting the flaw in the traditional economic focus on perfect competition (and the pricing of products at marginal cost), this point is often referred to as the “marginal cost fallacy.” That is, for industries with significant sunk and irreversible costs (such as telecommunications), marginal cost pricing “will not provide an adequate return to the investors who provide capital,” leading investors to be “cautious about investing money upfront because *ex post* competition could drive prices to nonremunerative levels.”<sup>58</sup>

From a purely Schumpeterian perspective, efforts to facilitate interoperability that would limit the ability of an inventor to reap monopoly rents might present a case of killing the goose that lays the golden eggs.<sup>59</sup> There is, however, another perspective—that of “network effects.” In this view, the innovation that develops a new market may not be dominant because of a novel invention (say, backed by patent protection), a superior product, or an effective marketing strategy. Rather, a market leader may capture a dominant position because of the presence of strong network effects—that is, the value created because a product enjoys a large customer base, whereas rivals possess relatively small customer bases.<sup>60</sup> Invoking this perspective, Carl Shapiro suggested that, in network industries, the “lack of compatibility can be the death-knell of a new technology.”<sup>61</sup>

The concept of network effects is increasingly familiar to lawyers and businesspersons alike. In the old economy, it was largely irrelevant whether a greater number or only a few individuals adopted a particular product. In the new economy, particularly for information and communications technology products, the more users who adopt a product, the more valuable that product is. In the case of the telephone network (or instant messaging, to take a more modern example), there is a clear and direct network effect—the more people a user can contact, the more valuable the service is. In the case of Microsoft’s operating system, the network effect is indirect—the more users of Windows, the greater the incentive to develop applications for that product (rather than for other, less popular operating systems). For both direct and indirect network effects, there is a positive feedback effect—a more valuable platform creates more demand for that platform, making that platform yet more valuable.

### The Role for Antitrust in Overseeing Standard-Setting

A fundamental choice for antitrust policy as well as IP law is whether the government should put a thumb on the scale to influence the nature of competition in particular markets. By encouraging or discouraging

compatibility between potentially rival products (say, by subjecting cooperative efforts to greater or lesser antitrust scrutiny), policy makers can influence how an industry evolves. How antitrust policy should view compatibility issues is a matter of some controversy, with the Schumpeterian perspective suggesting the importance of intersystem competition (based on incompatibility) and the network effects perspective championing the importance of intrasystem competition (based on compatibility).

To make matters more complicated, it may well be that the proper strategy for antitrust oversight will depend on the dynamics of the particular market at issue. As the D.C. Circuit observed in *United States v. Microsoft*: “the economic consequences of network effects and technological dynamism [may] act to offset one another, thereby making it difficult to formulate categorical antitrust rules absent a particularized analysis of a given market.”<sup>62</sup> In *Microsoft*, the court concluded that dominant firms have an obligation not to adopt technologies that exclude rivals without a legitimate business reason. In so doing, however, it made clear that “[a]s a general rule, courts are properly very skeptical about claims that competition has been harmed by a dominant firm’s product design changes.”<sup>63</sup> Nonetheless, the *Microsoft* case showed that there is a role for antitrust law to prevent the sabotage of the development of open standards by a firm seeking to maintain its expectation-based dominance.<sup>64</sup> Indeed, a critical issue in the *Microsoft* case was Microsoft’s deception of Java developers in an effort to frustrate the development of an open standard that threatened the dominance of its platform.<sup>65</sup>

Given the uncertainty between different policy strategies and how particular market dynamics might influence the appropriate strategy, it is a fair starting point for antitrust enforcers to proceed cautiously in this area and avoid categorical approaches that would either deem conduct per se illegal or per se lawful. To this end, courts and policy makers generally reject the notion that all standard-setting efforts are a front for collusion, and they increasingly appreciate that many such initiatives serve procompetitive purposes. Recognizing this point, Congress enacted the Standards Development Organization Advancement Act of 2004, providing for rule-of-reason oversight of standard-setting activity and restricting the availability of treble damages.<sup>66</sup>

In addition to adopting a cautious stance on regulating standard-setting, antitrust enforcers should appreciate how particular factors counsel deference to the decisions of standard-setting bodies and skepticism that antitrust oversight will be beneficial. First, deference toward standard-setting should be even more pronounced where the SSO is predominantly comprised of individuals whose interests are not to exclude competitors or reap monopoly profits, but rather to promote greater product quality, interoperability, or facilitate the emergence of a new product. Second, if a rival standard exists—even if it is not popular—its ability to constrain any market power of an official standard should be a factor in evaluating the merits of antitrust oversight.<sup>67</sup> Third, the value of antitrust oversight is suspect when a firm complains of conduct that was disclosed to the SSO before it selected a standard (say, licensing arrangements for intellectual property embodied in an official standard) and the SSO—assuming it

followed regular procedures and was not captured by a particular firm's interest—proceeded to approve the standard.<sup>68</sup>

Antitrust law's transformation from a skeptical to a hospitable stance toward cooperation on standards-related issues reflects an increasing appreciation for the dynamics of the information economy and the role of network effects. Rather than endure a costly standards war in which rival firms sponsor incompatible products, a cooperative venture—whether through a consortium of private firms or an open standard-setting body—can, as FTC chair Deborah Majoras noted, “allow products supplied by different firms to interoperate, making them more valuable to consumers and thus increasing the chances of market acceptance.”<sup>69</sup> After all, as one standard-setting veteran explained, “Although interoperable products can provide great value for customers, that value may not be realized unless standards exist to foster the availability of a network of related, interoperable products; many innovative products might never have existed without standards.”<sup>70</sup> In light of this recognition, Majoras suggested a tolerant stance toward standard-setting, explaining that “we have not seen frequent instances of naked collusion” in standard-setting and adopting an attitude markedly different from decades earlier.<sup>71</sup>

The evolving attitude toward standard-setting bodies has accepted their procompetitive virtues and focused on a new concern: the problem of patent holdup.<sup>72</sup> This problem reflects the confluence of the increased patenting in the technology sector as well as the increasing proliferation of standards to facilitate interoperability between competing or complementary products. As the FTC explained in its report on intellectual property and competition policy:

If an innovator or producer learns that it has infringed a patent only after it has committed sunk costs to its innovation and production—and thus locked in to the effort—the patentee may be in a position to demand supracompetitive royalty rates. If, before lock in, the downstream actor had known about the patent and could have designed its product or innovation around it, then the firm might have used the opportunity to adopt alternative designs as leverage for seeking a competitive royalty rate. But after lock in, the downstream actor no longer has that option. Redesigning a product after significant costs have been sunk may not be economically viable.<sup>73</sup>

Reflecting this point, the FTC has since concluded, “Antitrust scrutiny of possibly deceptive conduct in the standard-setting context is especially warranted when the standard-setting body has determined to carry out its work in an environment ostensibly characterized by cooperation rather than rivalry.”<sup>74</sup>

In theory, when technologies compete for inclusion in a standard, no patent holder can demand more than a competitive royalty rate. But after the standard is set and firms have incurred sunk investments in producing particular products, patent holders are in a position to extract supracompetitive royalties. The challenge in identifying holdup behavior in practice is that there may not be a clear benchmark for the relevant technology, and its

apparently high rates might be the product of cutting-edge technology “developed through ‘superior skill, foresight, and industry.’”<sup>75</sup> Moreover, to the extent that rival technologies to the standard exist, those rivals should limit the ability of a patent holder to extract supracompetitive royalties.

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To date, the *Rambus* decision is the FTC’s (as well as any antitrust authority’s) most dramatic decision involving antitrust oversight of standard-setting bodies. In that case, Rambus allegedly participated as a member of the Joint Electron Device Engineering Council (JEDEC) at the same time that it amended pending patent applications so as to cover the standard under consideration. As the FTC alleged in its complaint, Rambus violated the antitrust laws by “deliberately engaging in a pattern of anticompetitive acts and practices that served to deceive [JEDEC], resulting in adverse effects on competition and consumers.”<sup>76</sup> Even though Rambus officially withdrew from JEDEC before the final standard was adopted, the FTC concluded that it did so after failing to disclose its pending patent applications and with the intention of pursuing a holdup strategy. Finally, as the FTC appreciated, the *Rambus* decision emerged in a context where none of the mitigating factors noted above was present; in particular, there were no marketplace rivals to the selected standard, and Rambus had not disclosed its patents and intended licensing fee before the adoption of the standard.

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The *Rambus* decision is only beginning to influence the conduct of standard-setting, and some have suggested that a heightened role for antitrust in this area is inappropriate. In one line of criticism, Assistant Attorney General Barnett suggests that “if the government is too willing to step in as a regulator, rivals will devote their resources to legal challenges rather than business innovation” and, in particular, will not engage in “Schumpeterian competition.”<sup>77</sup> In a second line of criticism, Deputy Assistant Attorney General Gerald Masoudi emphasized that compulsory licensing of intellectual property as an antitrust remedy should be rare, citing *Trinko* for the proposition that antitrust authorities should avoid assuming “the day-to-day controls characteristic of a regulatory agency.”<sup>78</sup> Finally, Prof. Herbert Hovenkamp has claimed that failures by firms to disclose their patent positions and to later engage in a holdup strategy are beyond the competence of antitrust authorities to address and “are probably best addressed via the institutional design of standard-setting procedures, including predis-closure obligations, rather than by antitrust.”<sup>79</sup> To evaluate the merits of antitrust oversight in this area, the next section assesses the institutional strategies used by standard-setting bodies to avoid holdup, and the section that follows then investigates the proper role for antitrust law in this area.

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## INSTITUTIONAL RESPONSES TO HOLDUP

A significant challenge to standard-setting organizations in a global economy is how to avoid holdup-type scenarios. To address that challenge, many SSOs have adopted the strategy of mandating disclosure of any patent rights that inhere in official standards. In general, however, the principal safeguard against holdup is a requirement that firms participating in an

SSO commit to license any patented technology at RAND terms—a requirement that begs the question of what RAND actually requires. To address such concerns, an increasing number of SSOs have adopted a policy of requiring holders of essential patents to commit to certain licensing terms before the patents are included in official standards.

## The Disclosure Requirement

Mandating that firms disclose their intellectual property rights related to standards under consideration sounds like a fairly straightforward requirement. It is not. To avoid addressing a series of difficult questions related to the nature of a disclosure requirement, many SSOs leave the nature of the requisite search obligation vague or ambiguous on any number of dimensions. In particular, a number of SSOs' IPR policies do not specify the extent of the requisite search (i.e., whether it focuses on the knowledge of the participant or imposes a broader duty), whether the search covers patent applications as well as issued patents, or whether it is mandatory (or merely encouraged).

The diversity of possible approaches to a disclosure requirement is quite broad. At one extreme, SSOs can mandate a search of a participating firm's entire patent portfolio—but at the risk of creating an undue burden and a considerable disincentive for firms to participate.<sup>80</sup> At the other extreme, if firms are held accountable for only patents of which the firm's representative was aware, there is an incentive to send representatives with little knowledge of the firm's patent activity. In general, SSOs attempt to steer a middle course, eschewing a broad disclosure requirement, but also requiring reasonable inquiries so that firms cannot strategically avoid complying with the requirement.

The American National Standards Institute, which recommends that all accredited SSOs impose a disclosure requirement, has explained the principal virtues behind this procedure. In particular, its IP implementation guidelines state:

Experience has indicated that early disclosure of essential patents or essential patent claims is likely to enhance the efficiency of the process used to finalize and approve standards. Early disclosure permits notice of the patent to the standards developer and ANSI in a timely manner, provides the participants the greatest opportunity to evaluate the propriety of standardizing the patented technology, and allows patent holders and prospective licensees ample time to negotiate the terms and conditions of licenses outside the standards development process itself.<sup>81</sup>

Notably, ANSI recognizes that the presence of patented technology is a relevant consideration for SSOs selecting an official standard and that the awareness of licensing terms can influence the choice of whether to include a particular technology in an official standard.

Even after striking a balance on the extent of the search obligation, there are a series of other questions that SSOs must consider in crafting a

disclosure requirement. As an initial matter, SSOs must decide what type of patents must be disclosed—that is, whether pending (or future) patent applications are subject to the disclosure duty—as well as when the disclosure duty arises (say, at the time of the vote on the standard) and what consequences attach in the absence of a required disclosure (say, being subject to a RAND or royalty-free mandate). Moreover, SSOs must define the concept of an “essential patent claim,” through either a broad concept regulating all patents related to the standard or a narrower one focusing only on patents that are necessary to its implementation because no technically feasible technology exists.<sup>82</sup> In calibrating the nature of the disclosure obligation, SSOs need to be cautious about overbroad approaches that would extend the scope of the disclosure obligation to all patents related to the standard (as opposed to those necessary to its implementation), broaden the disclosure obligation to patents that might conceivably be related to the standard during any part of its development,<sup>83</sup> or expect the disclosure of confidential unpublished patent applications.<sup>84</sup>

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In both antitrust and patent litigation involving Rambus, the JEDEC’s lack of a clear disclosure requirement became a significant issue, underscoring the need for SSOs to evaluate the clarity of their policies. For the Federal Circuit (in a case addressing the relevant IP issues), the lack of a clear disclosure requirement undermined the claim that Rambus’s patents should be subject to equitable estoppel or an implied license (let alone the basis of a common law fraud claim). In particular, the court concluded that the JEDEC rule could only be interpreted as imposing an objective duty on participants to disclose patents involving essential claims. As it explained:

[T]he disclosure duty operates when a reasonable competitor would not expect to practice the standard without a license under the undisclosed claims.... To hold otherwise would contradict the record evidence and render the JEDEC disclosure duty unbounded. Under such an amorphous duty, any patent or application having a vague relationship to the standard would have to be disclosed. JEDEC members would be required to disclose improvement patents, implementation patents, and patents directed to the testing of standard-compliant devices—even though the standard itself could be practiced without licenses under such patents.<sup>85</sup>

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By contrast, the FTC’s ruling holding Rambus liable under antitrust law adopted a “totality of the circumstances” approach to discerning the relevant disclosure obligation, considering Rambus’s subjective attitude, other JEDEC members’ understanding, and the behavior of other JEDEC members. Based on this approach, the FTC concluded that “Rambus’s silence, in the face of members’ expectations of disclosure, created a misimpression that Rambus would not obtain and/or enforce such patents.”<sup>86</sup>

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## The RAND Licensing Requirement

Traditionally, many standard-setting bodies have maintained that the essential—and only necessary—safeguard against holdup is a commitment by all participating firms to license necessary patent claims at RAND terms



and conditions. As of 2002, an overwhelming majority of SSOs with written IP policies (twenty-four out of thirty-six surveyed) included some form of a RAND licensing commitment.<sup>87</sup> Attesting to the popularity of this approach, the IEEE, in its comments to the FTC, suggested that the

only reasonable approach [to safeguarding against holdup concerns], and one that has proven to be very efficient and effective for decades, is to ensure that any known patent holders whose patents may be required (i.e., essential to implement or use the standard) are willing to offer licenses under terms and conditions that are reasonable and not unfairly discriminatory.<sup>88</sup>

In so stating, however, it acknowledged that this model is “performed on a voluntary and reasonable best-effort basis”<sup>89</sup>—begging the question as to whether it can succeed in an environment in which firms (like Rambus) are behaving more strategically and are not motivated by a spirit of cooperation.

The overwhelming belief in commitment to RAND licensing as an effective strategy against holdup begs for closer analysis as to what the RAND commitment means in practice. As an initial matter, it is important to ask whether a commitment to RAND licensing is self-evident as to what it requires. In principle, the answer is relatively straightforward, as most commentators agree that “the concept of a ‘reasonable’ royalty for purposes of RAND licensing must be defined and implemented by reference to *ex ante* competition, i.e., competition in advance of standard selection.”<sup>90</sup> In practice, however, an approach that leaves the meaning of *RAND* unsettled until after a standard is adopted and implemented is highly problematic. After all,

what a patent holder considers to be a “reasonable” royalty rate will inevitably be considerably higher than what licensees believe such a rate to be, particularly at the *ex post* stage when the patent holder has the added leverage flowing from the lock-in effect of the industry adoption of the standard.<sup>91</sup>

Recognizing the extent of the leeway under a RAND commitment, some commentators have suggested that, even under a RAND commitment, a firm can “unilaterally impose onerous license terms at that ‘ex post’ stage, an anticompetitive exercise of artificially created seller market power that adversely affects consumer interests generally.”<sup>92</sup>

Scholarly opinion has generally been skeptical that the RAND commitment, standing alone, provides much of an effective safeguard. Robert Skitol, for example, contends that, “Requiring RAND assurances makes sense in general but becomes counterproductive—a tool for misuse—when SSOs foreclose any opportunity for participants to ascertain what RAND will mean (actual license terms) prior to voting on the proposed standard in question.”<sup>93</sup> Similarly, Mark Lemley concluded, after a thorough survey of SSO IP policies, that the RAND commitment is often an empty formulation:

Virtually no SSO specifies the terms on which licenses must be granted beyond the vague requirement that they be “reasonable” and “nondiscriminatory.” ... The result is uncertainty over the cost and scope of patent licenses that may not prove much better than having no policy at all.<sup>94</sup>

The best defense of the RAND commitment as providing a real safeguard is Joseph Miller's suggestion that it is, viewed properly, merely a commitment to accept a liability (i.e., damage) rule and to forgo a property rule (i.e., seeking an injunction). As he sees it, "the details of the license that the parties later negotiate [under the auspices of a RAND commitment] are quite minor compared to the paramount importance of establishing the patentee's inability to seek an injunction."<sup>95</sup> Consequently, Miller terms the RAND commitment as a "transaction cost-minimizing governance structure equivalent to the separate patent licensing corporation that sits at the center of the typical patent pool."<sup>96</sup> This view of RAND is certainly plausible, but until courts rule on actions such as the one filed by Nokia against Qualcomm requesting this relief, the practical impact of a RAND commitment remains to be seen.

### **The Endorsement of the SSO and the Value of Postdisclosure Negotiations**

The increasing concern that a RAND commitment does not provide a sufficient constraint on later royalty negotiations has led some standard-setting organizations to require a front-end disclosure and negotiation of licensing terms. To be sure, most SSOs have yet to require that participants disclose much information related to any essential patents, with 90 percent of those SSOs requiring some form of disclosure not calling for any information related to the pricing of essential patent claims.<sup>97</sup> Consequently, except for in a relatively few cases, SSOs do not have the necessary information to make price-quality trade-off judgments as to the merits of one proposed standard versus another option.

Recognizing the limits of the RAND commitment and the potential value of an up-front evaluation of licensing terms, a number of commentators have suggested that SSOs should provide a period of time to evaluate the royalty sought in the wake of the relevant disclosure.<sup>98</sup> In the past, such a model has generally been rejected on the grounds that, first, the engineers who participate in standard-setting are not well positioned to make the necessary business judgments assessing the merits of technologies based on the relevant royalties and, second, any such negotiations would, in effect, constitute an illegal group boycott under the antitrust laws.<sup>99</sup> I reject both suggestions, for reasons discussed in turn below.

### ***The Dynamics of Technology-Price Evaluations***

The classic response to the call for a greater awareness of the relevant costs of different technologies is that such a judgment is beyond the purview of the engineers who traditionally take part in standard-setting. As I see it, this attitude about standard-setting reflects an antiquated desire to preserve the model of standard-setting as a quasi-public service by technologists. To be sure, standards continue to serve an important public function, and many engineers still retain a public-interest-type concern about

technology quality. The reality, however, is that standard-setting decisions can make or break companies, the process has grown increasingly contentious, and the IP issues alone are increasingly determinative as to whether a standard can succeed. Consequently, to maintain the traditional stance amidst a new reality—as some standard-setting bodies do<sup>100</sup>—is both unsustainable and unwise.

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There are notable challenges in designing a disclosure system that can allow for judgments about both the quality of the technology and associated IP issues. If implemented appropriately, a disclosure regime can “encourage *ex ante* competition between substitute technologies without limiting the legitimate rights of patent-holders or harming innovation incentives.”<sup>101</sup> This ideal is indeed the same principle that animates the commitment to RAND licensing, except it is implemented on the front end as opposed to the back end. It is debatable whether this model will be more effective than a RAND commitment, but it is clear that a sole reliance on RAND licensing is an imperfect strategy, and it is worth investigating the effectiveness of alternative approaches.

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With respect to the weaknesses of the front-end model of scrutinizing IP licensing terms, it is likely that SSOs that implement such a system may encourage some participants to focus their efforts elsewhere. Notably, setting licensing policies in advance of a market’s development places a burden on businesses that they may prefer not to bear—both in terms of identifying relevant patents and placing a value on them. But any delays or burdens created by this activity earlier in the process may well save time down the road, at which point the process of licensing necessary technology without the aid of any clear guideposts can be time consuming, contentious, and costly (even with a RAND commitment).<sup>102</sup> Finally, even though asking “individuals who are not knowledgeable about or authorized to make decisions about licensing terms”<sup>103</sup> will require a change in the culture of standard-setting, this process is already under way and will become well accepted over time.

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In short, the reality is that patents are increasingly a part of what makes standards successful and thus SSOs cannot afford to ignore their existence. To pretend that decisions on standards are made on purely technical grounds is irresponsible and unrealistic, meaning that there are powerful reasons why SSOs should seek to understand the relevant patent issues and associated licensing terms before committing to particular approaches. As one observer has argued, “The more that is known before a standard is adopted, the better from the standpoint of anticipating and protecting against the post-adoption exercise of market power that a patent may confer if it is essential to the standard’s use.”<sup>104</sup> Over time, norms and policies will increasingly change to reflect this new reality—a trend underscored by ANSI’s current stance on the issue, which allows participants to make voluntary written disclosures of licensing terms.<sup>105</sup>

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It is important not to overstate the extent of the evaluation of licensing terms at the stage where an SSO endorses a proposed standard. Notably, this approach merely asks firms to disclose a maximum royalty rate and commit to a number of key nonprice terms without calling for a

thoroughgoing negotiation up front. Thus, while it may well be “folly to expect, much less insist upon, *ex ante* negotiation of detailed, tailored license terms,”<sup>106</sup> there are important issues that can be worked out on the front end in addition to an often vague commitment to RAND terms and conditions.

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### *Post-Disclosure Negotiations and Antitrust Oversight*

The cause for antitrust concerns related to up-front royalty discussions are increasingly diminished as antitrust enforcers, courts, and Congress have emphasized the procompetitive nature of standard-setting in general and such discussions in particular. FTC chair Majoras, for example, suggests that “joint *ex ante* royalty discussions that are reasonably necessary to avoid hold up do not warrant *per se* condemnation.”<sup>107</sup> In her view, the firms that mandate royalty-free licensing commitments have, in effect, already done just that. Moreover, she explains, front-end discussions on licensing terms can “prevent delays in the implementation of the standard resulting from *ex post* litigation (or threats of it), which may involve inefficient allocation of resources intended for innovation.”<sup>108</sup>

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At the Department of Justice, Assistant Attorney General Barnett signed a business review letter in 2006 that for the first time gave its blessing to a standard-setting body’s policy of requesting that all patent holders disclose their maximum royalty rate and most restrictive nonprice licensing terms before the body vote on any proposed standard.<sup>109</sup> In so doing, the department also indicated that it would evaluate any collective negotiation and discussion of royalty terms (which was not the case in the matter reviewed) “under the rule of reason because such practices could be procompetitive.”<sup>110</sup> Finally, in their joint report *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, the FTC and Department of Justice embraced the rule-of-reason model, further explicating the approach articulated by Majoras and Barnett.<sup>111</sup>

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In the judicial realm, courts are affording SSOs increased leeway. The First Circuit, for example, rejected an antitrust claim by a disappointed bidder that a private consortium of UNIX computer vendors violated the antitrust laws. In so doing, it not only explained that *per se* condemnation was inappropriate but also emphasized the procompetitive potential of standard-setting.<sup>112</sup> Similarly, district court decisions have called for rule-of-reason analyses to assess whether up-front royalty restrictions create anticompetitive effects.<sup>113</sup> To be sure, there are still anomalous decisions by courts that view standard-setting efforts with considerable skepticism,<sup>114</sup> but such decisions are increasingly rare and on shaky ground. In short, most courts recognize the obligation of antitrust plaintiffs to demonstrate the anticompetitive effects of a standard-setting-related decision, including ones related to licensing issues.<sup>115</sup>

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Weighing in on this issue, Congress enacted the Standards Development Organization Advancement Act, encouraging not only the disclosure of IPRs in proposed standards but also “discussions among intellectual

property rights owners and other interested standards participants regarding the terms under which relevant intellectual property rights would be made available for use in conjunction with the standard or proposed standard.”<sup>116</sup> In particular, this law calls for rule-of-reason scrutiny of decisions that emerge from formal standard-setting organizations and immunized such bodies from treble damage liability. To be sure, this statute applies only to formal SSOs (and not to other standard-setting bodies or individual members of formal SSOs), but its reasoning is more generally instructive, as well.

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The evolving stance on the role of antitrust oversight of standard-setting reflects an increasing appreciation that SSO private ordering-based solutions are likely to be more effective than antitrust authorities in policing against holdup concerns. The international nature of technology development and the multijurisdictional challenge of antitrust oversight mandates an even greater degree of caution concerning active antitrust oversight, as such a policy will most certainly invite conflicting approaches across the globe. In some contexts, different antitrust standards can even be healthy, allowing for different experiments as to the proper level of enforcement. In the standard-setting arena, however, the international nature of the activity does not allow standard-setting bodies to respond to different levels of oversight. Rather, most SSOs will be placed in the untenable position of attempting to satisfy all applicable antitrust rules—even when they are self-contradictory. The next section, therefore, outlines the case for a modest role for antitrust oversight of standard-setting in a global economy.

## THE ENFORCEMENT OF SSO IP POLICIES, THE PROPER ROLE FOR ANTITRUST, AND THE COMPLICATIONS OF MULTIJURISDICTIONAL OVERSIGHT

Standard-setting organizations are increasingly aware that they have a responsibility to develop and enforce rules to ensure that firms do not abuse the standard-setting process. As a legal matter, however, there are serious questions as to whether SSOs are in a position to enforce intellectual property policies as contracts or, in the alternative, as creating implied licenses. Moreover, as a practical matter, only a limited number of SSOs have any procedure in place for resolving disputes.<sup>117</sup> Consequently, a critical question for antitrust law is whether it is suitable to fill the breach and act as a backstop for enforcing SSO IP policies.

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### A Role for Antitrust Law?

In terms of the role for antitrust law as a response to holdup concerns, there are three possible theories:

1. Antitrust imposes an oversight regime to guard against holdup regardless of the underlying disclosure obligation.<sup>118</sup>

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2. Antitrust law serves to reinforce (and enforce) the disclosure obligation by providing a remedy.
3. Antitrust defers to the presence of an intellectual property right and leaves it to IP law (or private ordering) to guard against holdup.

On the last argument, it merits notice that in the *Verizon v. Trinko* decision can be read as counseling against antitrust oversight over IPRs, both in terms of incentives to innovate as well as in terms of the difficulties in overseeing any antitrust remedy. Nonetheless, as former Assistant Attorney General Hewitt Pate explained, “The mere presence of an IP right that somehow figures in a course of otherwise anticompetitive conduct does not act as a talisman that wards off all antitrust enforcement.”<sup>119</sup>

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As I have argued elsewhere with respect to antitrust and regulation, I believe that antitrust oversight can complement intellectual property law and private ordering.<sup>120</sup> In fact, effectively focused antitrust oversight can bolster the effectiveness of private standards bodies that might otherwise be less vigilant in ferreting out abusive conduct. Significantly, in order to enjoy the continued deference (as opposed to immunity) from antitrust liability, SSOs will need to protect their reputations for procedural regularity and unbiased administration. Thus, at least as a backstop for egregious cases of patent holdup, antitrust law can play a constructive role in addressing anticompetitive conduct emerging out of standard-setting activity.

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Although the threat of holdup appears to be a significant issue for antitrust authorities, there are questions as to how pervasive such threats are. As one commentator has suggested, the number of relevant abuses and disputes “remains very small when viewed in the context of overall standards development.”<sup>121</sup> Others, however, have maintained that

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patent holdup has been a real problem, introducing delay, inefficient allocation of resources intended for innovation, and the possibility for individual patent holders to exercise unjustified control over the design of fundamental technology infrastructure on which the entire marketplace depends.<sup>122</sup>

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In particular, one SSO has changed its patent policy on the ground that two previous episodes of holdup—where the presence of a RAND commitment was judged insufficient to ensure reasonable licensing terms—caused significant additional costs and delays in one case and rendered the standard commercially unviable in the other.<sup>123</sup>

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Even to the extent that antitrust oversight can be effective, the dynamic and globalized nature of the IT industries means that actions like that in *Rambus* should be reserved to truly exceptional (and very egregious) cases. As discussed above, a rule of antitrust restraint increases the likelihood that different jurisdictions will not interpret and apply the rules of antitrust oversight of standard-setting differently, thereby placing SSOs in the untenable position of facing contradictory directives. Stated differently, because of the international nature of standard-setting, national antitrust authorities cannot afford to conduct different experiments as to the appropriate level of antitrust enforcement (as they can in many other areas).

Even putting aside the international dynamic, a second reason for anti-trust restraint in the oversight of standard-setting is that it is important not to displace institutional experimentation and alternative strategies for addressing holdup. In the aftermath of a consent decree action involving Dell, for example, some commentators expressed concern that the anti-trust theory of the case was not well explained, leaving observers with the possible impression that antitrust law imposed on all participants in SSOs a comprehensive duty to search their patent portfolios before standards were adopted.<sup>124</sup> Therefore, in developing antitrust rules, enforcers and courts must be mindful of the ongoing experimentation in this area—meaning that it would be a mistake to preempt the variety of approaches now being used in favor of a uniform strategy driven by federal guidelines.<sup>125</sup> Indeed, the opportunity for standard-setting to take place in different contexts is an important strength of the U.S. system.<sup>126</sup> For this reason, ANSI has strongly opposed any suggestion that antitrust authorities displace the diversity of approaches used by SSOs.<sup>127</sup>

A final reason that antitrust enforcers should be careful about overly aggressive efforts to enforce SSO IP policies is that antitrust courts are often not in a position to devise effective remedies. In the *Rambus* case, for example, the FTC faced the question of how to “so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.”<sup>128</sup> This mandate required that the FTC undertake the difficult step of discerning what competitive conditions would hold absent Rambus’s forbidden conduct.<sup>129</sup> Thus, in that case, the FTC needed to evaluate—after the fact—whether JEDEC would have selected Rambus’s technology had it known that Rambus possessed a patent.<sup>130</sup> Concluding that it would not have done so or would have demanded a RAND commitment if it did, the FTC imposed a compulsory license on Rambus for the technologies for which it engaged in a patent holdup gambit.<sup>131</sup>

### A Modest Role for Antitrust and the Risks of Multijurisdictional Oversight

Given the realities that antitrust oversight can take place abroad or at home, it is quite possible that there will be competition between jurisdictions (or forum shopping) to provide enforcement of antitrust oversight over standard-setting activity. If such divergence in antitrust enforcement were to become significant enough (i.e., if jurisdictions take radically different views on the procompetitive virtues of standard-setting), it would undermine the very enterprise of standard-setting. Thankfully, there is a considerable degree of convergence in the attitudes of U.S. and European Union antitrust authorities, which are by far the most active agencies in antitrust matters.<sup>132</sup> Nonetheless, as antitrust law continues to develop in this area, it is important that international antitrust authorities adhere to similar principles and not undermine the potential for standard-setting bodies to operate internationally without facing antitrust liability.

As explained above, the most important point is that international anti-trust authorities should be hesitant to be overly interventionist either in second-guessing SSO solutions to holdup concerns (such as requiring a commitment to a maximum licensing arrangement) or to address what appears to be a holdup situation. There are, to be sure, efforts by SSOs that will cross over into collusive conduct and efforts by individual firms to abuse the standard-setting process, but there is still an emerging response by the bodies themselves to develop institutional protections against patent holdup. In the main, it is very likely that those protections—and not antitrust oversight—will protect the integrity of standard-setting processes.

Because standard-setting so closely relates to the success of individual firms with respect to their IP portfolios and business strategies, firms will often be willing to seek redress under antitrust law when SSOs make decisions that hurt them in the marketplace. It is thus critical that antitrust authorities—both in the United States and around the world—not allow themselves to be pulled into second-guessing expert judgments about standards or about price-quality comparisons insofar as one technology involved patent claims whereas another one did not. Given that standard-setting is often an inherently international exercise, the opportunity for firms to take advantage of forum-shopping possibilities is a real risk that can undermine SSOs' capacity to develop effective governance mechanisms.

Antitrust authorities still have a great deal to learn about standard-setting, but I believe there is an emerging scholarly consensus that can guide antitrust enforcement around the world. First, antitrust authorities should recognize that standard-setting efforts are generally procompetitive and should not scrutinize them skeptically (say, by using *per se* rules). In particular, the case for deferring to SSOs is even stronger where there is no evidence of procedural irregularity and where the composition of the SSO suggests that consumer interests (and not merely producer interests) are well represented. Second, antitrust authorities should not impose guidelines or other rules that would limit the ability of SSOs to craft unique approaches. Notably, the tolerance of diverse approaches by SSOs should include a willingness to allow them to mandate disclosure of licensing terms and conditions before the decision to endorse a particular technology as part of a standard. Finally, antitrust authorities should recognize that they are positioned to play an important enforcement role in extreme cases, such as Rambus's apparent holdup strategy, but that such actions should be exceptional and should not be viewed as an alternative to SSO-based safeguards against holdup.

## CONCLUSION

The information technology industries are, by many accounts, the quintessential globalized industry. For standard-setting efforts to operate effectively, it is critical that SSOs develop effective strategies to address holdup-behavior and different jurisdictional tribunals enable such efforts to



operate. Therefore, the best stance for international antitrust authorities is to allow such bodies to experiment and develop new strategies, particularly when aggrieved firms complain that otherwise procedurally regular and diverse SSO made decisions that hurt their business models.

Over time, there will certainly be some exceptional cases where antitrust oversight is appropriate, but the principal goal for antitrust oversight should be to allow SSOs to develop their own strategies for addressing such conduct and preventing it from occurring. Thankfully, international antitrust authorities have not—unlike in merger review in cases like GE-Honeywell—found themselves adopting markedly diverse approaches to standard-setting. As SSOs experiment with new approaches to address IPR issues in a global marketplace, it is important that antitrust authorities continue to allow them the latitude to develop effective governance mechanisms to prevent holdup and promote effective standard-setting.

## NOTES

1. An early harbinger of the tensions inherent in this regime emerged in the European Union's review of the merger of Boeing and McDonnell-Douglas, in which the European Commission's antitrust review threatened to bar the merger of two American companies that had already passed muster at the Federal Trade Commission (FTC). That threat took on increased significance in the wake of the General Electric-Honeywell merger, in which the European Commission blocked a merger between two U.S.-based companies that had been approved by U.S. antitrust authorities. Meanwhile, in 2004, it imposed penalties and regulatory requirements on Microsoft above and beyond the requirements set forth in a U.S. consent decree.

2. U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Washington, DC: GPO, 2007): 6, available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>. See also *Dell Computer Corp.*, 121 FTC 616, 626 (1995), highlighting "the important role of standard setting in the technological innovation that will drive ... competitive vigor in the 21st Century."

3. Nancy Gohring, "Qualcomm Sues Nokia in U.K.," IDG News Service, May 25, 2006, available at [http://www.infoworld.com/article/06/05/25/78666\\_HNqualcommssuesnokia\\_1.html](http://www.infoworld.com/article/06/05/25/78666_HNqualcommssuesnokia_1.html).

4. "Nokia Asks Delaware Court to Enforce Qualcomm's Contractual Obligations in Essential Patent Licensing," *WebWire*, August 9, 2006, <http://www.webwire.com/viewpressrel.asp?aid=18170>.

5. Ibid.

6. Nancy Gohring, "Qualcomm Accused of Anticompetitive Conduct in EU," IDG News Service, October 28, 2005, available at [http://www.infoworld.com/article/05/10/28/HNqualcommeu\\_1.html](http://www.infoworld.com/article/05/10/28/HNqualcommeu_1.html).

7. Nancy Gohring, "Nokia Files Complaint against Qualcomm," IDG News Service, August 9, 2006, available at [http://www.infoworld.com/article/06/08/09/HNnokiasuesqualcomm\\_1.html](http://www.infoworld.com/article/06/08/09/HNnokiasuesqualcomm_1.html).

