

FOREWORD: IN THE TWILIGHT OF THE NATION-STATE:
SUBNATIONAL CONSTITUTIONS IN
THE NEW WORLD ORDER

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As the twenty-first century progresses, models of governance around the world continue to shift. In particular, commentators have noted a transformation in prevailing notions of sovereignty. For hundreds of years, the dominant model of sovereignty conceived the nation-state to be the sole sovereign entity on the world stage. In this conception, sometimes termed a “Westphalian” notion of sovereignty, the nation-state functioned as an autonomous, self-sufficient entity.¹ International law consisted primarily of rules governing nation-states, and international relations concerned the network of relationships among national governments. The borders of the nation-state were thick, and the only point of entry was through the national government. Within those borders, the nation-state functioned as the sole legitimate source of authority.² All power flowed from that central government. Domestic governance was unitary. It followed from this

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1. See Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFF. 50, 50, (1997) (describing Westphalian system as characterized by “territorially fixed states where everything of value lies within some state’s borders; a single, secular authority governing each territory and representing it outside its borders; and no authority above states”).

2. For discussions of the characteristics of Westphalian sovereignty, see STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20-21 (1999); Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 375-77 (2005).

understanding of governance that any interaction between local and foreign governments could take place only through the node of the national government. Unmediated contact between the international realm and the local domain was impossible. In practice, state governance never actually conformed to this model: matters were never so tidy; borders were never so sharp.³ However, the Westphalian framework provided an influential conceptual paradigm.

Recently, globalizing forces have undermined that Westphalian model.⁴ The firm national boundaries of the Westphalian nation-state have been breached by enhanced global communication and commerce, as well as by the growth of transnational entities of many varieties, including businesses, nongovernmental organizations, and governmental associations. It is no longer the case that international norms can enter the United States only by way of Washington, D.C. States and localities increasingly are participating in a global dialogue on issues ranging from human rights to the environment. The flow of information and regulation is bi-directional. Not only are states and localities receiving input from abroad, but they are also creating principles with international effects. Whether by symbolic proclamation or binding regulation, states and localities are injecting their views into the global realm. Foreign policymaking is no longer the exclusive preserve of the federal government.

The transformation of the Westphalian model offers many benefits. The resulting legal regimes are more pluralistic and dynamic. More open to change and to the influx of ideas from other systems, the newer governance arrangement promotes innovation and adaptability. As the array of governing structures multiplies, more people can participate in these networks of authority.⁵ Government becomes less hierarchical and more decentralized. Of course, even if globalization did not offer these potential advantages, it is clearly here to stay. The revolution in technology, communications, and culture cannot be reversed. The question instead is how to maximize these benefits while addressing the costs of globalization.

3. See KRASNER, *supra* note 2, at 8 (“The logic of appropriateness of Westphalian sovereignty, the exclusion of external actors from internal authority arrangements, has been widely recognized but also frequently violated.”).

4. See Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1946 (1997) (“[T]he new conditions loosely associated under the platitudinous rubric of ‘globalism’ pose new and quite visible challenges to national sovereignty.”).

5. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 193-95 (2004).

Two potential casualties of the globalized world order are coordination and legitimacy. The exercise of power can lead to conflict, cost-shifting, and fragmentation. The existence of multiple overlapping legal regimes may impose costly burdens of complexity on individuals and firms that operate across jurisdictional boundaries, and because of globalization, many entities do engage in such cross-border activities. Various jurisdictions may adopt conflicting rules or may promulgate regulations that produce minimal local benefit, while imposing large costs on those outside the political unit.

In addition, globalization poses challenges to concepts of political legitimacy. A chief virtue of the Westphalian model and its strong notion of unitary sovereignty was a well-defined understanding of political legitimacy. Legitimacy can arise from various sources. In this Article, I will be focusing primarily on democratic accountability and on a quality I term “authenticity,” by which I mean the status of a system as reflecting the values of the citizens. These dual conceptions of legitimacy are related, but distinct. Authenticity captures the particular concern that the laws are autochthonous. Even a non-democratic process may produce results that accord with the will of people. On the other hand, the laws produced by a majoritarian process will generally also satisfy the principle of authenticity. The output of a democratic system is likely to reflect the goals and aspirations of the citizens, though that kind of match is not necessarily the case with regard to each distinctive group within a polity.

The Westphalian system succeeded in offering legitimacy in this sense of authenticity. The national government exercised complete authority over the content of the law of the nation-state. Only international laws approved by the national government entered the domestic legal system, and the central government exercised control over the laws produced within the nation-state. The lines of authority were clear. The national government bore ultimate responsibility for the laws of the nation-state. As long as that national government was legitimate, then the laws within the nation-state shared in that legitimacy. No law was imported without a seal of approval from the domestic government. The review by the domestic political authority served to ensure authenticity, that the laws promulgated reflected the views of the citizens. In addition to authenticity, if the national government was subject to majoritarian accountability—a condition that started as rare, but became more common—then the laws of the nation-state enjoyed a democratic imprimatur.

Globalization threatens to undermine these principles of coordination and legitimacy. My central argument in this Article is that states and state constitutions play a primary role in ameliorating each of these concerns. The new concepts of sovereignty do not entail the end of governmental authority.

Rather, power will be exercised in a more dispersed and non-hierarchical fashion. Cities and states will become increasingly important players on the global stage. The necessity of coordination, however, will remain. Nation-states are losing their monopoly on international influence, but some need for a framework continues. States and state constitutions are well positioned to fill that gap. States can provide a mediating structure to allow a variety of subnational bodies to participate in governance with less danger of conflict and confusion. States and state constitutions also offer a mechanism to provide political legitimacy within a post-Westphalian regime. As compared with the national political system, the state governmental process provides a means to incorporate international law that is more accountable to the electorate and more likely to ensure the appropriate adaptation of global norms within the domestic system. In this way, states can make the globalizing process more democratic and more authentic.

Part I reviews the chief characteristics of the Westphalian conception of sovereignty, which placed the autonomous nation-state at the center of its political theory. Part II examines the place of states and state constitutions within the Westphalian system, with a particular focus on the limitations on the ability of subnational entities to participate in the international political process. Part III then explores the impact of globalization on domestic legal systems and the accompanying challenges to coordination and legitimacy. These Parts set the stage for Part IV, which argues that states and state constitutions have a significant role in responding to these challenges. The character of state constitutions in the United States matches the needs of the new forms of governance. Globalization creates a potential crisis of coordination and legitimacy, and the state political system is well designed to address these concerns. Domestic legal doctrine will have to accommodate this important function of states in the new world order.

I. PREMISES OF WESTPHALIAN SOVEREIGNTY IN THE NATION-STATE

The nomenclature of “Westphalian” sovereignty derived from the Peace of Westphalia in 1648, which ended the Thirty Years War in Europe.⁶ The accord gave rise to the modern system of autonomous nation-states, all-powerful polities that generally enjoy complete authority within their borders and are bound only to what they themselves have negotiated with other

6. See KRASNER, *supra* note 2, at 20-21; Kelly, *supra* note 2, at 372-75.

countries.⁷ Under the Westphalian model, a state is a territorially defined entity with control over the law that applies domestically.⁸ A Westphalian state has firm boundaries, and it exercises control over the entry of legal norms into the polity.⁹ Power is unitary and complete.¹⁰ No competing sources of authority threaten the state's monopoly of power.

The Westphalian state served as a matrix for various theories of political legitimacy. As a nation-state, the Westphalian state reflected the ethos of the inhabitants of the state. The very term "nation-state" entails the concept that the polity matches a particular people with a distinctive national identity. The laws emanated from the people of the state and thus legitimately commanded obedience. The system enjoyed authenticity, as I am using the term. The people could understand the laws to reflect their views and aspirations. With the growth of liberal democracies, self-rule and popular sovereignty emerged as principles of legitimacy. The laws of the state reflected the democratic will of the citizens of the state. The Westphalian model ensured that all the laws that applied within a state owed their authority to the central government of that state. The law reflected the authentic will of the people, and the democratic provenance of the government served to legitimize further the laws that it promulgated.

