

International Delegations and
the Values of Federalism

Neil S. Siegel*

INTRODUCTION

Among U.S. legal scholars who specialize in foreign relations law, there is a growing debate about the constitutional implications of international delegations.¹ Almost all of this debate has focused on separation-of-powers issues (especially the non-delegation doctrine and the Appointments Clause)² as well as on Article III concerns.³ A prominent exception is Edward Swaine's provocative argument that international delegations diffuse political power and thereby

* Assistant Professor of Law and Political Science, Duke University School of Law. I thank Stuart Benjamin, Curtis Bradley, Erwin Chemerinsky, Judith Kelley, and H. Jefferson Powell for instructive feedback.

¹ Following the lead of Curtis Bradley and Judith Kelley, I define an international delegation as "a grant of authority by a state to an international body or another state to make decisions or take actions." Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 70 LAW & CONTEMP. PROBS. (forthcoming 2007). As Bradley and Kelley describe and illustrate well, international delegations take many different forms, leaving nations and subnational units of nations (e.g., U.S. states) with varying degrees of regulatory control regarding the subject matter of the delegation.

² See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 1557 (2003); David M. Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 121 (2000); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L.J. 331 (1998); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 272 (2d ed. 1996); Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573 (1994); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992).

³ See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 398-400 (2d ed. 2006).

vindicate the values of federalism.⁴ “Federalism,” Swaine submits, “superficially looks like a reason to dislike international delegations (and [it] plays that role in national discourse about international engagements), but [it] in fact provides a strong warrant in their favor.”⁵

Bracketing for a moment the persuasiveness of this claim, U.S. federalism theory and practice are deeply relevant to analyzing the law and politics of international delegations, including their costs and benefits.⁶ U.S. federalism endeavors to vindicate certain values by protecting state regulatory autonomy.⁷ International delegations pose a potential threat to these

⁴ See generally Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494 n.3 (2004).

⁵ *Id.* at 1502. See *id.* at 1613 (“Taking international delegations seriously reveals a constitutional character that serves, however inadvertently, many of the same ends as have the U.S. states. On this view, delegations of lawmaking authority to international institutions may promote the values underlying domestic federalism”); *id.* (“[D]iscovering legitimate bases for worrying about international delegations also provides a ground for resolving an extrinsic constitutional objection—federalism—and reveals a potential reason actually to embrace those delegations.”).

⁶ Bradley and Kelley “use the term ‘sovereignty costs’ to refer to reductions in [nation] state autonomy. International delegations tend to impose sovereignty costs because they transfer some of the state’s decision-making authority to other actors.” Bradley & Kelley, *supra* note 1, at 8. Because I approach this subject from the perspective of debates about federalism in U.S. constitutional law, I prefer to call reductions in national autonomy “autonomy costs.” As used by the U.S. Supreme Court, the concept of “sovereignty” is a whole other kettle of fish; it is bound up with symbolic notions of state sovereign “dignity.” The Court has even been willing to compromise substantive state regulatory autonomy in order to advance its conception of state sovereignty. See generally Siegel, *supra* note 8; Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 35 (2004) (distinguishing “sovereignty” in the sense of legal unaccountability for violations of federal law from “autonomy” defined as the ability of states to govern; submitting that “[t]he Court’s preference for sovereignty over autonomy is the most obvious hallmark of the ‘federalist revival’; and arguing that “[a]ny set of federalism doctrines focused on autonomy must make preemption its primary concern”); see also Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 39-40 (contending that the Court’s preemption decisions are significantly more important for state autonomy than are the rulings articulating a robust conception of state sovereign immunity).

⁷ By “federalism,” I refer to a constitutional regime that aims to vindicate certain values (which I specify below) by affording significant protection to the regulatory autonomy of subnational states. In other words, I use the term “federalism” in the sense of protecting state control, not in the distinct normative sense of achieving the optimal vertical division of authority between the federal government and the states. See *infra* note 29 (discussing these distinct conceptions of federalism). In this regard, I adopt the terminology of the U.S. Supreme Court, which tends to conceive federalism as a reason to limit federal power, not as a reason to validate its use. I recognize, however, that federalism could reasonably

values by undermining state control: such delegations may cause international bodies or foreign nations to exercise authority that would otherwise be exercised by the states. Thus, it is worth thinking about the effects of international delegations on the values of federalism.