8. See, for example, Robert Pitofsky, Donna Patterson, and Jonathan Hooks, "The Essential Facilities Doctrine under U.S. Antitrust Law," 70 *Antitrust Law Journal* 443 (2002).

9. Carl Cargill, "Evolutionary Pressures in Standardization," prepared statement for Hearing on the Role of Technical Standards in Today's Society and the Future, Subcommittee on Technology of the House Committee on Science, 106 Cong. 63 (2001), available at <http://www.sun.com/software/standards/Testimony-Final-reformatted.pdf>.

10. Philip Shaw Paludan, *A People's Contest: The Union and the Civil War, 1861-1865* (New York: Harper & Row, 1988).

11. Steven Oksala, Anthony Rutkowski, Michael Spring, and Jon O'Donnell, "The Structure of IT Standardization," *StandardView* 4, no. 1 (1996): 10.

12. To be more precise, standards are fairly considered an "impure public good" that "combine aspects of both public and private goods," serving a purpose for private firms, but also producing public benefits as well. Consequently, how standards "are produced is a societal choice of significant consequence" (U.S. Congress, Office of Technology Assessment, "Global Standards: Building Blocks for the Future" [Washington, DC: GPO, 1992], 14, 23).

13. For a description of the public goods concept, see Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods*, 2nd ed. (New York: Cambridge University Press, 1996), 240-326. See also Michael L. Katz and Carl Shapiro, "Systems Competition and Network Effects," *Journal of Economic Perspectives* (Spring 1994): 93, 102-3, which notes that "an open communications network shares many features with a public good; small users may free-ride on large users who may bear the costs necessary to create and market the network."

14. For a discussion of this issue, see Jonathan E. Nuechterlein and Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* (Cambridge, MA: MIT Press, 2005), 385-406.

15. Kathleen M. H. Wallman, "The Role of Government in Telecommunications Standards Setting," 8 *CommLaw Conspectus* 235 (2000).

16. See U.S. Office of Management and Budget, Circular No. A-119 revised, February 10, 1998, available at <http://www.whitehouse.gov/omb/circulars/a119/a119.html> (directing agencies to "use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical"); White House, "Read the Framework," July 1, 1997, available at <http://clinton4.nara.gov/WH/New/Commerce/read.html>; Jo Best, "EU Regulator: Let Consumers Pick Telecom Standards," CNet News.com, December 4, 2006, [http://news.com.com/2100-1033\\_3-6140471.html](http://news.com.com/2100-1033_3-6140471.html).

17. Best, "EU Regulator."

18. White House, "Read the Framework." See also Best, "EU Regulator," 28 ("We urge industry driven multilateral fora to consider technical standards in this area.... In some cases, multiple standards will compete for marketplace acceptance.").

19. See Paul Hoffman, "The Tao of IETF: A Novice's Guide to the Internet Engineering Task Force," February 29, 2008, <http://www.ietf.org/tao.html>.

20. "During the 1990s, the IETF evolved from a small, quasi-academic networking community into a high-stakes forum for technical decisionmaking" (Tim Simcoe, "Standard Setting Committees," December 2006, 9, available at [http://siepr.stanford.edu/programs/SST\\_Seminars/Simcoe\\_SSOCmmittes.pdf](http://siepr.stanford.edu/programs/SST_Seminars/Simcoe_SSOCmmittes.pdf)).

21. Philip J. Weiser, "Internet Governance, Standard Setting, and Self-Regulation," 28 *Northern Kentucky Law Review* 822 (2001): 831; Weiser notes: "In 1995, before the Internet became big business, private standard-setting bodies like the IETF could focus on the technical merits of proposed standards without the distorting influence of private companies that would benefit depending on the

ultimate outcome.” See also Simcoe, “Standard Setting Committees,” 25, suggesting that commercialization in the Internet environment increased the standardization process by approximately four months; and Scott O. Bradner, “The Internet Standards Process—Revision 3,” Network Working Group Request for Comments 2026, October 1996, available at <http://www.ietf.org/rfc/rfc2026.txt>.

22. Cargill, “Evolutionary Pressures,” 3.

23. Cargill suggests that a new such body is created every two weeks in the IT sector; “Evolutionary Pressures,” 66.

24. Charles R. Morris and Charles H. Ferguson, “How Architecture Wins Technology Wars,” *Harvard Business Review* (March–April 1993): 86.

25. Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Information Economy* (Boston: Harvard Business School Press, 1999), 236. See also Robert A. Skitol, “Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting,” 72 *Antitrust Law Journal* 727 (2005): 735–36; according to Skitol, IT standards facilitate “joint development of new technologies necessary to the creation and growth of new markets and the related necessity for interoperability among new products.”

26. Morris and Ferguson, “How Architecture Wins Technology Wars,” 89.

27. As Greg Werden explained: “A potential entrant into a market with network effects necessarily faces a disadvantage as compared with the incumbent. Without some offsetting advantage, the potential entrant has no prospect of success, and the stronger the network effects, the greater the potential entrant’s offsetting advantage must be” (Gregory J. Werden, “Network Effects and Conditions of Entry: Lessons from the Microsoft Case,” 69 *Antitrust Law Journal* 87 [2001]: 91–92). This dynamic is particularly true in the Internet context, where “the Internet opened up opportunities for competition” because compatible technologies “opened the door for smaller companies, which built businesses around limited product offerings” (Allen M. Lo, “A Need for Intervention: Keeping Competition Alive in the Networking Industry in the Face of Increasing Patent Assertions against Standards,” statement to the FTC, April 2002, 2, available at <http://www.ftc.gov/opp/intellect/020418lo.pdf>).

28. Werden, “Network Effects,” 109. On its own, a startup firm (or even an established one) might not be able to convince independent complementors to support its product, but a standard-setting body will often be in a far better position to catalyze and encourage support for the new product.

29. Timothy S. Simcoe, “Explaining the Increase in Intellectual Property Disclosure,” December 8, 2005, 2, available at [http://www.rotman.utoronto.ca/timothy.simcoe/papers/sso\\_ipr\\_disclosures.pdf](http://www.rotman.utoronto.ca/timothy.simcoe/papers/sso_ipr_disclosures.pdf); he dates the increase in standard-setting-related patenting to the early to mid-1990s.

30. “Our patent system is creating a *patent thicket*: an overlapping set of patent rights requiring that those seeking to commercialize new technology obtain licenses from multiple patentees” (Carl Shapiro, “Navigating the Patent Thicket: Cross License, Patent Pools, and Standard Setting,” in *Innovation Policy and Economics*, edited by Adam Jaffe, Joshua Lerner, and Scott Stern [Cambridge, MA: MIT Press, 2001], 199, 120, available at <http://haas.berkeley.edu/~shapiro/thicket.pdf>).

31. For the classic study on this point, see Mark A. Lemley, “Intellectual Property Rights and Standard Setting Organizations,” 90 *California Law Review* 1889 (2002).

32. Marguerite Reardon, “Wi-Fi Standards Face Patent Threat,” CNET News.com, November 20, 2006, available at [http://news.com.com/Wi-Fi+standards+face+patent+threat/2100-7351\\_3-6137372.html](http://news.com.com/Wi-Fi+standards+face+patent+threat/2100-7351_3-6137372.html); Reardon quotes Stan

Schatt of ABI Research noting that, because it is inexpensive, “it’s easy to just stick a Wi-Fi chip in a consumer electronics device.”

33. Ibid., quoting Schatt.

34. Marc Rysman and Tim Simcoe, “Patents and the Performance of Voluntary Standard Setting Organizations,” Networks, Electronic Commerce, and Telecommunications Institute Working Paper No. 05-22, October 11, 2005, 21, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=851245](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=851245). Rysman and Simcoe conclude that patents embodied in official standards of ETSI, IEEE, IETF, and the ITU were cited three times as often as others and were cited over a longer period of time, suggesting that the relevant technologies—that is, those embodied in standards—were more influential.

35. Some might also recognize more ad hoc coalitions chartered for specific purposes—sometimes referred to as “promoter’s groups” (or alliances) as an SSO of a sort, but such organizations lack the permanence of their more established counterparts, since they are often created to complete work on initial specifications that will be submitted to an established SSO. See Scott K. Peterson, “Patents and Standard Setting Processes,” prepared statement to the FTC, April 18, 2002, 2, available at <http://www.ftc.gov/opp/intellect/020418scottkpeterson.pdf>, in which Peterson suggests that promoters’ groups are similar to the other forms of standard-setting.

36. American National Standards Institute, “NIST/ITL American National Standards Process,” October 23, 2007, available at <http://www.itl.nist.gov/ANSI/ASD/ER0106.pdf>.

37. The financial contribution can be substantial, routinely running as high as \$60,000 per year and even reaching as much as \$200,000; Cargill, “Evolutionary Pressures.”

38. Ibid.

39. To be sure, the differences between the two types of organizations are significant in a number of ways. First, only technical standards developed by formal SSOs, which are sometimes called “voluntary, consensus standards bodies,” are eligible (and, in fact, required) to be used by federal agencies or to benefit from relaxed antitrust oversight; see OMB, Circular No. A-119 Revised, and Standards Development Organization Advancement Act of 2004, P.L. 108-237, 83 Stat. 661 (2004). Second, in large part because of their due process requirements, formal standards bodies tend to operate on a far slower timetable than informal consortia, which often explains why firms will opt for that model to develop standards to facilitate the emergence and success of a particular project.

40. See Herbert Hovenkamp, “Standards Ownership and Competition Policy,” 48 *Boston College Law Review* 87 (2007): “The history of antitrust policy suggests that it has been unreasonably hostile toward private standard setting” (91).

41. *Milk & Ice Cream Can Inst. v. FTC*, 152 F.2d 478, 482 (7th Cir. 1946).

42. Ibid.

43. *Vogel v. Am. Soc. of Appraisers*, 744 F.2d 598, 603 (7th Cir. 1984) (Posner, J.).

44. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988).

45. Ibid. at 492, 493.

46. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

47. *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126 (6th Cir.), cert. denied, 449 U.S. 826 (1980).

48. “Antitrust tribunals, particularly juries, lack the technical skills to answer such questions as whether chiropractic is really a legitimate form of medical

practice, whether a particular medical procedure is safe and effective, or whether a particular engineering standard is necessary for passenger limousines” (Hovenkamp, “Standards Ownership,” 90–91).

49. See, for example, *Moore v. Boating Indus. Ass’n*, 819 F.2d 693, 699–700 (7th Cir.), *cert. denied*, 484 U.S. 693 (1987), noting the role of customers in rejecting a claim that per se condemnation was appropriate; and *M & H Tire Co., Inc. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 980 (1st Cir. 1984), which ruled that track owner participation in setting tire standards suggested no animus toward firms in that market.

50. 486 U.S. 492, 501 (1988) (citation omitted).

51. *Golden Bridge Technology, Inc. v. Nokia, Inc.*, 416 F.Supp.2d 525 (E.D. Tex. 2006).

52. In fairness to the *Golden Bridge* court, its ruling may well find support in an FTC ruling that a standard-setting body cannot reject a technology on the sole ground that it is patented, even if it is in tension with the reasoning of *Allied Tube*; see *American Society of Sanitary Engineering*, 106 FTC 324 (1985) (automatic exclusion from standard on the ground that a technology is patented violates antitrust laws).

53. Consider, for example, that the enforcement agencies adopted guidelines that recognized the importance of such collaborations. See U.S. Department of Justice and Federal Trade Commission, “Guidelines for Collaborations among Competitors,” April 2000, 1, available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>, which states that “a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.”

54. In this sense, *Continental Airlines, Inc. v. United Airlines, Inc.*, reflected a possible abuse of standard-setting insofar as United Airlines set a standard for allowable carry-on luggage that deliberately negated the advantage of Continental’s airplane fleet that was capable of carrying more than the standard permitted (or United’s planes were capable of handling); see 126 F.Supp.2d 962 (E.D. Va. 2001), *vacated*, 277 F.3d 499 (4th Cir. 2002).

55. Schumpeter described his essential theory of creative destruction as “competition from the new commodity, the new technology, the new source of supply, the new organization ... competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives” (Joseph Schumpeter, *Capitalism, Socialism and Democracy* [New York: Harper Perennial, 1976/1942], 84).

56. As Joseph Farrell and Michael Katz put it, “when firms recognize the possibility of [the market tipping to a single firm], they may compete vigorously to become the dominant supplier: [the] so-called competition for the market” (“The Effects of Antitrust and Intellectual Property Law on Compatibility and Innovation,” 43 *Antitrust Bulletin* 609 [1998]: 611).

57. Thomas O. Barnett, “Managing Antitrust Issues in a Global Marketplace: Interoperability between Antitrust and Intellectual Property,” presentation to the George Mason University School of Law Symposium, September 13, 2006, 3, available at <http://www.usdoj.gov/atr/public/speeches/218316.pdf>.

58. Reed Hundt and Gregory Rosston, “Communications Policy for 2006 and Beyond,” 58 *Federal Communications Law Journal* 1, 6 (2006).

59. Barnett, “Managing Antitrust Issues,” 4.

60. The classic statement of a market characterized by network effects is that “the utility that a user derives from consumption of the good increases with the

number of other agents consuming the good” (Michael L. Katz and Carl Shapiro, “Network Externalities, Competition, and Compatibility,” 75 *American Economic Review* 424 [1985]).

61. Carl Shapiro, “Exclusivity in Network Industries,” 7 *George Mason Law Review* 673 (1999): 682.

62. *United States v. Microsoft*, 253 F.3d 34, 50 (D.C. Cir.) (en banc), *cert. denied*, 534 U.S. 952 (2001); the decision continued: “High profit margins might appear to be the benign and necessary recovery of legitimate investment returns in a Schumpeterian framework, but they might represent exploitation of customer lock-in and monopoly power when viewed through the lens of network economics. . . . The issue is particularly complex because, in network industries characterized by rapid innovation, both forces may be operating and can be difficult to isolate” (citing Howard A. Shelanski and J. Gregory Sidak, “Antitrust Divestiture in Network Industries,” 68 *University of Chicago Law Review* 1 [2001]: 6–7). See also Farrell and Katz, “Effects of Antitrust”: “there is a complex tradeoff between R&D and price competition, and one cannot say in a blanket fashion that either is more valuable than the other” (642).

63. 253 F.3d at 65.

64. Nonetheless, it also emphasized that “[j]udicial deference to product innovation, however, does not mean that a monopolist’s product design decisions are per se lawful” (*ibid.*). In particular, the D.C. Circuit concluded that Microsoft’s decisions to “exclu[de] IE [its Internet Explorer browser] from the Add/Remove Programs utility and commingl[e] browser and operating system code” undermined Netscape’s competitive position and did not rest on any legitimate business justification (*ibid.* at 66–67).

65. “[D]evelopers who relied upon Microsoft’s public commitment to cooperate with Sun and who used Microsoft’s tools to develop what Microsoft led them to believe were cross-platform applications ended up producing applications that would run only on the Windows operating system” (*ibid.* at 76).

66. Standards Development Organization Advancement Act of 2004, P.L. 108-237, §§104–5, 118 Stat. 661, 663–64 (2004).

67. Even without making any sales, a losing standard can still affect “the market outcome as long as the winner’s advantage is not so great that the winner can price as a monopolist and still not lose sales to a rival” (Farrell and Katz, “Effects of Antitrust,” 616).

68. This was the case in *Rockwell v. Townshend*, 2000 WL 433505, at \*5,\*8 (N.D. Cal. Mar. 28, 2000).

69. Deborah Platt Majoras, “Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting,” address at law conference on “Standardization and the Law: Developing the Golden Mean for Global Trade,” Stanford University, September 23, 2005, 1–2, available at <http://www.ftc.gov/speeches/majoras/050923stanford.pdf>.

70. Scott Peterson, “Consideration of Patents during the Setting of Standards,” Federal Trade Commission and Department of Justice Roundtable, November 6, 2002, 1, available at <http://www.ftc.gov/opp/intellect/021106peterson.pdf>.

71. Majoras, “Recognizing the Procompetitive Potential.”

72. Majoras notes the concern about the “potential for an intellectual property rights owner to ‘hold up’ other members of a standard setting organization after a standard has been set” (*ibid.*).

73. Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Washington, DC: GPO, 2003), 29, available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

74. *Rambus, Inc.*, FTC Dock. No. 9302, at 34 (August 2, 2006), available at [www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf](http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf).

75. Majoras, "Recognizing the Procompetitive Potential," quoting *United States v. Alcoa*, 148 F.2d 416, 430 (2d Cir. 1945).

76. Federal Trade Commission, "Initial Decision Reached in Rambus Case," press release, February 24, 2004, available at <http://www.ftc.gov/opa/2004/02/rambusid.shtm>.

77. Barnett, "Managing Antitrust Issues." To support this argument, Barnett cited Justice Antonin Scalia's skepticism in *Trinko* of antitrust-based restrictions on property rights and forced sharing, noting that such measures "may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities" (ibid., quoting *Trinko*, 540 U.S. 398, 407–8 [2004]).

78. Gerald F. Masoudi, "Intellectual Property and Competition: Four Principles for Encouraging Innovation," address at Digital Americas 2006 Meeting, São Paulo, Brazil, April 11, 2006, 8, available at <http://www.usdoj.gov/atr/public/speeches/215645.pdf> (quoting *Trinko*, 540 U.S. at 415, quoting P. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *Antitrust Law Journal* 841 [1989]: 853).

79. Hovenkamp, "Standards Ownership," 106.

80. Requiring "burdensome patent searches" based on the knowledge of entire companies "would discourage participation [in standard setting bodies] since searches are expensive, time consuming, resource intensive and not fool-proof" (IEEE Standards Association, "Comments Regarding Competition and Intellectual Property," April 17, 2002, 2, available at <http://www.ftc.gov/os/comments/intelpropertycomments/ieee.pdf>).

81. American National Standards Institute, "Guidelines for Implementation of the ANSI Patent Policy" (Washington, DC: ANSI, 2003), 5, available at <http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/Guidelines%20for%20Implementation%20of%20the%20ANSI%20Patent%20Policy%202007.DOC>.

82. Compare Internet Society, Internet Engineering Task Force, "Intellectual Property Rights in IETF Technology," March 2005, available at <ftp://ftp.rfc-editor.org/in-notes/bcp/bcp79.txt>, with Distributed Management Task Force, DMTF Patent and Technology Policy, October 2001, available at <http://www.dmtf.org/about/policies/patent-10-18-01.pdf>.

83. A disclosure obligation as to "any patents that 'might' be relevant creates a continuing nightmare because a developing standard may go through many iterations because it ultimately results in an approved standard" (Richard J. Holleman, "A Response: Government Guidelines Should Not Be Issued in Connection with Standards Setting," n.d., 2, <http://www.ftc.gov/opp/intellect/020418richardjholleman2.pdf>).

84. IEEE Standards Association, "Comments Regarding Competition."

85. *Rambus, Inc. v. Infineon Techs. AG*, 318 F. 3d 1081, 1100–1101 (Fed. Cir. 2003).

86. *Rambus, Inc.*, FTC Dock. No. 9302, at 67 (August 2, 2006), available at [www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf](http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf).

87. Lemley, "Intellectual Property Rights," 1904.

88. IEEE Standards Association, "Comments Regarding Competition."

89. Ibid.

90. Daniel G. Swanson and William J. Baumol, "Reasonable and Nondiscriminatory (RAND) Royalties, Standard Selection, and Control of Market Power," 73 *Antitrust Law Journal* 1 (2005): 10–11. Shapiro and Varian add: "Reasonable *should* mean the royalties that the patent holder could obtain in open, up-front

competition with other technologies, not the royalties that the patent holder can extract once other participants are effectively locked in to use technology covered by the patent” (*Information Rules*, 241).

91. Peterson 2002. “Considerations of Patents during the Setting of Standards.”

92. Skitol, “Concerted Buying Power,” 728. See also Swanson and Baumol, “Reasonable and Nondiscriminatory”: “[A] RAND commitment is of limited value in the absence of objective benchmarks that make clear the concrete terms or range of terms that are deemed to be reasonable and nondiscriminatory” (5).

93. Skitol, “Concerted Buying Power,” 729.

94. Lemley, “Intellectual Property Rights,” 1964–65.

95. Joseph Scott Miller, “Standard Setting, Patents, and Access Lock-in: RAND Licensing and the Theory of the Firm,” 40 *Indiana Law Review* 351 (2007): 358.

96. *Ibid.*, note 27.

97. Simcoe, “Explaining the Increase.”

98. See, for example, Skitol, “Concerted Buying Power,” 744; Patrick D. Curran, “Standard Setting Organizations: Patents, Price Fixing, and Per Se Legality,” 70 *University of Chicago Law Review* 983 (2003).

99. Holleman, “A Response,” 4.

100. See Fourth Generation Mobile Forum, “4GMF IPR Guidelines,” draft version, <http://delson.org/4gmobile/ipr.htm>, which states that, at a standards development meeting, attendees “must *not* discuss subjects like the pricing for use of a patent, how a patent should be licensed, validity or interpretation of a patent claim, or any terms or conditions of use.”

101. Simcoe, “Explaining the Increase.”

102. Curran, “Standard Setting Organizations,” 1005.

103. Holleman, “A Response,” 4.

104. Peterson 2002. “Consideration of Patents during the Setting of Standards.”

105. For a critical take on the IEEE’s failure to follow ANSI’s guidelines in this respect, see Jim Zyren, “Revisit IEEE Patent Policy,” *Electronic Engineering Times* (January 10, 2005), available at <http://www.ectimes.com/showArticle.jhtml;jsessionid=C4N5YZNJDQDMKQSNLPCKH0CJUNN2JVN?articleID=57300062>.

106. Miller, “Standard Setting,” 370.

107. Majoras, “Recognizing the Procompetitive Potential.”

108. *Ibid.* (internal quotations omitted).

109. Letter from Thomas O. Barnett, Assistant Attorney General, Department of Justice, to Robert Skitol, October 30, 2006, 9–10, available at <http://www.usdoj.gov/atr/public/busreview/219380.htm>. See also letter from Thomas O. Barnett, Assistant Attorney General, Department of Justice, to Michael A. Lindsay, April 30, 2007, available at <http://www.usdoj.gov/atr/public/busreview/222978.pdf>, adopting a similar stance as to an IEEE IPR policy.

110. Letter from Barnett to Skitol, October 30, 2006, 9n27.

111. U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement*.

112. In particular, Judge Boudin explained: “Where the venture is producing a new product—here, the OFC-1 software package—there is patently a potential for a productive contribution to the economy, and conduct that is strictly ancillary to this productive effort (*e.g.*, the joint venture’s decision as to the price at which it will purchase inputs) is evaluated under the rule of reason” (*Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 [1st Cir. 1998]).



113. *Sony Elecs., Inc. v. Soundview Techs., Inc.*, 281 F. Supp. 2d 399 (D. Conn. 2001).

114. *Golden Bridge Tech., Inc. v. Nokia*, 416 F. Supp. 2d 525, 532 (E.D. Tex. 2006) (applying the per se rule to a decision by a standard-setting effort to exclude a particular technology on account of its licensing demands).

115. In general, the relevant inquiry was well explained by the Sixth Circuit in *Eliason Corp. v. National Sanitation Found.*: “Where the alleged boycott arises from standard-making or even industry self-regulation, the plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable” (614 F.2d 126, 129 [6th Cir. 1980]). See also *Northwest Wholesale Stationers, Inc. v. Pacific Stationer & Printing Co.*, 472 U.S. 284, 294–95 (1985), which ruled that per se treatment was only appropriate when practices were not justified by plausible procompetitive virtues and where the plaintiff has established that the venture “possesses market power or exclusive access to an element essential to effective competition.”

116. 150 Cong. Rec. H3656–3657 (June 2, 2004).

117. Only 9 percent of organizations have a dispute resolution mechanism; Benjamin Chiao, Josh Lerner, and Jean Tirole, “The Rules of Standard Setting Organizations: An Empirical Analysis,” NBER Working Paper No. 11156, January 2005, 19n21, available at <http://www.nber.org/papers/W11156>.

118. Such an approach is suggested in David A. Balto and Daniel I. Prywes, “Standard Setting Disputes: The Need for Guidelines,” n.d., available at <http://www.ftc.gov/os/comments/intelpropertycomments/baltoprywes.htm>.

119. R. Hewitt Pate, “Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust,” speech at the 2005 EU Competition Workshop, Florence, Italy, June 3, 2005, 2, available at <http://www.usdoj.gov/aatr/public/speeches/209359.pdf>. In so stating, Pate referenced the dictum offered by the D.C. Circuit in *Microsoft* (calling it the “classic statement on this point”): “Microsoft’s primary copyright argument borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes. . . . That is no more correct than the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability” (*United States v. Microsoft Corp.*, 253 F.3d 34, 63 [D.C. Cir. 2001]).

120. Philip J. Weiser, “The Relationship of Antitrust and Regulation in a Deregulatory Era,” 50 *Antitrust Bulletin* 549 (2005).

121. Holleman, “A Response,” 1.

122. Daniel J. Weitzner, “Supplemental Comments,” November 6, 2002, available at <http://www.w3.org/2002/11/15-doj-ftc-ipr-weitzner-suppl.html>. Weitzner notes that patent holdup activity occurred within the World Wide Web Consortium 10 percent of the time.

123. Letter from Barnett to Skitol, October 30, 2006.

124. Such criticism is noted in Michael G. Cowie and Joseph P. Lavelle, “Patents Covering Industry Standards: The Risks to Enforceability Due to Conduct before Standard Setting Organizations,” 30 *AIPLA Quarterly Journal* 95 (2002): 124.

125. “I believe that a single set of uniform guidelines will deprive the U.S. of its current flexibility in developing standards according to different processes and policies that in turn are driven by the objectives of the particular standards project and related market factors” (Holleman, “A Response,” 1). See also Gerald F. Masoudi, “Efficiency in Analysis of Antitrust, Standard Setting, and Intellectual Property,” remarks at the High-Level Workshop on Standardization, IP Licensing,

and Antitrust, Tilburg University, Brussels, January 18, 2007, 1, available at <http://www.usdoj.gov/atr/public/speeches/220972.pdf>; Masoudi says the case against more interventionist antitrust oversight “reflects the fact that SDO practices are evolving and it is not yet clear what the specific practices and their effects are likely to be.”

126. As Peterson 2002 (“Patents and Standard Setting Processes”) put it: “There is great value in this diversity. Some technologies are more complex and difficult than others in terms of the facility of their translations into open standards. Marketplace dynamics may call for particularly expedited processes in some instances but can tolerate longer, more deliberate incubation periods in other instances. Some standards may affect the competitive opportunities of more classes of parties and in more fundamental ways than will be the case with other standards, thus calling for different kinds or degrees of participation rights.”

127. Amy A. Marasco, vice president and general counsel of ANSI, notes that IP policies adopted by SSOs “vary widely in response to ... differing needs and objectives” (Amy A. Marasco, “Standard Setting Practices: Competition, Innovation, and Consumer Welfare,” Hearing before the FTC and Department of Justice, April 18, 2002, 2, available at [www.ftc.gov/opp/intellect/020418marasco.pdf](http://www.ftc.gov/opp/intellect/020418marasco.pdf)).

128. *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 88 (1950).

129. “[T]he fruits of a violation must be identified before they may be denied” (*Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1232 [D.C. Cir. 2004]).

130. There is evidence in the record that it would not have. See Rambus, Inc., FTC Dock. No. 9302, at 74 & n.403 (Aug. 2, 2006), available at [www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf](http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf) (“[T]he one time that JEDEC members had advance knowledge that a Rambus patent was likely to cover a standard under consideration, the members took deliberate steps to avoid standardizing the Rambus technology.”); *Id.* at 76 (“[a]lternative technologies were available when JEDEC chose the Rambus technologies ... had Rambus disclosed its patent position.”); and *Id.* at 75 & n.407 (noting that one member of JEDEC reported that “I personally and Sun as a company would have strongly opposed the use of royalty-bearing elements ... in an interface specification”).

131. *Rambus, Inc.*, FTC Dock. No. 9302 (February 5, 2007), available at <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>.

132. See Masoudi, “Intellectual Property and Competition.”

## CHAPTER 9

# Global Terror, Private Infrastructure, and Domestic Governance

Kenneth A. Bamberger

If globalization is defined by “the growth of worldwide networks of interdependence,”<sup>1</sup> then one of its most chilling manifestations is the development of international terrorist networks, notably al Qaeda. Such groups, unfettered by national boundaries, not only epitomize the trend toward globalized networks but succeed specifically because of this development. They receive funding by means of worldwide financial systems, coordinate logistics through international communications networks, and achieve their physical reach through modern transportation methods. Perhaps most significantly, the destructive capacity of individual terror threats arises from the very networked nature of potential targets; the September 11, 2001, attacks proved especially devastating because of the localized assault’s effects on globally linked financial, communications, and transportation infrastructures.

This localized nature of terror attacks underscores the reality that globalization, in the words of sociologist Anthony Giddens, “is not just the dominance of the West over the rest; it affects the United States as it does other countries.”<sup>2</sup> Laptops found halfway across the world reveal digital surveillance of domestic U.S. infrastructure sites as diverse as the Golden Gate Bridge and Las Vegas casinos, while patterns of Middle Eastern and South Asian hits on domestic U.S. digital management systems reveal reconnaissance intended to identify vulnerabilities in energy, nuclear, water, and chemical facilities.<sup>3</sup> The global threat to critical domestic infrastructure poses a challenge for U.S. domestic administration as much as it does for international cooperation.

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The challenge arises, in large part, from both the diversity of domestic targets and the fact that private actors, rather than the government, hold 85 percent of the country's critical infrastructure. Accordingly, those private actors possess information about vulnerabilities, safeguards, response capacity, and network resiliency necessary for the identification and mitigation of domestic terror risks. They also have the capacity to act on that information in heterogeneous contexts.

By contrast, information about firm-specific risks and capacities is frequently inaccessible to public-sector agencies. Moreover, even if such localized knowledge were somehow available to regulators, the existing paradigm of universally applied legal rules could not possibly appreciate the varied manifestations of risk in tens of thousands of private workplaces, chemical storage facilities, transportation structures, and communications networks. Nor could traditional models of static regulation produced by time-consuming administrative process embody sufficient detail to guide behavior accurately, or be flexible enough to anticipate circumstances that change as a result of adaptive terrorist strategies or the implications of decisions made by other members of interlinked networks.

Recognizing both the heterogeneity of critical domestic infrastructure and its largely private nature, the White House has declared, "We must draw upon the resources and capabilities of those who stand on the new front lines—our local communities and private sector entities that comprise our national critical infrastructure sectors."<sup>4</sup> Regulators seeking to combat domestic terror must enlist the aid of private actors to overcome information asymmetries and marshal operational capacity. Indeed, homeland security policy has relied in large part on the self-regulatory capacities of private critical infrastructure holders to determine appropriate measures for identifying vulnerabilities, mitigating risk, and planning for response to catastrophic events.

Scholars across a variety of disciplines have documented the link between globalization and increased reliance on private actors more generally. International relations scholars have described the rise of global governance networks, in which private actors bridge gaps between nation-states.<sup>5</sup> Sociologists have suggested a phenomenon by which national governance has been relegated, in many instances, to enforcing locally the institutions that enable private markets to work globally.<sup>6</sup> Lawyers and economists have documented the rise of a system of global norms governing commerce, arising largely from private ordering and enforced by private institutions of international arbitration.<sup>7</sup> Philip Weiser has, in the previous chapter, pointed to similar phenomena arising from the need to address the network effects of technological interconnectivity globally. No single national government possesses either the power or expertise to determine technical standards to govern worldwide production; private standard-setting bodies, accordingly, have stepped into the gap.

This chapter considers implications for the private/public divide when "globalization comes home" in the form of terrorism risk management. Specifically, it addresses tensions created between the need to enlist private actors in the governance of global terror risks on the domestic front and

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the traditional model of domestic administration. The traditional model of regulation involves congressional delegation to administrative agencies featuring relevant expertise and bound by certain codes of accountability; private actors may have a voice in rule making but are bound to comply with the resulting regulations. However, in the terror risk context, policy makers must rely on private firms' choices regarding risk assessment. Yet these firms are driven by economic incentives and cognitive frameworks that might cause their behavior to diverge from public interests and ignore what are essentially public risks, thereby undermining their effectiveness. Nevertheless, the traditional regulatory model does not fit well with the national security context, in which the federal government—acting in its foreign affairs capacity—frequently makes policy absent outside controls, based on sensitive information held in secret.

This chapter gives an overview of these challenges and suggests that the reliance on voluntary self-regulation by private critical infrastructure entities fails to meet them. Specifically, delegating choices wholesale to private actors neither furthers important public accountability norms nor overcomes the incentive problems that hinder effective market responses to the problem. It then briefly explores alternative models of public-sector involvement in critical infrastructure governance that may hold promise in rendering private-sector decisions more accountable to both policy goals and public norms.

## TERROR RISK AND TOP-DOWN DOMESTIC REGULATION

As recognized by the White House's *National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*, "Our nation's critical infrastructures and key assets are a highly complex, heterogeneous, and interdependent mix of facilities, systems, and functions that are vulnerable to a wide variety of threats."<sup>8</sup> In particular, largely private communications networks provide, in the words of the complementary *National Strategy to Secure Cyberspace*, the "nervous system" for the breadth of critical infrastructure sectors: "agriculture, food, water, public health, emergency services, government, defense, industrial base, information and telecommunications, energy, transportation, banking and finance, chemicals and hazardous materials, and postal and shipping."<sup>9</sup>

The resulting recognition that the U.S. government must rely on the resources, capabilities, and decisions of private actors in protecting domestic critical infrastructure creates a tension with several traditional characteristics of domestic regulation. The formal system of American administration is premised on a dichotomy between public and private roles. Government governs. More specifically, exercising power delegated to them by Congress, administrative agencies are entrusted to exercise their judgment in developing specific means to implement broad legislative goals. The end-point of this public decision process is the production of regulations universal in application, yet detailed enough to guide behavior accurately.

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Private actors, by contrast, are governed. While private parties have the opportunity to provide input into the public decision process, once faced with rules and regulations, they are expected to coordinate their behavior accordingly.

The divergent legal and structural mechanisms for the oversight of regulators and the regulated, in turn, reflect these dichotomous roles. Administrative law and process focus on the discretion delegated to public decision makers, seeking to ensure that its exercise is accountable, in that it promotes solutions consonant with both legislative goals and public norms. Administrative regulation and enforcement, by contrast, focus on the behavior of private actors and their compliance with legal mandates.

## **The Paradigm of Domestic Administration and the Differential Treatment of Public and Private Actors**

### ***Administrative Process Norms of Accountable Decision Making***

Modern administrative law focuses on problems raised by discretion in the exercise of public power. While Congress possesses broad leeway to identify and articulate public goals, it lacks the constitutional capacity to execute laws as well as the resources and detailed information necessary to shape legislative principle into particularized policies. Regulatory statutes, therefore, generally delegate considerable discretion to administrative agencies to supply the practical detail necessary for regulatory implementation, enlisting the agency's relative expertise and its ability to research and collect pertinent information and to devote extended time and attention to specific problems.

Delegation to agencies, though necessary for large-scale administration, poses several related challenges both to the effective implementation of legislative mandates and to public law values undergirding the legitimate exercise of public power.<sup>10</sup> First is the danger that permitting unelected, extraconstitutional decision makers to construe the law unfettered by precise statutory mandate will foster arbitrary or unreflective governance. The absence of any constraint on the exercise of power poses a particular problem in light of fundamental rule-of-law values, which require rationality and regularity in legal application.<sup>11</sup>

Second, because its exercise often need not be justified, wide managerial discretion may render careful explanation by decision makers unnecessary, thus obscuring the reasons underlying particular decisions. In this way, broad leeway can imperil the ability of democratic or constitutional institutions like the public, Congress, and the courts to oversee agencies and review their decisions.<sup>12</sup>

Third—and of particular salience to this discussion—broad discretion creates the possibility that the exercise of power will respond to private, rather than public, priorities. The concern over taint by private interests takes several forms. Most simply, particular decision makers (whether individual bureaucrats or agencies as a whole) may seek to aggrandize their

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own power,<sup>13</sup> minimize their effort level, or favor personal policy predilec-  
tions over those of Congress. More generally, the process of administrative  
decision making itself may be captured by interested private factions.<sup>14</sup>  
Courts have identified a third type of danger when administrative discre-  
tion is delegated to private parties rather than to public regulators: the de-  
cision maker may be both self-aggrandizing *and* self-interested.<sup>15</sup>

Thus, the legitimacy and efficacy of domestic governance is predicated  
on a suite of public norms that govern the exercise of administrative dis-  
cretion in the interpretation and implementation of regulatory directives:  
norms rooted in rational decision making, external reviewability and over-  
sight, and responsiveness to the public interest. Administrative law, accord-  
ingly, seeks methods beyond the fact of delegation itself to safeguard these  
values against the dangers of unfettered discretion. Specifically, it seeks to  
make its exercise accountable by providing “checks on decisionmaking”<sup>16</sup>  
intended to channel discretion so as to promote both effective and legiti-  
mate regulatory decisions.