Westphalian states participated as equal, autonomous sovereigns in the international realm. The definite territorial boundaries embodied firm barriers to international interference in domestic affairs. Nation-states entered into international agreements, but no influx of foreign legal principles threatened the central government's control in the domestic sphere. No global law snuck into the domestic realm without the approval of the central authority. By the same token, subnational governments did not participate in global legal dialogues. Except as mediated by the central government, states and cities received no imports of global law and produced no exports. Only the national government participated in international

7. See Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, 892 (2006) ("The founding principle of international law is that states are sovereign within their territory and that international law is a self-imposed legal system to which states have to consent.").

8. See *id.*

9. See Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QLR 23, 25 (2005) ("States in the Westphalian system were hermetically isolated from each other . . .").

10. See Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 231 (2005) ("In its classical sixteenth century formulation, 'sovereignty' connoted unlimited and absolute power within a jurisdiction.").

relations. The nation-state faced no competitors in the domestic arena and recognized no superior authority in the international realm. This regulation of the import of international legal principles ensured that the law within the nation-state mirrored the will of the people. It was their law; it corresponded to their values and beliefs. The law embodied and helped to constitute the identity of the people.¹¹

II. STATES AND STATE CONSTITUTIONS IN A WESTPHALIAN SYSTEM

For most of this nation's history, the role of states in the United States aligned with this model of the Westphalian nation-state.¹² States did not participate in international affairs. Global legal concerns entered into state law mainly through the mediation of federal law. By the same token, foreign policy lay within the exclusive authority of the national government. Federal courts remain active today in protecting the national monopoly by striking down state legislation that the courts perceive to intrude unduly in foreign affairs.¹³

Within the United States, states generally exercised plenary authority over local governments, with little or no federal oversight of internal state governmental organization. Local involvement in international matters was even more rare than state participation. Cities and counties were two levels removed from the locus of international arrangements, which remained in Washington, D.C.

A. States and Internationalism

In the Westphalian conception of the nation-state, international law does not intrude directly into the domestic political order. International law concerns the relationship among autonomous, sovereign states, not the legal rights of the citizens within those states.

As a corollary of this Westphalian conception, the national government had exclusive control over the foreign affairs of the nation-state. Only the

11. See Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT'L. J. CONST. L. 33, 35 (2008) (discussing the related concept of "sovereignism" and its understanding of the popular appeal of understanding the laws of the nation-state to define the identity of a particular group).

12. As I emphasize in Part IV, states themselves did not function as nation-states. In this way, the role of states was completely consistent with the Westphalian model. A nation-state does not contain nation-states. Rather, it contains subordinates, such as states.

13. See *infra* note 36 and accompanying text.

national government played a role on the international stage. As one scholar has summarized the arrangement, “[i]n that world—the world of the Westphalian system—states did not trouble themselves with, and would take no cognizance of, other components of foreign states. As to each other, states were opaque.”¹⁴ The central government remained responsible for the activities of any subnational units, such as states in the United States, and ensured that no locality acted to undermine the national monopoly in international relations.¹⁵

Opinions of the U.S. Supreme Court reflect this unitary conception of the foreign affairs power of the United States. In *United States v. Curtiss-Wright Export Corp.*,¹⁶ for example, the Court emphasized what it understood to be a fundamental difference between the foreign and domestic realms. Writing for the Court, Justice Sutherland asserted that dating back to the pre-constitutional era, the states never had exercised authority in foreign affairs.¹⁷ He recognized a broad and exclusive power of the national government in the field of foreign relations.¹⁸ In keeping with the Westphalian understanding of sovereignty, Justice Sutherland’s opinion portrays the central government’s control of foreign affairs as a necessary deduction from the concept of the nation-state.¹⁹

The next year, Justice Sutherland continued this theme in *United States v. Belmont*.²⁰ Pursuant to an agreement between President Roosevelt and Maxim Litvinoff, People’s Commissar for Foreign Affairs of the Soviet Union, the United States received an assignment of certain Soviet claims. Based on that assignment, the U.S. government filed suit to recover funds deposited by a Russian corporation with a New York banker prior to 1918.²¹ The claim of the U.S. government was resisted on the grounds that it reflected a Soviet confiscation of property in violation of the policy of New York.²² Again writing for the Court, Justice Sutherland rejected this public policy argument. As in *Curtiss-Wright*, he asserted the exclusive authority of the central government in the international realm: “Governmental power over

14. Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 667-68 (2002) (footnotes omitted).

15. *See id.* at 668.

16. 299 U.S. 304, 315-18 (1936).

17. *Id.* at 316-17.

18. *Id.* at 318.

19. *Id.*

20. 301 U.S. 324 (1937).

21. *Id.* at 326.

22. *Id.* at 328.

external affairs is not distributed, but is vested exclusively in the national government.”²³ Justice Sutherland further affirmed the concept of the unitary nation-state and the idea that from a foreign perspective a nation-state must be opaque. In the international realm, only the national government had any role to play. In memorable language, he denied the very existence of subnational units on the international stage: “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist.”²⁴

In addition to upholding broad exercises of the foreign affairs power by the national government, the Supreme Court also has invalidated state action that might interfere with federal exclusivity. The 1968 case of *Zschernig v. Miller*,²⁵ for example, concerned an Oregon probate statute that prohibited foreign heirs from receiving property unless the foreigner could establish that the property would not be subject to confiscation. Pursuant to that law, East German relatives of an Oregon decedent were denied inheritance rights.²⁶ The U.S. Supreme Court struck down the Oregon law, holding that it interfered with the exclusive authority of the national government to establish foreign policy.²⁷

The Supreme Court has continued to invalidate state laws that it finds to trench on the federal prerogative in foreign affairs. Based on that theory, the Court struck down a Massachusetts law that imposed sanctions on Burma,²⁸ and it invalidated regulations of tanker design and operation by the State of Washington that sought to reduce the danger of oil spills.²⁹ An especially broad understanding of the exclusive role of the federal government in foreign affairs appeared in *American Insurance Association v. Garamendi*³⁰ in 2003. This case grew out of attempts to collect the proceeds of Holocaust-era insurance policies issued in Europe. Many Jewish families purchased insurance policies, but were unable to collect the benefits because of Nazi persecution. Following World War II, the beneficiaries had difficulty establishing their claims to the proceeds. By 2000, it was estimated that the value of the unpaid policies totaled at least \$17 billion and perhaps as much

23. *Id.* at 330.

24. *Id.* at 331.

25. 389 U.S. 429, 440-41 (1968).

26. *Id.* at 430-31.

27. *Id.* at 441.

28. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 366 (2000).

29. *See United States v. Locke*, 529 U.S. 94 (2000).

30. 539 U.S. 401 (2003).

as \$200 billion in current terms.³¹ Prodded by the threat of law suits to collect the unpaid policies, European insurance companies organized the International Commission on Holocaust-Era Insurance Claims (“ICHEIC”) in 1998 to administer a claims collection process.³²

In 2000, President Bill Clinton and German Chancellor Gerhard Schroeder entered into an executive agreement addressing the broader issue of Holocaust-era compensation claims. That agreement set up a foundation funded by the German government and German industry to address such claims, and the United States and Germany agreed that the foundation would work with and provide funding for the ICHEIC process.³³ California legislators decided to provide additional assistance to claimants attempting to recover policy proceeds. Toward that end, California enacted a statute requiring insurers doing business in California to disclose the details of insurance policies issued in Europe from 1920 to 1945.³⁴ In *Garamendi*, the United States Supreme Court struck down the California law, holding that it invaded the foreign relations power of the federal government.³⁵

The Court in *Garamendi* could point to no text purporting to preempt the California statute. Rather, the California law violated the concept of unitary national control over foreign affairs. *Garamendi* thus constitutes a rather extreme version of the entrance of the Westphalian doctrine into domestic jurisprudence. In other instances as well, though, the U.S. Supreme Court has held state law preempted based on very modest text.³⁶ Clearly the Supreme Court is trying to keep states out of international affairs.

31. PAUL BELKIN ET AL., CONGRESSIONAL RESEARCH SERVICE, HOLOCAUST-ERA INSURANCE CLAIMS: BACKGROUND AND PROPOSED LEGISLATION CRS-8 (2008).

32. See *id.* at CRS-4 to CRS-5; MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 130-35 (2003).

33. See *Garamendi*, 539 U.S. at 404-08.

34. See Holocaust Victim Insurance Relief Act of 1999, CAL. INS. CODE §§ 13,800-13,807 (West Supp. 2005) preempted by *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003).

35. *Garamendi*, 539 U.S. at 401.

36. See Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 162 (2004) (noting the breadth of the Court’s cases invoking a dormant preemption authority to oust state authority “even without affirmative action by Congress”); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 167-85 (2001) (noting the Court’s broad invocation of preemption in the foreign affairs area).

B. States and Localism

Not surprisingly, the lack of concern for states in an international perspective carried over even more strongly to cities. Professors Gerald Frug and David Barron have noted the “invisibility of cities within international law.”³⁷ In keeping with the model of unitary sovereignty, local governments have enjoyed no special place in the constitutional system of the United States. Neither the federal constitution nor the state constitutions contemplate protection for the independent activity of localities.

The federal doctrine has become associated with the classic case of *Hunter v. City of Pittsburgh*.³⁸ In *Hunter*, the U.S. Supreme Court held that, as a matter of federal constitutional law, localities were creatures of the state and that states enjoyed plenary authority over them.³⁹ The allocation of authority within a state generally reflects unitary premises as well. Although some state constitutions have home rule provisions guaranteeing certain decision making at the local level, the basic premise of state-local relations is contained in Dillon’s Rule. Under Dillon’s Rule, a city only has the power expressly granted by the state, and courts will narrowly construe the scope of local authority.⁴⁰ The *Hunter* case and Dillon’s Rule reflected a conception of unitary authority in the domestic sphere that aligned with the Westphalian conception of sovereignty.

III. GLOBALIZATION/NEW WORLD ORDER

The concurrent forces generally designated under the collective title of “globalization” threaten this traditional, Westphalian conception of the nation-state. Enhanced communication and transportation, in particular, have fostered increased connections between people, governments, and organizations all across the globe.⁴¹ No longer is nation-to-nation contact the

37. Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1, 14 (2006).

38. 207 U.S. 161, 178-79 (1907)

39. For a discussion of the context of the *Hunter* case, see David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 562-63 (1999).

40. See *id.* at 506-08; Richard Briffault, “What about the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1340-41 (1994) (discussing Dillon’s Rule).

41. See Frug & Barron, *supra* note 37, at 8 (noting “key features” of globalization as “the dramatically enhanced mobility of capital, a spatial division of labor on a world scale, sharp reductions in travel time, unprecedented advances in communications technology, and

sole vector for international relations. All levels of government, as well as nongovernmental organizations, are participating in the process of governance. The strict Westphalian hierarchy has dissolved into multi-nodal network of political relationships.

A. *Disaggregation of the Nation-State*

International relations scholars have noted a “disaggregation” of the nation-state.⁴² Power flows “up” to supranational bodies, such as the European Union and bodies set up under the North American Free Trade Agreement. At the same time, power flows “down” to regions and localities. No longer does the nation-state exercise a monopoly of authority over internal governance. The nation-state retains a powerful role in international relations and in domestic policy, but many other bodies, private and public, participate in governance decisions of all kinds.⁴³ Power is no longer nested in a hierarchical fashion with each layer of government limited in authority to the confines of its geographical boundaries.⁴⁴ Decisions about trade, human rights, and other policies spread across jurisdictional boundaries.

1. Supranational Law and Supranational Institutions

One of the defining features of the global legal order is the increasing importance of supranational organizations, such as the European Union and

large-scale domestic and international migration”); Mathews, *supra* note 1, at 51 (emphasizing transformative impact of computer and telecommunications revolution).

42. See SLAUGHTER, *supra* note 5, at 5-6 (2004); Andrea Hamann & Hölme Ruiz Fabri, *Transnational Networks and Constitutionalism*, 6 INT’L J. CONST. L. 481, 482 (2008) (“[A] paradigm shift is taking place, from Westphalian sovereignty to a ‘disaggregated sovereignty’”); Sol Picciotto, *Constitutionalizing Multilevel Governance?*, 6 INT’L J. CONST. L. 457, 457-58 (2008); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 10-12 (2002); Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF., Sept.–Oct. 1997, at 183, 184 (“The state is not disappearing, it is disaggregating into its separate, functionally distinct parts.”); Spiro, *supra* note 14, at 669-71.

43. See Zick, *supra* note 10, at 267 (“Overall, one can speak of a tripartite shift of authority away from national governments: upwards, as a most direct result of European integration; downwards, because of subnational empowerment; and sideways to, for instance, public-private partnerships.” (quoting Tanja E. Aalberts, *The Future of Sovereignty in Multilevel Governance Europe—A Constructivist Reading*, 42 J. COMMON MKT. STUD. 23, 28 (2004))).

44. See Slaughter, *The Real New World Order*, *supra* note 42, at 184.

the World Trade Organization.⁴⁵ These institutions wield more power, and their influence spreads across state boundaries. The World Trade Organization, for example, directly regulates trade, but it has an impact on a host of issues including environmental protection and workers' rights.⁴⁶ The European Union makes rules that apply within the member states of Europe.⁴⁷ A tribunal authorized under the North American Free Trade Agreement was empanelled to decide if a state-court tort suit in Mississippi against a Canadian firm violated basic principles of fair treatment under international law.⁴⁸ As this case illustrates, international law is penetrating the boundaries of the nation-state and has an impact on subnational governments.⁴⁹

Sometimes international law arrives on the domestic scene without the intervention of supranational institutions or even treaties. In the latter part of the twentieth century, litigants increasingly invoked international human rights norms in domestic litigation.⁵⁰ The *Filartiga* case in 1980 illustrated this possibility. As alleged in that litigation, Joel Filartiga was an opponent of long-time Paraguayan leader Alfredo Stroessner. In retaliation for Filartiga's political activities, Norberto Pena-Irala, the Inspector General of Police in Asuncion, Paraguay, directed the abduction, torture, and murder of Filartiga's son Joelito. Filartiga's daughter, Dolly, subsequently came to the United States and sought political asylum. Dolly and Joel Filartiga learned that Pena was living in the United States, and they filed suit against him in federal court in New York, seeking damages in connection with Joelito's torture and murder. They alleged that the actions violated international law. The United States Court of Appeals for the Second Circuit allowed the

45. See Engle, *supra* note 9, at 45 (noting the "sublimation of sovereignty into transnational international organizations").

46. See Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 304 (2004).

47. See Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415, 415 (2008).

48. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2036-44 (2004) (describing the litigation); see also *Loewen Group, Inc. v. United States*, 42 I.L.M. 811 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://www.state.gov/documents/organization/22094.pdf>. The panel found that the state court action in Mississippi did violate basic principles of due process, but denied relief because of technical deficiencies in the claim. See Ahdieh, *supra*, at 2040-41.

49. See Frug & Barron, *supra* note 37, at 21.

50. See Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997).

litigation to proceed, holding that the Filartigas stated valid claims for the violation of customary international law.⁵¹

This invocation of international human rights norms in domestic litigation represents a dramatic step away from the idea that international law only regulates interaction among states. As discussed further below, the reliance on customary international law, rather than on a treaty or convention, constitutes a further break from the traditional model.⁵²

2. Devolution of Power

With the disaggregation of sovereignty comes an end to the state's monopoly on authority within its boundaries.⁵³ Emboldened by greater access to information and resources, regions and localities are playing an important policy role.⁵⁴

B. Regionalism

The effort to fight global warming provides an illuminating example of this regionalism. Because of its worldwide implications, global warming appears to be a subject best addressed through traditional means, such as international agreements that nation-states then enforce domestically. In the face of inaction by the United States, however, regions are breaking out of this traditional pattern. The United States refused to ratify the Kyoto Protocol, relating to global warming, but that national decision did not end

51. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980).