The accountability model recognizes that regulating the exercise of  
judgment is complicated. Informed not only by legal theory and policy  
but also increasingly by political science and economic understandings of  
how institutions and the individuals within them make decisions in the po-  
litical arena, administrative law regulates decision making in large part  
through structure and process. It ensures that a variety of government and  
private actors, each with their own interests, capacities, and approaches to  
problems, have particular roles to play. Directly elected legislators set  
goals guided by political calculus. Private parties represent a host of di-  
vergent interests through participatory procedures. Agencies guided by  
substantive expertise and executive policies promulgate regulations. Inde-  
pendent judges, guided by precedent and legal principle, review the  
resulting determinations. Thus multiple participants—each armed with a  
distinct decision-making logic—participate in the process that leads to a  
final agency decision.

This external structure shapes internal agency decision making. Formal  
participation processes govern the procedures by which agencies gather  
knowledge. The Administrative Procedure Act (APA)<sup>17</sup> itself requires con-  
sideration of divergent perspectives in a number of ways.<sup>18</sup> Its notice-and-  
comment provisions, for example, compel agencies promulgating rules to  
account for a written record filled with information and interpretations  
from a host of conflicting viewpoints.<sup>19</sup> By legislation and executive order,  
Congress and the president further compel agencies to consider informa-  
tion they might not ordinarily address, such as the impact on the environ-  
ment,<sup>20</sup> state and local governments<sup>21</sup> and small business,<sup>22</sup> as well as the  
costs and benefits of regulatory decisions.<sup>23</sup>

Judicial standards further shape the decision process. Under both the  
APA’s proscription against “arbitrary and capricious” agency action<sup>24</sup> and  
*Chevron’s* step-two reasonableness requirement,<sup>25</sup> courts require that  
agencies engage in reasoned deliberation in reaching their decisions.<sup>26</sup> Spe-  
cifically, they require that agencies take account of all of the information in  
the record and explain, in a public way, why they reached their outcome

in light of contrary data, arguments, and alternatives presented.<sup>27</sup> Through such requirements, “all of the intensity of [judicial] review is directed toward identifying flaws in the agency’s decisional process.”<sup>28</sup>

Finally, the transparent nature of administrative record-building and agency decision making further facilitates accountability in a host of ways. These processes make agency explanations available to Congress, which can evaluate the agency’s implementation of legislative goals and formulate legislative responses. As discussed previously, they allow courts to assess agency decision making without necessarily intruding on the substance of decision outcomes. And they provide both private groups and other government institutions with meaningful yardsticks for reviewing, assessing, and critiquing ultimate agency action.<sup>29</sup>

The traditional model of domestic administration, then, relies on the involvement of multiple actors and methods in the search for regulatory solutions. These actors bring to bear varied institutional capacities and decision-process strengths on regulatory choices. In this model, static notions of control are supplemented by accountability notions of dynamic oversight, dialogue, and process.<sup>30</sup>

### *Private Actors in the Traditional Administrative Model*

By contrast, administrative law’s focus on decision making has ended at the door to the private regulated firm. The administrative regulation of private parties generally focuses not on process or structure but on substantive outcomes. Thus, unlike the web of institutional and procedural requirements guiding agency discretion, the dominant model for controlling behavior by regulated entities adopts, almost exclusively, the means for controlling agents suggested by traditional economic principal-agent models:

1. Making rules as specific as possible
2. Adjusting incentives—here principally by threat of punishment—so as to align the interests of the regulated firms with those of the regulators
3. Monitoring performance to ensure compliance<sup>31</sup>

None of these top-down tools enlists the judgment of regulated parties. Such private actors are generally assumed, whether animated by normative or consequentialist concerns,<sup>32</sup> to possess the ability to organize themselves in a purposive, rational manner to comport with public mandate—that is, to follow the law.

### **The Limits of the Domestic Administrative Paradigm and Inapplicability of Traditional Regulation to Terror Risk**

The traditional administrative process frequently offers effective solutions for problems of societal risk. Many contexts lend themselves to “command-and-control” regulations—that is, mandated conduct by a group of regulated



parties similar enough to be subjected to a single behavioral rule or technological requirement. In others, regulators can identify “performance-based” directives—that is, regulations that articulate a measurable desired result but leave “the concrete measures to achieve this end open for the [regulated entity] to adapt to varying local circumstances.”<sup>33</sup> Both methods mandate specific results that are relatively easy to identify, monitor, and enforce.

For several reasons, however, the problem of global terror risk on American soil lends itself to regulation by neither uniform behavioral commands nor measurable outcomes. Administrative process may promote accountability but is slow by design and static in its results, while terror networks are manifestly dynamic in nature. Behavioral rules are, further, ill-suited to reflect the large number of variables involved in achieving multifaceted regulatory goals, such as reducing the types of risk produced by a combination of factors.<sup>34</sup> Such rules identify certain relevant factors that can easily be codified, while ignoring others. They thus direct behavior toward compliance with an incomplete set of detailed provisions that may frustrate, rather than further, the reduction of risk in any particular circumstance.<sup>35</sup>

The problem is compounded when regulated entities are heterogeneous, and contexts varied.<sup>36</sup> One-size-fits-all rules cannot easily account for the ways in which risk manifests itself differently across firms—anything from an unsecured door in a chemical facility, to an easy-to-hack cybernetwork at a utility plant, to lax documentation policies in a railroad loading yard. Indeed, the sheer range of potential critical infrastructure targets is underscored by the White House’s identification of a “broad array of unique facilities, sites, and structures whose disruption or destruction could have significant consequences across multiple dimensions.”<sup>37</sup> Examples include sites of historical interest, centers of commerce, transportation systems, “systems for the provision of food and water for human use and consumption,”<sup>38</sup> and information systems “essential to the telecommunications, energy, financial services, manufacturing, water, transportation, health care, and emergency services sectors.”<sup>39</sup> The responsibility for regulating such a diverse set of systems is fragmented across a host of government agencies, including the departments of Agriculture, Energy, Health and Human Services, Treasury, Commerce, and Homeland Security, as well as the Environmental Protection Agency, to name a few.<sup>40</sup> Indeed, even if rules could be developed to specify measures that would mitigate the terror threat, regulators as a group frequently lack both the resources and the vantage to attain the knowledge of the situation on the ground necessary to combat risk within individual companies.

Finally, performance-based regulation, although it addresses some of the challenges created both by the information asymmetry between regulators and the regulated and by heterogeneity in regulated entities, precludes effective monitoring because the potential harm of a terrorist attack is catastrophic, but the probability is low (at least at present). In these circumstances, outcomes—for example, whether or not the regulated party’s security measures successfully stopped a terror attack—are, in one scholar’s

understated words, “undesirable to rely upon as the sole basis for a regulatory standard.”<sup>41</sup>

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## ASSESSING THE CHOSEN ALTERNATIVE: BOTTOM-UP SOLUTIONS

### The Turn toward Voluntary Self-Regulation

Faced with the shortcomings of traditional administrative regulation, policies addressing critical infrastructure security have largely employed one form: voluntary programs that accord responsibility for decisions about how to identify and mitigate risk exclusively to the private actors that largely own and operate them. Regulatory initiatives across the substantive spectrum—from the Food and Drug Administration’s voluntary guidance on security measures for food producers, processors, and transporters,<sup>42</sup> to the Environmental Protection Agency’s suggested blueprint for developing drinking-water security collaboratives among stakeholders<sup>43</sup>—articulate general goals, principles, and guidelines. However, these initiatives leave to firms themselves the decisions about specifics—everything from the meaning of the public aim in a particular context (mitigating risk, enhancing security) to the means for achieving it, and even whether it is appropriate or necessary to apply the regulatory guidance at all.

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This phenomenon occurs at all levels of government. New Jersey’s state-level chemical plant protection measures rely principally on manufacturers themselves for the “assessment of facility vulnerabilities and hazards that might be exploited by potential terrorists,” and the development of “prevention, preparedness, and response plan[s]”—including measures “to eliminate or minimize risk of terrorist attack, to mitigate the consequences of any attack that does occur, or to respond to an attack that does occur.”<sup>44</sup> On the federal level, the Bush administration—adopting the pre-9/11 approach of the Clinton presidency—emphasizes “voluntary public-private partnerships involving corporate and nongovernmental organizations,”<sup>45</sup> including sector-specific Information Sharing and Analysis Centers (ISACs), intended to serve as clearinghouses for the exchange of information between participating industry members and the federal government.

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Such developments signal a fundamental shift in the role of regulated parties. They are no longer just objects of governance but increasingly *partners* in regulation, implicitly and explicitly enlisted to fill out the substance of legal norms and develop the means for implementing those broader principles locally. Delegating to private actors choices about the substance of regulatory detail might both tap private knowledge held by firms and offer means for increased speed and flexibility in responding to risk. However, placing private actors largely in charge of policy choices has serious implications for the accountability of decisions that result.

Administrative law’s suspicion of private influence in lawmaking, discussed above, reflects important economic and sociological realities. In general, there is often little congruence between private firm and regulator preferences; indeed, the preferences animating corporations are the very

interests the legal and economic literatures are most concerned will capture public decision making. Moreover, private firms are particularly responsive to factors unrelated to legislative policy, such as the behavior of competitors, the interests of consumers, and the pressures of the market. Finally, the very information advantages that underlie the delegation of discretion to private actors also create information asymmetries that hinder the type of external oversight of firm decisions that can promote accountability.

Despite these accountability concerns, self-regulatory decisions of private actors are not generally subject to either the participatory requirements of administrative process or the opportunities for judicial review or congressional oversight—the traditional accountability mechanisms central to ensuring that agency decisions conform to norms of rational and publicly oriented decision making.

Regulators, instead, have relied on market constraints to provide accountability in private decisions about risk administration.<sup>46</sup> More specifically, agencies in both the Clinton and Bush administrations pointed to congruent private and public incentives as a means to ensure accountability in security decisions. In the words of one federal regulator, because security is a “business problem as well as an issue of national security,” it “is both necessary and appropriate” that private actors will “take the lead in this area.” Thus “voluntary cooperation between the public and private sector, rather than federal regulation, is the best route to progress.”<sup>47</sup>

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### **Assessing the Market as an Accountability Mechanism: Economic and Cognitive Impediments to Effective Private Measures**

Developments since 9/11, however, have undermined faith in market forces alone as a means for ensuring accountable and effective self-regulatory decisions by private owners and operators of domestic critical infrastructure. In the words of the 9/11 Commission, “the private sector remains largely unprepared for a terrorist attack.”<sup>48</sup> Estimates calculate the post-9/11 rate of growth in security spending in the low single digits.<sup>49</sup> Such shortcomings reflect a combination of economic and cognitive factors that undermine the market alone as a means for ensuring public accountability in the private implementation of infrastructure protection measures.

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A variety of economic factors suggest that firms by themselves will not secure the right investment in security. First, terror attacks would likely be directed in a way intended to trigger widespread damage extending far beyond the target, creating what scholars have termed “security externalities.”<sup>50</sup> The level of precaution taken by a waste facility or telecommunications node would be determined by the private costs expected from a terror attack and would likely not reach the level justified by the public costs of the spread of hazardous waste or the collapse of an entire communications network.

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Additionally, the highly networked nature of the information infrastructure on which many critical industries rely further diminishes the incentive to make the correct investment. Because a network is protected only if each of its elements is, collective action problems will shape security decisions; individual actors will make security investments only if all do.<sup>51</sup>

Finally, the competitive nature of many critical infrastructure industries exacerbates the problem. Because profit margins are so small, the push toward efficiency (which diminishes reliability) and the elimination of redundancy (which promotes it) is acute. As one group of scholars describes, a competitive outlook might rationally prompt a private entity to invest in a cheaper, larger generator rather than two smaller ones, despite the fact that the smaller generators could maintain operations should one fail, while the failure of the large unit would end them altogether.<sup>52</sup> These economic factors, accordingly, suggest that the unstructured delegation of security decisions to this set of private actors poses serious accountability failures: the likelihoods of ineffective decision making responsive to private, rather than public, goals.

Even if economic incentives were adjusted to align public and private interests, however, and even in the absence of collective action problems, assigning to private firms decisions about the effective identification of risk and response to it raises additional accountability problems rooted in the workings of organizational decision processes. Specifically, the rich account of corporate decision making developed in the management and organizational behavior literatures demonstrates that efficient methods of organization—corporate structures, mindsets, and routines developed to coordinate individuals in the pursuit of core firm goals—can create predictable decision failures that mask the very type of risk that raises homeland security concerns. This filtering can render firm decision making about public risk and vulnerability both unaccountable and ineffective.

Firms maximize operational efficiency via specialization of labor and segmentation of knowledge to focus attention and make tasks manageable.<sup>53</sup> Yet formalized and streamlined communication structures may not permit accurate transmission of knowledge that is difficult to codify, such as the “tacit” knowledge that is embedded in worker skills, work routines, and shared understandings.<sup>54</sup> Maintenance departments, for example, will most likely be trained to identify, report, and repair the particular types of events that pose threats to ongoing, core, company activities. Yet although security risks might best be appreciated at this level, vulnerabilities might never be identified or be codified through standardized reporting systems in ways that upper-level managers of a firm would hear of them; they could be missed even if top-level managers seek to ameliorate risks. Thus administrative and communication systems that prioritize efficiency are less effective in ensuring that information about unanticipated issues, unfamiliar events, and changing circumstances reaches appropriate decision makers or will be recognized as relevant even by those with access to it.

The mismatch between company organization and effective regulatory decision making is further exacerbated by the rules and routines on which

business efficiency is premised. Yet although routines often promote good decisions, they can sometimes render decision makers insensitive to risks by inaccurately shaping the characterization of new situations. The literature on cognition in organizations describes how, when decision makers consider a course of action, they draw on the stock of existing organizational routines to frame their understanding of the situation they face. The more familiar—or cognitively “available”<sup>55</sup>—the past experience, the easier it is to draw on it as a lens for understanding new events, and the easier it is to assimilate into existing routines. This availability heuristic is often very efficient; yet, because cognition accentuates familiarity and deemphasizes difference, it masks changes in circumstance that might make existing routines inappropriate—it prompts individuals unconsciously to “make the problematic non-problematic.”<sup>56</sup> This phenomenon can create particular trouble in the context of low-probability events such as terrorist attacks.

The initial process of contextual interpretation is further exacerbated by two sets of decision-making biases demonstrated in the behavioral literature on judgment and decision making. The first stems from the unconscious cognitive strategy “to construe information and events in such a way as to confirm prior attitudes, beliefs, and impressions.”<sup>57</sup> Such “cognitive conservatism” is bolstered once a course of action has been commenced by a “commitment” effect, which biases subsequent analysis toward information that confirms the initial interpretation.<sup>58</sup> The second set of biases involves the “self-serving bias,” by which the mind naturally interprets ambiguous information in a manner favorable to the perceiver.<sup>59</sup> Although this cognitive effect reduces anxiety and often promotes efficient functioning, it also permits decision makers to view situations with a self-interested spin that can facilitate the erroneous belief that the group’s interest is “in full consistency with their personal goals.”<sup>60</sup>

These biases are particularly powerful in industries characterized by strong competition, which promotes an extreme drive toward efficiency. An optimistic outlook is a characteristic of an effective workplace. Yet such a culture exacerbates a manager’s “tendency to underestimate or rationalize risk,”<sup>61</sup> by shaping the interpretation of early, and still ambiguous, information. Once managers have publicly committed to expressions of optimism, they are to some extent cognitively locked in to the approach. Their optimistic perceptions are entrenched by their commitment, and they interpret and winnow new information consistent with their self-interest. Accordingly, fewer danger signs will raise red flags.

In sum, rules developed in prior contexts guide behavior in new situations for which they may be inappropriate; relevant information is ignored in favor of familiar but unimportant guideposts; and the knowledge necessary for informed judgment may be trapped so that it never reaches the appropriate decision maker. These phenomena, moreover, impede judgment most predictably when the matter at issue is the type of greatest concern to regulation: the accurate assessment of the type of risk and change likely to not only affect an individual subunit or even a single firm but also impose costly externalities more broadly.

Such failures of effective decision making go to the heart of the accountable exercise of regulatory discretion. Firms' decisions may be not only unresponsive to the public goals delegated to them, but literally arbitrary, in that they are reached because of unconscious and systemic factors that neither company managers nor individual decision makers intend to matter. Moreover, the decision processes responsible for these irrational decisions, to a large extent, evade external review. The flawed logic on which they rest are hidden in systems and instinctive responses that appear to be rationally ordered but are difficult to communicate and hard to monitor.

When affected by structural decision-making pathologies, then, businesses' exercise of regulatory discretion implicates each element of decision-making accountability. First, they undermine the type of rational decisions for which administrative law holds delegated decision makers accountable. Some corporate decisions will predictably, in the words of the Supreme Court, have "relied on factors which Congress [or agencies] ha[ve] not intended," have "entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence," or be "so implausible that it could not be ascribed to a difference in view or the product of [decision maker] expertise."<sup>62</sup> In other words, the exercise of regulated firm discretion, by this account, may be literally arbitrary or capricious—reached "without consideration or adjustment with reference to principles, circumstances, or significance ... [and] decisive but unreasoned."<sup>63</sup>

Second, the structure of decision making in firms will exacerbate economic pressures undermining responsiveness to public goals. Efficient systems will skew private decisions involving "secondary" public risk priorities toward the primary corporate goals around which formally rational structures and routines have developed. This promotes a form of private capture that undermines effective homeland security policy.

Finally, the role of routines and cognitive filters in corporate decision making points to a failure of reviewability. Because the routines that structure much business behavior are often unwritten, unarticulated, and even unconscious, they are largely insulated from external review by administrative agencies, the courts, or the public. External observers unfamiliar with internal company workings lack the means to delve beyond formally rational structures. They may be able to identify the existence of efficient firm organization, but they lack the logic to assess when formal structures might lead to pathological outcomes or to identify such structures buried deep within the firm. Given these restraints, little is revealed about whether a company's discretion will ultimately be exercised in a responsive or effective manner.

The reliance on self-regulation in recent homeland security policy, then, threatens to make hollow domestic attempts to govern global terror risk. It creates the danger, as one prominent administrative law scholar has written about regulatory delegation generally, that we will be misled "into thinking that the firm is being supervised or controlled, while in actuality it can violate applicable public norms with impunity."<sup>64</sup>

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## ROLES FOR GOVERNMENT IN PROMOTING ACCOUNTABILITY

The traditional model of domestic administration breaks down in the face of the risks posed by global terror. The fragmented U.S. system of administrative agencies that promulgate static rules through formal administrative processes does not possess the granular knowledge, the means for flexible response to threats raised by an adaptive enemy, or the control over resources necessary to identify, mitigate, or respond to the terror risk by itself.

At the same time, the current trend toward delegating the task of combating terror vulnerabilities to private entities engenders both a significant risk of failure and the abandonment of public norms in the development of policy in an area of central importance to the American public. Delegation without accountability threatens abdication both of the public responsibility—of constitutional dimension—to “provide for the common defense”<sup>65</sup> and of the necessity for public regulation in the face of market failure. How, then, might administration be reconceived in a way that brings accountability back in, as a means for preserving its legitimacy and, ultimately, maximizing the chances of effectiveness?

Just as administrative law regulates decision making in a manner informed by understandings of how institutions and the individuals within them make decisions in the political arena, policy makers can turn to the sophisticated study of judgment and decision making more generally for lessons as to how policy networks can promote more accountable and effective private-sector decisions about terror risk. At a general level, a variety of literature on social cognition, organizational behavior, and the economics of cooperation underscores the fact that government cannot abdicate an active role in the response to terror risks simply because it may be poorly situated to regulate these risks in the traditional manner. Indeed, this research demonstrates the importance of government as an *external* actor in structuring policy networks to promote better *internal* decision making by those private actors best situated to develop local responses to terror risks. In particular, they offer a variety of tools for using networked decision making to overcome economic and cognitive barriers to effective decision making, and instead structure discretion consonant with public norms.

## Deriving Accountability Tools from the Literature on Effective Decision Making

The promise of a network structure for overcoming decision-making pathologies is demonstrated explicitly in studies of firms and networks for which the interest in accountable and reliable decision making—rather than efficiency—is paramount. These types of “high-reliability organizations” (HROs), such as nuclear power plants, hospitals, and aircraft carriers, reflect particular sensitivity to the ways that efforts to simplify

decisions can create irrational outcomes. They promote the thoughtful pursuit of important goals by doing just the opposite—by making decision processes more complex, implementing several mechanisms that are, on their face, in tension with one another. These mechanisms in turn may increase these organizations' capacity to engage in effective risk assessment vis-à-vis potential terrorist threats.

On the one hand, HROs incorporate into decision structures a network of different actors and organizations with different viewpoints. In this model of "negotiated complexity," formal and informal interorganizational agreements about how decisions are made are repeatedly renegotiated and renewed, ensuring that the homogeneity, specialization, and standardization that organizations usually develop in the interest of efficiency are supplemented by diversity, duplication, overlap, and a varied response repertoire, which promote substantive reliability.<sup>66</sup> HROs also permit subversion of usual hierarchies in at least two pertinent ways: they include structures to ensure that information—including information about errors—can get to the right people in a decentralized manner, and they invest power and legitimacy in a class of "reliability professionals" who have a personal interest in avoiding risk and accidents.<sup>67</sup>

On the other hand, however, HROs' reliability derives also from very visible "external watching elements," in the form of parent organizations, industry groups, and strong stakeholder groups, each of which claims economic positions and cultural outlooks that diverge from the organization in question.<sup>68</sup> Moreover, although these organizations achieve their reliability through adaptability and flexibility in practice, they are characterized ultimately by "authority overlays"—the background existence of a hierarchy that, in extreme conditions, serves as "the lubricant that makes the informal processes work," by commanding a form of trust and coordination that permits joint output to be maximized and prevents the "undermining of the ability of others to perform their jobs."<sup>69</sup>

The success of HROs in dealing with crises indicates the counterintuitive importance of a strong coordination authority in the background to enable flexible, learning responses on the ground. This further reflects the literatures on network governance, which emphasizes the importance of information collection, dissemination, and communication as centralized tasks without which individual network partners will be unable to perform their otherwise discrete tasks.<sup>70</sup> Indeed, a growing body of empirical and analytic research in the literature on regulation indicates that addressing complex networked risks by the proliferation of uncoordinated rules itself creates an unwieldy, confusing body of mandates and exceptions leading to uncertain and inconsistent application.<sup>71</sup>

To be sure, most private firms face different pressures than HROs. Most notably, unlike HROs, they need to continue to conduct their primary business efficiently while still remaining on guard against terror risks.

Yet lessons from the HRO context play out in a host of decision-making contexts in which accountable and reliable decision making is necessary, even in environments that usually focus on efficiency. Interorganizational relationships such as joint ventures, strategic alliances, and other



networked affiliations on which firms increasingly rely for adaptation and learning, for example, form a locus of innovation precisely because the participants bring different experiences, and therefore different knowledge structures, to the venture.<sup>72</sup> Multiple lessons about structuring lines of authority and communication, empowering individual decision makers, and the importance of professionals have proven important in understanding how organizations arranged around one set of goals successfully meet “secondary mandates” imposed externally.<sup>73</sup> And research on the psychology of accountability documents ways in which oversight by independent watchers “motivat[e] cognitive misers to be thoughtful.”<sup>74</sup>

These rich bodies of evidence, in particular, suggest that, even when public challenges like terror risks elude the traditional regulatory model of command, monitoring, and threats of punishment, the public sector still claims a central role both as an independent watcher itself and in structuring networks so as to include oversight and review measures by others.

### **Networked Domestic Responses to Global Terror Risk: Some Suggestions for Exploration**

Together, these themes suggest means for a networked response to the global terror threat and accordingly a blueprint for the public coordination of accountable risk governance. More specifically, they suggest some possible ingredients of an accountability toolbox that regulators should employ to govern the processes by which private entities make decisions about how to identify, mitigate, and respond to terror risk—a task at which they have largely failed.

#### ***Collaborative Problem Solving and Decision Making***

First, these themes suggest a central role for government in ensuring that entities with divergent economic interests and mindsets participate in private firms’ decisions about terror risk management. One such entity might be an administrative agency itself, which would likely offer a different viewpoint and might promote collaborative problem solving by offering direct financial support for mitigation measures or other incentives in the form of expertise and education. Such agency–firm interaction can be successful at overcoming economic barriers to corporate behavior in certain instances. One Oklahoma utility, for example, implemented a new security regime, including an expensive backup transformer inventory program, in conjunction with permission from the state utility regulator—which worked with federal agencies for two years on the program—to increase rates accordingly.<sup>75</sup>

Agencies might also serve as a “trusted intermediary” model that could collect information about vulnerabilities that firms might not yet wish to share with competitors or the public, but that could be acted on in a coordinated manner. Scholars have identified such a model in the context of data security regulation more generally.<sup>76</sup> The Interagency Guidance

implementing Title V of the Gramm-Leach-Bliley Act regarding data security breaches by financial institutions,<sup>77</sup> for example, provides for disclosure to the institution's supervisory regulatory agency for some security breaches. Chief privacy officers are then given an initial opportunity to open the doors of the firm to the regulator to "assess the effectiveness of an institution's response plan"<sup>78</sup> before the decision regarding further disclosure is reached. Regulators are thus provided with internal information, involved in overseeing the critical decision regarding disclosure, and given "an opportunity to consider steps other than notice to help mitigate the harm caused by the breach."<sup>79</sup> Initial attempts in this direction include InfraGuard, an FBI-administered program for reporting information infrastructure incidents.<sup>80</sup> While this voluntary initiative has met with limited participation,<sup>81</sup> it might indicate directions for success if reframed, as in the Gramm-Leach-Bliley context, in a way that cooperating firms might find a collaborative "safe harbor" from the other mandatory, or more punitive, regulatory measures discussed below.

Several other types of third-party entities might play an even more important role in improving decision making. Professional groups such as the American Bar Association and compliance professional organizations could provide a very important impetus for their members to focus on security decisions within firms. They possess a very strong interest in promoting such activities because it augments the importance, role, and power of their members. In addition, they hold a position of trust among their member firms (and prospective members) in general and therefore are in a unique position to provide technical support and comparative information about "best practices" to managers well placed within businesses.

The strengthening of professional networks of security officers might further enhance the collaboration with government agencies, which, after all, possess national security information generally inaccessible to private firms. Individual security officers trained and certified by the Department of Homeland Security (DHS) and placed within firms could serve to span the boundaries between the public and private sectors, and their links to both sectors could give them a unique vantage point on both public and private sources of information, as well as commitments different from others within the firm that might provide important alternative perspectives in organizational decision making.

Parallel developments in the context of domestic financial regulation point to possible successes of this model. Settlements reached after enforcement actions have explicitly involved placing agents approved by the Securities and Exchange Commission (SEC), such as former SEC chairman Richard Breeden in the case of troubled telecommunications giant WorldCom, within the company to supervise compliance implementation.<sup>82</sup> More generally, the SEC has explicitly announced, in light of mutual fund scandals, a new compliance rule grounded on the repeated premise that the commission "will look to the Chief Compliance Officer as [its] ally."<sup>83</sup> In the 2004 words of the SEC's then-director of the Office of Compliance Inspections and Examinations, "We will develop that alliance—we will speak often to the Chief Compliance Officer, utilizing her knowledge to more

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completely understand the [firm]’s compliance program, to hear concerns, and to understand emerging issues and the ways in which they are being handled.”<sup>84</sup>

Insurers offer an additional promising paradigm for third-party involvement in regulatory networks. Because insurers possess significant data on risk across businesses and industry sectors, they offer an independent perspective on risks that may be missed by those internal to any individual firm’s mindset. Moreover, insurers’ historical practice of encouraging (by premium pricing) or requiring (as a condition of coverage) risk-reduction measures on the part of those it insures<sup>85</sup> offers an example of involvement in risk identification and mitigation by a party with whom firms would have incentives to share detailed information about their internal workings and to collaborate. By changing both the outlook and incentives governing security decisions, insurers offer one possible means for refocusing decision makers on longer-term goals rather than short-term efficiency. For such insurer involvement to be successful, however, it would be necessary for public actors to ensure that the regulation and subsidization of terror insurance does not remove the ability of insurers to spur safety measures by reflecting risk assessments in the pricing of availability of coverage.<sup>86</sup>

Finally, structures might be put into place that both enhance collaborative decision making by parties and traditional administrative law values of public participation, adapted for the sensitivities of the national security context. While the opportunity for public input provided by the usual administrative notice-and-comment process seems unsuited to the context of intrafirm policy around sensitive security concerns, models of more limited public involvement might be drawn from other contexts in which law is suspicious of private “lawmaking.” Specifically, antitrust law recognizes that, because of private actors’ unique access to relevant information, the technical standards governing a variety of different industries must be determined by a private standard-setting body, rather than by a government agency or through the market. Yet antitrust enforcement bodies have, nonetheless, suggested that such decision making can itself violate concerns about private collusion, absent inclusion of participants representing consumers.<sup>87</sup>

### *Identifying Decision Makers by Assignment and Liability*

Regulators might also be able to overcome accountability problems by identifying and creating individual players within networks whose incentives might align more closely with the public interest than with any one company. They might do this by regulating which individuals must make decisions in firms. Measures focusing on terror risks have not, so far, widely employed techniques of adjusting the economic incentives of, and assigning tasks to the judgment of, particular individuals.

There has been one notable exception to this disinclination to focus on individual roles: the Customs Trade Partnership against Terrorism (C-TPAT), a voluntary port security initiative premised on the cooperation

of private U.S. and select Mexican companies.<sup>88</sup> The program first provides incentives for participation in risk mitigation by offering streamlined processes, as opposed to burdensome security enforcement, for businesses that meet certain security minima. These include, notably, requirements that certain managers be actively involved in developing and implementing security measures. The program, for example, contains a requirement that CEOs and corporate boards review security measures periodically, approve them, and remedy deficiencies that may exist.<sup>89</sup> Taking advantage of the benefits of benchmarking and bottom-up experimentation, Customs then shares the best practices of these firms with other C-TPAT members, including them in requirements for streamlined security burdens.<sup>90</sup>

Such initiatives are central to several domestic regulatory initiatives outside the terrorism context, notably the Sarbanes-Oxley Act,<sup>91</sup> which requires officials to certify the effectiveness of their company's internal controls in preventing financial misrepresentation. These measures, which have had very significant impact on decision making within firms, suggests a model, for example, for requiring the development of similar *security* internal controls within critical infrastructure firms or networks, as discussed below.

Additionally, public agencies can be instrumental in locating actors within networks whose decisions may not be shaped by "public externality" problems and who can offer redundancy in risk identification measures. Efforts in this arena have been minimal, but the potential is suggested by such programs as Highway Watch, through which the DHS supplements trucking and shipping companies' efforts to reduce risk by coordinating with the American Trucking Association to underwrite training programs on risk assessment for individual truckers and to provide a system for direct reporting from the road.<sup>92</sup>

Finally, policy makers might identify particular parties who might be especially responsive to tort liability for the harms caused by security vulnerabilities. For the economic reasons discussed above, such liability might not provide much extra incentive, for example, for an individual chemical plant to take greater security measures against a low-probability attack that could put them out of business in any event. But tort liability for security failures generally might successfully enhance incentives for better protection by information infrastructure industries, which are subject, as well, to the far greater risk of lower-harm events, such as intrusion by hackers or data thieves. Encouraging better protection against these sorts of attacks, and providing the network capacities that could minimize damage, might well contribute to protection against more serious terror attacks as well.<sup>93</sup>

### ***Public Coordination and Watching: Network Decision Making in the Shadow of Public Oversight***

Finally, the high-reliability model suggests the critical importance of administrative agencies in both playing a network coordination function—especially in the face of collection action problems—and serving as a strong "external watcher" overseeing networked decisions.

In certain circumstances, public actors simply cannot leave coordination functions to others. In the coordination of disaster response, for example, the interorganizational collaboration model emphasizes the importance of a history of shared decision making over time between all involved actors, public and private, to promote the establishment of sufficient trust to overcome divergent interests during a crisis in which adaptive decision making is necessary. The establishment well in advance of disaster of a coordination structure with a public official at its head can set the stage for the development of such positive relationships throughout the planning and disaster exercise process. Moreover, government is in a unique position to overcome collective action barriers to communication coordination and is necessary to bring all relevant actors to the table for projects like Texas's interoperable communications network, which permits police, fire, federal agencies, private industry, and airport personnel to communicate with each other over their existing networks and equipment.<sup>94</sup>

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Two particular characteristics of domestic terror as a governance problem require active government coordination. First, unlike many regulatory challenges, the treatment of terror risks requires not only federal and state or public and private coordination, but coordination of issues that fall within the jurisdiction of nearly all federal agencies, including those dealing with matters outside U.S. borders. Relatedly, combating terror threats will frequently require access to classified or sensitive information available only to the federal government in the first instance. Accounting for an adaptive enemy in decision making in this context simply cannot be done without a central federal role.

Additionally, even if third parties are employed in enhancing individual businesses' decision making, they will often not be as effective an external watch as the government, backed by the force of law. While, in the nuclear power context, industry groups' self-regulation has been largely responsible for their high reliability, it is unlikely that relevant firms could reproduce this effect in other industries central to critical infrastructure—most of which feature a larger and more diverse set of actors. And it is far from clear whether the insurance industry will develop the role of robust regulation of risk mitigation measures that I have suggested.

This suggests the unique role of government in requiring, rather than just encouraging, the type of networked decision processes likely to result in effective solutions. In a smattering of contexts, regulators have experimented with such models, with some success. As mentioned above, the federal regime of securities regulation relies to an increasing extent on the design of internal controls to monitor financial and other risks in a networked context in which decision makers are influenced by the viewpoints of, and must provide explanations to,<sup>95</sup> both third-party monitors and public regulators—all under threat of legal sanction. In the environmental context, regulators have employed positive incentives to spur firms to join organized networks of public and private representatives to develop site-specific compliance plans. Freed from compliance with existing rules that may prove especially burdensome or difficult to implement in specific circumstances, firms get a voice in how they combat environmental

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problems. In this model, the regulatory process produces solutions that combine regulated-actor familiarity with facts on the ground and regulators' understandings of public goals.

This model offers promise for inclusion in the toolbox for governing terror risks. And, more than five years after 9/11, regulators took the first steps in this direction. In April 2007, the DHS issued an interim final rule requiring high-risk chemical plants to provide regulators with assessments of their vulnerabilities and resulting security plans.<sup>96</sup> Under the rule, manufacturers could be fined as much as \$25,000 a day or, in the worst case, closed down for noncompliance. While the initiative is clearly limited in scope, it reflects a government recognition not only of the need to devote increased financial and administrative resources to homeland security coordination but also of particular approaches to networked governance that might promote effective results.

## CONCLUSION

Governing the global terror threat within U.S. borders challenges established top-down models of accountable and effective domestic administration. The interdependent nature of such risks, the diversity of their local manifestations, and the adaptability of terror actors make such threats ungovernable by traditional means: the enforcement by public actors of uniform commands imposed on private entities. Private actors alone possess the local knowledge and capacity necessary for informed and flexible response to vulnerability.

Yet those same characteristics of terror risks—exacerbated by the need for additional information available primarily to domestic and international law enforcement and intelligence—mean that private actors will often lack the capacity or incentive to tackle public risks from the bottom up alone.

Thus the networked risks of global terror require a reformation of domestic administration in the direction of networked governance. They require conceiving of how these new forms of shared governance may be structured consonant with traditional public accountability and effectiveness norms drawn from more traditional models. And, finally, they suggest roles for domestic *government* dealing with global challenges: a greater focus on assigning decision responsibilities and incentives, involving a variety of actors to bring divergent viewpoints to bear in particular decisions, and coordinating oversight of decision processes and harmonized responses in mitigating catastrophic effects.