52. See *infra* notes 92-98 and accompanying text.

53. See Engle, *supra* note 9, at 43 ("Though the authority of the sovereign within its own borders still exists, sovereignty is no longer seen as absolute.") (footnotes omitted). Yishai Blank describes the transformation as follows:

[I]t seems that globalization marks a real transformation of, and perhaps departure from the current national order in which sovereignty, understood as the absolute control of the nation, through its political institutions, over the whole national territory and its populace played a major role. States across the globe are currently losing the monopoly that they have possessed during the past two hundred years over economic, social, and political activities within their territory.

Blank, *supra* note 7, at 883.

54. See David Ignatius, *Back to the States*, WASH. POST., June 27, 1999, at B07 ("In a paradoxical sense, the new regionalism is a corollary of globalization. For just as the world is becoming more centralized in economic matters, it's becoming more diverse and decentralized in cultural and political affairs.").

the matter within the United States.⁵⁵ Seven Northeastern and Mid-Atlantic states entered into a memorandum of understanding regarding a plan to reduce carbon dioxide emissions through a cap and trade plan.⁵⁶ Other organizations of governors are developing their own regional plans to cut greenhouse gases.⁵⁷

In an even greater affront to the traditional paradigm, interchanges among regions and cities cross national boundaries.⁵⁸ In the United States, several states have worked with Canadian provinces on formulating plans to address global warming.⁵⁹ In 2001, the Conference of New England Governors and Eastern Canadian Premiers adopted a "Climate Action Plan," which included specific targets for the reduction of greenhouses gases.⁶⁰ Another, less formal group, known as "Powering the Plains," includes representatives from North Dakota, South Dakota, Iowa, Minnesota, Wisconsin, and Manitoba. These states and provinces are collaborating on alternative fuel projects.⁶¹

C. Localism

Localities also become more significant. Global cities exist as great centers of commerce and authority, functioning with substantial independence from the surrounding states.⁶² At one point, theories of sovereignty focused on two distinct sets of relationships: the relationship between a nation-state and other nation-states and the relationship of a nation-state to domestic sub-national entities, such as cities and localities. While the former relationship was among equals, the latter was a relationship of the dominant authority with subordinates. Globalization has transformed these two distinct pairs of relationships into a single relationship among localities, their nation-states, and the international legal order. Communications, ideas, and legal principles flow freely among these

55. See Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 *ECOLOGY L.Q.* 183, 192-93 (2005).

56. See Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 *N.Y.U. ENVTL. L.J.* 54, 65-66 (2005).

57. *Id.* at 65-68.

58. See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 *EMORY L.J.* 31, 44-45 (2007).

59. See Engle, *supra* note 56, at 65.

60. See *id.*

61. See *id.* at 65-68.

62. See SASKIA SASSEN, *THE GLOBAL CITY* 345-47 (2d. ed. 2001).

different nodes with some bilateral interactions that bypass the third party. The direct relationship between localities across international borders is, of course, the most novel.⁶³

1. Local Foreign Policy

Cities have become actors on the global stage, advancing their own policies, independent of broader domestic legal structures.⁶⁴ City councils, for example, have opposed nuclear proliferation, urged divestment from firms doing business in South Africa, and demanded cuts in defense spending. More recently, cities have passed resolutions opposing the Iraq War and the Patriot Act.⁶⁵

Cities also have sought to incorporate international legal norms into domestic law.⁶⁶ San Francisco and Los Angeles have adopted portions of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women, which the United States has declined to ratify.⁶⁷ Salt Lake City and Seattle have pledged to abide by the Kyoto Protocol relating to global warming, another international agreement that the United States has refused to approve.⁶⁸ As Yishai Blank has observed, “[l]ocalities have become autonomous enforcers of international norms.”⁶⁹ Cities throughout the United States have enforced international norms in adopting a range of ordinances to protect workers, preserve the environment, and enforce prohibitions against discrimination.⁷⁰ These ordinances represent one aspect of the larger process of “glocalization,” the local adaptation of global influences.⁷¹

63. See Blank, *supra* note 7, at 889 (“In the previous legal constellation, the world, through its institutions, could form relationships with, pose demands to, and be addressed by states alone; but in the new global legal order the world is increasingly developing the same legal relationship with localities, independent of states.”).

64. See *id.* at 899 (“Thus, localities have become, and will become more so, nodal points for radically distinct governance projects that have as their common goal to transform cities from mere subdivisions of sovereign states into legally empowered entities, able to advance goals and values that are different from their states’.”).

65. See Frug & Barron, *supra* note 37, at 28.

66. See Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT’L L.J. 263, 269 (2006).

67. See Frug & Barron, *supra* note 37, at 28.

68. See *id.*

69. Blank, *supra* note 7, at 924.

70. See *id.* at 925.

71. See *id.* at 927-28.

In a parallel phenomenon, localities enter into global associations of local governments. These organizations, such as the World Organization of United Cities and Local Governments and the International Union of Local Authorities, facilitate local governments becoming global actors, roles once preserved for nation-states.⁷²

2. Local Domestic Policy

In some instances, cities have taken the lead in domestic policy areas generally committed to the states. San Francisco registered gay and lesbian couples for marriage licenses in contravention of state law.⁷³ Mayor Newsom justified the practice based on the theory that he believed that the U.S. Constitution prohibited discriminating against same-sex couples in marriage.⁷⁴ Accordingly, he argued that the California ban violated the Federal Constitution and that he was compelled to follow the Federal Constitution, rather than the unconstitutional state law.⁷⁵ Other local governments that authorized same-sex marriages included New Paltz, New York and Multnomah County, Oregon.⁷⁶

3. Judicial Reference to Foreign and International Sources

In addition to applying binding international law, federal courts reference foreign and international law when interpreting domestic law, including the U.S. Constitution.⁷⁷ This practice, which is even more common for courts abroad, reflects three key features of globalization.⁷⁸ First, officials all around the world have better access to the opinions and experiences of others. The internet and other means of communication make information

72. See *id.* at 930-31.

73. See Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148 (2005).

74. See *id.*

75. See *id.*

76. See *id.* at 148-49.

77. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575-77 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). For an overview of the Supreme Court's practice of citing foreign sources, see, for example, Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

78. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN L. REV. 131, 135 (2006) (noting that in other nations "[c]onsultation of foreign law seems to be the rule, not the exception").

readily available. Second, officials perceive the situation in their countries and other countries to be sufficiently similar to merit reference. When the issue of physician-assisted suicide or the execution of juveniles arises, judges think that it makes sense to explore how other legal systems address these questions.⁷⁹ Third, much of the impact of the foreign law comes through influence, rather than command.⁸⁰ Judges in the United States do not feel themselves bound by international decisions, but they find the examples useful and informative.⁸¹ With the transformation of a legal hierarchy into a global network, officials have much more contact with non-authoritative sources. Cross-border law often does not have binding force, but it presents an important example. Globalization has produced these kinds of rich and complex webs of influence.⁸²

D. Challenges of Globalization

Globalization offers many potential benefits. However, the disaggregation of the post-Westphalian state presents challenges as well. The Westphalian model of the nation-state had several positive attributes that globalization threatens. Globalization may undermine the legitimacy and coordination provided by the Westphalian state.

1. Legitimacy

One of the most important features of the Westphalian model was a theory of the legitimacy of the government. In the modern era, the governments of the new nation-states claimed legitimacy because their laws corresponded to the views of the ruled. At first, this legitimacy came from a

79. See, e.g., *Roper*, 543 U.S. at 575-77 (juvenile death penalty); *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (assisted suicide).

80. Professor Slaughter has emphasized the role of “soft power” in exercising influence in a globalized world. See SLAUGHTER, *supra* note 5, at 192.

81. In a public discussion with Justice Antonin Scalia, Justice Stephen Breyer made clear his position that while “of course, foreign law doesn’t bind us,” it may prove helpful in examining issues which arise around the world, such as the interpretation of basic human rights guarantees. Justice Antonin Scalia & Justice Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at <http://domino.american.edu/AU/media/mediaref.nsf/-1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

82. Professor Robert Ahdieh has investigated and created a typology of this kind of influence. See Ahdieh, *supra* note 48, at 2029-31, 2086-2160.

reflective sense of nationalism. The government represented the people of the state, its culture, values, traditions, in short, the nation.⁸³ As nation-states became more democratic, self-rule came to the fore as a ground of legitimacy. The people chose their rulers, and the laws thus corresponded to the democratic will of the people. The authenticity of the laws necessarily followed. The laws reflected the will of the people because the people actually chose, and retained the power to remove, their lawgivers.⁸⁴ The strong, impermeable borders surrounding the state protected this democratic accountability and authenticity. The only international law that penetrated into domestic legal systems was approved by the national government, thus ensuring that it represented the values, goals, and ideals of the people.

For the United States, as for other nations, globalization challenges the laws' claims to legitimacy by threatening both democratic accountability and authenticity. These threats come in different forms, corresponding to the different transnational impact of global developments. With regard to treaties and international conventions, the ratification process provides some guarantee of majoritarian approval and authenticity.⁸⁵ Presumably, the President would not negotiate and the Senate would not ratify an international agreement that imported alien values.⁸⁶

83. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 456-59 (2002). For an extended discussion of the relationship between nationalism and political legitimacy, see ERNEST GELLNER, *NATIONS AND NATIONALISM* 1, 55 (1983). See also Brendan O'Leary, *On the Nature of Nationalism: An Appraisal of Ernest Gellner's Writings on Nationalism*, 27 BRIT. J. POL. SCI. 191, 191 (1997) (referring to nationalism as "the most potent principle of political legitimacy in the modern world").

84. See T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1997-98 (2004) (discussing popular sovereignty as a theory of political legitimacy); Louis W. Pauly, *Introduction: Democracy and Globalization in Theory and Practice*, in *DEMOCRACY BEYOND THE STATE? THE EUROPEAN DILEMMA AND THE EMERGING GLOBAL ORDER* 1, 1 (Michael Th. Greven & Louis W. Pauly eds., 2000).

85. See John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1193-95 (2007) (noting that ratification process gives electoral accountability to treaties).

86. The argument would be at least as strong for agreements that are deemed not to be treaties and are approved by majority vote of the House and the Senate, as opposed to a supermajority vote in the Senate alone. Executive agreements with no legislative approval would be on less firm ground, but the President's electoral status provides democratic grounding. See Aleinikoff, *supra* note 84, at 1998 ("Treaties establishing consent-based state-to-state commitments appear to be consistent with any plausible account of popular sovereignty. They are made by the President and Senate—with an informal role for the House of Representatives regarding appropriations and other implementation legislation—in a

Nevertheless, the increased power of supranational institutions has occasioned much controversy. Critics complain that the rules promulgated by these organizations are not derived through a democratic process and that the implementing organizations lack democratic accountability.⁸⁷ In part, these criticisms trace back to the 1950s. During that period, Senator John Bricker of Ohio proposed an amendment to the United States Constitution to ward off the potential encroachments of international law in the domestic sphere. The Bricker Amendment would have prohibited the United States from entering into treaties that would affect the rights of citizens of the United States, and it would have required authorizing legislation before any treaty took effect.⁸⁸ The amendment failed narrowly, indicating the depth of distrust of international incursions into domestic law. The recent expansion in the number and the scope of these supranational institutions has made the concern especially sharp.

Various agreements authorize ongoing decisions by bodies that are not accountable to the citizens of the nation-state. The European Union promulgates rules that have domestic impact in Europe. Adjudications under the World Trade Organization and under NAFTA, for example, apply to activity within the United States.⁸⁹ Although the adoption by the United States of the overall framework agreements resulted from a democratic process, the ongoing bureaucratic and adjudicatory activity does not. Similarly, the International Court of Justice (“ICJ”) may interpret binding agreements executed by the United States.⁹⁰ While the agreements reflected democratic input, these ongoing rulings by the ICJ do not. Further, international law traditionally applied primarily to the operations of the states themselves. Today, international law may apply to the actions of subnational units and sometimes individuals.⁹¹ This penetration of international law into

manner expressly provided for in the Constitution.”); Bradley & Goldsmith, *supra* note 50, at 348-49.

87. See Aleinikoff, *supra* note 84, at 1996-2000.

88. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1606-12 & n.195 (2006).

89. See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2035-44 (2004) (discussing the domestic impact of international legal norms).

90. See, e.g., *Medellín v. Texas*, 128 S. Ct. 1346, 1353-54 (2008) (discussing the submission to jurisdiction to the ICJ with respect to the Vienna Convention on Consular Relations).

91. For a discussion of the application of international law to subnational units, see, e.g., Frug & Barron, *supra* note 37; Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567 (1997). For a discussion of the role of international law in regulating

the domestic arena, as opposed to regulating merely the operation of states, may be more disruptive of democratic expectations.

Customary international law presents an especially sharp challenge to the values of democratic accountability and authenticity. Unlike treaty law, customary international law does not depend on incorporation into a written agreement. Nor does it require formal ratification or any particular act by a democratic body to become binding. Instead, customary international law reflects the consistent practice of nations followed out of a sense of obligation.⁹² Customary international law includes a broad array of rules, including immunity of foreign diplomats, the enforcement of legal judgments and, most controversially, human rights principles.⁹³

Customary international law has provoked much recent controversy. Some scholars have claimed that customary international law is, and always has been, binding federal law.⁹⁴ Other revisionist scholars insist that customary international law does not become binding law in the United States without an authorizing action from a domestic legislative body.⁹⁵ The revisionists offer a variety of objections to customary international law. They argue that it is not well defined, that it does not reflect the values of the United States, that it violates principles of federalism, and that it lacks a democratic imprimatur.⁹⁶ These objections track the general arguments raised against incorporating international law into the domestic legal system. The origin of the law in practice, rather than in a ratified treaty, though, magnifies the objections. At least treaty law results from a democratic process of ratification.

The revisionists assert that Congress could enact a statute to incorporate part of customary international law into federal law. Alternatively, state legislatures could pass laws to incorporate customary international law into state law. However, the revisionists argue that without legislative action by

the conduct of private individuals, see, e.g., Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229 (2004).

92. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

93. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 753-54 (5th ed. 2003).

94. See, e.g., Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

95. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

96. See Bradley & Goldsmith, *supra* note 95; McGinnis & Somin, *supra* note 85, at 1193-1207 (2007).

Congress or a state legislature, customary international law simply is not law in the United States. In *Sosa v. Alvarez-Machain* in 2004,⁹⁷ the Supreme Court addressed the issue of customary international law, but did not definitively resolve the dispute about its status.⁹⁸

In all of these debates, the issues of democratic accountability and authenticity come to the fore. The critics of treating customary international law as domestic law emphasize the lack of democratic pedigree.⁹⁹ Similarly, critics fear that customary international law will not necessarily reflect the values of the United States.¹⁰⁰ It may not appear to us to be “our law.” Dean Alexander Aleinikoff emphasizes this point by disaggregating the elements in President Lincoln’s memorable oration. Because customary international law does not arise from the political process of the United States, it does not reflect government “of the people.”¹⁰¹ Because customary international law lacks ratification through a democratic process, it does not reflect government “by the people.”¹⁰² Because it may reflect alien values rather than the goals and interests of the United States, customary international law does not reflect government “for the people.”¹⁰³

The judicial reference to foreign legal sources, discussed above, raises similar issues of legitimacy. Critics fear that the references involve an unauthorized replacement of authentic values of the United States with foreign values.¹⁰⁴ In response, legislators have proposed statutes purporting

97. 542 U.S. 692 (2004).

98. See Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28 (2007), <http://www.harvardlawreview.org/forum/issues/120/feb07/young.pdf> (“Since its release in 2004, Justice Souter’s majority opinion in *Sosa v. Alvarez-Machain* has become something of a Rorschach blot, in which each of the contending sides in the debate over the domestic status of customary international law (CIL) sees what it was predisposed to see anyway.”) (footnote omitted).

99. See McGinnis & Somin, *supra* note 85, at 1193-1207; Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 398-400 (2002).

100. See Aleinikoff, *supra* note 84, at 1999-2000.

101. *Id.* at 1998.