## NOTES

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actors in Kenneth A. Bamberger, "Regulation as Delegation: Private Firms, Decision Making, and Accountability in the Administrative State," 56 *Duke Law Journal* 377 (2006).

1. See Beverly Crawford's introduction to this volume and Joseph S. Nye Jr., *The Paradox of American Power* (New York: Oxford University Press, 2002), 83.

2. Anthony Giddens, quoted in Nye, *Paradox of American Power*, 79.

3. See, for example, Barton Gellman, "Cyber-attacks by Al Qaeda Feared: Terrorists at Threshold of Using Internet as Tool of Bloodshed, Experts Say," *Washington Post*, June 27, 2002.

4. Ibid.

5. See, for example, Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

6. See, for example, Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006).

7. See, for example, Robert D. Cooter, "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant," 144 *University of Pennsylvania Law Review* 1643 (1996).

8. Office of the President of the United States, *National Strategy for the Physical Protection of Critical Infrastructures and Key Assets*, February 2003, 2, available at <http://www.whitehouse.gov/pcipb/physical.html>.

9. Office of the President of the United States, *National Strategy to Secure Cyberspace*, February 2003, vii, available at <http://www.whitehouse.gov/pcipb/>.

10. For vigorous literature setting forth fundamental constitutional and policy arguments against the legitimacy of delegation to unelected agencies in the first place, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) ("That legislators often find it convenient to escape accountability is precisely the reason for a non-delegation doctrine" [133]), and Theodore J. Lowi, *The End of Liberalism: Ideology, Policy and the Crisis of Public Authority* (New York: W. W. Norton, 1969) ("[Delegation] becomes pathological, and criticizable, at the point where it comes to be considered a good thing in itself, flowing to administrators without guides, checks, safeguards" [127]).

11. See generally A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1982); Dicey states that rule of law requires, "in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government" (120).

12. See, for example, *National Association of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003): "Agencies must articulate a satisfactory explanation for their action to permit effective judicial review" (internal quotation marks omitted).

13. See Daryl J. Levinson, "Empire-Building Government in Constitutional Law," 118 *Harvard Law Review* 915 (2005): 917.

14. See, for example, Thomas W. Merrill, "Capture Theory and the Courts: 1967-1983," 72 *Chicago-Kent Law Review* 1039 (1997); Mark Seidenfeld, "A Civic Republican Justification for the Bureaucratic State," 105 *Harvard Law Review* 1511 (1992): 1565.

15. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), rooting the proscription on delegation to private parties in the concern over self-interested regulation.

16. Jody Freeman, "The Private Role in Public Governance," 75 *NYU Law Review* 543 (2000): 664.

17. Administrative Procedure Act of 1946, P.L. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

18. See, for example, Steven P. Croley, "Theories of Regulation: Incorporating the Administrative Process," 98 *Columbia Law Review* 1 (1998): 79 nn.226-27 (noting that the APA facilitates deliberative agency decisions).

19. 5 U.S.C. § 553(b) (2000) sets forth notice and comment requirements for administrative rule making. See generally *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996): "[N]otice-and-comment procedures of the Administrative Procedure Act [are] designed to assure due deliberation."

20. The National Environmental Policy Act of 1969 (NEPA) § 102, 42 U.S.C. § 4332(C)(i)-(v) (2000), for example, mandated that agencies prepare Environmental Impact Statements. By explicitly instructing agencies to consider types of information not previously taken into account, NEPA changed decision outcomes by "making bureaucracies think" (Serge Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform* [1984]: 3-4).

21. Unfunded Mandates Reform Act of 1995 § 2, 2 U.S.C. § 1501 (2000).

22. Regulatory Flexibility Act § 3, 5 U.S.C. 603(a) (2000).

23. See Executive Order 12866, 3 C.F.R. 638, 639 (1994), reprinted in 5 U.S.C. § 601 (2000).

24. APA's proscription against arbitrary and capricious decision making requires reasoned decision making; see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971).

25. For a discussion of APA-*Chevron* parallels, see Lisa Schultz Bressman, "Disciplining Delegation after *Whitman v. American Trucking Ass'ns*," 87 *Cornell Law Review* 452 (2002): 457-59.

26. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), stating that agency action is arbitrary and capricious when "the agency has not really taken a 'hard look' at the salient problems and has not genuinely engaged in reasoned decisionmaking."

27. "Well-settled principles of administrative review plainly require agencies to provide reasoned explanations for their legal interpretations" (Gary Lawson, "Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions," 48 *Rutgers Law Review* 313 [1996]: 315). See also Mark Seidenfeld, "Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking," 87 *Cornell Law Review* 486 (2002): 518.

28. Jeffrey J. Rachlinski and Cynthia R. Farina, "Cognitive Psychology and Optimal Government Design," 87 *Cornell Law Review* 549 (2002): 589.

29. See Arthur Lupia and Mathew D. McCubbins, "Designing Bureaucratic Accountability," 57 *Law and Contemporary Problems* 91 (Winter 1994): 97.

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31. See generally Michael C. Jensen and William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure," *Journal of Financial Economics* 3, no. 4 (1976): 305-60, discussing, in the context of corporate shareholders and managers, market and contract controls designed to align the divergent interests of principals and agents.

32. Compare Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982), 64-66 (discussing "good apples" for whom conformity with the law derives from "bottom-up" commitments), with Robert A. Kagan and John T.



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33. Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (1999), 23. See generally Cary Coglianese, Jennifer Nash, and Todd Olmstead, "Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection," 55 *Administrative Law Review* 705 (2003). By executive order—Executive Order 12866, § 1(b)(8), 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000) (issued by President Clinton and retained by President George W. Bush)—presidents Clinton and Bush directed agencies, when feasible, to regulate by mandating performance objectives rather than behavior, and much regulation of complicated subject matter takes this form.

34. See Douglas C. Michael, "Cooperative Implementation of Federal Regulations," 13 *Yale Journal on Regulation* 535 (1996): 570–71, 590, 598–600 (discussing regulation of seafood health risks); Julia Black, "Critical Reflections on Regulation," London School of Economics and Political Science, Centre for the Analysis of Risk and Regulation Discussion Paper Series DP 4, January 2002, 13–16; Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach," 101 *Columbia Law Review* 458 (2001): 461 (discussing workplace bias).

35. Carol A. Heimer, "Legislating Responsibility," American Bar Foundation, Working Paper No. 9711 (1997): 5–6.

36. See, for example, Cass Sunstein, "Administrative Substance," 40 *Duke Law Journal* 607 (1991), citing failures in using "rigid, highly bureaucratized 'command-and-control' regulation" to govern "hundreds, thousands, or even millions of companies and individuals in an exceptionally diverse nation" (627).

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38. White House, Executive Order 13228 (establishing the Office of Homeland Security and the Homeland Security Council), October 8, 2001, available at <http://www.whitehouse.gov/news/releases/2001/10/20011008-2.html>.

39. White House, Executive Order 13231 (on critical infrastructure protection), October 16, 2001, available at <http://www.whitehouse.gov/news/releases/2001/10/20011016-12.html>.

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41. Cary Coglianese, "Reducing Risk with Management-Based Regulation," notes on the Columbia/Wharton-Penn Roundtable on Risk Management Strategies in an Uncertain World, Palisades, NY, April 11–12, 2002, available at [http://www.ldeo.columbia.edu/chrr/documents/meetings/roundtable/pdf/notes/coglianese\\_cary\\_note.pdf](http://www.ldeo.columbia.edu/chrr/documents/meetings/roundtable/pdf/notes/coglianese_cary_note.pdf).

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46. "These policy initiatives have relied almost exclusively on 'market forces' to create a robust and secure infrastructure" (David Alderson and Kevin Soo Hoo, "The Role of Economic Incentives in Securing Cyberspace," Stanford University Center for International Security and Cooperation, November 2004).

47. Statement of William A. Reinsch, Under Secretary, Bureau of Export Administration, U.S. Department of Commerce, to the Partnership for Critical Infrastructure Security, July 26, 2000.

49. *The 9/11 Commission Report: Final Report of the National Commission on Terrorism Attacks in the United States* (New York: W.W. Norton, 2004), 398.

49. Ibid.

50. Philip E. Auerswald, "Complexity and Interdependence: The Unmanaged Challenge," in Auerswald et al., *Seeds of Disaster*, 157.

51. See generally Alderson and Hoo, "Role of Economic Incentives," 5, discussing the literature on free-riders in information infrastructure security, perverse incentives in information insecurity, and cyber-security vulnerabilities arising from network dependencies.

52. Jay Apt et al., "Electricity: Protecting Essential Services," in Auerswald et al., *Seeds of Disaster*, 218.

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63. *United States v. Carmack*, 329 U.S. 230, 244 n.14 (1946).
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## PART IV

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# The Impact of Unilateral Governance



## CHAPTER 10

# Globalization and Terrorism: The Effects on U.S. Society

Beau Grosscup

This chapter probes the effect of globalization on the U.S. National Security State (NSS) in the wake of the September 11, 2001, attacks. The National Security State consists of the president, vice president, National Security Council, secretaries of state and defense, Central Intelligence Agency (CIA), Federal Bureau of Investigations (FBI), and National Security Agency (NSA). Except for the president and a few selected members of Congress, the NSS is unaccountable to the electoral process.<sup>1</sup> Utilizing the connection between globalization and terrorism, the focus of this chapter is on the institutional expansion of executive branch power, the change in U.S. political discourse, and the privatization of the NSS. The underlying premise is that the George W. Bush administration has utilized its post-9/11 Global War on Terror to rationalize an omnipotent NSS in order to sustain U.S. global hegemony and construct a more militarized and repressive society at home.

Historically, the discourse on globalization has focused primarily on economic forces and its effect on national economies. Yet, for the United States, the continued dominance of the economic forces required the globalization of its NSS. As the editors of *Monthly Review* have remarked: “The global expansion of military power on the part of the hegemonic state of world capitalism is an integral part of economic globalization.”<sup>2</sup> The demise of the Soviet Union, which opened up areas of the Eurasian continent and the Middle East previously unavailable to the U.S. NSS, resulted in the ultimate globalization of U.S. military and paramilitary instruments of violence. As of 2007, the United States had a global network of more than eight hundred military bases in at least 130 countries.

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The number of U.S. military personnel serving abroad is estimated at 2.5 million.<sup>3</sup> In 2006, U.S. military spending was \$529 billion, almost half of the total \$1.2 trillion of the world's military spending—and ten times that of China.<sup>4</sup> In short, as the dominant force in the step-by-step process of globalizing militarism, not quite two decades into the post-Cold War era, the United States had solidified its imperial status.<sup>5</sup>

Due to national security requirements, major elements of this global military empire have always been kept secret. But even before 9/11 and the Bush administration's Global War on Terror, the sheer size and cost of the growing empire required political justification. A rising tide of anti-Western violence in the 1970s provided the needed rationale. Starting with Ronald Reagan, U.S. administrations have utilized the image of a global anti-U.S. terror network to help justify the globalization of U.S. instruments of coercion. By 9/11, the imagery of a global terrorist network was so well entrenched in the American psyche that President Bush needed no further rhetorical flourish to mobilize public support for his Global War on Terror. For NSS officials, 9/11 only sharpened the image of a global anti-U.S. terrorist threat.

On September 11, 2001, nineteen foreign terrorists hijacked four commercial airliners and crashed them into New York City's World Trade Center, the Pentagon, and the ground in western Pennsylvania.<sup>6</sup> In all, close to three thousand civilians died. In the tradition of his three predecessors, Bush announced that the United States faced the globalization of terrorism and, together with its "civilized" allies, would counter with a Global War on Terror. Insisting that the world was polarized between good and evil, he asserted: "Either you are with us, or you are with the terrorists."<sup>7</sup>

Many observers connect the 9/11 terrorist attacks to globalization's negative effects. Among the most prominently mentioned are deepening levels of poverty, maldistribution of income and wealth, class conflict, political injustice, and environmental degradation.<sup>8</sup> Douglas Kellner sums up this broad-based analysis, asserting: "The disclosure of powerful anti-Western terrorist networks shows that globalization divides the world as it unifies, that it produces enemies as it incorporates participants.... The events disclose explosive contradictions and conflicts at the heart of globalization."<sup>9</sup> Analysts also address why, among postindustrial societies, terrorists specifically targeted the United States. Some, such as William J. Dobson, cite the hegemonic position of the United States and the terrorists' desire to strike at the heart of the colossus.<sup>10</sup> Others focus on the globalization and brutal use of U.S. instruments of violence, framed in a "realist" strategy in which "the enemy of my enemy is my friend."<sup>11</sup> As Noam Chomsky succinctly put it: "For the first time, the guns have been directed the other way."<sup>12</sup> In essence, for many analysts connecting the 9/11 attacks with various aspects of globalization, the question is: "Just who has been terrorizing whom?"

It has been the Bush administration's interpretation as to the "why" of 9/11—that the terrorists hate our liberties—that has prevailed in the U.S. corridors of power and public mindset. Still, among administration officials, it was well understood, as Richard Haass stated, that "terrorism is



like many other challenges of this globalized era.... Global problems require global solutions.”<sup>13</sup> On this premise—and with vigorous support from mainstream media, the general public, and major foreign allies—the Bush administration quickly launched a war on terror at home and abroad. As neoconservatives of the Project for the New American Century—later senior officials in the Bush administration—predicted in 2000, a “new Pearl Harbor” would finalize the global reach of U.S. power and justify their long-desired domestic political and social agenda. After 9/11, both agenda items have been pursued under cover of the globalization of counterterrorism.<sup>14</sup>

In important respects, the domestic impact of the Bush administration’s strategy to counter the globalization of terrorism is rooted in the 1970s neoconservative agenda to globalize U.S. power while changing the nature of Western industrial society.<sup>15</sup> In brief, to neoconservatives, the “chaos of the 1960s” and the resulting rise of “the politics of fringe group participation” had produced a “crisis of democracy.” The rise of a politically liberal new class in the institutions of power had encouraged an “anything goes” (including violence) permissive culture that was undermining traditional notions of authority, culture, and the role of government. Western societies, they asserted, faced a choice between democracy and governability. They urged Western political elites to choose governability, in which the powers of the state, limited to the essential security function, would be used to mitigate the forces of “democratic excess.” Meanwhile, market-oriented globalization, uninhibited by government intervention both at home and abroad, would prosper.

Neoconservatives used the rise of anti-Western terrorism to justify their global and domestic crisis management system. In 1981, armed with a set of counterterrorism prescripts, specifically that “the terrorist needs democratic permissiveness as a fish needs water” and that “it is axiomatic that individual rights liberties are secondary to the requirements of national security and internal order,” the Reagan administration set out to confront a global Soviet terror network (an “evil empire”) and moderate democracy at home.<sup>16</sup> Throughout the 1980s and 1990s, advocates of participatory democracy fought hard and at times successfully to counter government efforts to prioritize governability. Out of the social forces battling the neoconservative agenda came the antiglobalization movement, consisting of various constituencies determined to make globalization responsible to multiple facets of society via government policy rather than just private capital.

Invoking the 9/11 attacks as evidence of the dark side of globalization, Bush’s neoconservatives looked to ensure complete U.S. dominance of every aspect of globalization. Their agenda, as articulated in the Project for the New American Century’s Statement of Principles, calls for increasing defense spending, strengthening ties to democratic allies while confronting hostile regimes, promoting political and economic freedom abroad, and maintaining America’s unique responsibility for international order.<sup>17</sup> True to this agenda, the Bush administration’s unilateral and confrontational approach to foreign policy has emphasized the use of military power,

rejection of permanent alliance structures in favor of ad hoc (event-oriented) alliances, and cancellation or nonobservation of international conventions if they restrain U.S. power.

It is on these prescripts that the Bush administration, aided by temporary “coalitions of the willing,” has unilaterally prosecuted wars in Afghanistan and Iraq; conducted paramilitary operations in the Middle East, Africa, and Latin America; encircled China and Russia with military bases; and threatened military reprisal on Syria, Iran, and North Korea. In conjunction with its global network of military bases, the United States has globalized its intelligence, arms sales, surveillance capacity, and “ghost” imprisonment systems.<sup>18</sup> It abrogated the 1972 Anti-Ballistic Missile (ABM) treaty with Russia while refusing to join the Kyoto Protocol and the International Criminal Court. It has tested the United Nations and either ignored or reinterpreted in its favor the Geneva Conventions on war, prisoners of war, attacks on civilians, and torture.<sup>19</sup> According to Edward Herman, this strategy has caused other countries to build up their militaries and produced a boomerang effect of ethnic, racial, and class conflict, including terrorism.<sup>20</sup>

In sum, under the umbrella of a Global War on Terror, the Bush administration has made the global arena more dangerous for even U.S. citizens. But it is the boomerangs of global terrorism and militarism that have affected the domestic aspects of the NSS and thus U.S. society the most.

## DOMESTIC EFFECTS OF THE GLOBAL WAR ON TERROR: CONSTRUCTING AN OMNIPOTENT AND PRIVATIZED NSS

“We are at war.”<sup>21</sup> “They have stirred up the might of the American people, and we are going to get them no matter what it takes.”<sup>22</sup> “Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen.”<sup>23</sup> With these declarations, President George W. Bush ordered the NSS and U.S. citizens to fight and be prepared to fight a permanent Global War on Terror. Nearly two and a half years later, in proclaiming “I’m a war president,” he confirmed that his Global War on Terror would continue to be the key in forcing fundamental changes in the institutions, policies, culture, and discourse of American society.<sup>24</sup> By 2006, the Global War on Terror was renamed “the Long War.” It was clear that, like the globalization of U.S. power, the neoconservative modifications of U.S. democracy were to be permanent and would be orchestrated under his post-9/11 mantra, “Whatever it takes.” As Bush put it in January 2006, “Congress gave me the authority to use necessary force to protect the American people, but it didn’t prescribe the tactics.”<sup>25</sup>

At the time of this writing, six years after 9/11, it is clear that Bush’s chosen tactics center on bolstering the NSS’s institutional and legal powers and, through privatization, making the U.S. security bureaucracy the poster child for market orientation and global capitalism. Conversely, he looks to diminish the authority and legitimacy of democratic institutions—that is,

those not controlled by the executive branch. The dramatic acceleration in the militarization of post-9/11 U.S. political culture has greatly aided this project. Briefly, militarization is a step-by-step process in which everything military or connected to the military is honored, privileged, and accepted as normal or natural. Its impact is broad and deep, affecting multiple venues of society. Today, militarization is global, and thus it is taken as normal or natural that every nation's civilian infrastructure be intimately linked with the military and that political candidates with some sort of military experience gain instant political advantage in elections.

As an imperial power, the militarization process is strongest in the U.S. national security bureaucracy. Citizens serving in the military as soldiers, especially in combat, or indirectly in a civilian capacity in the NSS assume and vigorously defend their mantle as the civilized world's patriotic "protectors." They are seen and view themselves as the rational experts on all matters of security, tasked to ensure the safety of the naïve and emotional "protected." Within the political culture of the NSS, the very definition of *security* is set in a militarized tradition, emphasizing military solutions—be it war, nation building, or counterinsurgency—above all else.

The events of 9/11 afforded Bush administration neoconservatives, who have long desired a more governable society, the opportunity to silence the voices of the emotional and irrational protected (feminists, gays, labor, civil rights activists, and environmentalists) and reassert the power and privilege of the manly, rational, and expert protectors. The Global (foreign) War (task of men) on Terror (immoral violence to be fought with righteous instruments of violence) accelerates this militarization process. Warning that it will be a long war further stresses the need for a permanently and deeply militarized U.S. society. Thus, core elements of militarization now dominate post-9/11 U.S. political culture, where

the world is seen as dangerous, learning to be preoccupied with enemies, bolstering executive power in the name of fighting those enemies, starting to define one's patriotism and the criteria belonging according to military service, or deferring to those who have done military service.<sup>26</sup>

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Within this highly militarized culture, the efforts to make a privatized NSS preeminent over democratic institutions, discourse, and process have borne fruit.

Prioritizing a market-oriented NSS means diverting public and private economic resources to it. Fearing 9/11 could paralyze the U.S. economy, the Bush administration used the public treasury consistent with its commitment to support private capital and increase defense spending. For example, capital-gains tax cuts and increased depreciation write-offs on capital equipment, along with loans of \$11.7 billion to banks and \$11 billion to the airlines, became priorities of fiscal policy. Refusing to raise taxes, Bush and the Republican Congress used the Social Security surplus to finance the debt and increased the money supply to assist financial institutions, businesses, and individuals. Finally, the president asked for \$18.4 billion for more defense spending and \$8.3 billion for ballistic missile defense.

These early commitments to private capital and defense spending at the expense of social programs continue to guide federal government policies. In 2005, the Bush administration's \$2.6 trillion federal budget included a record deficit of \$521 billion, unprecedented military spending, and a virtual freeze on domestic social program funds. The plan was introduced as one that would "protect the country from terrorism while chipping away at the record federal budget deficit by eliminating or shrinking 150 domestic programs."<sup>27</sup> The fiscal year 2007 budget of \$2.7 billion continued the trend as it cut spending at eleven federal agencies, limited benefits for the poor and elderly, and ended or reduced 141 federal programs in a wide variety of areas. Meanwhile, funding continues for private sector, faith-based social service programs. Robert Dreyfus notes the explosion in defense spending since 9/11:

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For 2008, the Bush administration is requesting a staggering \$650 billion, compared to the already staggering \$400 billion the Pentagon collected in 2001. Even subtracting the costs of the ongoing "War On Terrorism"—which is what the White House likes to call its wars in Iraq and Afghanistan—for [fiscal year] 2008, the Pentagon will still spend \$510 billion. In other words, even without the president's two wars, defense spending will have nearly doubled since the mid-1990s.<sup>28</sup>

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In short, under the guise of fighting a permanent Global War on Terror, the Bush administration has pushed the neoconservative agenda of increasing national security spending while limiting the role of government in social welfare.

The political effects of the Global War on Terror are most apparent in the power relations among the executive, legislative, and judicial branches of government and in political discourse. The militarized distinction between the protector and the protected has provided the rationale to centralize even greater power in the NSS. The president's constitutional role as commander in chief of the armed forces and the assertion that the United States is at war have given the Bush administration multiple opportunities to expand the powers of the executive. They have also allowed it to diminish the role of Congress, insinuating that because legislators represent the emotional and irrational protected citizenry, they not only lack national security expertise but cannot even be trusted with state secrets. Thus, only a select few "trustworthy" congressional members are deemed as having a "need to know" about national security operations.<sup>29</sup> Likewise, the judicial branch's insistence on "legal niceties" in time of war is lamented as constraining executive experts' ability to bring victory and giving "aid and comfort to the enemy." Constitutional lawyer Scott Horton sums up the Bush administration's attitude toward these legal niceties by referring to its approach as "the ipse dixit school of jurisprudence—'because I say so.'"<sup>30</sup>

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The public battle over the NSA's secret domestic surveillance program, in which President Bush asserted the right to bypass the Foreign Intelligence Surveillance Act (FISA) legislation, is a case in point. The administration

attacked Congress and the judiciary (as well as “disloyal” media institutions who “leaked the story”) on these grounds.<sup>31</sup> The Bush administration’s assault on the powers of Congress and the judiciary is neither accidental nor haphazard. It is based on a radical form of Unitary Executive Theory, a doctrine requiring almost absolute congressional and judicial deference to the executive branch.<sup>32</sup> By April 2005, Bush had invoked his “constitutional authority to supervise the unitary executive branch” ninety-five times to justify his executive actions.

Under the urging of administration neoconservatives, particularly Vice President Dick Cheney, Bush accepted the principle that “there exists no norm that is applicable to chaos.”<sup>33</sup> This principle corresponds to the work of German legal philosopher Carl Schmitt, who asserted that “legal norms [are] only applicable in stable and peaceful situations—and not in times of war, when the state” is confronted by violence.<sup>34</sup> Armed with this principle and his constitutional position as commander in chief, President Bush asserted that he was free to do whatever he deemed necessary to win the Global War on Terror. For example, in July 2007, he issued an executive order entitled “Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq.” The order expands the powers of the president under the International Emergency Economic Powers Act, permitting government seizure of the assets and property of anyone deemed to be interfering with the administration’s Iraq policies.

Like past presidents, Bush uses executive orders to notify Congress of presidential actions. Since 9/11, much of what he and his NSS loyalists deemed essential has been done in secret and without congressional review. The effect, as documented by the House Oversight and Reform Committee, chaired by Rep. Henry Waxman, is widespread government secrecy and unaccountability.<sup>35</sup> A massive report, *Government Secrecy: Decisions without Democracy, 2007*, by a bipartisan coalition of civil liberties groups, echoes Waxman’s concerns.<sup>36</sup> The report asserts that at a time when new information technologies, in particular the Internet, make it easier and cheaper for the government to inform the citizenry, secrecy “has been advanced in a myriad of ways, including excessive classification, brazen assertions of ‘executive privilege’ and ‘state secrets,’ new control markings to restrict ‘sensitive but unclassified’ information, and new limits on Freedom of Information Act requests.”<sup>37</sup>

Under the aegis of a “war administration,” Bush officials have written energy policy in secret, refused to inform the public of the potential costs of the Iraq War, reclassified public documents as secret, and insisted that the NSA’s secret bypassing of the FISA court notification requirements and the withholding of information about the Global War on Terror are legal.<sup>38</sup> To protect the secret activities of his office, in 2007 Vice President Cheney asserted that his dual legislative and executive responsibilities exempt his office from the president’s 2003 executive order requiring federal agencies to report each year on the classification, declassification, and safekeeping of national security information. Utilizing presidential signing statements, Bush claimed the authority to disobey more than 750 laws if they conflict with his view of the executive’s constitutional powers.

Under the Bush administration, Dean Acheson's 1963 rationale for the U.S. policy of ignoring international law and conventions if they restrain U.S. power remains intact.<sup>39</sup> Armed with the moral cover of fighting global terrorism, the executive branch, depending upon what it deems to be in the national interest, has ignored, reinterpreted, or obeyed the 1949 Geneva Convention on the treatment of war prisoners.<sup>40</sup> Administration officials redefined captured terrorist suspects as "unlawful combatants" and thus placed them outside the purview of Geneva guidelines. In 2006, after a Supreme Court setback (*Hamdan v. Rumsfeld*) to their plan to try terrorist suspects before military tribunals, the Bush administration and the Republican-controlled Congress responded with the Military Commissions Act of 2006. This law further extends executive war powers, according to one account, giving "the president absolute power to decide who is an enemy of our country, to imprison some people indefinitely without charging them with a crime, and to define what is—and what is not—torture and abuse."<sup>41</sup>

In reality, the Military Commissions Act did away with the writ of habeas corpus, the foundation of the U.S. legal system from which all other legal rights flow.<sup>42</sup> On May 9, 2007, President Bush issued the National Security and Homeland Security Presidential Directive. According to Marjorie Cohn, in the event of a "catastrophic emergency" such as a terrorist event or natural disaster, the directive "places all governmental power in the hands of the president and effectively abolishes the checks and balances in the Constitution."<sup>43</sup> In short, this directive reaffirms the urgency component of militarized security and the executive's privileged place in dealing with national emergencies.

An important measure of how determined, and indeed successful, the Bush administration has been in utilizing the 9/11 attacks to push for an imperial presidency rests in the warnings of critical opinion. Originally, much of it came from the liberal and progressive political, academic, legal, and media communities, but by 2006, some members of the conservative community had joined in. Notable among them are the Liberty Coalition's proposals calling on Congress to rescind many of the broad sweeping powers President Bush has championed under his Global War on Terror. Its ten-point agenda calls for an end to military commissions, warrantless wiretapping, the CIA rendition program, and executive use of the state-secret privilege; restoration of habeas corpus; a prohibition on secret evidence or evidence obtained by torture and detention of U.S. citizens as enemy combatants without proof; and challenges to presidential signing statements.<sup>44</sup>

How effective critics of an imperial presidency will be is unclear. What is clear is that they face a general and determined effort to expand executive power under the rationale that the threat of globalized terrorism has ended "normalcy" both at home and abroad. Thus it is necessary to tame the "excesses of democracy" through domestic surveillance, the curtailment of congressional and judiciary power, and the militarization of society. The effect, argue Alison Parker and Jamie Fellner of Human Rights Watch, is that "it is precisely good government—and its protection of human rights—that the Bush administration is currently jeopardizing with

its post-September 11 antiterrorist policies.”<sup>45</sup> Indeed, as demonstrated in the August 3, 2007, congressional approval of expanded FISA powers that eliminate any judicial review as long as global terrorism is projected as a “catastrophic and permanent threat,” future presidents will have the rationale and precedent for further centralization of executive power.

Since 9/11, both the meaning of *national security* and the institutional base of the NSS have been broadened. As Cynthia Enloe notes, “Anything can be defined as a threat to national security, using the conventional understanding of that term, insofar as it appears to threaten the strength of the state.”<sup>46</sup> To NSS terrorism experts, the 9/11 attacks clearly demonstrated that while foreign terrorists were responsible for 9/11, help also came from domestic sources. The attacks validated their warnings about the subversive and indiscriminate nature of the disease known as terrorism.<sup>47</sup>

Together, these assertions have produced a national security policy premised on the necessity and urgency of “securing everything and everyone” and militarizing the nation’s resources to do so. The result has been further centralization of power in and greater resources directed toward the NSS. This has been done on two fronts. First, the institutional base of the national security bureaucracy has been enlarged. Second, legislation principally embodied in the Patriot Acts (see below) has expanded the legal authority of the NSS. Both measures have greatly increased the ability of federal, state, and local government agencies to conduct domestic intelligence activities in the name of protecting everything and everyone, while diminishing the scope of individual rights.

In March 2003, the Bush administration created the Department of Homeland Security (DHS) in the largest reorganization of the federal government since the 1947 creation of the Department of Defense. Combining twenty-two federal agencies into a cabinet-level bureaucracy, the DHS was armed with a budget of \$24 billion. By fiscal year 2008, President Bush’s request had jumped to \$46.8 billion, a nearly fourfold increase from the \$13 billion the federal government had spent on homeland security in 2000. Whether the new bureaucracy has made the United States more secure is a matter of debate. In its 2005 analysis of the billions of dollars of contracts the DHS handed out in the name of the war on terror, the *Washington Post* reported that “the Department of Homeland Security failed to properly supervise those projects, the costs are climbing far above the original estimates, and some of the systems are not performing as promised.”<sup>48</sup>

It is clear that the DHS has affected the lives of individuals and the operations of federal, state, and local public agencies and the private sector. For example, in assessing the impact of the DHS on the U.S. national security establishment—specifically the Department of Defense, which before 9/11 had had both foreign and homeland portfolios—Thomas Barnett and Henry Gaffney conclude that “the Pentagon has just been demoted to subcontractor to the Homeland Security authority.”<sup>49</sup> Moreover, the DHS gained enforcement powers in immigration policy. As a result of market-driven globalization, illegal immigrants from Third World countries have sought jobs and political asylum in the United States for decades, but the 9/11 attacks put a “terrorism face” on the immigration

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“boomerang” in the context of fears of foreign terrorists’ surreptitious entry into the United States.

In the wake of criticism from the 9/11 Commission that the attack was the result of “faulty intelligence,” in 2005 President Bush created the position of director of national intelligence (DNI). The director’s task is to centralize and coordinate the work of fifteen separate civilian and military intelligence agencies in order to “connect the dots” of intelligence data produced by these competing agencies. The new post constitutes the most sweeping change in the intelligence bureaucracy since the beginning of the Cold War. Critics such as Timothy H. Edgar of the American Civil Liberties Union (ACLU) fear that putting the director, or “intelligence czar,” in the White House will “make sensitive domestic national security investigations a servant of the president’s political or ideological goals.”<sup>50</sup> Others, such as Bill Van Auken, express concern that the extraordinary powers of the new position will be used for domestic spying and to suppress democratic dissent.<sup>51</sup> At a minimum, the effect of both the DHS and DNI bureaucracies on U.S. society is a greater centralization of power in the executive branch, larger amounts of the government treasury going to the national security apparatus, and the aggravation rather than alleviation of bureaucratic inflexibility and coordination.

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Immediately after 9/11, the Bush administration moved to enact legislation that would give it the legal basis to conduct its Global War on Terror. The legislation, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, more commonly known as the USA Patriot Act (USAPA), passed through Congress on October 25, 2001, with no debate allowed and no member permitted to read it. President Bush signed the USAPA into law one day later. The USAPA has proven to be one of the most controversial pieces of legislation in U.S. history. While supporters and critics agree that the USAPA expands the power of the federal government and limits the scope of individual rights, debate centers on whether it is politically appropriate in a liberal democracy and effective as a counterterrorism instrument. For the Bush administration and its supporters, the answer to both questions is yes.

The USAPA is the culmination of the neoconservative campaign to use the threat of global terrorism to swing the pendulum away from civil liberties in favor of public safety. While both the Reagan and Bush administrations made some progress, there was bipartisan resistance to the more draconian proposals such as

the resurrection of guilt by association, association as grounds for exclusion or deportation, the ban on supporting lawful activities of groups labeled “terrorist,” the use of secret evidence, and the empowerment of the secretary of state to designate groups as terrorist organizations, without judicial or congressional review.<sup>52</sup>

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The absence of a foreign-instigated terrorist event on U.S. soil appeared to justify the restraint.



The April 1995 Oklahoma City bombing did result in congressional approval of the Clinton administration-sponsored Antiterrorism and Effective Death Penalty Act of 1996. The legislation restored the guilt-by-association law and undermined the right to habeas corpus by making it harder for the federal government to retry prisoners whose constitutional rights state courts had violated. Yet again, a bipartisan congressional coalition managed to stall other draconian measures. To Jennifer Van Bergen, the lesson was clear: "Oklahoma City proved that only a 'real' terrorist attack would convince Congress."<sup>53</sup>

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The 9/11 attacks qualified as the required real (catastrophic) terrorist event. In part, this was due to the large number of victims. But more importantly, unlike Oklahoma City, the 9/11 attacks came from "over there" and were the work of unknown foreigners from little-understood or -respected foreign cultures. By emphasizing the foreign source of 9/11 and a world still starkly divided between the civilized (law abiding) and uncivilized (arbitrary) peoples, the Bush administration easily rallied bipartisan political leadership and the public at large to its draconian legal agenda.

Thus the USAPA contains many of the measures previously rejected in dealing with domestic terrorism. For example, analysts from the Electronic Frontier Foundation argue that the USAPA gave "sweeping new powers to both domestic law enforcement and international intelligence agencies and eliminated the checks and balances that previously gave courts the opportunity to ensure that such powers were not abused."<sup>54</sup> They note that the USAPA restored executive powers rescinded in 1974 after it was discovered that the FBI had spied on more than ten thousand U.S. citizens, among them Dr. Martin Luther King Jr. The USAPA also expanded the power of the secretary of state to designate terrorist groups without any court or congressional review and allows for secret searches without probable cause.<sup>55</sup> These powers can be invoked in all criminal investigations whether they are terrorism related or not.

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Under Section 218, the USAPA modified the prior FISA requirement that, in order to conduct surveillance, the executive had to confirm "the purpose" (meaning the primary purpose) of the spying; the change now requires only that a "significant purpose" must be certified. Van Bergen interprets the change as meaning that "the FBI, the CIA, or any other intelligence agency, can surveil you without probable cause, as long as they say the surveillance has something to do with a foreign intelligence investigation of some sort (which may otherwise not even involve you directly)."<sup>56</sup> In short, the end of the "primary purpose rule" undermines the Fourth Amendment's probable-cause requirement and effectively ends any judicial review of surveillance activities.