102. *Id.*

103. *Id.*

104. See Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 58-61 (2004); Posner & Sunstein, *supra* note 78, at 150. For an overview of the criticisms of referring to international or foreign law, see Mark Tushnet, Essay, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

to ban such references, with the threat of impeachment for judges who disobey.¹⁰⁵

2. Coordination

The multiplicity of legal regimes can present challenges. The Westphalian system generally promised a single lawgiver and a single set of laws within a polity. The penetration of international law and the participation of localities in the transnational legal process create complexity. Activity may be subject to overlapping sets of laws that may conflict and at the very least may create difficulties in ascertaining the law and complying with it. Firms will need to account for international and domestic regulation. Further, to the extent that localities become active participants in the global lawmaking process, the complexity becomes magnified. The application of international legal norms may vary from jurisdiction to jurisdiction. Localities may have incentives to impose regulations that provide local benefits to some but disproportionate costs on others.¹⁰⁶

IV. STATES AND STATE CONSTITUTIONS IN THE NEW WORLD ORDER

States and state constitutional systems can provide critical loci of legitimacy and coordination. The Westphalian model places a great deal of emphasis on the concept of unitary sovereignty. The only sovereign is the national government. International law represents arrangements among sovereign states, and the national government has complete authority over its own domestic affairs. Subnational states never fit comfortably within a Westphalian conception of the nation-state. Federalism questions the conception of undivided sovereignty, both by restraining the national government and by empowering subnational states.

Writing in 1858, Chief Justice Roger Taney described the system as follows: “[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres.”¹⁰⁷ As Chief Justice Taney’s opinion suggests, a way to accommodate federalism with notions of unitary sovereignty was by allowing both the states and the national government to

105. See Resnik, *supra* note 58, at 36.

106. See Blank, *supra* note 6, at 934.

107. *Ableman v. Booth*, 62 U.S. 506, 516 (1858).

be sovereign within their own spheres. Dual federalism understood states to have no role in international affairs. International rules generally applied only at the level of the national government.

Globalization has changed all of this, as states and localities participate in transnational legal dialogues. While the involvement of states in international matters subverts the premises of dual federalism, that global participation also provides a response to the challenges of globalization. As receptors and facilitators of globalization, states can afford the legitimacy and coordination that globalization otherwise would undermine.

A. State Participation in the Implementation of International Law

1. Treaty Law

The penetration of international law into the domestic setting and the burgeoning of international institutions raise problems, but state participation can address them. As discussed above, international law increasingly may trump local law and also may reflect rulings or regulations of bodies established under a treaty, rather than the language of the agreement itself. Even if the United States agreed to a structure of law making, if those rules are promulgated by means that are not democratic, the resulting rules may lack legitimacy. The recent controversy over the Vienna Convention on Consular Relations helps to illustrate this issue.

In 1969, the United States ratified the Vienna Convention on Consular Relations.¹⁰⁸ The Convention governs procedures in the event that a signatory arrests a foreign national.¹⁰⁹ The Convention obligates signatories to allow the person arrested to speak with a representative of that person's government. The consular officials may then assist the defendant in understanding the local legal system and in preparing a defense.¹¹⁰ Further, the Convention requires countries to inform the detained person of the existence of such a right.¹¹¹ The United States also approved the Optional Protocol to the Convention, which agreed to the jurisdiction of the International Court of Justice for disputes arising out of the Convention.¹¹²

108. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

109. See *Medellín v. Texas*, 128 S. Ct. 1346, 1353(2008).

110. See *id.*

111. See *id.*

112. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

The notification provisions of the Convention were widely ignored in the United States, perhaps because of the decentralized system of law enforcement in the United States.¹¹³ Arrests are made primarily by local law enforcement officers in myriad counties, cities, and towns across the United States. All of these officials would need to know about the requirements of the Vienna Convention, and apparently they did not.

The issue came to a head with regard to procedural default. The usual rule is that if criminal defendants do not assert defenses at trial, they are barred from raising the issues at later stages of the proceedings.¹¹⁴ The question was whether the defendants' failure to object to violations of the Vienna Convention at trial constituted a waiver of the issue. In *Breard v. Greene*, in 1998, the United States Supreme Court held that the Vienna Convention did not require courts to abandon their usual rules of procedural default.¹¹⁵ Subsequently, the governments of Germany and Mexico brought actions against the United States in the International Court of Justice ("ICJ")¹¹⁶ on behalf of their nationals facing death sentences in the United States, who did not receive the notifications required under the Vienna Convention. In these proceedings, Germany and Mexico argued that under the terms of the Convention, the United States could not invoke procedural default rules to defeat the claims of their citizens who may never have known of their rights.¹¹⁷ The ICJ agreed with Germany in the *LaGrand* decision¹¹⁸ and with Mexico in the *Avena* decision.¹¹⁹ The ICJ held that notwithstanding the procedural default, the United States had an obligation to review and reconsider the convictions and sentences so as to remedy the treaty violations.¹²⁰

The focus then turned back to the U.S. Supreme Court. The question was whether the Supreme Court's interpretation of the Convention would have to

113. See *Medellín v. Dretke*, 544 U.S. 660, 674-75 (2005) (O'Connor, J., dissenting) (noting the states' failure to comply with the Vienna Convention).

114. See *Breard v. Greene*, 523 U.S. 371, 375-76 (1998) (per curiam).

115. *Id.* at 375.

116. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 57 (Mar. 31); *LaGrand* Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

117. For an overview of the *Avena* and *LaGrand* cases, see Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 13-16 (2006).

118. *LaGrand*, 2001 I.C.J. at 514-17.

119. *Avena*, 2004 I.C.J. at 71-73.

120. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 352-53 (2006) (discussing the *LaGrand* and *Avena* proceedings).

yield to the ICJ's. In *Sanchez-Llamas v. Oregon*, the Court said no.¹²¹ Insisting on its interpretive supremacy, the Supreme Court gave "respectful consideration" to the ruling of the ICJ, but declined to follow it.¹²² Finding that the ICJ had misconstrued the Convention, the Supreme Court reaffirmed its own prior interpretation.¹²³

The next case concerned specific aliens who were named in the rulings in the *Avena* and *LaGrand* actions. They argued that at least with regard to their claims, the United States was bound to honor the judgment of the ICJ, especially in light of the United States' ratification of the Optional Protocol, in which the United States submitted to the jurisdiction of the ICJ for disputes arising out of the interpretation of the Convention.¹²⁴ In *Medellín v. Texas*, the Supreme Court rejected this argument.¹²⁵ The Court concluded that while the ICJ rulings created valid obligations on the United States under international law, the judgments did not automatically become binding law within the United States.¹²⁶ Without specific congressional authorization, the Court held, the provisions of the Convention were not automatically applicable in domestic courts.¹²⁷

The majority opinion in *Medellín* reflects the concerns that underlie the traditional view of Westphalian sovereignty. The Court understands the Convention as a compact among nation-states that requires additional sanction by a nation-state to give the agreement domestic effect.¹²⁸ In this instance, the United States had submitted to the jurisdiction of the ICJ for disputes arising out of the Convention. The Court gave this agreement a very narrow reading, drawing a sharp distinction between allowing a dispute to be heard in the ICJ and promising to comply with the judgment. The Court summarized this distinction as follows: "Of course, submitting to jurisdiction and agreeing to be bound are two different things."¹²⁹ This assertion is rather puzzling unless set against the background of traditional notions of state sovereignty. In the domestic context, it would be difficult to draw such a distinction between submitting to the jurisdiction of a court and agreeing to be bound by the Court's holding. In light of a concern about the international

121. *Id.* at 354-55.

122. *Id.* at 356.

123. *See id.* at 356-57.

124. *See* *Medellín v. Texas*, 128 S. Ct. 1346, 1356 (2008).

125. *Id.* at 1353.

126. *Id.* at 1363-65.

127. *Id.* at 1356-60.

128. *See id.* at 1358-61.

129. *Id.* at 1358.

law backdrop, the Court interpreted that obligation of the United States as an “undertaking” to comply with the decision of the ICJ.¹³⁰

In denying direct effect to judgments of the ICJ, the Court emphasized the central role of the national government, and the executive in particular, in conducting foreign affairs. The opinion gives a classic statement of the Westphalian notion of unitary national control over the entry of foreign law into the domestic system. The Court faults the argument that ICJ judgments automatically become binding domestic law because that approach would

undermin[e] the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment—again, always regarded as an option by the political branches—any more than courts may consider whether to comply with any other species of domestic law.¹³¹

Medellín thus presents the doctrinal instantiation of the concern for legitimacy that underlies resistance to a global legal order. The Court emphasizes the importance of the opportunity for Congress and the President to reject an international ruling, even one flowing from a ratified treaty.