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Two general effects of the USAPA on U.S. domestic life flow from these and other sections that expand the investigative power of the NSS and undermine civil liberties.<sup>57</sup> The ACLU argues that Section 805 expands the type of conduct that the government can investigate when it is investigating "terrorism." The definition of domestic terrorism is so broad that it could include actions of any individual or group the

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government decides fall under the all-encompassing criteria.<sup>58</sup> In addition, the Justice Department rescinded regulations against the FBI counterintelligence program that had been put in place in 1971 as a result of three decades of secret surveillance and “intelligence abuses” of civil rights and peace activists. Thus, since 9/11, the Pentagon and NSA have kept under surveillance a plethora of groups and individuals who assumed they were exercising their constitutional rights. The list is long and, due to the secrecy surrounding surveillance activity, no doubt incomplete. It includes antiwar protestors, peace activists, animal rights groups, environmental activists, the Muslim-American community (particularly Muslim immigrants), antinuclear groups, student organizations, pro-Palestinian groups, critics of U.S. policy toward Cuba, and opponents of globalization. In the name of counterterrorism, state and local governments have reintroduced the infamous “Red Squad” activities of infiltrating and intimidating political groups.<sup>59</sup>

Even before 9/11, President Bush secretly authorized the NSA to conduct covert and illegal domestic surveillance. In August 2007, NSA director Mike McConnell confirmed that, via a single executive order, Bush had authorized a broad series of secret surveillance operations on U.S. citizens. According to declassified documents, after 9/11 the NSA, “on orders from Defense Department officials and President Bush ... kept a running list of the names of Americans in its system and made it readily available to a number of senior officials in the Bush administration.”<sup>60</sup>

In the name of protecting everyone, the USAPA undermines everyone’s right to privacy. It dramatically increases the ability of the CIA and FBI to monitor email and to access medical, financial, and student records. It permits phone and roving wiretaps and allows agents to break into private dwellings without prior notification. Supporters of the USAPA and the intelligence agencies consistently justify the privacy invasions as relevant for ongoing investigations concerning international terrorism or clandestine intelligence activities.

On December 13, 2003, President Bush signed into law the Intelligence Authorization Act. Supporters focused on the “urgency” argument. They claimed that it was necessary to give the FBI the expanded and permanent powers to deal, in an “expeditious and efficient” manner, with the next terrorist attack. The bill, which passed with only a voice vote in the Senate, was attached to a general funding of all intelligence agencies. This again permitted its supporters to avoid public hearings and floor debates on further expansion of the powers of the intelligence agencies and the end of judicial review. It also redefined *financial institution*, which, under the USAPA, referred only to banks. Now it includes stockbrokers, car dealerships, casinos, credit card companies, insurance agencies, jewelers, airlines, the U.S. Post Office, and any other business “whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.”<sup>61</sup>

In March 2006, Congress passed and the president signed the renewal of the USAPA. With the exception of three provisions to be reviewed in four years, USAPA II is without any sunset provisions. Rationalized as required by the Global War on Terror, the broad expansion of NSS powers

and the undermining of civil liberties that USAPA II represents are, for the foreseeable future, a permanent part of U.S. political life.

In sum, under the body of counterterrorism legislation passed since 9/11 and presidential executive orders, civil liberties in the United States have been severely curtailed. In describing what he labels “Bush’s Era of Repression,” Matthew Rothschild notes that under its post-9/11 legal edifice, the government is monitoring citizens’ phone calls, emails, traditional mail, and large financial transactions. Law enforcement officials can enter citizen’s homes unannounced and when no one is home. They can plant listening devices and go through private belongings. They can also monitor public exercise of political rights and religious places of worship and can infiltrate political organizations. Citizens have lost the right to protest in view of the president and vice president or even at events where neither is present and can be held as a “material witness” in “preventive detention” for months.<sup>62</sup>

The 9/11 attacks have also brought dramatic changes in domestic political discourse. President Bush’s answer to the “why” of 9/11 and his starkly polarized imagery of “us against the terrorists” reinforced the American public’s perception of their nation’s benevolent role in the world and their positive image of “self” and negative construction of the foreign “Other.”<sup>63</sup> With an administration heavily influenced by and staffed throughout with traditionalist Christians, including the president himself, a more pronounced moral righteousness has been added to the post-9/11 political discourse. A day after the attacks, Bush framed the conflict as one between “good and evil,” and he later invoked the word *crusade* to describe his war on terrorism. He altered the labeling of the enemy from “rogue states” to the “axis of evil,” and his constant references to the forces of light and darkness reflect in the multitude of “God Bless America” bumper stickers.<sup>64</sup> Religious conflict is also a key element in the popular thesis that 9/11 represents a seminal event in the global “clash of civilizations.” According to Michael Weinstein, coauthor of *With God on Our Side*, evangelical Christians are close to their goal of “spiritually transforming” the U.S. military.<sup>65</sup> Empowered by the Holy Spirit, they see the U.S. military serving as global ambassadors for Christ.

In the post-9/11 militarized political culture, the sentiment “you are either with us or against us” rules the day. The effect has been to give impetus to the militarization of discourse, in particular the superimposition of the meaning of jingoism onto the concept of patriotism. Thus, being a patriot or doing one’s patriotic duty in the war on terror has come mean “shut up and support the president.” Jingoist imperial slogans such as “America Right or Wrong,” “These Colors Don’t Run,” and “Pride Is Power” now dominate even moderate militarized discourse. More strident jingoist sentiments such as in “Antiwar = Pro-terrorism,” “Give War a Chance,” “Nuke Mecca,” “Strike Globally, Protect Locally,” or “Kill ’em All, Let God Sort It Out” also dot the militarized American landscape. In this climate, a “Peace Is Patriotic” bumper sticker is unwelcome. As the female country band the Dixie Chicks discovered, even mild criticism of the president will produce boycotted recordings and music tours, death

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threats, and organized protests. Meanwhile, pro-war country artists such as Toby Keith, with his song "Courtesy of the Red, White and Blue (The Angry American)," find political and financial favor.

A product of the imperial globalization of U.S. instruments of violence and the rapid militarization of U.S. society, the jingoist political culture has helped create a context in which democracy is undermined, legal and social traditions and protections of civil society are diminished, and xenophobic and racist violence rises. Thomas Frank documents the rise of this "backlash" politics in post-9/11 middle America, in which anger toward foreign enemies, a range of "outgroups," and social traditions such as evolution, secularism, science, and pluralism has replaced long-standing animosity toward big corporations.<sup>66</sup>

Jingoist sentiments dominate the headlines and bumper stickers, but it is the discourse about "urgency," "national security," and a Global War on Terror that have mobilized public backing for an omnipotent NSS and blunted democratic dissent. Public support for the Iraq War has slipped since 2003. Yet, through 2007, a majority of the public and the political elite continued to back the concept of a Global War on Terror. Though 9/11 happened on their watch, the public still views Republicans as stronger on national security issues than Democrats. Leading presidential candidates of both parties support President Bush's assertion that, like Iraq under Saddam Hussein, Iran is the major supporter of global terrorism. Though critical of how the Bush administration "marketed" the Iraq War and aware that the same public relations techniques are at play relative to the "problem of Iran," they all back his bellicosity toward the Iranian government, support the U.S. Persian Gulf naval buildup, and refuse to "take any option off the table." Predictably, militarized jingoists have shifted their attention to the "new enemy" with "Bomb Iran Now" bumper stickers.

Public references to 9/11 continue to reap political rewards for the Bush administration and its allies. Fear of more 9/11-like terrorism magnifies the emergency side of national security that is postured as requiring "urgent" and "unusual" measures. Accusations that Bush administration officials have purposely used the "fear factor" to bolster their political fortunes and divert attention away from their political mishaps or negative news are rampant. For example, data support the suspicion that Bush officials manipulated the color-coded terror alert system for political gain in the 2004 election.<sup>67</sup> MSNBC researchers found that the Bush administration's public warnings of a new terrorist plot had consistently coincided with news that shed a negative light on the administration and that many of the plots turned out to be overblown or nonexistent.<sup>68</sup>

David Keen points to the record of frank admissions from the Bush administration concerning the need to "sell" the war on terror. He says Bush officials carefully chose the phrases "axis of evil," "smoking gun," "shock and awe," "Islamic fascists," and "arc of extremism" to oversimplify and hype the threat as required in a "sound-bite culture."<sup>69</sup> The fear factor is also expressed in the administration mantra that the Global War on Terror requires "special tactics" doing "whatever it takes" to "fight them there so they won't come here." Fear of "not supporting the

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troops” has largely silenced critics of U.S. shock-and-awe bombing campaigns in Afghanistan and Iraq and allowed the ongoing air wars that have killed hundreds of thousands of civilians to be wrapped in secrecy.

Photographs from Abu Ghraib prison disseminated throughout the global communications system revealed a secret global U.S. prison system. Further investigation disclosed that torture and other forms of prisoner abuse, at times resulting in death, are routine throughout the far-flung system.<sup>70</sup> As a result, heated public debate over the need for and utility of torture has entered U.S. political discourse. On the one hand, public opinion polls show a vast majority (72–89 percent) of Americans oppose the use of torture. Many professional interrogators also warn that torture-induced intelligence is unreliable. Yet, within powerful political, security, and media circles, torture is defended as essential in a “dangerous world” where urgency requires instant information. For example, Congress passed and the president signed legislation allegedly banning torture. Yet, the bill allows interrogators to use, in extreme cases, harsh measures labeled “enhanced interrogation techniques.” Still undisclosed, they are thought to include various forms of slapping and exposing interrogation subjects to stressful exercise and extreme temperatures. Such techniques are permitted under the Justice Department’s Office of Legal Counsel (OLC) operative definition of *torture*, under which “physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” This definition expands the 1994 United Nations Convention against Torture, which, at the insistence of the U.S. negotiators, is said to be “interrogator-friendly.”<sup>71</sup>

President Bush attached a signing statement to his signature, permitting him, as commander in chief, to ignore the no-torture legislation. Torture in cases of extreme emergency has also found favor in electoral politics. In their May 17, 2007, debate, eight of ten Republican candidates (the dissenters were Ron Paul and Sen. John McCain, who was tortured as a prisoner of war during the Vietnam War) and the audience enthusiastically supported torturing terrorist suspects in urgent situations.<sup>72</sup> As of mid-2007, the CIA’s secret rendition program that sends “terror suspects” to be interrogated (tortured) in foreign countries, though under scrutiny, remains intact.

In late July, Bush signed an executive order allowing the CIA to resume its enhanced interrogation measures in the U.S. global prison system. According to Jerry White,

The order, which was issued in conjunction with a classified list of approved interrogation techniques, is designed to provide a legal sanction for physical and psychological torture and protect CIA operatives from being charged with war crimes for violating U.S. and international law against inhuman treatment.<sup>73</sup>

Congressional funding continues for the controversial detention center at Guantanamo Bay despite numerous accusations of prisoner abuse and torture and pleas from around the globe for its closure. Clearly, the jingoist

mantra “What happens at Gitmo, stays at Gitmo” (or anywhere else) continues to dominate U.S. elite opinion.

Support for U.S. global militarism remains strong even among Democrats elected to Congress in 2006. Allegedly, they were swept into office due to public discontent with the Iraq War. Yet, in selecting new candidates, Democratic Congressional Campaign chairman Rahm Emanuel, a rising star in Democratic Party circles applauded for his “toughness,” pledged that the party would not support antiwar liberals. Militarism among Democrats is partly due to Republican success at playing “into the Western myth and mined images of manliness, feminizing Al Gore as a Beta Tree-Hugger, John Kerry as a Waffling War Wimp With a Hectoring Wife, and John Edwards as his true bride, the Breck Girl.”<sup>74</sup>

Thus, on both sides of the congressional aisle, there is a powerful commitment to militarized security so that pro-war on terror sentiment prevails, “support the troops” funding of the Iraq War continues, and “responsible” criticism is narrowly focused on the Bush administration’s “incompetent conduct” of the Iraq War. In this context, both the Republican and Democratic 2008 presidential campaign debates are extremely militarized. Both have been showcases for an extremely masculine militarism as the majority of candidates try to “out-tough” each other on national security issues.<sup>75</sup> If past presidential campaigns are any guide, the battle to “show strength” will intensify as candidates, especially those proposing nonmilitary options for resolving national security issues, are labeled “soft” (feminine) and deemed unworthy of being commander in chief (protector). In a post-9/11 political culture where the Global War on Terror is the centerpiece of U.S. worldwide hegemony, candidates representing the voices of the protected are deemed ill suited for the militarized NSS corridors of power.<sup>76</sup>

## THE PRIVATIZED NATIONAL SECURITY STATE

Along with its preeminent position in post-9/11 society, market-oriented globalization has greatly affected the operational aspects of the NSS. Much like the Reagan and Clinton administrations before it, the Bush administration entered office determined to limit the role of government to the essential task of national security and continue the privatization (delegating public duties to private organizations) of the public realm. Neoconservative crisis management prescriptions that celebrate both private-sector efficiency and effectiveness and the failures of bloated government bureaucracies guide the January 2001 Heritage Foundation Report, “Taking Charge of Federal Personnel,” which also advised private contractors to “make appointment decisions based on loyalty first and expertise second.”<sup>77</sup> As of 2006, the Bush administration had increased government contracting by 86 percent at the cost to taxpayers of \$400 billion a year. More people now work in privatized federal jobs than in civil service ones. They serve in the vast majority of agencies and are involved in every task, including budget and policy decisions. Private contractors even monitor the federal private contact system.

Around the world, national security bureaucracies have embraced privatization. As Robert Mandel notes, “Even the area most tightly associated with government functioning—the provision of security for its citizenry—has fallen prey to the privatization tidal wave.”<sup>78</sup> As of 2004, the privatized military industry’s estimated annual global revenue was \$100 billion. According to Peter W. Singer, “Working in over fifty conflict zones, the industry is emblematic of a broader globalization.”<sup>79</sup>

With the 9/11 attacks, the subsequent Global War on Terror, and its preeminent responsibility for national security all working in its favor, the Bush administration greatly accelerated the privatization of the NSS. To globalization enthusiasts, the arguments for doing so ring familiar, if not true. For Doug Brooks, president and founder of International Peace Association, a trade organization for the military service companies, the 9/11 attacks greatly amplified the need for urgency and efficiency. Privatization, Brooks asserts, gives the NSS “surge capacity” as private companies can be mobilized quickly, thus reducing the need for a large and expensive standing military.<sup>80</sup> As secretary of defense, Donald Rumsfeld insisted that using private contractors saved money and freed up the military to concentrate on its core warmaking mission. Other observers recognize a direct connection between the privatization project and war. As Hacene Djemam, general secretary of the International Confederation of Arab Trade Unions, points out, “War makes privatization easy: first you destroy the society and then you let the corporations rebuild it.”<sup>81</sup>

The privatization of the domestic national security bureaucracy is extensive and affects a wide range of areas, such as housing, maintaining, and operating high-technology weapons and information systems, military energy facilities, and military hospitals. The privatized NSS has created the private military company (PMC), specializing “in the provision of military skills, conducting tactical combat operations, strategic planning, intelligence, operational and logistics support, troop training, and technical assistance, etc.”<sup>82</sup> Functionally, the PMC is separated into military provider firms, military consulting firms, and military support firms.

The federal government has also contracted out intelligence and surveillance functions to the point where, as of 2007, nearly 70 percent of U.S. intelligence was privatized.<sup>83</sup> In his research, R. J. Hillhouse found that

for all practical purposes, effective control of the NSA is with private corporations, which run its support and management functions. . . . More than 70 percent of the staff of the Pentagon’s newest intelligence unit, CIFA [Counterintelligence Field Activity], is made up of corporate contractors.<sup>84</sup>

At the CIA’s National Clandestine Service, whose central task is human intelligence, 50–60 percent of the work is done by for-profit contractors. Private employees in the DNI’s office largely prepare President Bush’s daily briefing document.

A case study in privatized intelligence is Science Applications International Corporation (SAIC). A huge yet virtually anonymous company, SAIC is a major player in the privatized intelligence/surveillance business.

It employs around 44,000 people and is larger than the Labor, Energy, and Housing and Urban Development departments combined. Donald Bartlett and James Steele describe SAIC as

a body shop in the brain business. It sells human beings who have a particular expertise—expertise about weapons, about homeland security, about surveillance, about computer systems, about “information dominance” and “information warfare.” If the CIA needs an outside expert to quietly check whether its employees are using their computers for personal business, it calls on SAIC. If the Immigration and Naturalization Service needs new recordkeeping software, it calls on SAIC.<sup>85</sup>

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In 2005, the nuclear weapons industry was privatized as Bechtel, a construction company, won a \$553 million yearly management contract to run the Los Alamos National Laboratory, a facility employing more than 13,000 people with a \$2.2 billion annual budget. Finally, the 2007 decision of the Halliburton Company to move its chief executive and corporate headquarters to Dubai for resource access and tax considerations signals a further globalization of U.S. PMCs with significant ties to the NSS.

Foreign corporate interests are also involved in NSS privatization. The multiple global sites of research and advanced technology and the huge U.S. military budget have resulted in a reciprocal relationship between foreign PMCs and the U.S. military. As Leslie Wayne notes:

The Pentagon’s latest weapons-buying list has a distinctly global tinge. . . . A recent Pentagon study identified seventy-three foreign suppliers who provided parts to twelve of the most important weapon systems used by American troops. Laser-guided bombs use German aluminum tubes, Tomahawk missiles have Italian guidance systems, and Predator drones have Swiss data terminals.<sup>86</sup>

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In June 2005, British-based BAE Systems, the world’s third largest defense contractor, spent \$4 billion to buy United Defense Industries, a major producer of naval guns, combat vehicles, artillery, missile launchers, and precision munitions. Over the previous year, BAE, which the U.S. government declared to be “American,” had acquired five other U.S. contractors. In 2007, with the \$4.5 billion purchase of Armor Holdings, BAE became one of the top ten U.S. defense contractors. It was also the target of a Justice Department investigation for money laundering and bribery.

BAE, along with the Franco-German European Aeronautic Defense and Space (EADS)—a major global supplier in the aerospace sector and producer of Airbus—and other foreign companies have set up production sites in the United States. PMCs from eight countries were involved in the \$256 billion project to build the Joint Strike Fighter that is to replace the F-16. Germany (24 percent) and Italy (17 percent), along with the United States (58 percent) are funding the \$3.5 billion development of a new medium-range missile system that will replace the Patriot defense missile. In short, despite congressional and internal Pentagon fears that national security is being compromised and a “buy American” post-9/11 climate,



foreign participation in NSS privatization has grown. According to Robert Trice, vice president of Lockheed Martin, foreign participation in Pentagon projects is necessary as U.S. industry is no longer able to provide all of the required military resources.

Privatization and globalization have also come to U.S. port facilities. Though deemed to be “infrastructure critical to national security,” foreign companies and governments either own or run the majority of U.S. port terminals. For example, APL Limited, a part of the Singapore government’s Neptune Orient Lines, runs terminals in Oakland, Seattle, and Alaska. Cosco Container Lines, a division of China Cosco and partly owned by the Chinese government, operates a terminal at the Port of Long Beach. The London-based Inchcape Shipping Services (as of January 2006 owned by the royal family of Dubai) manages the tugs, pilots, and dockworkers in many U.S. ports, including New York, New Jersey, and San Francisco. In February 2006, with the support of the Bush administration, Dubai Ports World bought the British company Peninsular & Oriental Steam Navigation Co. (P&O) for \$6.8 billion. P&O manages container terminals in New Jersey, Baltimore, New Orleans, Miami, and New York City. The deal caused a political firestorm when leading political figures expressed alarm that an Arab nation, albeit a U.S. ally, would control six major U.S. ports. In December 2006, political pressure forced Dubai Ports World to sell its U.S. operations to American-owned AIG Global Investment. Yet, despite the jingoist (and racist) rhetoric, the reality is that, like foreign PMC-Pentagon ties, private foreign involvement in U.S. ports is an unavoidable fact of globalized maritime commerce.

A hint as to the enormous extent of NSS privatization became evident in the 2003 U.S. invasion and (privatized) occupation of Iraq. During the months before the invasion, private contractors, who outnumbered U.S. military personnel by a ten-to-one ratio, were

operating supply lines, running training exercises, and even assisting with the war gaming and battle planning in the Kuwaiti desert. . . . During the major combat operations phase of the Iraq War . . . private military employees handled everything from feeding and housing U.S. troops to maintaining sophisticated weapons systems like the B-2 stealth bomber, F-117 stealth fighter, Global Hawk UAV, U-2 reconnaissance aircraft, M-1 Tank, Apache helicopter, and air defense systems on numerous Navy ships.<sup>87</sup>

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Halliburton led the way with a \$425 million contract for troop support work. By July 2007, at least 180,000 private contractors were in Iraq under the auspices of the NSS.

Led by Kellogg Brown & Root, Halliburton, Bechtel, MCI WorldCom, Blackwater USA, and Dyncorp/Computer Sciences Corp, dozens of U.S. corporations have assumed traditional military duties, including security tasks that often place private contractors in harm’s way.<sup>88</sup> In 2004, the Pentagon further globalized the Iraq War, signing a \$293 million contract with British-based Aegis Defense Services to coordinate security in Iraq. At the insistence of the Bush administration, L. Paul Bremer III, U.S.

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administrator of the Coalition Provisional Authority, issued his “One Hundred Orders” to ensure that postoccupation Iraq would be included in globalization. Parsons Corporation, Fluor Corporation, Washington Group Shaw Group, Bechtel, Perini Corporation, and Contrack International led the way in the multibillion-dollar privatized reconstruction of Iraq’s infrastructure. Upon passage of the Iraq Oil Law, global energy giants Mobil, Chevron, BP Amoco, and Royal Dutch Shell are expected to dominate Iraq’s newly privatized oil industry.

The privatization of the NSS raises several dilemmas that affect the future of U.S. democracy. Among them, the issue of accountability is paramount. PMCs operate in a largely unregulated and secret global context in which policy makers and the public are left in the dark about foreign adventures taken in their name. Peter W. Singer argues that even in light of public disclosure of several incidents such as Abu Ghraib, there remains much about PMCs—in terms of the allocation and spending of funds, policy made, and actions taken—that is unaccounted for.<sup>89</sup> Privatization offers national security officials the opportunity to proceed with policies that would be troubling to legislative officials and the general public if they became known. It also means there is “insufficient control over who can work for these firms and who these firms can work for.”<sup>90</sup>

A companion dilemma for a democratic society is that private actors are making public policy. For example, in the determination of threats to public aviation safety, using private data contractors to produce and assess threat levels or contracting out public surveillance and monitoring tasks results in democratic states relying on “private actors to direct where, and on whom, state power is to be focused and exercised—that is, to determine who is to be trusted . . . or not.”<sup>91</sup> Increasingly, unaccountable private citizens are in a position of authority to determine the loyalty and patriotism of fellow private citizens, with serious consequences for those determined to be untrustworthy. The fact that PMCs are not part of the military and thus not subject to military legal codes, or at best exist in a legal gray area, means citizens seeking redress of private contractor decisions may not have legal options.

Finally, the privatization of national security raises great potential for conflict of interest between private profit and public safety. PMCs must make a profit, so whether what they do is effective security policy or not may be beside the point. A glance at the DHS website—in particular the section “Open for Business,” where the DHS offers hundreds of grants and contracts—highlights this dilemma. In his assessment of these “opportunities,” Jim Hightower concludes that few of the projects have anything to do with counterterrorism: “Instead, they are make-work studies, silly technologies, and useless systems that essentially serve as mediums for transferring billions of our tax dollars to a few corporate big shots.”<sup>92</sup>

While secrecy envelops any security failure, cases of PMCs—including Halliburton, Blackwater, Boeing, and Dynacorp—serving “profit over patriotism” are well chronicled.<sup>93</sup> For example, security personnel for Wackenhut Services, hired to provide security at the headquarters of the Energy Department and the DHS itself, demonstrated a lack of proper training in

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handling suspicious powder (possibly anthrax) and nuclear and conventional weapons transport. Finally, cost overruns and no-bid contracts, such as those between DHS and the consulting firm Booz Allen Hamilton that resulted in a \$2 million contract rising to \$124 million, are the tip of the iceberg relative to public oversight of private contractors.<sup>94</sup>

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## CONCLUSION

Globalization affects all national societies in multiple ways. Due to its unique position as the global hegemon, the United States has enjoyed the benefits of globalization more than others. But it has also meant that those who suffer from the “dark side” of globalization hold U.S. power responsible for their situation. As the 9/11 attacks demonstrated, they have increasingly invoked the instrument of terrorism to “right the wrongs” of U.S.-dominated globalization. American political leaders, both before and particularly after 9/11, have placed the international community on a war footing to counter what they identify as a globalized terrorist network. The effect on U.S. society has been the construction of a highly militarized and privatized NSS at the expense of democratic public and private institutions.

The effects will become even more evident as globalization produces political and economic transformations requiring even more draconian measures to preserve the privileged position of the United States. Indeed, NSS officials are already planning for such eventualities.<sup>95</sup> In the end, the U.S. political system—its political, social, and economic resources directed to a militarized and narrow concept of security—is unlikely to tackle, let alone solve, the overriding problems of modern society such as affordable health care for all, a disastrous trade deficit, and global warming.<sup>96</sup> The likely effect is that globalization’s “dark side” will increasingly boomerang back to its point of origin. Given the current strategic consensus for “redistributive wars,” this would place U.S. democracy in even greater peril.

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## PART V

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# Globalization and American Sovereignty



## CHAPTER 11

# Arguing over Sovereignty: Globalization and the Structure of Political Conflict in the United States

Edward S. Cohen

This chapter seeks to make some sense of the emergence of a debate over “sovereignty” in American political life over the past decade and a half. This debate is a phenomenon of fundamental importance, but one that has escaped much systematic analysis. From the late 1940s onward, the concept of sovereignty had largely disappeared from mainstream political debate and academic political thinking in the United States. With some exceptions, such as the defenders of states’ rights and a fringe conservative opposition to the United Nations, few Americans seemed to think about or talk about sovereignty as a pressing concern of political life. At best, sovereignty was considered a basic but uninteresting given in a world of nation-states, something with which discussions of international politics began but quickly moved beyond.

This is clearly no longer the case. Heated debates over the meaning and future of sovereignty in the United States are now common in areas such as trade policy, immigration, language and culture, and even constitutional interpretation. In this chapter, I explore the phenomenon of the sovereignty debates themselves to determine what their emergence means for the nature of political life in the United States and particularly the ways in which globalization is changing the contours of domestic political conflict.

My thesis is that the emergence of debates over sovereignty is part of an important shift in the relationship between the state and society in the United States, one that is a key part of the phenomenon of globalization itself. In the modern state, the concept of sovereignty is deeply tied to the relationship between the state itself and the social institutions and citizens

it governs. The emergence of public arguments about sovereignty, including claims about the “threat to” or “decline of” sovereignty, indicates fundamental changes in the ways in which the state treats citizens, in what it expects of citizens, and in what citizens can expect of the state. In particular, ideas about sovereignty are linked to two of the deepest roles of the state, those of providing *identity* and *security* for citizens. The changes wrought in American society by globalization have generated a debate over sovereignty precisely because they have shaken some long-accepted understandings of the state’s relationship to the identity and security of Americans.

While this debate is often framed in terms of the relative power of the state in relation to global forces, the underlying substance of the argument concerns the *priorities* of the state and the policies it pursues. These are two essential but different aspects of sovereignty. Over the past three decades, while the American state has remained a powerful agent in world politics, political elites have rearranged the state’s role in American society as part of the construction of globalization. The debate over sovereignty is a manifestation of how these policy choices have shaken the security and identity of U.S. citizens and have as a result reconfigured political debate and conflict in the United States. These arguments over sovereignty pit against each other two very different views or projects regarding the role of the state and the relationship between American society and a globalizing world.

The chapter presents a conceptual analysis and evaluation of how and why globalization has generated a debate over sovereignty. I begin with a review of the contours of these debates as they emerged in the 1990s and continue into the first decade of the twenty-first century. I then turn to an analysis of the concept of sovereignty and its role in the modern state and examine the ways in which globalization is linked to a rearrangement of the role of the state in American society. The analysis then explores the ways in which the changing relationship between state and society has generated a debate over sovereignty, explains why the argument over the priorities of the state has been articulated in terms of the power of the state, and examines how this debate plays out across a variety of policy issues, such as trade, immigration and language, and constitutional interpretation. I conclude with some reflections on the links between sovereignty, identity, and security in the current political situation.

## DEBATING SOVEREIGNTY AND GLOBALIZATION

How and why did the issue of sovereignty move from a footnote to a centerpiece of American political debate? To begin to find an answer, we need to return to the crucible of the early 1990s, when a number of key events elevated the globalization-sovereignty debate. Central events included were the negotiation of the North American Free Trade Agreement (NAFTA) in 1991–92 and the conclusion of the Uruguay Round of negotiations in the General Agreement on Tariffs and Trade (GATT) that

created the World Trade Organization (WTO) in 1994. Add to these a lingering recession, growing concerns over “illegal” immigration, and a closely fought presidential election in 1992, and the conditions were ripe for a decisive shift in the political debate. While the focus of the debate has changed over time, the essential structures of argument and claims on both sides were established during this period and have remained relatively unchanged.

The critics of the WTO and NAFTA struck first and have driven the debate ever since. Their criticisms addressed a variety of substantive policy issues implicated in these agreements, such as income inequality, environmental regulation, and immigration control, and they came from across the political spectrum, from Patrick Buchanan on the right to Ross Perot in the center to Public Citizen on the left. The thread uniting these critics was the claim that the NAFTA and WTO agreements—and the process of globalization that they were intended to advance—posed a fundamental threat to American “sovereignty.” If these agreements were ratified, the claim went, the people of the United States would lose their ability to shape the terms on which their social relations were conducted within the borders of the country. While critics differed in their understanding of where this power would go—multinational corporations and capital markets, international and supranational institutions, or some combination of the two—they all shared the understanding that a deepening of globalization would undermine the sovereignty of the American state and political community by transferring power from the citizenry to unaccountable global actors and institutions.

The tenor and substance of the claim can be seen in the following statements from the period. For William Greider,

The logic of commerce and capital has overpowered the inertia of politics and launched an epoch of great social transformations. . . . Old verities about the rank ordering of nations are revised and a new map of the world is gradually being drawn. These great changes sweep over the affairs of mere governments and destabilize the established political orders in both advanced and primitive societies.<sup>1</sup>

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Kim Moody and Michael McGinn of the International Labor Rights Education and Research Fund wrote:

The North American Free Trade Agreement is not about the commerce of nations. The treaty that binds the United States, Canada, and Mexico in economic union is more about corporate profit than trade. It is about letting private businesses reorganize the North American economy without the checks and balances once provided by unions, social movements, and governments.<sup>2</sup>

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Patrick Buchanan put the point more bluntly:

NAFTA is about America’s sovereignty, liberty, and destiny. It is about whether we hand down to the next generation the same free and

independent country handed down to us; or whether 21st century America becomes but a subsidiary of the New International Economic Order [*sic*].<sup>3</sup>

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While the examples can be multiplied, these excerpts present the shared sense among critics of globalization that the United States (and “the state” more generally) was losing a fundamental aspect of control over increasingly powerful sources of change in contemporary life. The concept of a “loss of sovereignty” provided an important vehicle for making sense of this growing perception.

Initially, the supporters of these agreements and of globalization more generally were taken aback by such claims. Ultimately, though, two strands of argument have developed in response to the critics. The first accepts the critics’ basic premise but turns their conclusion on its head—globalization *does* reduce the power and sovereignty of states, but this is a good thing. Thomas Friedman, for example, argues that globalization leaves states with a stark choice of accepting the “golden straightjacket” of policies that secure the conditions for capital investment and market competition—and thus prosperity—or resist global integration and face economic decline:

As your country puts on the Golden Straightjacket, two things tend to happen: your economy grows and your politics shrinks. That is, on the economic front the Golden Straightjacket usually fosters more growth and higher average incomes—through more trade, private investment, privatization and more efficient use of resources under the pressure of global competition. But on the political front, the Golden Straightjacket narrows the political and economic policy choices of those in power to relatively tight parameters.<sup>4</sup>

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In this view, the attempts of critics of globalization to protect American sovereignty is both a fruitless exercise—national sovereignty as it has been understood makes little sense in the interdependent world brought about by globalization—and detrimental to the economic well-being of Americans. President Bill Clinton captured both dimensions of this argument in a 1995 speech to a meeting of the International Monetary Fund (IMF) and World Bank:

The revolutions in communications and technology, the development of non-stop global markets, the vast currency flows that are now the tides of international business—all these have brought enormous advantages for those who can embrace and succeed in the new global economy.... The trend toward globalization, after all, has far surpassed anything the great figures of Bretton Woods could have imagined. Interdependence among nations has grown so deep that literally it is now meaningless to speak of a sharp dividing line between foreign and domestic policy.<sup>5</sup>

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The second strand of defense, however, challenges the basic premise behind the critics’ analysis. From this perspective, the trade agreements and other institutions and policies that contribute to globalization have

nothing to do with any “loss of sovereignty” by modern states, least of all the United States. Rather, these institutions and policies are the result of the decisions of independent states to make commitments to certain priorities and actions in return for the economic benefits they promise to bring. At the basis of this argument is the idea that sovereignty connotes the independent authority of a state to make its own choices. States may choose to bind themselves to certain policy directions, and in this way to limit their future freedom of action, but this does not in any way diminish their sovereign independence. In this sense, NAFTA and the WTO are like any other agreements states undertake; they represent the *use* of sovereignty, not its eclipse. This case was perhaps best presented by the authors of *Globaphobia*. Their account of international trade agreements is illustrative:

But just as an individual who signs a contract does not forfeit his or her liberty, so the United States does not lose its sovereignty when it signs a trade agreement. NAFTA and the WTO, like all major trade agreements, was signed by an elected president and approved by an elected Congress. Those who objected to these agreements had the right to contest them. Many did so, and they lost the debate. Far from constraining the liberty of the citizens of the United States, this process and its results were democratic and entirely consistent with preserving national sovereignty.<sup>6</sup>

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Furthermore, the argument went, the resulting deepening of globalization did not pose any fundamental challenge to the ability of the U.S. government to set its own priorities in areas such as income, environmental, or regulatory policy. To be sure, the operation of global markets, corporations, and institutions presented new pressures on policy makers and often seemed to require the modification of existing policies, but the state retains a wide degree of discretion in how it responds to such challenges. The authors of *Globaphobia* recognized that the forces of globalization might indeed generate an increased degree of insecurity and inequality for U.S. citizens, but maintained that it was within the power of the state to determine how these pressures would actually play out. As Paul Krugman put the case:

None of the important constraints on American economic and social policy come from abroad. We have the resources to take far better care of our poor and unlucky than we do; if our policies have become increasingly mean-spirited, that is a political choice, not something imposed on us by anonymous forces. We cannot evade responsibility for our actions by claiming that global markets made us do it.<sup>7</sup>

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So what are we to make of this debate over sovereignty and globalization? On the one hand, the debate raises some basic issues of definition and conceptual analysis—what exactly is “sovereignty”? what is the relationship between global economic integration and national policymaking?—which I will address to some extent below. But the fundamental problem here, I argue, is the relationship highlighted by Krugman between globalization and a number of central shifts in policy priorities and social

developments in the United States over the past three decades. These shifts—“deregulation,” the reduction in the social safety net, a greater role for market competition, increasing levels of inequality and insecurity—are at the heart of the political conflicts generated by globalization. The question we need to explore is why these conflicts came to be (partially) articulated through a debate over the power of the state vis-à-vis its borders, and how this debate has shaped continuing struggles regarding the direction of policy choice and social change. The engagement of these issues through the lens of sovereignty, I argue, is crucial to understanding how the American polity has changed through—and in reaction to—globalization.

## SOVEREIGNTY AND THE MODERN AMERICAN STATE

The modern concept of sovereignty was born with the modern state.<sup>8</sup> As Bodin and Hobbes emphasized, sovereignty—understood as the ultimate, absolute authority of the state over its territory and population—is the defining attribute of the states that emerged out of the confusion of feudal and early modern political conflict. But it is more than an abstract legal concept. From its beginnings, sovereignty embodied and articulated a relationship between the state and those it governs, a relationship that centers on the notions of *security* and *identity*. The sovereign state, first and foremost, provides security and protection for its members from the variety of potential threats—internal and especially external—that are part of an anarchical world. This provision of security, in return for the obligation and obedience of its subjects or citizens, also generates a sense of membership in one state (and not other states) and thus a relationship of political identity. In both contexts, the territorial borders of the state play a central role; they mark off the space in which the state’s authority operates and for which it provides protection, and identify the state to which one belongs. Sovereignty, then, defines the political community in the modern state by marking off spheres of political order and membership. This is the classic understanding of sovereignty as the power of a state to control that which occurs within its borders.

The structure of this community, and thus the relationships of security and identity upon which notions of sovereignty are based, change over time. For my purposes, the crucial developments surround the long struggle for the establishment of the notion of popular sovereignty, which began in the late eighteenth century and continued through the mid-twentieth century. A product of the combined political and intellectual forces of nationalism, democracy, and socialism, the notion of popular sovereignty ultimately rearranged understandings of the relationship of state and society, and particularly of the meanings of security and identity. In addition to the idea of security as basic protection from violent threat, popular sovereignty embodied the idea that states owed citizens—as the source of sovereign authority—wider protections of basic rights, equality before the law, and security from economic and social destitution.<sup>9</sup>



This expanded notion of security, in turn, was linked to the transformation of the identity of the state. As membership in the state was redefined as citizenship in a sovereign body, the tie between individuals and “their” state was dramatically deepened, as was the importance of the boundaries of states in defining the identities of their members. By the early twentieth century, the impact of this changing relationship between state and society could be seen in the emergence of large interventionist state institutions dedicated to the provision of various dimensions of security for citizens and the deepening controls over the movement of persons and things across the borders of states. (Both developments were reinforced by the total warfare of the twentieth century, which was central to the reconstruction of state–society relationships.) As it deepened the relationships between the state and the citizen, popular sovereignty reconfigured the state as a comprehensive protector and promoter of a broadly defined national interest and identity against “outside” threats. The post-1945 democratic and social democratic state grew out of and depended upon this re-creation of the notions of security, identity, and sovereignty, and in turn deepened the importance of borders in defining the spaces and meaning of citizenship. The notion of sovereignty was extended to include a new dimension of the relationships between state, borders, and citizens.

This account is clearly drawn primarily from the European experience, and developments in the United States—where popular sovereignty was at the foundation of the political order and race and federalism complicated issues of citizenship—took a somewhat different path.<sup>10</sup> Nonetheless, we can see many of the same basic outlines in the development of state and society from the later nineteenth century onward. Beginning with the Populist and Progressive movements and culminating in the New Deal, the meaning of citizenship and the role of the national government were redefined in ways that led to the triumph of a version of the deepened notions of security and identity described above. Over this period, we see the growing role of government institutions in providing economic and social security for citizens, establishing for the first time a direct, daily link between citizens and the national state. The pressure of immigration put the question of identity on the public agenda, and movements for cultural assimilation and immigration control followed. By the end of the 1930s, we can see the emergence of an interventionist state dedicated to providing a broad umbrella of security to a community of citizens defined by tightly drawn and protected borders, within which a conception of national identity that incorporated most European immigrants could be fostered and diffused.

To understand the contemporary politics of sovereignty in the United States, I suggest, we must examine the impact of globalization on this complex of practices and understandings. Consolidated during the 1930s and World War II, these arrangements established clear and deep-seated expectations regarding the role of the state and its obligations toward American society and citizens. In this view, the purpose of the state was to protect and promote the economic and social security of Americans by managing a national economy for the benefit of those who lived within

the borders of the state. These citizens, in turn, were defined by membership in the polity understood as a community bounded by the borders of the state and sharing a common political culture, language, and broader set of cultural expectations created by a broadly European immigrant ancestry. The state provided and reinforced this identity through the guarantees of security and opportunity it provided to members of the polity, in addition to protection from the threat of Soviet Communism.

The scope of the political community and that of the state's obligations were both defined by the territorial boundaries of the state, but went beyond the pure control of territory to the provision of a certain understanding of security and identity to its citizens. This amounted to a reformulation of the concept of sovereignty, but one that was never fully articulated nor clearly distinguished from the more basic sense of power over borders and territory. As a structure of political understanding, however, this formula became deeply rooted in the expectations and practices of American politics, to the point that significant discussions of sovereignty were pushed to the margins of political debate.<sup>11</sup> Concerns over sovereignty would return to political discussion only when globalization put this understanding into question, a process to which I now turn.

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## GLOBALIZATION, THE STATE, AND SOCIETY IN THE UNITED STATES

Arguments about globalization extend all the way to its basic definition.<sup>12</sup> At some level, though, most observers will agree that globalization involves the deepening interconnections between the forces and developments that shape our lives in different parts of the planet. It is a process that increasingly subjects the choices and constraints facing individuals and institutions in any given place to the impact of actors and movements operating in and across different parts of the globe. As such, globalization changes the relationship between the individual, her society, and the state in which she lives, raising questions and challenges that long-established models of sovereignty and political community had seemed to resolve.

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But what kind of challenge is this? For many critics and some supporters of globalization, as I have noted, these challenges are presented in terms of a conflict between the forces of globalization and the power of the state over its borders. I believe that this approach to the issue is misleading, especially in the context of the United States. Here, globalization has created a politics of sovereignty not by reducing the power of the state, but by changing the way it has approached issues of security and identity. This distinction between these different but often intertwined meanings of the term is necessary to grasp clearly the current politics of sovereignty.

My analysis begins by identifying the sources of globalization in a set of political choices and policy changes in the United States beginning in the late 1970s.<sup>13</sup> In the context of persistent inflation, low growth rates, and concerns over competitiveness, an emerging coalition of policy makers,

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policy intellectuals, and business leaders began a process of redirecting the role of the American state toward the promotion of market institutions and competition. Over the next two decades, this coalition was successful in substantially reducing the guarantees of security that had been built into the American political economy since the 1930s in areas such as income security, business regulation, and collective bargaining. In the process, and in order to deepen the force of competitive market pressures in the United States, policy makers worked to substantially increase the openness of the economy to the forces of the global marketplace, from finance to production and eventually to services.

During the 1980s and 1990s, this combination of market promotion and reduction of barriers to finance and trade spread across the globe, buttressed by the power of American policy making and economic institutions.<sup>14</sup> It was accompanied by the creation and/or reform of a variety of international financial and trade regimes to promote and protect the policy choices that secured economic integration. The strategies varied, including the spread of the prescriptions of the “Washington Consensus” by the IMF and World Bank,<sup>15</sup> the emergence of a trade-based theory and practice of development in the 1990s, the incorporation of this approach into NAFTA, and the more ambitious attempt to legalize and solidify an open market consensus through the creation of the WTO. Globalization was and remains the product of an exertion of state power and sovereignty by some of the key states in the global system, designed to reform and reinvigorate the modern capitalist economy. While it has had effects well beyond the intention, and sometimes the control, of its protagonists, globalization is best understood primarily as part of a larger project for a reconstruction of the relationship of state and society.<sup>16</sup>

But the creation of an integrated global marketplace is only part of the story. By the early 1980s, an earlier and independent set of policy choices was beginning to coalesce with the changing political economy to shape the meaning of globalization in the United States. I am referring here to the major overhaul of immigration policy, which began with the 1965 Immigration Act, along with subsequent and related developments in undocumented immigration and in policies related to education and cultural change.<sup>17</sup> The 1965 reforms eliminated the northern European bias in immigration quotas and began a process of steady increases in the levels of legal immigration that continued into the 1990s. As a result of these policy changes, the United States experienced (and continues to experience) a growing flow of migrants from Asia, Latin America, and Africa, which has significantly altered the demographic profile of the citizenry.<sup>18</sup>

The emergence of a steady and growing flow of undocumented workers into the United States from the late 1970s onward, a process stimulated by changing patterns of labor organization and an unwillingness of the state to challenge their employment, contributed further to the same demographic changes. Over the same period, educational reforms generated by the civil rights and multiculturalism movements of the 1960s and 1970s—which emphasized the goal of accommodating the cultural differences of immigrants—helped produce a heightened public presence of

cultural and linguistic diversity. These developments, of course, were reinforced by the revolution in systems of communication, which facilitated the greater presence of cultural influences from outside the United States in the daily lives of Americans.

Together, this convergence of political, economic, immigration, and cultural policy choices transformed the relationship between American society and the larger world. Instead of using the borders of the state to protect the society from the impact of “external” influences, they created openings in these borders to allow the flow of finance, goods, persons, and ideas into (and out of) the United States. Americans came to see and feel the presence of corporations, goods, and persons on a regular basis “inside” the borders of the state and began to feel the impact of global processes and institutions on their lives in a more direct way than they had come to expect. This is precisely the impact that most discussions of globalization highlight, but my account emphasizes the roots of these developments in a set of political choices designed to change the relationship between state and society—and to a great extent the shape of society—in the United States. Globalization came to the United States not as a challenge to its sovereignty, but through the use of the state’s power and authority to *reconfigure the meaning of sovereignty* via redefinition of the obligation of the state in relationship to citizens and social institutions. By introducing market competition to key areas of the economy and society, reducing guarantees of economic and social security, and changing the demographic and cultural contours of the community, the state essentially undermined key elements in the understandings of political community that had been consolidated since the 1930s.

## EXPLAINING THE DEBATE OVER SOVEREIGNTY

As I have told it, this is not a story of the decline of sovereignty in the sense it has been portrayed in much popular discussion. How are we to make sense, then, of this argument and the debate it has ignited? The key, I suggest, is to return to the distinctions between the different meanings that *sovereignty* can have. We need to explore the differences between what the discourse seems to be saying and what actors are actually meaning to talk about. In particular, we need to be sensitive to the relationships between the experiences and basic perceptions of citizens and the language they have available through which to articulate them, and the various meanings locked up in the key terms of that language. The argument over sovereignty, while it often appears to be about arcane aspects of the power of states, is at its core a debate over how to evaluate the policy changes and social outcomes that have defined the changing relationships between state and society in the United States over the past three decades.

The central patterns here are the differential effects of globalization and the changing role of the state in American society. For many Americans, the changes associated with globalization have provided new opportunities—in the creation of wealth, the expansion of consumption choices, and the

variety of cultural influences on which they can draw and which they can appreciate. These changes have coincided with a period of significant increases in overall wealth and well-being in the United States and (until September 2001, at any rate) unparalleled American influence over patterns of world politics. In addition to these broad benefits, globalization has coincided with an especially successful era for certain industries (computer software, finance, intellectual property, employers of low wage labor, etc.), certain regions of the country (the East and West coasts, the Southwest, and key parts of the South), and the legal protections available to immigrant communities, which make up the fastest-growing section of the population.<sup>19</sup> It is not surprising that the major institutions that make up these parts of American society have been consistent supporters of globalization and have often demonstrated much bemusement and bewilderment over the claims that globalization is somehow weakening U.S. sovereignty and undermining the quality of life in the United States.

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But globalization and the policy changes with which it is associated have simultaneously had very different effects. In many fundamental ways, they have undermined the role of the state in providing security to its citizens (in general and in relationship to specific groups) and challenged long-accepted notions of identity linked to the relationship between state and society.

The impact on security is clear and well understood. By reducing guarantees of income and social security, opening up major sectors of the economy to international competition, deregulating financial markets and changing financial law, and facilitating competition for jobs with immigrants and overseas labor, the policy choices linked to globalization have meant that the U.S. state has broken the post-1945 commitment to providing stable relationships of employment and social support for its citizens.<sup>20</sup> As Jacob Hacker has recently shown, these policy changes have led to a tremendous increase in the amount of risk faced by individuals and families throughout the society.<sup>21</sup> In those industries, sectors, and regions especially vulnerable to international competition (in goods, services, and labor), the insecurity generated by these changes has been much more dramatic and concentrated, leading in many cases to relative and absolute declines in wages, living standards, and economic opportunity. The increase in risk and insecurity has been accompanied by a steady increase in levels of economic inequality that have accompanied globalization.<sup>22</sup>

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The challenge to notions of identity is harder to measure, but no less important. Increased immigration has intensified competition for employment, and the increasing presence and accommodation of multilingualism and cultural diversity in the public sphere has generated a growing sense among significant sections of the population that the cultural center and cohesion of the political community is under challenge as well.<sup>23</sup> This is especially important when linked to the perception that the state is encouraging or ignoring these developments.

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Here as well we see a reversal of long-settled expectations; instead of using its control over borders to protect and promote a national culture, it has seemed to many Americans that the state is betraying this promise and

allowing a threat to the community's sense of itself to spread across and within its borders. Examples of this perception can be found at a variety of levels, from Proposition 187 in California in 1994 (which denied a variety of public benefits to illegal immigrants) to a continuing stream of anti-illegal immigrant rhetoric in public discourse (which has been reignited by the Bush administration's pursuit of immigration reform)<sup>24</sup> to the influential scholarly work by Samuel P. Huntington, *Who Are We?*<sup>25</sup>

The sense of a threat to identity is not a purely symbolic issue, but is linked to the threats to security previously discussed. Immigration and cultural change are also inextricable from the spread of labor competition, which is an important component in the decline of economic and social security.<sup>26</sup> As importantly, the state stands at the center of and provides the link between the emergence of threats to security and identity in contemporary American politics.

It is in this context that the emergence of an argument over sovereignty in the United States makes sense. A set of policy choices and social changes beginning in the late 1970s added up to a fundamental change in the relationship of state and society—one that exposed many citizens to new levels of insecurity and challenged their notions of political community and identity. These choices and changes, in turn, were closely identified with the increasing impact of international and global forces—trade, investment, immigration, culture—within the borders of the United States. Indeed, policy makers over this period highlighted these forces and their impact, directly linking them with arguments for the benefits of globalization. For many Americans, the resulting change amounted to a break in key elements of the post-1930s social compact underlying the role of government in the economy, the causes of which seemed clearly linked to the impact of “external” and “foreign” phenomena within the national community.<sup>27</sup> Faced with a state no longer willing or able to provide the guarantees it promised its citizens in the face of a seeming onslaught of international pressures, it is understandable that increasing numbers of Americans began talking about, and became receptive to the idea of, a challenge to American sovereignty. It is in this sense and context that we can say that globalization has generated a politics of sovereignty in the United States.

## THE POLITICS OF SOVEREIGNTY AND POLICY MAKING IN THE UNITED STATES

The arguments over sovereignty in contemporary American politics are not only a symptom of the impact of a transformation in the relationship of state and society. They have also become part of the structure of political conflict itself, shaping the opportunities and constraints facing political elites and policy makers across a number of substantive issue areas. Conflicts over sovereignty and globalization mobilize groups of citizens and organized interests in ways that have had many unintended and unanticipated results for American politics and policy making. In this section, I

provide a general review the impact of sovereignty debates in several prominent policy areas—trade, immigration and language, and constitutional interpretation—discuss the impact of the September 11, 2001, attacks on the debates over sovereignty, and try to evaluate the meaning of these developments for the politics of globalization in the United States.

## Trade

In the 1990s, the debates surrounding globalization and the discussions of sovereignty were most wide-ranging and clearly articulated in the context of trade policy.<sup>28</sup> It was in the conflicts over the NAFTA treaty and the creation of the WTO that the loudest claims regarding the loss of American sovereignty were heard and where they had the most impact on political life. In the battles over these two agreements, we saw the coalescence of an “antiglobalization” movement that pulled together a disparate set of groups and individuals from across the political spectrum. The debates over these agreements split both political parties, had a significant impact on two presidential campaigns, and established a pattern of conflict in which most elites in politics, economics, and the media defended these agreements and most critics took up populist positions representing the average person against the depredations of large institutional forces. The critics utilized the concept of decline of or threat to sovereignty to articulate their basic claim that policy makers were “selling out” the interests of Americans to the preferences of global corporations.<sup>29</sup> Although this movement failed to stop the advance of globalization, it continued to grow in support and sophistication, reaching its zenith in the protests at the Seattle WTO ministerial in 1999. In these protests, and to some extent subsequent protests in Washington, DC, and Genoa, the antiglobalization movement successfully created obstacles to further deepening the legal and institutional framework for a globalized world economy.

Domestically, the claims of a loss of sovereignty and the political forces mobilized by these claims changed the context for trade policy making. Through the early 1990s, initiative in trade policy was dominated by a coalition of executive policy makers and representatives of American corporations that were leading players in the global marketplace and saw the deepening of the institutional framework for globalization as crucial to their continued success.<sup>30</sup> The victories they achieved, however, came at the cost of energizing an opposition that went beyond a traditional protectionist agenda to offer a broader political critique of the implications of globalization for the role of the state in the national community.

The arguments surrounding sovereignty, while only one part of this critique, proved important in enlarging the terms of the debate and thus the potential basis of support for this opposition. They have proved particularly significant in providing a bridge between the traditionally “right” and “left” parts of the movement, which otherwise share little in their views of the role of the state. Concerns about a loss of sovereignty served to link “conservative” fears of the impact of international institutions with

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“progressive” fears of the impact of multinational corporations using these institutions to constrain and change domestic policy regimes. By emphasizing the virtues of multilateral institutions and agreements for promoting globalization, and indeed for constraining traditional protectionist pressures, American policy makers unintentionally created the basis for a more broadly based opposition to emerge and for the appeal of the defense of U.S. sovereignty.

The impact of this opposition on policy making can be seen in a number of developments over the past decade. The difficulties the later Clinton and then Bush administrations have faced in renewing and keeping “fast-track” negotiating authority for trade agreements, and the resulting difficulties in the path of the Free Trade Agreement for the Americas and other bilateral trade agreements, are the product of a growing resistance to further trade liberalization in both major political parties. By the mid-2000s, the controversy over the “offshoring” of jobs and the emerging power of the Chinese economy worked to deepen this resistance and to keep the issue of trade policy in the public’s attention.<sup>31</sup> As a *USA Today* story reported in 2006, the American public shows deepening skepticism with regard to the benefits of globalization:

[This] pessimism may be linked to a deep dissatisfaction over the way globalization is working. In a 2005 Program on International Policy Attitudes poll, only 16 percent of respondents backed the current U.S. approach; 56 percent said they favor expanded trade but only if much more is done to help affected U.S. workers. Almost one-quarter of those surveyed said they opposed further trade liberalization because the costs would outweigh the benefits.<sup>32</sup>

These concerns, it turns out, played an important role in the Democratic victories in the congressional elections of 2006. As a number of commentators pointed out, many if not most of the newly elected representatives and senators made criticism of free trade (and current immigration policies) a central part of their campaigns. According to one analysis of the elections, the emphasis on “fair trade” (as opposed to a “free trade”) was central to the success of Democratic challengers.<sup>33</sup>

The issue of sovereignty is only one theme in this growing skepticism regarding trade, but it remains an important force in shaping the way many Americans interpret a perceived threat to their economic security. There is increasing evidence, for instance, that the “loss of sovereignty” theme has become part of popular discourse regarding trade and trade policy. Accounts of the reaction of citizens and politicians to developments in the NAFTA and WTO regimes are full of this kind of discourse.<sup>34</sup> In a new and increasingly important permutation, claims regarding the loss of sovereignty have emerged over the past three years in regard to a perceived growing threat to the power of U.S. state governments as a result of emerging proposals for deepening the scope of multilateral trade agreements and institutions. Here, we can see the way in which claims regarding sovereignty are helping to constitute and mobilize an unusual coalition



of state governments, business groups, and consumer-based antitrade groups to resist the direction of trade policy making.<sup>35</sup> This movement is particularly striking in the way it draws on a more traditional U.S. discourse of “state sovereignty” and links it to the globalization and trade debates.

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As these examples illustrate, claims about the loss of sovereignty continue to play a powerful role in appealing to the sense among many, if not most, Americans that increased trade and economic integration subject them to an unprecedented level of insecurity, and these people feel unable to exert any control over these dynamics. Calls for limits on trade are based on a demand for the state to reestablish—in the interests of its citizens—some degree of security for their lives. These dynamics shaped the debates over “outsourcing,” which emerged as a key focus of trade politics in the early 2000s. While the scope of the job loss may have been overblown, outsourcing of jobs to other countries perfectly embodied and reanimated the sense of insecurity that is seen to be linked to greater integration of the U.S. economy with the global economy. It is this sense of loss of control and security, and not errors of cost-benefit analysis, that is at the heart of the current reluctance of a majority of Americans for any further move toward greater free trade.

## Immigration and Language

The issue of immigration has been central to the contemporary debates over sovereignty, for obvious reasons. Few images more clearly connect to the sense of a loss of control over borders than that of the country being “overrun” by migrants who cross the frontier illegally and a state seemingly unable to do anything about it. In the past several years, it is fair to say that immigration has become the focal point of the sovereignty debates. Concerns about unimpeded migrants (usually, but not always, undocumented) taking jobs, violating the law, and collecting benefits intended for citizens has dominated an electoral cycle and frustrated efforts to reform immigration law. It has spawned the Minuteman movement (whose most recent initiative was named Operation Sovereignty), mobilizing hundreds of Americans to “defend the border,” and led to a major expansion of the boundary wall on the U.S.-Mexico border.<sup>36</sup> In all of these dimensions, the immigration issue has intensified a sense of a loss of control by the national community over its fate.<sup>37</sup>

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But it was by no means inevitable that immigration would play out this way in the context of globalization. In the era beginning with the New Deal, a powerful mythology putting immigration at the center of American national identity seemed to take deep roots in the political culture.<sup>38</sup> From this perspective, all Americans share a background as immigrants and should value the contribution new migrants can make to the economy, society, and polity. When the issue of immigration appeared on the public agenda in the 1980s, in turn, this mythology seemed to play an important role in defeating proposals to limit further legal immigration and

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limiting the scope of moves to address illegal immigration. (Of course, the pressure of the business community to resist strong enforcement measures and the efforts of civil rights organizations opposed to discrimination played important roles as well.) The 1996 Immigration Act did mark a more successful effort to tighten controls on illegal migrants, but even here the more dramatic proposals were limited, and the rhetoric of immigration and American identity played an important role in securing this result. The issue did not disappear, but it was clearly overshadowed in the sovereignty debates by the controversies over trade policy.

This is no longer the case, and the new developments in immigration politics help illustrate the impact of sovereignty arguments on contemporary American politics. There are, of course, a number of factors contributing to the emerging consensus that immigration policy needs fundamental reform. The recession of the early 2000s, in common with all economic downturns, led to increased worries about competition for jobs and pressures on wages. Over the past decade, immigrant populations spread out from the traditional receiving states into regions across the country that had not experienced a significant presence of foreign-born residents for decades.<sup>39</sup> At the same time, more and more Americans were experiencing directly the presence and role of (often presumed) undocumented workers in their daily lives, performing jobs that put them in regular contact with a wider slice of society. Overshadowing all of these developments was the impact of the 9/11 attacks, which focused renewed concern on the ability of foreigners to enter the United States with seemingly minimal oversight and control. Suddenly, the challenge of governing the movement of persons across the borders seemed to be at the center of the task of ensuring basic national security and protection.<sup>40</sup> For all of these reasons, it seems fair to say that the growing public concern with border control and migration was “overdetermined”; almost every major trend in society seemed to raise this issue in one way or another.

But the debates over sovereignty are shaping the way immigration policy is framed and the intensity with which it is felt. In the past two or three years, critics of current patterns of legal and illegal immigration have been increasingly successful in portraying the problem as one of a “loss of control over borders.”<sup>41</sup> They have used images of migrants “swarming” across U.S. borders and “seeping into” all sectors of the economy—and thus threatening the jobs and wages of American workers—to heighten the sense that the state is not doing what is necessary to protect citizens from a foreign threat.<sup>42</sup> An important part of this strategy is the characterization of the temporary guest worker programs proposed by the Bush administration as forms of “amnesty,” a formulation that draws on the perception among some that these programs would threaten the integrity of territorial borders. The sovereignty argument, then, has played a key structural role in making a link between a perceived threat to security and a critique of the state as abrogating its responsibilities to citizens.

There is another potential impact of the sovereignty critique. For most of the 1980s and 1990s, defenders of current immigration policy were able to successfully maintain support for high levels of legal immigration

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while acknowledging (if doing little about) the problem of illegal immigration. However, there is now growing (if still minority) support for the view that immigration as a whole needs to be limited, and claims about a loss of sovereignty are crucial here.<sup>43</sup> The rhetoric of sovereignty elides the differences between legal and illegal by emphasizing the difference between citizen and foreigner as defined by territorial borders. This is not a new phenomenon, and scholarly work is beginning to explore the connections between concerns for sovereignty and immigration policy throughout the past century in the United States.<sup>44</sup> This connection becomes even more important when sovereignty is linked to the question of the economic security and opportunity of American citizens; in this situation, control over the migration of labor becomes central, and the differences between legal and illegal forms may be subordinated to the larger and intertwined issues of the physical, cultural, and economic security of Americans. To the degree that immigration policy debates are shaped by sovereignty concerns, this is likely to become even more prevalent, and the pressure for a general, restrictive overhaul of policy is likely to be even greater.<sup>45</sup>

There is another important piece to this puzzle: the issue of language. For a brief period in the late 1980s and early 1990s, concern over the increasing use of Spanish in public life and in bilingual education programs led to a wave of support for “official English” legislation in a number of states.<sup>46</sup> The recent reemergence of immigration policy arguments has coincided with a renewal of these proposals, and this connection is likely to be important for the direction in which policy change moves. As with the concept of sovereignty, the issue of language submerges issues of legality under a more basic division between American and foreigner. A perceived challenge to a dominant language reflects and embodies a sense of threat to a whole culture and its values and reinforces the kinds of concerns about political identity and the state’s role in preserving that identity that are central to modern notions of sovereignty.<sup>47</sup> Debates about language reinforce the power of loss-of-sovereignty concerns, and the latter feeds the intensity of the former. The emergence of the language issue, in turn, raises the possibility of some basic revision to the national immigration mythology. The notion of cultural assimilation, as reflected particularly in language use, has long been understood in the United States as the other side of the “bargain” of relatively open immigration. To the degree that language (and thus broader cultural) concerns become more pressing, they work to weaken the mythology of immigration and the consensus that is crucial to the current policy regime.

The combination of the 2006 congressional elections with the discussions of immigration policy reform proposals provided an opportunity to examine the state of this consensus, and initial results suggest that it is frayed, but not broken. The main elements of these proposals combine new opportunities for the legalization of current illegal residents, some form of guest worker program for future migrants, strengthened border controls, and a reconfiguration of legal immigration requirements to favor the influx of skilled over low-skilled labor. Opponents of these proposals

attempted to make them a central theme in the elections, arguing that the legalization programs amounted to an amnesty and that immigration as a whole needed to be much more limited.

The election results, and postelection polling, suggest that they did not succeed in generating majority support for these claims. Nationally, 57 percent of voters supported the proposals for legalizing current illegal residents, while 38 percent of voters supported their deportation, and candidates using the anti-amnesty agenda to challenge incumbents were rarely successful.<sup>48</sup> At the same time, there seems to be widespread support for a guest worker program and a shift toward a preference for skilled workers in future immigration policy. Overall, most observers conclude, the results represent a mixed situation.<sup>49</sup> While majorities seem to reject the most extreme anti-immigration/pro-sovereignty rhetoric and proposals, there has emerged a significant and very vocal minority that supports this approach; indeed, at the time of writing, this minority may have been central in effectively derailing the latest immigration reform proposals.<sup>50</sup>

Sovereignty concerns, linked to a growing sense of economic and social insecurity, have led many Americans to rethink the direction of immigration policy. It remains to be seen whether these concerns will lead, as they did in the 1920s, to a more fundamental change in policy in the coming years.

## Constitutional Interpretation

Trade and immigration are issues that quickly come to mind when we think of globalization, but this is not the case with constitutional interpretation. Recent trends in constitutional argument, however, do serve to illustrate the dynamic that I have been describing throughout the chapter. In a series of recent Supreme Court decisions and in speeches given by the justices, the issue of the relevance of international and comparative legal precedent for the interpretation of the U.S. Constitution has been debated in ways that are quite similar to the arguments I have reviewed. Unlike the conflicts over trade and immigration, these arguments have not focused explicitly on the question of sovereignty. But their relevance is enhanced by this absence, for in substance they have engaged precisely the same issue highlighted in the sovereignty debates—the impact of “foreign” developments on the mutual obligations of state and citizen within the United States. Indeed, they provide a surprisingly clear example of the patterns of change globalization has brought to U.S. politics and society. Placing this discussion of constitutional interpretation in the context of the broader globalization debates helps further our understanding of the significance of the latter.

The roots of this dynamic lie in one of the defining features of globalization in the world of politics: the spread and deepening of liberal constitutionalism and the growing internationalization of constitutional argument since the 1980s. A number of phenomena have been part of this trend—the spread of human rights discourse and principles and their impact at the national and regional levels, the impact of rule-of-law

thinking in economic and regulatory policy (particularly in the European Union), the central role of constitutional courts in new democracies in central and eastern Europe and South Africa, the growing number and importance of international and regional (such as the European Court of Justice) courts, and the like. The practice and discourse of liberal constitutionalism is now a clearly international one, with much movement of ideas among and across states and regions. One result, as Anne-Marie Slaughter has shown, is the growth of transnational networks of dialogue and cooperation among judiciaries, lawyers, and legal scholars, in which this interchange of ideas is nurtured and through which it is extended.<sup>51</sup> Initially, the flow of ideas and models was dominated by the spread of American models of constitutional thought and interpretation, but this has been transformed into a multidirectional flow of ideas in which different traditions are articulated, compared, and modified.

It was only a matter of time before these global networks and flows of ideas, just like those of finance, goods, and persons, began to have an impact in the United States. In a series of decisions in the 2000s involving issues such as privacy rights (*Lawrence v. Texas*), federalism (*United States v. Morrison*), capital punishment (*Roper v. Simmons*, *Atkins v. Virginia*), and the rights of detainees held at Guantanamo Bay and elsewhere (*Rasul v. Bush*, *Hamdan v. Rumsfeld*), several Supreme Court justices cited and discussed decisions, opinions, and principles from other national constitutional courts and international courts as part of the process of interpreting the meaning of the U.S. Constitution. The common purpose was to note the character of emerging international norms and practices in each area to support each justice's reasoning regarding the meanings of terms or principles which the U.S. Constitution now shares with constitutions in other liberal states. For the most part, these discussions were confined to the opinions of one or two justices, and they were never cited as the main basis for any step in interpreting the Constitution. Their presence in Supreme Court opinions was something new and notable, however, and reflected a belief that American constitutional discourse and practice is now part of a larger community of constitutionalism, in which the meaning of the U.S. Constitution could be better understood or elaborated by reference to evolving international practice. None of the justices, and few of their supporters, claimed that foreign practice or doctrine was "controlling" on U.S. practice. But the very fact of engaging in this dialogue suggests a belief that the globalization of liberal constitutionalism does (and should?) have an impact on the way Americans understand their constitution, and thus on the relationship between state and citizen within the United States.

The controversy that this phenomenon has generated is familiar within, and increasingly beyond, the world of constitutional experts. The most influential critic of the incorporation of the opinions and precedents of foreign courts into U.S. constitutional interpretation has been Justice Antonin Scalia. Central to his argument is the notion that this practice risks subjecting American constitutional practice to the influence of foreign jurists who are not part of, nor are constrained by, the bonds between state and citizen embodied in the Constitution that creates and sustains

the American political community.<sup>52</sup> Scalia and his supporters do not use the language of a loss of sovereignty, but the underlying analysis is very similar. In their view, the use of foreign legal precedent—like the impact of international markets or population movements—subjects the American political community to the influence of forces over which Americans have little control. It undermines the bond or social contract that links those who exercise political power to the interests, security, and values of those they govern.

This debate, in turn, is linked to similar conflicts regarding the role of the Dispute Resolution Body in the WTO and the jurisdiction of the International Criminal Court (ICC) over U.S. citizens.<sup>53</sup> In these areas, the source of threat is identified as agencies outside of (rather than judges within) the United States, and the language of sovereignty is used more clearly. But the same pattern is at work. As the state rearranges its role in society and relationship to other states, globalization opens up U.S. society to the impact of foreign and international phenomena. This impact, in turn, generates perceptions of uncertainty, insecurity, and threats to identity for many Americans, which generates a debate over sovereignty, centering on the question of the proper relationship between state and society within the United States and the role of the state in maintaining the borders that distinguish it from the international arena. The debate then reverberates in the actual practice of policy making.

## The Impact of 9/11

The basic dynamics of the relationship between globalization and the politics of sovereignty were established by the mid-1990s, but there is little question that the attacks of September 11, 2001, and their aftermath have significantly affected this dynamic. As an attack on U.S. territory by a force of foreign origin, these events pushed the questions of border security to the forefront of American politics and heightened awareness of the dangers lurking in the contemporary global context. The questions surrounding who and what crosses the state's borders now involve not simply issues of economic and cultural security but the basic physical security of Americans as well. In this context, it is inevitable that any discussions of sovereignty, security, and identity are implicated in and shaped by the responses to the attacks. But the actual result of these events has been much more complex and uncertain than might be expected. In this section, I will organize the discussion around three general themes, drawing on diverse policy examples from the above areas in elaborating on each theme.

First, the 9/11 attacks have created a context in which much of the discussion of "threats to sovereignty" has been increasingly linked to threats to U.S. physical and military security. Certain aspects of foreign investment are now discussed in these terms, as we saw with the Dubai Ports World deal, and the kinds of border arrangements needed to facilitate global commerce (in shipping and airports) are now questioned as dangers to national security.<sup>54</sup> The notion of a tradeoff between engagement with

global commerce and physical security marks a new dimension in the globalization debates.<sup>55</sup> The debates over illegal immigration have been most clearly reshaped by 9/11, as the inability of the U.S. government to control the movement of persons across its southern (and northern) border is now a central part of the push for more restrictionist policies. As Stephen G. Flynn puts it:

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While the NAFTA imperative of a more open border was gathering steam prior to 9/11, since that fateful day, controlling the southwest border in an effort to prevent illegal immigration and smuggling has been advanced as essential to combating the terrorist threat against the United States. Security has trumped cross-border facilitation as our abiding interest.<sup>56</sup>

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It seems clear that the growing consensus among policy makers on the need to “do something” about the borders, and the more prominent role of the issue in electoral politics, is the result of the new emphasis on the danger of terrorist infiltration into the United States. Even more stark has been the impact of the terrorist attacks’ aftermath on the debates over constitutional interpretation, where opposition to traditional approaches to treaty interpretation, international legal obligations, and the separation of powers have been emboldened by the perception of the need to rebuild the tools of sovereignty.<sup>57</sup> These are just some examples of the ways in which the 9/11 attacks have sparked interest in practices aimed at reconstituting the role of the state in protecting borders and reconfiguring the relationships between state, citizen, and foreigner throughout the polity.

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Second, however, this reaction has been more limited and focused than one might have expected. In trade policy, concerns about national security have surfaced only in certain contexts, where the issue involved states or actors perceived as dangerous on more general grounds. While issues such as Arab state ownership of U.S. infrastructure, the impact of the Chinese economy on American jobs, and the offshoring of American jobs have intensified sovereignty and economic security concerns, the broader argument that pro-globalization economic policies have created national security risks has yet to seriously affect trade policy debate or choices. The link between security and sovereignty concerns has been stronger in the area of immigration, but it seems that an initial push to radically overhaul the U.S. immigration policy regime has been frustrated by persistent impact of the pro-immigration narrative in U.S. political culture. The deepening division between this tendency and the demand for tighter border control has, to this point, frustrated ongoing attempts for comprehensive immigration policy reform. While it is likely that U.S. policy will become more restrictionist in the coming years, it seems improbable at this point that the existing combination of economic and physical security concerns will lead to serious attempts at a major closing of U.S. territory to migration.

Third, despite the role of 9/11 in empowering sovereignty arguments, the perceptions and practices that underlie continuing globalization remain deeply rooted in the U.S. polity. This is the other side of the thesis I have been exploring. When globalization comes “home” to affect American

politics and society, it creates not only insecurity but also opportunities and interests that benefit from its impact. The shifting roles of the state in society, and the resulting transformation in social and economic relationships, have garnered a good deal of support from policy makers and citizens. On the whole, elite opinion remains solidly in support of continued movement toward greater immersion of American society in a global system and loses few opportunities to point out the benefits of globalization and the errors of the loss-of-sovereignty argument.<sup>58</sup> While the antiglobalization movement has forced dominant political coalitions to make some concessions regarding the “reform” of the global system and of domestic policies that support it, as reflected in the May 2007 agreement between the Bush administration and congressional Democrats to include trade and environmental concerns in future trade agreements, it has not fundamentally changed the direction of policy making.<sup>59</sup>

As the reaction to 9/11 indicates, elite opinion and policy makers have tried to isolate any necessary responses as much as possible from the core policy arrangements and state–society relationships necessary to support continued globalization. In this, they have the support or resignation of large sections of American society that benefit in one way or another from globalization, or believe it inevitable. This situation is always fluid, and we cannot know whether and how this consensus will survive the uncertain evolution of immigration politics, a significant economic crisis, or another major terrorist attack. It remains the case, however, that the project of globalization through state–society transformation in the United States has to this point survived both the powerful impact it has made in shifting the relationships between the state and citizens and the rhetoric and project of the restoration of sovereignty that it has unleashed.