The dissenters in *Medellín*, Justices Breyer, Ginsburg, and Souter, concluded that under the treaty regime, the United States had indeed agreed to give effect to the decision of the ICJ.¹³² The dissenters understood that obligation to mean the ICJ judgment became federal law that bound states under the U.S. Constitution’s Supremacy Clause.¹³³ Under this view, the judgment of an ICJ panel would automatically become domestic law in the United States. This importation of law into the United States system presents the democratic accountability and authenticity issues discussed above.

For present purposes, I am not especially interested in which side has the better reading of the applicable law. Instead, it is illuminating to contrast the differing accounts of how law enters the domestic legal system. For the majority in *Medellín*, the ratification of treaties, even treaties submitting to the jurisdiction of the ICJ for disputes, represents only a step along a difficult

130. *Id.* at 1374.

131. *See id.* at 1360.

132. *Id.* at 1376 (Breyer, J., dissenting).

133. *Id.*

path to domestication. The judgment of the ICJ only enters the domestic legal system through additional democratic authorization, such as an implementing statute.¹³⁴ For the majority, it is very important that the United States retain the option of not obeying the judgment and thus preserving its sovereign prerogative.¹³⁵ The dissenters, by contrast, find that as a result of the ratified treaties, an international tribunal has the authority to make federal law.¹³⁶

Justice Stevens's separate opinion, concurring in the judgment, follows a different path.¹³⁷ He agrees with the majority that the ICJ judgment does not become federal law without an additional authorizing act.¹³⁸ However, he highlights the vital role of states in implementing foreign obligations.¹³⁹ He stresses that Texas clearly had a duty under the Vienna Convention to inform the people who are arrested of their right to speak to their consular officials.¹⁴⁰ Justice Stevens further emphasizes that states can, themselves, provide remedies for their violations of the treaty:

Under the express terms of the Supremacy Clause, the United States' obligation to "undertak[e] to comply" with the ICJ's decision falls on each of the States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas' duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another.¹⁴¹

Justice Stevens thus places the states in the center of the enforcement of international obligations.

134. *Id.* at 1362 (majority opinion) ("Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances." (citing U.S. CONST., art. I, § 7)).

135. *See id.* at 1360.

136. *Id.* at 1374 (Breyer, J., dissenting).

137. *Id.* at 1372-75 (Stevens, J., concurring).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1374 (alteration in original).

Even if the ICJ judgment does not constitute binding federal law, states could, and indeed should, seek to implement the ruling. Justice Stevens suggests states might have leeway to weigh the costs and burdens of enforcement, which appear minimal.¹⁴² As Justice Stevens notes, Oklahoma previously had followed exactly this path.¹⁴³ One of the Mexican nationals at issue in the *Avena* case in the ICJ had been convicted of murder in Oklahoma and sentenced to death.¹⁴⁴ In the wake of the ICJ's ruling, the Oklahoma Court of Criminal Appeals decided to stay the execution and ordered a hearing on whether the violation of the treaty prejudiced the defendant.¹⁴⁵ The Governor of Oklahoma then decided to commute the sentence to life in prison without the possibility of parole as a way of respecting the ICJ judgment.¹⁴⁶ Justice Stevens takes pains to emphasize that the Governor of Oklahoma described the commutation as an implementation of an international legal obligation.¹⁴⁷ Additionally, California and Florida have passed statutes specifically implementing the requirements of the Vienna Convention.¹⁴⁸

In Justice Stevens's account, states play a key mediating role. They serve as an entry point for international law.¹⁴⁹ This portal offers greater democratic legitimacy and authenticity than unmediated penetrations of international law. The Governor and the state court participate in the decision. These bodies are closer to the people than a federal bureaucracy.

142. *Id.* at 1375.

143. *Id.* at 1375 n.4.

144. *See id.* (citing *Torres v. Oklahoma*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004)).

145. *See id.*

146. *See id.*

147. Justice Stevens describes the Governor's reasoning in detail:

[T]he Governor of Oklahoma commuted Torres' death sentence to life without the possibility of parole, stressing that (1) the United States signed the Vienna Convention, (2) that treaty is "important in protecting the rights of American citizens abroad," (3) the ICJ ruled that Torres' rights had been violated, and (4) the U.S. State Department urged his office to give careful consideration to the United States' treaty obligations.

Id. at 1375 n.4.

148. *See* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 508-510 (2004).

149. *See id.* at 462-63; *see also* Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 408 (2006) ("In a federal system, state courts have a critical role to play in implementing the international human rights obligations of the national government.").

This method of entry for international law thereby gives local democratic imprimatur and helps to ensure that the international principles correspond to the views, hopes, and ideals of the people in the state.¹⁵⁰

2. Customary International Law

Just as states can provide an important mediating force to legitimate the incorporation of treaty law into the domestic legal order, states can also respond to concerns posed by customary international law. Because customary international law does not arise from a formal process of ratification, its incorporation into domestic law presents an especially direct challenge to principles of democratic accountability and authenticity. Customary international law becomes binding without an authorizing act of a democratically accountable body, and the principles of customary international law reflect practices accepted throughout the world, rather than homegrown values.

The current debate about the status of customary international law remains firmly inside the Westphalian paradigm of sovereignty. It is that paradigm that creates the concerns for democratic accountability and authenticity. For the advocates of the traditional position that customary international law is automatically binding federal law, international matters must be within the exclusive domain of the national government. The international obligations created by customary law therefore must have the supreme status of federal law and be enforceable by federal courts. The unitary nation must stand behind the enforcement of the law. For the revisionists, only a national ratification process can create binding law. Firm boundaries surround and protect the domestic legal system. The only entry point is through the national legislative process.

150. See Ku, *supra* note 148, at 531-32 (“By leaving much of the incorporation, implementation, and execution of international law to the states, the federal government can confer the greatest amount of political legitimacy on the new international law.”). Professor Catherine Powell has expressed the legitimation argument as follows:

[E]nabling state and local governments to partner with the federal government in incorporation of human rights law may convert weakly-legitimated norms developed at the international level into norms that are more strongly legitimated at a local level. By bringing human rights lawmaking closer to the people whose rights are affected, a dialogic federalist approach has the added benefit of democratizing the implementation of international law norms.

Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 265 (2001).

Some scholars, such as T. Alexander Aleinikoff, have suggested an alternative approach that eases the tensions of customary international law by moving beyond the Westphalian paradigm and allowing states and state courts to participate more directly in the incorporation of customary international law.¹⁵¹ For example, customary international law could function like general law in the pre-*Erie* period.¹⁵² The state and federal courts could independently interpret customary international law, and the interpretation in the federal courts would not bind the state courts.¹⁵³ This process would allow state courts to play a central role in the domestication of customary international law.¹⁵⁴ As Professor Julian Ku has pointed out, states have traditionally played some role in the implementation of customary international law.¹⁵⁵

State courts function as part of a state constitutional process that is much more sensitive to democratic concerns than the federal process. Most state judges are elected or subject to periodic retention elections.¹⁵⁶ State courts are more a part of the local community. The more democratic character of state courts provides a response to the concerns about the democratic deficit and inauthenticity of customary international law. State courts routinely fashion common law,¹⁵⁷ and the resulting legal principles are not conceived of as violating fundamental tenets of self-government. The state courts are part of a state constitutional process; they are, at least to some degree, democratically accountable. They also presumably reflect the values of the United States. In this sense, state court incorporation of customary international law ensures that customary international law satisfies the tenets of government “of the people, by the people, and for the people.”¹⁵⁸ Through the mediation of the state courts, the customary international law receives a

151. See *supra* notes 99-103, and accompanying text.

152. See *id.*

153. See *id.*

154. See *id.*

155. Professor Ku’s research has suggested that states played an important role in applying customary international law in earlier periods. See Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265, 269 (2001); see also Ku, *supra* note 148, at 498-99.

156. See Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 429-30 (1998); see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-27 (1995) (reviewing electoral methods employed by different states); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 636-39 (2009) (discussing methods of judicial selection).

157. See Resnik, *supra* note 88, at 1628.

158. See Aleinikoff, *supra* note 84, at 1998.

democratic imprimatur and a sense of authenticity—the law is our law, not foreign law.

B. States and Localism

The growth of local participation both in international affairs and in independent constitutional interpretation raises concerns for legitimacy and coordination. Local action may create a multiplicity of conflicting legal frameworks with regard to both international and domestic affairs.

In the domestic setting, states can play an important role in coordinating the independent actions of cities. State constraints on excessive variation in cities' independent interpretation of their legal obligations can help avoid the problems of excessive fragmentation.¹⁵⁹ In California, for example, the state supreme court reviewed San Francisco's decision to issue licenses to gay and lesbian couples, in apparent violation of state law as it then stood.¹⁶⁰ The supreme court ordered the city to cease from issuing the licenses.¹⁶¹

The interaction of San Francisco and the California Supreme Court illustrates an important point about the multiple layers of governance characteristic of the new, more globalized society. San Francisco's action was part of a larger movement to change the law in California. That movement eventually succeeded, for a time, when the California Supreme Court held that the denial of marriage to same sex couples violated the state constitution.¹⁶² That decision was in turn reversed by popular referendum in November 2008.¹⁶³

The California marriage saga shows that the important functions of policy initiatives are to raise consciousness, to show dissent, and generally to make an issue part of the public discourse. State efforts to address pollution, for example, have sometimes prodded the federal government into action.¹⁶⁴ Similarly, state and even regional plans to address climate change will likely have little environmental impact on their own. However, these measures may spur more effective responses from other levels of government.

159. See David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2234 (2006).

160. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 462 (Cal. 2004).

161. *Id.* at 464.

162. See *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008).

163. See Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

164. See Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 170-71 (2006).

These diverse, decentralized responses provide alternatives and examples for further regulation. This kind of local experimentalism practiced in myriad jurisdictions is a benefit of a more interconnected world.¹⁶⁵ Localities can learn from each other and participate in a global dialogue about best practices. Coordination may be needed, however, to provide some uniformity and avoid excessive fragmentation. The state constitutional process is well designed to balance experimentalism and uniformity. As the California marriage situation further illustrates, the democratic nature of state constitutionalism allows a popular dialogue about important issues to persist.

C. State Courts and Foreign Sources of Law

State courts also provide a response to the heated arguments about the reference to foreign sources of law in the opinions of the U.S. Supreme Court. Critics charge that citing foreign sources is tantamount to incorporating foreign values into our legal system.¹⁶⁶ The resulting decisions lack authenticity because they do not reflect the principles and norms of the United States. They are alien imports that have no role in understanding documents, such as the U.S. Constitution, that reflect and help to constitute the distinctive character of the people of the United States.¹⁶⁷

Whatever the merits of these arguments at the federal level, they have little or no purchase at the state level for several reasons. A general point about state constitutionalism discussed above is that it is more democratically accountable than federal constitutionalism.¹⁶⁸ Judicial errors in interpreting documents or defining values can be corrected more readily than similar errors in federal court. More fundamentally, though, state constitutionalism is not and never has been about reflecting the values of a pre-existing community. As I have argued extensively elsewhere, attempting to divine the distinctive characteristics of the inhabitants of a particular state reflects a mistaken understanding of a state and its relationship to a state

165. For an extended discussion of this kind of “democratic experimentalism,” see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 314-26 (1998).

166. See *supra* note 104 and accompanying text.

167. See *id.*

168. See Davis, *supra* note 149, at 379 (arguing that, in comparison with federal courts, “state courts have more flexibility because the state’s executive branch, its legislature, and the state’s citizens are in a position to respond relatively rapidly to any court decisions they think are misguided”); Resnik, *supra* note 88, at 1629 (noting that greater democratic accountability of state constitutionalism may ease acceptance of international norms).

constitution.¹⁶⁹ In brief, the job for a court is not to figure out the true character of the people of the state, but to interpret the values, goals, and aspirations embodied in the document. In that project, reference to the values of other states or nations may well be relevant. If various jurisdictions, in the United States and around the world, attempt to understand and implement principles of equality, it makes sense for a court to see how other courts have addressed the issue. There is no reason to believe in the incommensurability of the values reflected in different constitutions.

To put it slightly differently, the reference to foreign sources in federal constitutional adjudication raises problems from the perspective of the nation-state. The legitimacy of the laws of the nation-state stems in part from the aspiration for the laws to reflect the people. The authenticity, the reflective nature of the laws, served to legitimate the government of the nation-state even before the rise of widespread democracy. This concern for authenticity, along with democratic accountability, underlies much of the critique of the reference to foreign law.

States in the United States by contrast never were nation-states. The legitimacy of the government of New York never flowed from a forced identification of the government with the people of the state. The Kings of France sought legitimacy by claiming to be the Kings of the French. The Governors of New York never had to present themselves as the Governors of New Yorkers. States within the United States did not rely on the cultural self-identification of nation-states.

The decline of the Westphalian model of the nation-state, therefore, has no effect on the legitimacy of the state government. Never having been nation-states, they have nothing to lose. State courts routinely apply the law of other states and look to the jurisprudence of other states for guidance.¹⁷⁰ Expanding this range to include foreign sources does not represent a substantial stretch. State courts have indeed looked to foreign and international sources, and they continue to do so.¹⁷¹ Guided by a different

169. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 275-78 (2005); see also Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 455-56 (1998) (discussing role of community of value in constitutional interpretation).

170. See Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 19-20 (2004); Posner & Sunstein, *supra* note 78, at 133-35.

171. See Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997); Mark Wendell DeLaquil, *Foreign Law and Opinion in State Courts*, 69 ALB. L. REV. 697 (2006); Ku, *supra* note 155, at

self-perception, the external reference is less destabilizing in state court than in federal court.

To be clear, I am by no means affirming the legitimacy critique of those who decry the reference to foreign and international sources by federal courts. As others have pointed out, the reference by federal courts to foreign sources of law need not undermine a commitment to the values of the United States, nor represent an abdication of sovereign authority.¹⁷² My point is the more limited one that whatever one thinks of that argument, it simply does not apply in the state court context. State courts and state constitutions were ready-made for the transborder incursions of law characteristic of globalization, and they can play a key role in mediating the effects of globalization.

V. CONCLUSION

Globalization brings a disaggregation of the nation-state, but by no means spells the end of formal structures of governance. Informal cross-border networks have blossomed; supra-national organizations exert strong influences across a wide range of issues; and regions and localities have undertaken projects of grand scope. The resulting plurality of legal regimes creates important possibilities for experimentalism, learning, and dialogue.

Certain fundamental issues of governance, however, endure. A government must project a theory as to why its exercise of power is legitimate, as to why people should heed its commands out of obligation, rather than simply out of fear. The need to coordinate multiple layers of governance remains as well. Globalization has led to a proliferation of intersecting legal institutions, thus heightening the need for conceptions of legitimacy and for coordinating structures.

States and state constitutions have a central role in this project of legitimation and coordination. States always have existed in a liminal space, mediating between the national government and the localities. Moreover, states long have functioned as non-Westphalian sovereigns. They are not nation-states, but polities that act within a complex web of legal institutions. Their legitimacy comes not from their identification with the “people” of the state, but through adhering to certain transparent processes and providing

269; Resnik, *supra* note 88, at 1627-32; Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (And Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937 (2003).

172. See Aleinikoff, *supra* note 84, at 2014-16.

numerous means of democratic accountability. States are well suited to provide key nodes of power in the new world order, and an understanding of their role will be critical to responding to the challenges that globalization poses.

From this perspective, cases striking down state participation in international affairs¹⁷³ appear as rearguard actions, attempts by the U.S. Supreme Court to retain a Westphalian model against the forces of a globalizing world. Over time the Court should appreciate and accept the role of states in the emerging global order. Some national coordination of foreign policy will remain essential, but doctrines based on older conception of sovereignty will have to be reconceptualized in light of the evolving models of governance.

173. See *supra* notes 25-36 and accompanying text.