## THE FUTURE OF SOVEREIGNTY

In this chapter, I have argued that the emergence of a debate about sovereignty in American politics is an important symptom of the impact of globalization on American life. Globalization is itself a product and constitutive element of the reconstruction of the role of the state in society, which has broken with long-established expectations of the obligations of the state and the role of territorial borders and citizenship in shaping those obligations—expectations central to widespread contemporary understandings of what *sovereignty* means in a democratic state. The resulting insecurity, uncertainty, and shock to conceptions of political identity, easily identified with the growing presence and power of “the foreign” within American life, generated a critique of the “decline” or “loss” of sovereignty that is the prime mover in the sovereignty debates.

These competing visions—broadly, the pro- and antiglobalization perspectives—can be seen as alternative projects offering conflicting understandings of political community in the context of globalization. The former advocates the use of sovereign power to deepen the immersion of American society in a rapidly changing global economic and social order,



one that is constructed and maintained by that power. The latter demands the use of sovereign power to protect Americans from the threats generated by this global order and to change the rules by which this order operates. This is not a debate about the presence or absence of sovereignty, but rather over what the sovereign state ought to do. This broader debate has both driven and been reproduced in a variety of policy areas—including trade, immigration, and constitutional interpretation—in which the critique of dominant pro-globalization policy models has had a palpable impact on the shape and direction of political conflict.<sup>60</sup>

Throughout the chapter, I have also tried to explain why much existing analysis of the sovereignty debate has been lacking in clarity. Most analysts and scholars have understood this debate in terms of the power of the state in relation to global forces and have been perplexed by the claims of critics of globalization. Our neglect of the sovereignty concept over the years, however, has led us to miss the ways in which popular understandings of the concept have been modified by the changed relationships between state and citizens in modern democracies. The social compact that emerged from the crises of the mid-twentieth century redefined the provision of security and identity to include the responsibility of the state to provide economic and cultural security to its citizens. The challenges faced by American citizens in the past three decades—driven largely though not exclusively by globalization—have led many to question the willingness or ability of the state to live up to this compact.

What we are experiencing is a change in the practice of sovereignty, not the end of sovereignty itself. The sovereign state is not likely to disappear in the foreseeable future: it will remain the primary source of human security and political identity for most people. But globalization will continue to upset established meanings of political membership and the symbolism of territorial borders. These conditions make it likely that debates regarding the nature of the state–society relationship in a context of globalization will remain with us for a long time.

It is my view, however, that we will need to move beyond the current state of the sovereignty debate if the American polity is going to figure out a better way of dealing with the challenge of globalization. The existing alternatives, considered as sources of a new political bargain, leave much to be desired. The loss-of-sovereignty argument relies on a sharp, and increasingly obsolete, distinction between what is within and without the territorial borders of the United States. Too many individuals and institutions within the United States are now tied to global processes and have their own security and identity linked to the deepening of globalization, whether we are talking about economics, politics, or culture. Simply rebuilding the arrangements that contained economic and population movements in the form they took prior to globalization, whatever its practicality, would exclude the interests and aspirations of large sections of the current citizenry. The fate of too many Americans is tied to the operation of a globally integrated economic and human order; the steps necessary to disengage from this order would inflict significant hardship on broad sectors of the society.

On the other side, the defenders of current patterns of globalization have yet to take very seriously, or think very creatively, about the insecurity—physical, economic, cultural—that globalization continues to pose for many Americans. They continue to rely heavily on platitudes about the persistence of sovereignty, the overall gains from trade and economic growth of the past decades, and the legacy of immigration. Often their arguments are correct, but just as often they fail to address the real challenges of constructing a polity based on a relationship of state and society that allows all to benefit from globalization. It is not clear just what such a construction would look like, but it is clear that its absence from American political debate is one of the central problems of our time.

## NOTES

1. William Greider, *One World, Ready or Not* (New York: Simon & Schuster, 1997), 11.
2. Kim Moody and Michael McGinn, *Unions and Free Trade: Solidarity vs. Competition* (Detroit: Labor Notes, 1992), 1.
3. Patrick Buchanan, "GOP's NAFTA divide," *Washington Times*, August 23, 1993.
4. Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Farrar, Straus & Giroux, 1999), 87.
5. William Jefferson Clinton, "Remarks by the President at the Annual Meeting of the IMF and the World Bank," White House press release, October 11, 1995, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=50638&st=&st1=>.
6. Gary Burtless, Robert Z. Lawrence, Robert E. Litan, and Robert J. Shapiro, *Globaphobia* (Washington, DC: Brookings Institution, in association with the Progressive Policy Institute and the Twentieth Century Fund, 1998), 117–18.
7. Paul Krugman, "We Are Not the World," in *"The Accidental Theorist," and Other Dispatches from the Dismal Science* (New York: W. W. Norton, 1998), 79.
8. The literature on sovereignty and its permutations is voluminous. A good contemporary source is F. H. Hinsley, *Sovereignty*, 2nd ed. (Cambridge: Cambridge University Press, 1986).
9. For a classic account of this process, see T. H. Marshall, *"Citizenship and Social Class," and Other Essays* (Cambridge: Cambridge University Press, 1950).
10. For the following discussion, I draw on the account presented in chapters 2 and 3 of Edward S. Cohen, *The Politics of Globalization in the United States* (Washington, DC: Georgetown University Press, 2001).
11. The success of a similar formula throughout the world of advanced democratic capitalist states is well analyzed in Helen Thompson, "The Modern State, Political Choice, and an Open International Economy," *Government and Opposition* 34, no. 2 (1999): 203–25. Thompson shows clearly the relevance of this transformation in the understanding of the state for the current politics of globalization.
12. It is futile to try to present any short list of the leading works on globalization. Three books of different length that have held up well over time are, in order of descending size, David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton, *Global Transformations* (Stanford, CA: Stanford University Press, 1999); Jan Aart Scholte, *Globalization: A Critical Introduction*, 2nd ed. (Basingstoke,

UK: Palgrave-Macmillan, 2005); and Malcolm Waters, *Globalization*, 2nd ed. (London: Routledge, 2001).

13. In addition to the book cited above, I have elaborated this argument in Edward S. Cohen, "Globalization and the Boundaries of the State: A Framework for Analyzing the Changing Practice of Sovereignty," *Governance* 14, no. 1 (January 2001): 75–97. My approach to globalization relies heavily on the framework laid out in Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996), and the work of Ian Clark in his *Globalization and International Relations Theory* (New York: Oxford University Press, 1999).

14. It is also true that the 1980s saw the spread of various and new forms of protectionism and concerns for protecting borders in the United States and beyond. But much of the key "work" in the construction of the contemporary global economy—the freeing up of capital markets, the spread of the "Washington Consensus" and the resulting opening up of markets in developing countries, the transformation of the agenda of global trade politics, and the movements to "deregulate" and "privatize" economies in the major developed states—was set in motion during this decade. For a good account of this work in the 1980s, see Saskia Sassen, *Territory-Authority-Rights* (Princeton, NJ: Princeton University Press, 2006), especially chapter 4.

15. The term "Washington Consensus" was introduced in 1990 by John Williamson to refer to the set of mostly "neoliberal" policy recommendations that had come to shape the outlook of these institutions. For a more recent reflection on the various meanings and implications of the term, see John Williamson, "What Should the World Bank Think about the 'Washington Consensus'?" *World Bank Research Observer* 15, no. 2 (August 2000): 251–64.

16. I use the idea of globalization as a political "project" in the same way as it is employed in Philip McMichael, "Globalization: Myths and Realities," *Rural Sociology* 16, no. 1 (1996): 25–55.

17. For an excellent and concise overview of U.S. immigration policy since the 1960s, see Louis DeSipio and Rodolfo de la Garza, *Making Americans, Remaking America* (Boulder, CO: Westview Press, 1998).

18. From 1990–2000, for instance, the foreign-born population of the United States increased by 57 percent, from 19.8 million to 31.1 million persons, and from 7.9 percent to 11.1 percent of the total population. See Nolan Malone, Kaari F. Baluja, Joseph M. Costanzo, and Cynthia J. Davis, "The Foreign-Born Population: 2000," U.S. Census Bureau, December 2003, <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf>.

19. One of the best presentations of this case during the 1990s is Burtless et al., *Globophobia*. Two recent works which effectively advance this claim, on a global as well as U.S. level, are Jagdish Bhagwati, *In Defense of Globalization* (New York: Oxford University Press, 2004), and Martin Wolf, *Why Globalization Works* (New Haven, CT: Yale University Press, 2005).

20. For a careful analysis of these developments, see Kenneth F. Scheve and Matthew J. Slaughter, *Globalization and the Perceptions of American Workers* (Washington, DC: Institute for International Economics, 2001).

21. The evidence for these impacts is presented in depth in Jacob S. Hacker, *The Great Risk Shift* (New York: Oxford University Press, 2006). A more succinct version of the same argument can be found in Elizabeth Warren, "The New Economics of the Middle Class: Why Making Ends Meet Has Gotten Harder," testimony before the Committee on Finance, U.S. Senate, May 10, 2007, available at <http://finance.senate.gov/hearings/testimony/2007test/051007testew.pdf>.

22. An essential source on the divergent impact of globalization on different parts of U.S. society is Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997). A careful recent analysis of these trends is presented in Gary Burtless, "Income Progress across the American Income Distribution, 2000–2005," testimony before the Committee on Finance, U.S. Senate, May 10, 2007, available at <http://finance.senate.gov/hearings/testimony/2007test/051007testgb1.pdf>.

23. An excellent analysis of this backlash against immigration, focusing on the 1980s and 1990s, is presented in David M. Reimers, *Unwelcome Strangers: American Identity and the Turn against Immigration* (New York: Columbia University Press, 1998).

24. For some examples from different parts of the United States, see Dave Gorak, "Legislators Selling Us Out," letter to the editor, *Chicago Sun-Times*, April 5, 2007, and "Broken Borders: Illegals Stir Resentment," letters to the editor, *Oregonian*, September 13, 2006.

25. Samuel P. Huntington, *Who Are We?* (New York: Simon & Schuster, 2004).

26. Scheve and Slaughter's *Globalization and the Perceptions of American Workers* makes this point well.

27. A powerful recent representation of this understanding is presented in Lou Dobbs, *The War on the Middle Class* (New York: Viking/Penguin, 2006).

28. Excellent overviews of these debates are provided in I. M. Destler and Peter J. Balint, *The New Politics of American Trade: Trade, Labor, and the Environment* (Washington, DC: Institute for International Economics, 1999), and Frederick W. Mayer, *Interpreting NAFTA* (New York: Columbia University Press, 1998).

29. A comprehensive recent presentation of this argument can be found in Lori Wallach and Patrick Woodall, *Whose Trade Organization?* (New York: New Press, 2004).

30. For an excellent analysis, see Susan K. Sell, *Private Power, Public Law* (Cambridge: Cambridge University Press, 2003).

31. To this point, most economists believe that the impact of offshoring has been greatly exaggerated. For a statement of this view, see Charles L. Schultze, "Offshoring, Import Competition and the Jobless Recovery," Brookings Institution Policy Brief No. 136, August 2004, <http://www.brookings.edu/views/papers/schultze/20040622.pdf>. More recently, however, some analysts have begun to wonder if the long-term impact will be much more significant. The most influential such account is Alan S. Blinder, "Offshoring: The Next Industrial Revolution?" *Foreign Affairs* 85, no. 2 (March/April 2006): 113–28.

32. David J. Lynch, "Election Pushes Globalization to the Forefront," *USA Today*, November 14, 2006, available at [http://www.usatoday.com/money/economy/trade/2006-11-14-globalization-usat\\_x.htm](http://www.usatoday.com/money/economy/trade/2006-11-14-globalization-usat_x.htm).

33. See Chris Slevin and Todd Tucker, "The Fair Trade Sweep," *Democratic Strategist*, January 7, 2007, [http://www.thedemocraticstrategist.org/ac/2007/01/the\\_fair\\_trade\\_sweepsup\\_class.php](http://www.thedemocraticstrategist.org/ac/2007/01/the_fair_trade_sweepsup_class.php). Slevin and Tucker are associated with Public Citizen, a key organization in the antiglobalization movement.

34. For two recent examples, see James Langton, "Texans Fear U.S. Sovereignty Will Disappear down Superhighway," *Sunday Telegraph*, March 4, 2007 (quoting Rep. Ron Paul on a proposal to facilitate the movement of trucks across the U.S. border with Mexico: "It would represent another step toward the abolition of national sovereignty"), and Paul Blustein, "U.S. Farmers Get a Lesson in Global Trade: Cotton Ruling Demonstrates WTO's Power over Markets," *Washington Post*, April 28, 2004 (quoting a Texas farmer: "We're losing our sovereignty in a lot of ways").

35. For examples of this emerging discourse, see Paul Magnusson, "States' Rights v. Free Trade: As Trade Pacts Proliferate, States Start to Howl about Lost Sovereignty," *Business Week*, March 7, 2005; "Corporate Groups Agree: FTAs Threaten U.S. Sovereignty!" *Eyes on Trade*, April 23, 2007, [http://citizen.typepad.com/eyesontrade/2007/04/corporate\\_group.html](http://citizen.typepad.com/eyesontrade/2007/04/corporate_group.html); and Mischa Gaus, "Altered States: New Trade Proposal Would Place Local Sovereignty in the Hands of Multinationals," *In These Times*, June 21, 2004.

36. The Minuteman Project website can be found at [http://minutemanproject.com/mmp/?page\\_id=13](http://minutemanproject.com/mmp/?page_id=13).

37. See Huntington, *Who Are We?*, for an influential and sophisticated version of this argument. For a rebuttal, see Jack Citrin, Amy Lerman, Michael Murakami, and Kathryn Pearson, "Testing Huntington: Is Hispanic Immigration a Threat to American Identity?" *Perspectives on Politics* 5, no. 1 (March 2007): 31–48.

38. See DeSipio and de la Garza, *Making Americans*, and Reimers, *Unwelcome Strangers*, for good discussions of this mythology. Much of this paragraph is based on their accounts of the 1980s and 1990s.

39. The impact of geographical concentration/dispersion of immigrants on politics is explored insightfully in Jeannette Money, *Fences and Neighbors: The Political Geography of Immigration Control* (Ithaca, NY: Cornell University Press, 1999).

40. An excellent analysis of the connection between immigration policy and national security concerns is presented in Fiona B. Adamson, "Crossing Borders: International Migration and National Security," *International Security* 31, no. 1 (Summer 2006): 165–99.

41. The best single source to review these arguments is the website of the Federation for American Immigration Reform (FAIR) at [www.fairus.org](http://www.fairus.org). FAIR was formed in 1979 and has remained the single leading force calling for limiting both illegal and legal immigration ever since. Its website presents the organization's own arguments and links to the arguments of sympathetic groups and individuals.

42. See Dobbs, *War on the Middle Class*, chapter 8, for an excellent example of this kind of argument. Through his CNN show and various writings and appearances, Dobbs has played a central role in the wider dissemination of this discourse beyond traditional anti-immigration circles.

43. In a *New York Times*/CBS poll reported in May 2007, for instance, 48 percent of respondents "favored imposing some controls on immigration," and 35 percent "said that in the long run, the new immigrants would make American society worse, while only 28 percent said they would make it better" (Julia Preston and Marjorie Connelly, "Immigration Bill Provisions Gain Wide Support in Poll," *New York Times*, May 25, 2007).

44. See Cheryl Shanks, *Immigration and the Politics of American Sovereignty, 1890–1990* (Ann Arbor: University of Michigan Press, 2001) on the centrality of sovereignty arguments to restrictionist immigration politics, and Anne Demo, "Sovereignty Discourse and Contemporary Immigration Politics," *Quarterly Journal of Speech* 91, no. 3 (August 2005): 291–311 on the importance of sovereignty in shaping public discourse on immigration generally in the 1990s.

45. According to a June 1, 2007, *Washington Post*/ABC News poll, however, a 63 percent majority of Americans still agree that legal immigrants "do more to help the country" rather than hurt it, although the 28 percent who disagree make up a significant minority. For specific details of the poll questions and answers, see [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_060307.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_060307.html).

46. I discuss these developments in some detail in Cohen, *Politics of Globalization*, chapter 6.

47. A good recent analysis of this theme in the context of the language policy in the United States is April Linton, "Language Politics and Policy in the United States: Implications for the Immigration Debate," Working Paper 141, Center for Comparative Immigration Studies, University of California, San Diego, August 2006, available at <http://www.ccis-ucsd.org/publications/wrkg141.pdf>.

48. David R. Ayón, "Immigration and the 2006 Elections," *U.S.-Mexico Policy Bulletin* 8 (December 2006), available at [http://www.wilsoncenter.org/topics/pubs/mex.bulletin\\_8.pdf](http://www.wilsoncenter.org/topics/pubs/mex.bulletin_8.pdf).

49. See Preston and Connelly, "Immigration Bill Provisions." For a good example of the consensus response to the election, see Fareed Zakaria, "Time to Solve Immigration," *Newsweek International*, November 13, 2006, available at <http://www.msnbc.msn.com/id/15566722/site/newsweek/from/ET>.

50. Julia Preston, "Grass Roots Roared and Immigration Plan Collapsed," *New York Times*, June 10, 2007, available at [http://www.nytimes.com/2007/06/10/washington/10oppose.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2007/06/10/washington/10oppose.html?_r=1&hp&oref=slogin).

51. Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

52. For a good sample of Scalia's views, which define this position in the debate, see the transcript of his speech at the American Enterprise Institute on February 21, 2006, available at <http://www.joink.com/homes/users/ninoville/aei2-21-06.asp>. Scalia's argument is more nuanced than I have presented it; much of it focuses on the discretion given to American justices when they incorporate non-U.S. sources of law. But he does rely heavily on the need to protect the integrity and distinctness of the American constitutional tradition.

53. A good example of a thorough critique of the WTO's dispute resolution system from this perspective is presented in Wallach and Woodall, *Whose Trade Organization?* For a review of the debate over the ICC, which is critical of the sovereignty-based criticisms, see Sarah B. Sewell and Carl Kaysen, eds., *The United States and the International Criminal Court* (Lanham, MD: Rowman & Littlefield, 2000).

54. For an interesting postmortem on the Dubai Ports deal, see David Frum, "The High Price of the Dubai Ports World Debacle," *Financial Times* (Asia Edition 1), March 16, 2006.

55. For two thoughtful and detailed analyses of this issue, see Moises Naim, *Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy*. New York: Anchor Books, 2006; and Stephen E. Flynn, *America the Vulnerable: How Our Government is Failing to Protect Us From Terrorism*. New York: Harper-Collins, 2004.

56. Stephen E. Flynn, "Rethinking the Role of the U.S.-Mexican Border in the Post-9/11 World," testimony before a hearing of the Committee on Foreign Relations, U.S. Senate, March 23, 2004, available at <http://foreign.senate.gov/testimony/2004/FlynnTestimony040323.pdf>.

57. For an early treatment of these debates, see Mark Tushnet, ed., *The Constitution in Wartime* (Durham, NC: Duke University Press, 2005).

58. See, for example, "Still Flying High," editorial, *New York Times*, December 25, 2006.

59. See Jim Abrams, "Democrats, Bush Reach Trade Framework," *Washington Post*, May 10, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/10/AR2007051001759.html?tid=informbox>.

60. In this context, it is worth noting that this dynamic is not limited to U.S. politics. In the collapse of the campaign for a new European Constitution during 2005, the issue of sovereignty was a key theme. Opponents, especially in France,

were able to effectively mobilize the idea of a loss of national sovereignty to help defeat the constitution in popular elections. This puzzled many analysts, who believed that the constitution itself did not greatly change the legal position between states and the Union, and who learned from polls both that the details of the constitution were little understood by most voters and that voters cited issues of economic and cultural insecurity as central to their opposition to the treaty. If we follow the analysis I have offered, however, this complex of perceptions makes good sense. The language of a loss of sovereignty was powerful, I would suggest, because it crystallized fears of insecurity and a sense that political elites were out of touch with the interests and perceptions of ordinary citizens. This is very similar to the pattern I have tried to identify in the United States. For a clear account of this vote and its meaning, see Katrin Bennhold, "France Rejects EU Constitution," *International Herald Tribune (Europe)*, May 29, 2005, available at <http://www.iht.com/articles/2005/05/29/europe/web.0529france.php>.





## CHAPTER 12

# Globalization and Western Political Culture

Jack Citrin

Globalization is the increasing flow of capital, labor, people, and ideas among disparate parts of the world. This process implies more permeable national borders and more open labor markets. The most typical use of the term refers to economic transactions. In the economic context, globalization stresses the growing interdependence of countries through more trade, the expansion of multinational enterprises, and the emergence of worldwide financial markets. In the demographic realm, globalization refers to greater migration, particularly from the less developed regions of Africa, Asia, and the Middle East to the West.

The term *globalization* also is used to refer to political and cultural trends. In the political realm, it generally means the growing impact on domestic politics from external events and actors, including nonstate actors. Among the hypothesized consequences of these dynamics are the erosion of national sovereignty and the spread of international norms of conduct among states and internationalist attitudes among citizens. “Cultural” globalization can be defined as the worldwide diffusion of products, dress, food, music, and language—a process facilitated by the technological revolutions in communication and transportation.

Paradoxically, globalization facilitates both homogenization and differentiation in politics and culture. For example, globalization spreads the idea of human rights along with Kentucky Fried Chicken and karaoke. So it is easy to see why globalization is associated with the idea of cultural imperialism, as the attractions of Hollywood, fast food, and others features of Westernization threaten to supplant local customs. At the same time, the technology underlying globalization permits both greater individual

access to cultural diversity and the maintenance of ties to their original cultures among ethnic diasporas. When Marx wrote, "All that is solid melts into air," he was forecasting that economic globalization would engender a shallow cultural uniformity. Yet an alternative possibility is that international migration, the spread of economic power, and the ease of communications make the preservation of cultural differences compatible with globalization.

The above is a prologue to the main purpose of this chapter, which is to examine the impact of globalization on Western, and most particularly American, political culture—that is, the distinctive set of assumptions, beliefs, and practices that define a political community's "way of life." The focus is on how multiculturalism—as both demographic fact and political ideology—is influencing how Americans (and Europeans) answer fundamental questions about collective identity, collective purposes, and collective authority. New immigrants bring with them distinct cultures and histories that can conflict with the dominant values of the receiving countries. As the chapter demonstrates, relatively open immigration policies and support for multiculturalism do not necessarily imply the erosion of an existing liberal political culture in the United States and (to a lesser extent) Europe.

However, challenges remain in the choice of how to tolerate (and perhaps encourage) cultural diversity while retaining the spirit of *e pluribus unum*. Globalization generally is believed to erode national sovereignty in the realms of economic and social policy. The underlying issue here is whether the processes of change mentioned above complicate or even undo the maintenance of a society with people who "can breathe and speak and produce ... the same culture," which Ernest Gellner believed was instrumental to a society's persistence.<sup>1</sup>

1

## POLITICAL CULTURE AND MULTICULTURALISM IN THE WEST

The dominant interpretation of American political culture portrays the United States as an ideological nation, defining itself not ethnically but rather through the values of democracy, individualism, liberty, equality, and property rights. Immigration is a fundamental part of America's founding myth. The repeated proclamation by presidents and other politicians that "we are a nation of immigrants" elicits virtually no rhetorical dissent. Most Americans acknowledge that all of us "here" now—even Native Americans, if one goes back far enough—originated from somewhere over "there." Indeed, immigrants are often portrayed as "foreigner-founders," the quintessential Americans, adherents of the values of personal responsibility and hard work that are distinctive to American political culture and symbols of an optimistic "new" nation constantly renewing its consent-based, individualist identity through the arrival of people leaving their past behind.<sup>2</sup> Although the historical reality is that legal immigration to the United States often was difficult and that

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immigration policy before the 1960s was founded on ethnic prejudice, the welcoming figure of the Statue of Liberty and Ellis Island, the landing place for the “huddled masses yearning to breathe free,” are symbols of American national identity as potent as Plymouth Rock and Jamestown.

In Europe, the story is quite different. Immigration does not figure in the construction of identities of most nation-states in the ever-expanding European Union; instead, these states define themselves in bounded ethnic terms. The demographic fact may be that Germany has a large foreign-born population, but the often-mocked official position that “Germany is not a country of immigration” is broadly accurate in describing how ethnic minorities, even if born in Germany, fit into the political community.<sup>3</sup> Unlike the American experience, large-scale immigration came to the nations of Western Europe more recently, first as a reaction to the consequences of World War II and then as a result of the political convulsions in Eastern Europe, the Middle East, and elsewhere.

Today, both the United States and Europe are deeply entangled in the economic, demographic, and cultural trends described above, and many observers believe that these countries are globalizing and fragmenting at the same time. On the one hand, it is argued that economic interdependence frays the connections between citizenship and personal welfare and diminishes the sovereignty of even the American superpower. As a result, nationalism gives way to a cosmopolitan outlook favoring multilateral decision making and “world citizenship.” On the other hand, immigration and asylum-seeking are making multiculturalism a demographic fact, bringing people of different races, religions, languages, and cultures into the political community. When linked to an ideology holding that these diverse groups have distinct beliefs, values, and interests, immigration-driven diversity threatens the idea of national solidarity based on a common political culture. What, then, are the implications of multiculturalism for the politics of the West and, more specifically, on the prevailing conceptions of national identity in America and Europe?

The demand for multiculturalism is strong in the contemporary world and is much invoked in the making of political policies in America and Western Europe. As an ideology, multiculturalism assumes that a strong and positive ethnic identity is vital to a person’s dignity and self-realization. Defenders of this proposition thus argue that government should take special steps to preserve minority cultures that otherwise would fade away due to the influence of the majority group. Accordingly, nationhood in a multi-ethnic society cannot be based on a common culture. Critics of multiculturalism reply that institutionalizing cultural differences both undermines the idea of democracy as a community of autonomous individuals with equal rights and erodes a sense of national solidarity.

There are both soft and hard versions of ideological multiculturalism. The weak form emphasizes tolerance and calls on the government to assure public recognition of minority groups. What Christian Joppke calls “festival multiculturalism” is the result: money for ethnic dance and art groups, ethnic history months, the renaming of streets and parks, revising the school curriculum to pay attention to the contributions of minority

groups and figures, and so forth.<sup>4</sup> This approach flirts with the notion of group rights without embracing it. By contrast, strong multiculturalism holds that differences among communities of descent are basic and permanent. Moreover, no culture is superior to any other and therefore none should be privileged in a multiethnic society. From this vantage point, the American ideal of the melting pot simply stands for cultural imperialism. With one's ethnic affiliation trumping all others, the proper model of the state is not a community of autonomous individuals but a confederation of ethnic groups with equal rights.

At the core of strong multiculturalism is the conviction that group representation should govern the allocation of public benefits. All public policies should be judged in how they affect the balance of power among the carriers of different cultures. The purpose of strong multiculturalism's agenda is extensive redistribution: key policies in the United States include affirmative action, racial representation in legislatures, and official bilingualism.

Between the strong and weak poles of multiculturalism, obviously, there is a range of postures. So, for example, some countries like Canada adopt multiculturalism as a form of welcome to new ethnic groups but stop short of rigidly institutionalizing group differences. Until recently, Britain and the Netherlands bowed in the direction of multiculturalism, whereas France, as demonstrated by *l'affaire du foulard*—the controversy over Muslim girls wearing headscarves in public schools—consistently refuses to recognize any cultural distinctions among its republican citizens.

Throughout American history, it was debated whether immigrants could absorb the prevailing Anglo-Protestant values and become loyal, democratic citizens. Nativists argued that Catholics, Asians, and Eastern Europeans lacked the moral and intellectual attributes necessary for democratic citizenship; they contended that immigrants should come only from Western and Northern Europe. Others believed that assimilation was possible but needed to be pushed along by a process of "Americanization." So Theodore Roosevelt accepted immigration but insisted that newcomers must "speak and think American." Zangwill's metaphor of the melting pot was an optimistic vision: anyone could blend in and the American soup would evolve as immigrants introduced new customs and habits without challenging fundamental values.

The political contest between the nativist and liberal conceptions of American identity was settled in the 1960s. The twinned passage of the 1964 Civil Rights Act and the 1965 Immigration and Nationality Act instituted a color-blind version of citizenship that steadily increased the Hispanic and Asian segments of the population. And despite periodic outbursts of anti-immigrant sentiment, the legal foundations of this ethnic transformation of American society remain intact.

Ironically, though, liberalism's triumph quickly spawned multiculturalism as a new ideological challenge. In the United States, multiculturalism emerged after the failure of the civil rights movement to quickly overcome entrenched racial inequality fueled black nationalism in the late 1960s. Immigration then produced an influx of newcomers from Latin America and

Asia. These groups became part of the American “ethno-racial pentagon” embedded in affirmative action law and greatly enlarged the groups with a vested interest in multiculturalism’s program of redistribution. As the composition of the United States changed, ethnic politics became more complex, with the historic problem of assimilating immigrants overlaid upon the seemingly intractable problem of race.

Europe’s experience with immigration and multiculturalism has raised similar questions in a somewhat different context. As in the case of the United States, the main population flows have been from east to west and south to north, with poor people from Africa, the Middle East, and Asia coming to wealthy industrialized democracies. In the case of Europe, immigration was encouraged between 1950 and the early 1970s, a period when workers were needed to help drive economic recovery after the war. After the first oil crisis, however, European policies generally aimed at stemming rather than soliciting immigration, and this has been the dominant position even though declining populations suggest a need for more people to sustain economic growth and to fund generous welfare states. Still, the combined result of immigration, asylum-seeking, and fertility rate disparities means that there are substantial and growing immigrant populations in EU countries. The estimates vary from 2 percent foreign-born in Finland to 9 percent in Germany. The comparable U.S. figure in 2000 was 14.2 percent. These figures probably are underestimates due to the exclusion of some illegal immigrants.

One important difference between multiculturalism in the United States and Europe, of course, is the background of the immigrants. In the United States, the largest immigrant group comes from Mexico—*Mexifornia* is the title of a recent book decrying this development.<sup>5</sup> In Europe, the Muslim religion defines the largest category of immigrant; Bruce Bawer, in his 2004 book *While Europe Slept*, raises the specter of an emerging “Eurabia” replete with Koranic law and honor killings.<sup>6</sup> The problem faced by Europe is far greater, Bawer and others argue, because of the greater gap between the core values of Western Europe and Islam and because of the conflicts of loyalty generated by the international politics of the moment.

A second important transatlantic difference is the historical self-definition of the countries involved. As already mentioned, the United States calls itself a nation of immigrants and its national identity is, in principle if not always in practice, civic rather than ethnic. Assimilation American style is a relatively simple matter; it entails defining oneself as an American first and foremost, learning English, and espousing democratic political values. Despite the official separation of church and state, invoking one’s religion, whatever it may be, is acceptable in public life. Nostalgia about one’s country of origin also is the norm: Cinco de Mayo has joined St. Patrick’s Day and Columbus Day as occasions for public parades. One can call oneself an Italian-American or Mexican-American—but to be “truly American,” one is expected to give priority to the term after the hyphen.

As of now, there is no equivalent self-definition in Europe. People do not call themselves Moroccan-Dutch, Italian-French, and Pakistani-British.

This reflects the fact that most European nations have defined themselves in ethnic terms. To the extent that there has been attention to the issue of hyphenated identities in Europe, the focus has been on the relative strength of national and supranational European loyalties. Recently, however, reactions to the riots in France, the bombings in London and Madrid, and the murder of Theo Van Gogh in Amsterdam have swung the policy pendulum toward assuring cultural cohesion within the nation-state. Many countries in Europe are proposing language tests for immigrants, history tests as a prerequisite for citizenship, and measures to curb the power of imams.

A third difference between the United States and Europe in addressing multiculturalism stems from the more generous and inclusive welfare state regimes in Europe. In most European countries, in part because of EU treaties, there is largely nondiscriminatory treatment of immigrants in health care, schooling, and social security. In the United States, access to health care and social security for immigrants is less immediate and less generous. One possible implication of this difference is the greater willingness of immigrants, including second-generation immigrants in the United States, to take low-paying jobs. Another is asylum-shopping in Europe, with migrants seeking to enter or move to countries with the most generous and accessible benefits, which may in turn fuel resentment among the receiving country's taxpayers.

## IDENTITY CHOICE IN A MULTICULTURAL NATION

Differences in political history and culture affect how countries deal with multiculturalism. It is plausible, in fact, that America's social diversity, as fueled by immigration, has sustained its individualist culture, which emphasizes personal responsibility and regards economic inequality as a function of differences in effort and motivation. Immigrants are a self-selected group and historically are determined individuals prepared to endure hardship to make a better life for their families. Moreover, they come without expectations of cradle-to-grave support from a nanny state but rather tend to view their economic circumstances in the United States as superior to those left behind.

Two underlying questions posed by multiculturalism are:

1. How should people be categorized—as individuals or as members of an inherited group identity?
2. Should public policy be directed at leaving people of different cultural traditions “alone” to apply their own rules and preserve their own customs, or should it insist on the application of universal principles of individual rights and promote the participation in education and civil society of minority group members?

More succinctly, the choice is between a politics of difference (strong multiculturalism) and a politics of integration. Yet a key factor in this debate is how broad and deep the cultural gap is that needs to be bridged (or not). Before deciding whether and/or how to bridge this gap, policy makers

need to ask a prior question: How strongly inclined are those living in the United States—whether native-born citizens or immigrants—to see themselves as “American”?

### Antecedents of Ethnicity Choice

Ethnicity is likely to emerge as a significant antecedent of identity choice in a multicultural society. Since people tend to live and interact with others like themselves, the majority group is likely to perceive most other citizens as sharing their physical characteristics and values. So there is a simple perceptual or cognitive basis for the majority ethnic group to define themselves as “just Americans,” particularly when the structural integration of white immigrants is virtually complete.<sup>7</sup> Given that immigrants tend to come from minority cultures and to look and act differently, the belief that newcomers *should* assimilate is quite natural among those who view their own values as the American norm. In addition, some argue that the majority group has a political and psychological interest in the dominance of its own cultural norms and thus is less likely to favor identities based on other cultural heritages.

On the other hand, members of groups that differ markedly from the majority are likely to perceive themselves as different. Particularly when the boundaries between ethnic groups are sharp and impermeable, minority groups should be more likely to identify in ethnic terms. And even as structural integration begins, a hyphenated identity should be a more common mode of structuring multiple identities for minority group members than for majority group members. *Ceteris paribus*, it is expected that whites will define themselves exclusively in terms of their national identity more often than blacks, Latinos, or Asians.

Immigrant status is another likely antecedent of identity choice. Overall, immigrants should be more likely than the native-born to adopt the ethnic-dominant or hyphenated self-definition. However, if it is true that assimilation proceeds in a straight line over time, this gap should diminish with each succeeding generation of immigrants. In every ethnic group, the tendency to define oneself as just an American should increase as one moves from those born abroad to those born in the United States to those whose parents were born in the United States.<sup>8</sup> The outcome here has obvious relevance for the current debate over whether immigrants from Asia and Latin America will follow the assimilationist path of their European predecessors.<sup>9</sup>

Additionally, students of ethnic politics and immigration assume that structural integration, defined in socioeconomic terms, reinforces cultural assimilation and fosters the political incorporation of minority groups and immigrants.<sup>10</sup> Upward mobility increases interaction across group lines, exposes people to each other’s norms, and ultimately increases the tendency of minority group members to view themselves as full-fledged members of the national community. Clearly, this process can be tempered or reversed if official or informal discrimination stimulates feelings of relative deprivation among the assimilated members of immigrant or minority groups.<sup>11</sup> On balance, however, one would expect that rising

socioeconomic status, as assessed by education and income levels, will attenuate the choice of ethnicity-dominant and hyphenated identities.

Political socialization is another source of identity choice. As already noted, people are exposed to different norms regarding the relative merits of assimilating or maintaining one's original ethnic culture. Multiculturalism, whose principal tenet is the preeminence of ethnicity in defining one's identity and interests, is a relatively new ideology most widely diffused in the nation's colleges and universities. Exposure to these ideas therefore may foster political outlooks that devalue nationalism in favor of subgroup identifications. So a final expectation is that age and identity choice are associated, with the relatively young more likely to adopt or approve hyphenated and ethnic self-definitions.

### Consequences of Identity Choice

The political relevance of social identities rests partly on how they influence attitudes and behavior toward one's own and other groups. The master hypothesis is that self-categorization is sufficient to produce in-group favoritism,<sup>12</sup> though this tendency is enhanced by the emotional significance of the group to its members.<sup>13</sup> So, how Americans balance their national and ethnic identities is at the core of the ongoing debate about whether the American melting pot is "working" or can "work again."<sup>14</sup> If the assimilation model of American ethnic group relations remains accurate, then over time today's immigrants and their offspring should come to identify themselves as Americans first and members of a particular ethnic group second. Ethnic differences in patriotism should be relatively small and primarily reflect a group's length of tenure in the United States. And while assimilation does imply the erosion of ethnic ties from one immigrant generation to the next, expectations about how national and ethnic attachments should be associated depend upon one's interpretation of the melting pot metaphor. Here the distinction between the effects of self-categorization and ethnic identification is clear.

If *melting* means "cleansing," then successful assimilation would mean that a strong sense of national attachment should have washed away the residues of an earlier, primary loyalty to the ethnic group.<sup>15</sup> By contrast, if *melting* means "blending," strong identification with both nation and ethnic group are not merely compatible but may even be mutually reinforcing. This version of the assimilation model imagines America as a nation defined by its openness to immigrants who embody the traditional virtues of optimism and hard work and who use ethnic solidarity as a resource to speed their full participation in the country's economic and political life. The success of the melting pot therefore does not require the loss of ethnic pride among minority groups. What matters is that when a choice must be made, members of all the country's ethnic groups put their common national identity—what comes after the hyphen—first.

The image of America as an enduring ethnic hierarchy, with whites zealously guarding their place at the top, projects a different pattern of attitudes

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from either variant of the melting pot metaphor.<sup>16</sup> From this perspective, the ideological commitment of the United States to legal equality for ethnic minorities masks the use of race and ethnicity as the basis of economic and social privilege. By this way of thinking, in reality, if not in rhetoric, Americans hold to an ethnic definition of membership in the national community. In a representative statement of this position, social psychologist James Sidanius asserts that in any multiethnic society, the politically dominant ethnic group will claim “ownership of the nation, resulting in a psychological fusion between nationality and ethnicity among its members.”<sup>17</sup>

By contrast, because of past discrimination and humiliation, members of minority groups see themselves as *in* but not *of* the American nation. In this context, a strong sense of attachment with one’s particular ethnic group is predicted to erode attachment to the nation as a whole. Strong national and ethnic identities are complementary for whites only. For minorities, national and ethnic allegiances compete and, by implication, the particularistic group identity is dominant. Ideological multiculturalism endorses this version of the dominance strategy, asserting that ethnicity is the fundament of one’s authenticity and dignity. To the extent that this view prevails and a strong sense of ethnic identity among minorities erodes feelings of patriotism and national attachment, demographic diversity and national solidarity do indeed collide, making *e pluribus unum* an unrealizable ideal.

## SURVEY EVIDENCE ON MULTICULTURALISM AND “AMERICANNESSE”

In the United States, the survey evidence is clear that rather than embracing ideological multiculturalism, most Americans give priority to an overarching national identity and retain strong patriotic feelings. This is true both within the native-born population and among immigrants. A 2006 national survey of Hispanics living in the United States confirms that a large majority feels strongly American and that this patriotic outlook is associated with the length of time spent in the country, naturalization, and nativity. Both Hispanic and Asian immigrants overwhelmingly agree that it is crucial to learn English, and by the third generation most members of these ethnic groups are monolingual English speakers similar to the experience of earlier European immigrant generations. Samuel Huntington worries that the ongoing influx of unskilled immigrants from Mexico living in tight-knit communities in the Southwest is the harbinger of an American version of Quebec,<sup>18</sup> a linguistic and cultural enclave tempted to secede, but the evidence to date does not support this scenario. Recent immigration into the United States does not threaten the status of English as the country’s common language or the values of individualism and personal responsibility. If anything, new immigrants are more traditional in their moral values, tending to side with conservatives in the “culture war.”

We can look to a variety of survey results to confirm these propositions. The indicator of identity choice used here is the question, “When you think

of social and political issues, do you think of yourself mainly as a member of a particular ethnic, racial, or nationality group, or do you think of yourself as just an American?" As reported by David Sears and colleagues, in the 1994 General Social Survey (GSS) national sample, the most important result is that 90 percent chose the "just an American" response.<sup>19</sup> Only 7 percent opted to categorize themselves as mainly a member of a particular ethnic or racial group. And while one might think people would squirm at the bald choice, only 2 percent gave "both" or "it depends" as an answer.

A follow-up question asked whether they thought of themselves that way on "all issues, most issues, some issues, or just a few issues." Of the total sample, over half (54 percent) stated that they thought of themselves as "just an American" on "all issues," and 28 percent said they felt this way on "most issues." Less than 2 percent said they thought of themselves as being in some subgroup on "all" or "most" issues. In the public as a whole, then, American national identity rather than membership in an ethnic subgroup is the dominant choice for self-categorization.

In a national sample, of course, whites are by far the largest group of respondents. And in the 1994 GSS, identity choice did vary with ethnicity: 95 percent of the whites, 79 percent of the Hispanics, and 66 percent of the blacks opted for this "just an American" category when asked if they had to choose between the national and the ethnic identity. Even among minority groups, then, nationality generally trumped ethnicity; in addition, among both blacks and Hispanics, a majority said they thought of themselves as "just Americans" on all or most, rather than just some, issues.

The Los Angeles County Social Surveys (LACSS) have larger numbers of minority respondents and table 12.1 reports the answers of the Los

**Table 12.1.**  
**Identity Choice by Race and Ethnicity**

Question: When it comes to political and social matters, how do you primarily think of yourself: just as an American, both as an American and (ethnicity), or only as (ethnicity)?

	Just an American	Both	Ethnic Group	Total N
White	75%	20%	5%	702
Black	28	55	17	270
Hispanic	11	57	32	631
Born in U.S.	25	65	11	188
Naturalized citizen	10	74	16	118
Noncitizen	3	47	50	322
Asian	6	71	23	121

*Note:* Columns present the percentage of each racial group with the indicated response. Rows may not total 100% due to rounding error. *Source:* Pooled 1995, 1999, and 2000 LACSS.

Angeles samples to the basic identity choice item asking people whether they considered themselves to be “just Americans” or mainly members of an ethnic group. It shows that the LACSS data largely parallel the national results: when given just two choices, 80 percent of respondents chose the “just an American” identity over the “mainly ethnic” response. Whites were virtually unanimous (95 percent), but more than two-thirds of each minority group also preferred the superordinate national identity to thinking of themselves primarily as a member of a specific ethnic group. In a supposed ethnic cauldron, when asked to choose, the “just an American” appellation prevails in all four ethnic groups.

Moreover, when we compare Hispanic respondents subdivided by their place of birth and citizenship, it is clear that ethnicity is far more likely to be the dominant choice among immigrants, particularly those who are not yet citizens. Indeed, native-born Hispanics are less likely to prioritize their ethnic identity than blacks, suggesting that the traditional process of assimilation continues to hold sway, with successive immigrant generations identifying themselves simply as Americans.

The dichotomous self-categorization question does not offer people the choice of calling oneself a hyphenated American. The LACSS surveys permitted this by asking people who first said they thought of themselves as “just American” this follow-up: “Which of the following is most true for you: just an American or both American and (ethnicity)?” Thus, respondents could reveal either an intersection strategy, by selecting both American and ethnicity, or a dominance strategy, by selecting either “just American” or “just ethnicity.” Given this opportunity to use the intersection strategy, most whites do not take it: 75 percent continued to call themselves “just an American” and only 20 percent, most of whom are immigrants, shifted to the “both” category. Among the three minority groups, however, the dual or hyphenated identity is the majority choice. In this follow-up question, this is especially true for Asians (71 percent), but also for blacks and Latinos (about 56 percent each).

However, there is some divergence among the minority groups. A substantial minority of blacks (28 percent) did not budge from the “just an American” identity. And given that 55 percent chose a hyphenated identity and only 17 percent in the two-option question made ethnicity their dominant choice, it is clear that relatively few blacks are denying a sense of identification with the nation as a whole. Indeed the “just American” response is surprisingly common, given that there is other evidence that African-Americans have a stronger sense of ethnic solidarity than other groups.<sup>20</sup> What W. E. B. DuBois called the “double consciousness” of being American and black is the modal identity choice. And given that the process of change occurring among groups largely comprised of recent immigrants does not apply to blacks, this outcome seems likely to endure.

Among Hispanics in the LACSS surveys, there is a reversal of the pattern of identity choice observed among blacks. Here, one-third opted for the solely ethnic identity and only 11 percent say they feel themselves to be “just an American.” Similarly, Asians prefer a purely ethnic label to the “just an American” identity by a substantial margin. This contrast between

blacks and these new immigrant groups begins to make more sense when we compare native-born and foreign-born Hispanics. Among the native-born, an American identity (25 percent) far outstrips a purely ethnic identity (11 percent). The opposite holds for those who are foreign-born: a purely ethnic identity is far more common (41 percent) than American identity (5 percent), and this difference is accentuated when one looks only at the foreign-born noncitizens. This is another indication that the immigrant status of Hispanics and Asians is far more important in contributing to how they balance their national and ethnic identities than is their position in a supposedly rigid American racial and ethnic hierarchy.

This result was confirmed by the Pilot National Asian American Political Survey, a multiethnic, multilingual, and multi-city study of 1,218 adults age 18 or older residing in five major population hubs.<sup>21</sup> Respondents were asked how they identified themselves, *in general*, and were given the choices of American, Asian-American, Asian, ethnic-American (e.g., Chinese- or Korean-American), or just one's national origin. The authors of this study, Pei-te Lien, Margaret Conway, and Janelle Wong, report that 61 percent of the sample chose some form of American identity: 12 percent of this sample chose the American identity, 15 percent opted for the pan-ethnic Asian-American, 34 percent preferred a hyphenated national-origin American self-designation.<sup>22</sup> Of the approximately 40 percent of the sample remaining, 305 chose the purely ethnic identity and defined themselves in terms of their country of origin.

What, then, should we conclude about how Americans are balancing their national and ethnic identities? First, a clear majority in all ethnic groups tend to choose "just an American" if forced to choose between that and a purely ethnic label. Among whites, this preference remains intact even when they are offered the option of a dual, hyphenated self-categorization. For them, the ethnic label has little salience or resonance; it is an optional identity<sup>23</sup> that few whites choose, either because ethnic ties have lost emotional significance and practical relevance for many whites or because, as some scholars allege,<sup>24</sup> they do not make a cognitive distinction between their national and racial identities. However, majorities in all three ethnic minority groups tend to shift to a hyphenated label, or even prefer one from the outset, if they are given the opportunity.

Finally, the only group in which a majority prefers a purely ethnic identity consists of the foreign-born immigrants to the United States. Native-born ethnics tend to prefer to be thought of as hyphenated Americans, with an emphasis on the "American." But that seems to be a kind of half-way house in terms of social identity, much as the hyphenated-American identities tended to be in the early and mid-twentieth century for many European immigrant families. Given the large proportions of immigrants in this Los Angeles sample of Hispanics and Asians, it seems probable that the data reported here record an early stage in a process of assimilation.

## IMMIGRATION, MULTICULTURALISM, AND POLICY

In the context of global migration and the increased diversity of the population of the United States (as well as European countries), a number

of policy questions arise. The following discussion briefly introduces some questions relevant to U.S. policy makers as they confront the impact of U.S. “ethnic globalization.” How these policy makers should respond may be informed by the above survey results, but is ultimately beyond the scope of this chapter.

### Immigration Reform

How many immigrants should be admitted and who should receive preference? The official U.S. policy since 1965 has been the elimination of ethnic preferences in favor of family reunification. The result is chain migration that has enlarged the Hispanic and Asian segments of the population. The refugees admitted have tended to come from factions allied with the United States, and they have tended to be more royalist than the king—that is, loyal Americans. Many of the Middle Eastern Muslim immigrants have been middle-class political refugees uninterested in challenging the dominant political norms—a condition that does not necessarily hold true in Europe.

Public opinion in both the United States and Europe favors “designer” immigration, in which preference is given to people with educational skills, as in Canada, and to people culturally similar to the native population. Since skills and the ethnicity of potential immigrants tend to be correlated, egalitarian norms make the adoption of such a policy problematic.

### Citizenship

Immigration and multiculturalism also raise the question of dual nationality, something more widely recognized in the European Union than the United States. Does the possibility of dual nationality speed the process of naturalization? Does it diminish loyalty to the nation-state? If economic interdependence increases the mobility of labor and diminishes the utilitarian foundations of national identity, should multinational citizenship be generally accepted?

The American policy of *ius soli*—granting citizenship via American birth, rather than by blood (*ius sanguinis*)—defines the process of citizenship and naturalization as one based on liberal principles. In practice, bureaucratic shortcomings often delay naturalization. As for *ius soli*, this recently has come under attack as allowing illegal immigrants to come to the United States, have a baby, and then use that as the basis for staying in the country.

### Immigrant Rights

What should be the rights of immigrants when it comes to access to public services and other benefits provided by the welfare state? Should there be a waiting period before health care, housing, and other forms of poverty relief? Should social citizenship rights be provided to illegal as well as legal immigrants? States and localities vary in how immigrants are

treated, and an important question is how this variation affects both the integration of immigrants and the level of support for welfare-state policies among the native-born. For example, several observers have argued that in high-immigration states such as California, support for public education has declined because these are perceived as benefiting undeserving immigrants.

## **Integration**

How should society achieve a level of cultural unity? Everyone, including immigrants themselves, generally views linguistic assimilation as critical. The United States has mandated bilingual education in public schools, although this policy has taken several forms and remains controversial. Several states, including California, have passed laws limiting the scope and form bilingual education can take. The basic issue is pedagogical: English immersion versus transitional learning in one's native language alone, and the evidence of what works and with what side effects is murky, to say the least. Other dimensions of the language issue deal with bilingual ballots in elections and bilingual signs, forms, and interpreters in courtrooms, hospitals, and government offices. Most jurisdictions are taking a pragmatic approach to this issue.

## **Representation**

Multiculturalism poses the question of proceeding beyond nondiscrimination to what Americans call "affirmative action" and the English call "positive discrimination." In other words, should there be a preference in recruitment or promotion given to people from a specific group in order to increase their representation in a particular position? Affirmative action in the United States has been shaped by judicial and bureaucratic decisions, rather than legislation, and remains unpopular in general public opinion. A frequent justification for affirmative action is that it diminishes the alienation of disadvantaged minorities from political and economic life and in so doing reduces the chances of crime and civil strife.

## **Religion and Law**

Multiculturalism raises the question of the separation of church and state. Relative to Europeans, religiosity remains a distinctive feature of American political culture. Americans are more likely than Europeans to say that they believe in God, pray, and attend religious services. There is no established state religion, but practices such as invocations and benedictions at public ceremonies are commonplace. Moreover, religious sentiment shapes the debate on abortion, homosexuality, stem cell research, euthanasia, and teaching science; and the moral orthodoxy of the more traditional elements in all religious denominations recently has been far more influential in the United States than in Europe.

Multiculturalism raises new questions about the relations between religion and law. One question centers on the potential conflict between civil law and cultural norms, a question that has produced the so-called cultural defense in criminal cases. What happens when criminal conduct under domestic law is defended as simply conforming to one's culture? An extreme recent case is the consummation of an arranged marriage by abduction and rape. Another is the claim of an African-American mother that leaving her young child alone in a bathtub to go shopping was appropriate in her "culture." Liberalism dictates the rejection of such claims, and so far, despite some waffling, American courts have done so.

A related issue is whether Muslim religious leaders should have judicial authority to decide certain cases involving members of their community by applying *sharia* (religious law). This recently was proposed in Ontario, but public outcry led to an immediate reversal of the government's proposal. Given the large Muslim population in Europe, similar policy choices are likely to arise, as is the question of government support for religious schools controlled by imams. In France, Muslim leaders generally have opposed sharia, but in Britain there is much more support.

### Free Speech

When different cultures rub against each other, prejudice and ethnic strife are a danger. Speech that inflames by insulting one's ethnicity becomes a problem. The First Amendment in the United States makes regulating "offensive" speech problematic, but in Europe there are many laws against "racist" and derogatory speech. At the same time, the *fatwa* against Salman Rushdie was just the first of a number of threats against persons, cartoons, plays, operas, and other cultural productions deemed to denigrate a particular religious group, and how far officials go to defend freedom of speech has varied.

## COMPARING ATTITUDES TOWARD IMMIGRATION IN THE UNITED STATES AND EUROPE

Though the contrasting American and European histories of immigration are familiar, we have few systematic comparisons of American and European opinions about immigration policy. The many extant studies of attitudes toward immigration either focus on single countries—for example, the United States,<sup>25</sup> the Netherlands,<sup>26</sup> or Italy<sup>27</sup>—or draw comparisons only among European countries.<sup>28</sup> Comparisons of the United States and Europe have typically included only a handful of European countries<sup>29</sup> and have often lacked comparable survey items. Studies based on the European Social Survey (ESS) of 2002 and the "Citizenship, Involvement, Democracy" (CID) American National Survey conducted by Georgetown University in 2004 allow us to compare the United States and twenty different European countries.<sup>30</sup> These two studies also include a sizable number of items that speak to the preferred composition of the state,

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knowledge about the immigrant population, the desired qualities of immigrants, and the perceived consequences of immigration. Public opinion on these matters provides a useful backdrop to the likely trajectory of public policy, because in a democracy the preferences of ordinary citizens, expressed on election day, constrain the actions political leaders may safely contemplate.

## Cultural Diversity

We begin with two items that tap attitudes toward the broader notion of cultural diversity, without specific reference to immigrants. Respondents in both the ESS and CID were asked whether they agreed or disagreed with the following statements:

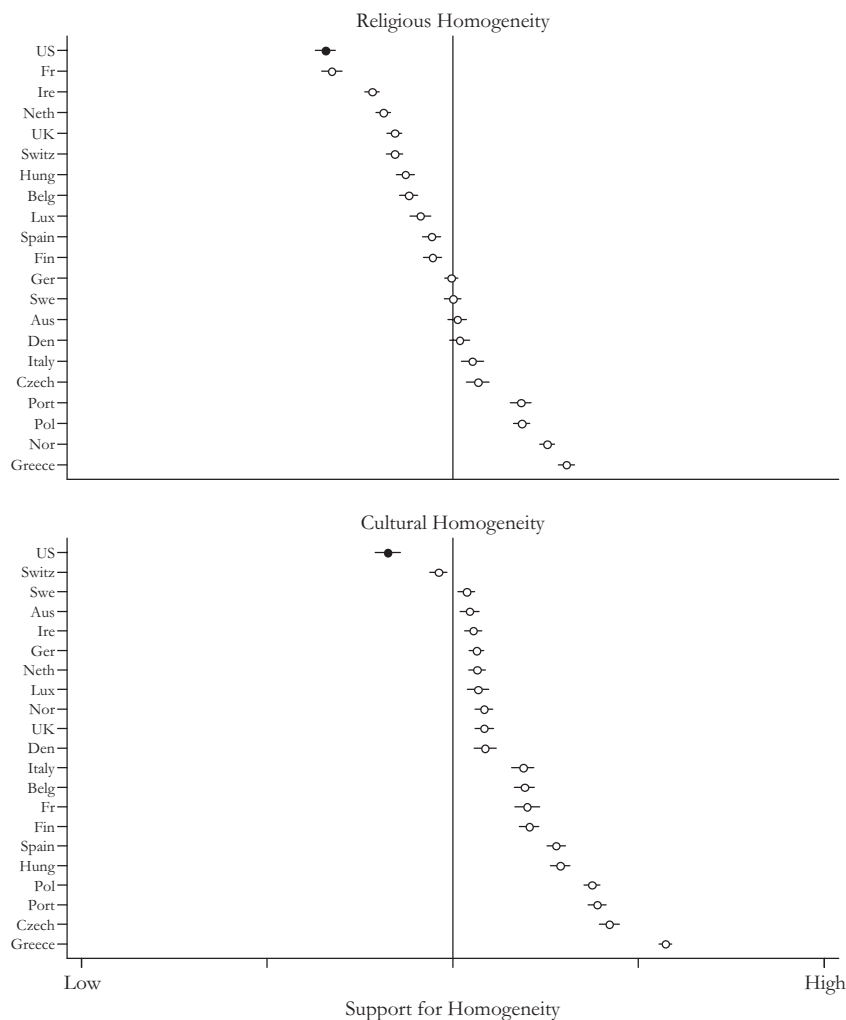
- “It is better for a country if almost everyone shares the same customs and traditions.”
- “It is better for a country if there are a variety of religions among its people.”

Each item was coded so that high values equal support for homogeneity (i.e., agreement with the first statement and disagreement with the second). Figure 12.1 presents the country-level means for each item, along with the 95 percent confidence interval for each country’s mean. The data point for the United States is darkened to highlight any differences between the United States and these European countries. In each graph, the x-axis ranges between the minimum and maximum value for that item—in this case, from strongly agree to strongly disagree, or vice versa. The vertical line in each graph denotes the midpoint of the scale.

The results suggest, first, that countries are relatively evenly distributed between a tendency to oppose and a tendency to support religious homogeneity. However, the majority of countries tend to support the idea of cultural homogeneity; on average, majorities in nineteen of these twenty-one countries agree that it is “better for a country if almost everyone shares the same customs and traditions.” Countries from Eastern and Southern Europe, especially the Czech Republic, Poland, Portugal, and Greece, had the highest apparent level of support for homogeneity.

By contrast, the United States appears distinct in its greater tolerance of cultural and religious diversity. With regard to religious homogeneity, the United States and France are more opposed to this ideal than nearly every other country in the sample.<sup>31</sup> With regard to cultural homogeneity, the United States is less supportive than every European country in the sample. It appears that the long history of ethnic and religious diversity in the United States has produced a distinctive, and more favorable, orientation toward cultural heterogeneity.<sup>32</sup> However, as we show below, in the United States as elsewhere, those less accepting of cultural diversity tend to be more opposed to immigration.





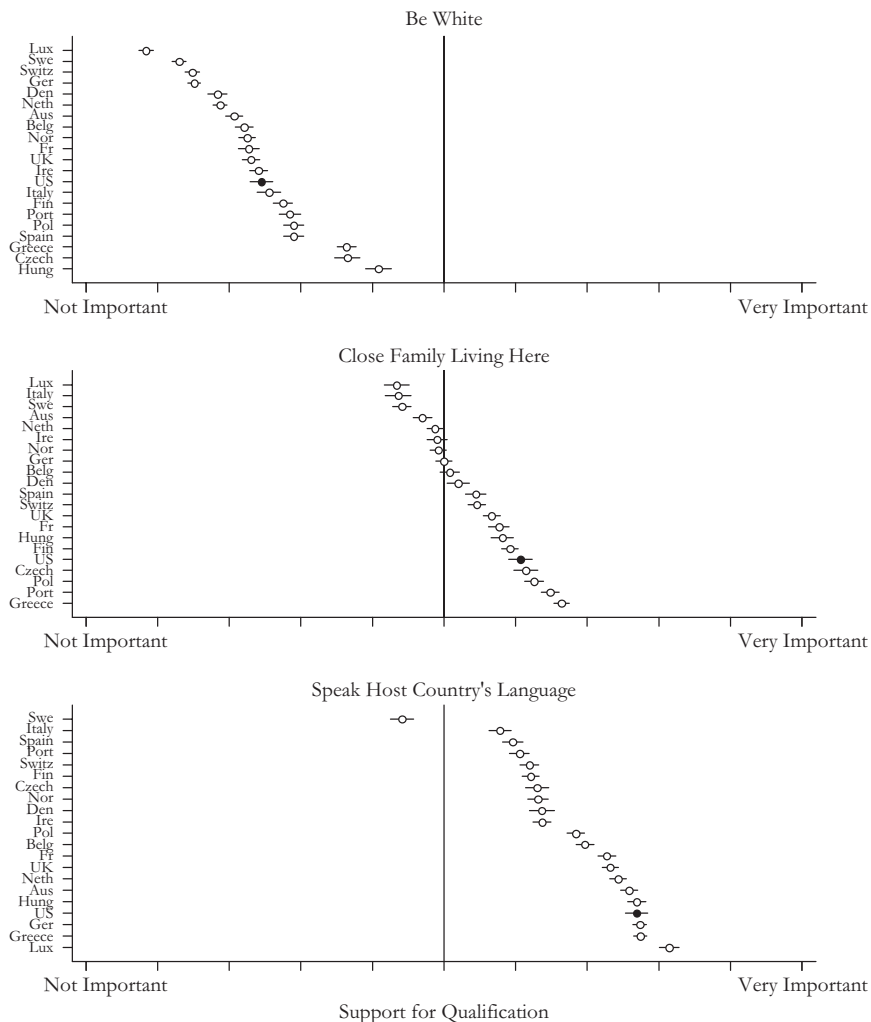
**Figure 12.1. Beliefs about Societal Homogeneity**

*Source:* 2002 ESS, CID. Data points are country-level means, with 95% confidence intervals.

## Desired Qualities

A second set of items speaks to the qualities that people desire in immigrants. The ESS and CID asked respondents to rate the importance of three different qualities on a 0–10 scale, from “not important” to “very important”.<sup>33</sup>

Please tell me how important you think each of these things should be in deciding whether someone born and raised outside [this country] should be able to come and live here:



**Figure 12.2. Beliefs about Qualifications for Immigrants**

*Source:* 2002 ESS, CID. Data points are country-level means, with 95% confidence intervals.

- (a) Close family living here
- (b) Be able to speak [the local language]
- (c) Be white

Figure 12.2 presents the average importance of each item in each country. The results suggest that, overall, the ability to speak the host country's language is the most important quality, while being white is the least important. In fact, a white racial background is, on average, considered

unimportant in every single nation—though a skeptic might wonder if some respondents are merely giving the socially desirable answer. Among these countries, the Swedish sample stands out as less insistent on each of these three criteria.

Americans actually appear relatively more likely than citizens of most European countries to prioritize each of these three qualities, especially linguistic ability and the presence of close family. Support for giving priority to family ties dovetails with U.S. immigration policy, which focuses on family reunification and admits the majority of legal immigrants based on this principle. The desire for immigrants to speak English also is consistent with persistent efforts, particularly at the local and state levels, to make English the “official” language.<sup>34</sup> Though Americans tend to favor cultural diversity in the abstract, they appear to regard linguistic separatism as beyond the pale. Speaking a foreign language is viewed as a benefit, and bilingual education is accepted as long as it is implemented as a pathway to fluency in English. Not “English-only” perhaps, but “English first” is the defining cultural outlook. Americans seem to regard speaking English as the indispensable glue in a country made up of diverse groups and as a necessary skill for economic mobility and civic engagement. Polls consistently show that Americans of all ethnic backgrounds agree that speaking English is very important for making one “truly American.”<sup>35</sup>

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## Public Attitudes and Public Policy

There are differences in American and European attitudes toward immigration consistent with the divergent national myths and experiences with foreign migration. The evidence from the ESS and CID surveys indicate that Americans appear more tolerant of diversity, yet are simultaneously a little more concerned about the potential negative consequences of higher levels of immigration. However, here the differences are not so stark as to indicate a true “American exceptionalism.” More striking are the similarities in opinion across countries. In the United States and in virtually every European country polled, the mass public has similar views about immigrants’ qualifications, with less emphasis placed on their color and more on their ability to speak the language of the receiving country. This latter criterion—as salient in the United States as in Europe, if not more so—suggests that citizens everywhere worry about the integration of immigrants. On the whole, there is a pervasive *syndrome* of opinions about immigration: the public overestimates their number, favors fewer immigrants, and perceives the consequences of immigration for public finance and safety as negative. Furthermore, the main determinants of anti-immigrant attitudes tend to be the same in countries on both sides of the Atlantic: social trust, education, and leftist political views make one more favorable toward immigration; feelings of economic insecurity and the desire for a culturally and religiously homogeneous society make one less favorable.

This common syndrome of opinions means that, in most countries, there is a disjunction between public opinion and the dominant view of

political elites, who tend to be more favorable toward immigrants. In the United States, this disconnect is striking, but—perhaps because both the Republican and Democratic parties are divided on this issue and because diverse legislators with ties to immigrant groups, ethnic activists, and business interests can prevent significant change—public policies have generally continued to favor more immigrants.

In 2006, the potential to end this disconnect seemingly emerged. Anger about illegal immigration led one side to demand more stringent border control and the other to demonstrate in favor of immigrant rights and the legalization of the millions of undocumented aliens in the United States. Legislation attempting to deal with both issues—the problem of illegal immigration and the demand for both unskilled and highly educated workers—finally emerged in 2007. One component of the bipartisan proposal was to tilt the balance of legal immigration away from family reunification and toward admitting English-speaking migrants with specialized skills. Another was to provide a path toward legalizing the status of long-term residents who were illegal immigrants. A third plank of the complex legislation was to create a guest worker program. Finally, the legislation promised to commit increased resources to “border control” in the hope of stemming the influx of illegal immigrants.

The public outlook toward these proposals was both divided and ambivalent. A 2004 national survey conducted by the Kaiser Family Foundation found that 30 percent of the public felt that overall the large influx of recent immigrants has been good for the United States, 39 percent said the impact was bad, and 28 percent said that recent immigration had not made much difference. When questions focused on illegal immigrants, however, opinion was decidedly negative. Among nonimmigrants, 62 percent agreed that recent immigrants do not pay their fair share of taxes, 51 percent said illegal immigrants take jobs away from American workers, and 66 percent believed that government was not tough enough on immigration. Moreover, while 64 percent described the United States as a country made up of “many cultures and values that change as new people come here,” 62 percent felt the country should have a “basic American culture that immigrants take on when they come here.” Only 39 percent of immigrants expressed this normative position, a gap that arguably feeds concern about the cultural threat posed by large-scale immigration.

In May 2007, with the congressional debate on the Bush-backed legislation under way, a *New York Times* poll found that 90 percent of the public believes that U.S. immigration policy either should be “completely rebuilt” or needs “fundamental change.” Fully 82 percent believed that the government was not doing enough to deal with illegal immigration, which was named by 63 percent as a very serious problem. While recognizing that illegal immigrants generally fill jobs Americans do not want, 70 percent of the public believed that the tax burden imposed by immigration was not worth this benefit. Increasing border control and punishing employers who hire illegal immigrants were named as the most effective ways for stemming illegal immigration, though there was no great confidence in the government’s ability to implement these measures.

Finally, a slim majority of the public did favor some process by which to legalize the estimated 12 million illegal immigrants in the country.

This public mood emerging from these recent polls is largely consistent with the CID data reported here and makes it easy to understand how conservative activists were able to mobilize public opposition against the proposed legislation by arguing that it would be ineffective in protecting the border while rewarding those who were in the country by breaking the law. After two months of legislative effort, the proposal died, but it seems likely that any future effort to overcome the American political system's barriers against change must have the same flavor of compromise. Whatever the intensity of public anger about illegal immigration, the impracticality of mass deportation and the belief that all people deserve consideration and fair treatment make a truly draconian response unlikely.

The interplay between public opinion about immigration and public policy in Europe obviously is varied, and overarching generalizations are foolhardy. Within Europe after World War II, former colonial powers (France, Britain, and the Netherlands) admitted erstwhile colonial subjects, who were allowed to become permanent residents and citizens, whereas others, such as Germany and Switzerland, admitted "guest workers" who were expected—wrongly, it turned out—to be temporary residents. European countries also differ in their national traditions, and these have sustained divergent approaches to defining citizenship and minority cultural rights. Ruud Koopmans and colleagues conclude that there has been a general move away from an ethnic definition of citizenship—a move that appears to diverge from a significant body of public opinion—but that policies regarding minority group rights and state support for cultural diversity vary, with Britain more tolerant of multiculturalism than France or Switzerland.<sup>36</sup> Similarly, the Scandinavian welfare regimes are more open to immigrants than the neoliberal British.

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The European Union further complicates the task of disentangling the influence of mass attitudes on public policy. The European Commission and Court of Justice sometimes push toward the liberalization of treatment of immigrants and toward "post-national" norms, but it also is the case that the Union has facilitated the ability of nation-states to cooperate in enforcing border controls and other anti-immigration measures in the name of security. Beyond this, the enlargement of the Union has made citizens of people who once would have been immigrants, further muddying the meaning of insiders and outsiders.

## CONCLUSION

A key component to globalization broadly defined is population movement. Immigration is a challenge to a nation's identity by introducing people with different values and identifications. Political multiculturalism poses a threat to the extent that it places one's ethnic identity as an automatic priority over all other affiliations. After all, common to every nationalist doctrine is the tenet that the nation is one's primary loyalty.

Self-determination is the dominant principle of political legitimacy in the modern world, but Ernest Gellner had a point when he called the multi-ethnic nation an oxymoron.<sup>37</sup>

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The United States generally has been successful in assimilating diverse immigrants, in part because the social and economic advantages of cultural integration have been overwhelming. As the survey results presented in this chapter show, individuals generally identify themselves first as “American” and only second as a member of their particular ethnic group. Although difficult questions remain for U.S. policy makers, their task is ultimately less difficult than that of their European counterparts. Europe’s problem in assimilating its Muslim population seems far greater, but in both regions, policies that harden ethnic boundaries have negative implications for social solidarity and national integration.

Because globalization is such a multifaceted phenomenon, its political outcomes are almost certainly contingent. Structural processes seem to push in the direction of convergence, but differences in culture and public policy are bound to shape outcomes, particularly with regard to the central question addressed here: the compatibility of multiculturalism with liberal democracy.

Evidence suggests that large-scale cultural integration occurs when countries facilitate the acquisition of citizenship while expecting migrants to absorb the values that receiving countries confidently espouse.<sup>38</sup> When this process of integration is perceived to be occurring, the expectations of the public are met and, as a consequence, conflict over immigration is likely to wane. But if integration appears to founder, then many European countries, especially those with various anti-immigrant political parties and a proportional representation electoral system that makes it easier for them to win seats, will continue to experience significant political conflict about their huddled masses.

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Marc Morjé Howard has pointed to the democratic deficit in immigration policy in both Europe and the United States while also warning about the “trap” of populism.<sup>39</sup> Liberal immigration policies are facilitated by institutional arrangements limiting the power of the people. An important irony is that the public continues to crave a generous welfare state while opposing one source of assistance in funding it—the increase in the number of immigrants who tend to be younger and have larger families and thus provide the tax revenues required to finance pensions and medical care for the elderly native-born population. In the end, though, globalization, immigration, and multiculturalism are about who is “inside” and who is “outside” the polity, and public opinion about immigrants and immigration both reflects and shapes how that boundary is changing.

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## NOTES

I am indebted to Beverly Crawford and Loan Le for their invaluable help in preparing the manuscript. This chapter draws heavily on two earlier papers: Jack Citrin and David O. Sears, “Balancing National and Ethnic Identities: The

Psychology of *E Pluribus Unum*,” presented at the 2003 Harvard Symposium on Identity; and Jack Citrin and John Sides, “Immigration and the Imagined Community in Europe and the United States,” presented at the 2007 annual meeting of the Midwest Political Science Association.

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30. We exclude two countries from the ESS sample: Israel and Slovenia. The former is obviously not part of Europe, and thus falls outside the scope of this study. We exclude Slovenia because we lack comparable country-level data on the volume of immigration, which is a part of subsequent analysis.

31. It is worth noting that this first wave of the ESS took place in the fall of 2002, which preceded the riots in the French *banlieue* as well as the 2004 law banning the wearing of headscarves and other religious symbols. Both of these events could have heightened the level of concern about different religions (Islam, in particular). Unfortunately, the second wave of the ESS, which was fielded in fall 2004, did not include this item.

32. The response options of the CID and ESS items were not strictly comparable. In the ESS, the middle option was labeled “neither agree nor disagree,” but in the CID it was labeled “uncertain.” On average, 21 percent and 29 percent of ESS respondents selected this category for the cultural and religious homogeneity items, respectively. The comparable figures for CID respondents are 8 percent and 10 percent. Thus, it seems likely that some CID respondents chose to agree or disagree when they might have remained neutral if given the ESS wording. The question is whether CID respondents who would have preferred neutrality ended up evenly divided between “agree” and “disagree”—in which case there is no systematic bias in the U.S. country mean in figure 12.1—or whether they were more likely to gravitate toward a particular side. We do not think there is any a priori reason to expect a systematic bias, but nevertheless some caution is appropriate in interpreting figure 12.1.



33. The CID also included an item about “good educational qualifications and work skills.” However, the ESS separated education and skills into two separate items. This complicates any comparison between the American and European samples, so we focus on the three items common to both surveys.

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