In this inquiry, I conduct such an examination, and I conclude that the relationship between an international delegation and federalism values depends upon what would happen in the absence of the international delegation. When the delegation replaces regulation by the federal government that would have displaced state choices anyway, then the delegation has no effect on state regulatory control but an uncertain net effect on federalism values. As I show, the impact turns on the relative inclinations of the federal government and the international body to decentralize. When, however, there would be no federal regulation in the absence of an international delegation, so that the delegation reduces state autonomy, then the justifications for international delegations, whether constitutional or prudential, do not include the values commonly understood to be associated with federalism. In this situation, the submission that international delegations diffuse political power is unpersuasive: power is more diffused when fifty states maintain control than when one international body is delegated authority. When international delegations reduce state control, moreover, they compromise every other value that federalism is commonly thought to advance.

Part I discusses the values of federalism. Part II examines the impact of international delegations on the values of federalism. Part III illustrates the tension between federalism values and international delegations by contrasting such delegations and instances of commandeering based on their relative impact on federalism values. The U.S. Supreme Court has prohibited any form of commandeering in order to safeguard the federalism value of accountability, even

be understood in the different normative sense that I just identified. I also part ways with the Court's prioritization of symbolism over substance in this area of constitutional law. *See supra* note 6.

though the Court’s doctrine leaves the states with less regulatory control in certain situations.⁸ By contrast, international delegations that reduce state autonomy compromise *both* political accountability and state regulatory control.

Part IV clarifies my thesis. Most importantly, I explain why my argument does not imply, let alone demonstrate, that international delegations are unconstitutional, whether in general or in their particulars. I conclude with some brief reflections on the premium placed on novelty in legal academic discourse.

I. THE VALUES OF FEDERALISM

A federal system entails a vertical division of regulatory authority between the national government and subnational states.⁹ Commentators specializing in constitutional law, political science, or economic analysis have argued that a federal system vindicates important values by protecting the regulatory autonomy of the subnational states.

First, a powerful check on the abuse of government power is said to exist when multiple levels of government compete for regulatory authority and political power is diffused.¹⁰ James Madison famously identified federalism as part of “a double security” that “arises to the rights of the people.”¹¹ The federal and state governments, Madison insisted, “will control each other, at

⁸ See generally, e.g., Neil S. Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006).

⁹ See, e.g., ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 103-04 (2000).

¹⁰ See, e.g., Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 S. Ct. REV. 341, 380-95.

¹¹ THE FEDERALIST NO. 51 (James Madison) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”).

the same time that each will be controlled by itself.”¹² Two centuries later, Justice O’Connor would invoke the intentions of the Framers on behalf of the Court in *Gregory v. Ashcroft*.¹³ She there identified the tyranny prevention championed by the Framers as “the principal benefit of the federalist system.”¹⁴

Second, democratic self-government is supposed to be facilitated when there exists a robust space for participatory politics at levels closer to the people who are governed.¹⁵

Federalism, observed Justice O’Connor for the Court in *Gregory*, “increases opportunity for citizen involvement in democratic processes.”¹⁶ On this point, she referenced no less of an

¹² *Id.*

¹³ 501 U.S. 452 (1991). In *Gregory*, Missouri state-court judges challenged, as violative of the federal Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621-634 (2006), the mandatory retirement age set forth in the state constitution. 501 U.S. at 456. The Supreme Court issued a “clear statement” rule of statutory interpretation. Justice O’Connor wrote for the majority that the Court will construe federal law to apply to important state government activities only if Congress issues a clear statement that it wants the law to apply to the states in these circumstances. *Id.* at 461. Because the ADEA lacked such a clear statement, the Court concluded that the federal antidiscrimination law did not preempt the state’s mandatory retirement age. *Id.* at 467. In so holding, the Court underscored the importance of the Tenth Amendment in protecting state autonomy. *Id.* at 461 (“This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”); *id.* at 463 (“[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at the heart of representative government. It is a power reserved to the States under the Tenth Amendment . . .”) (internal quotations omitted).

¹⁴ *Id.* at 458 (“Perhaps the principal benefit of the federalist system is a check on abuses of government power. ‘The “constitutionally mandated balance of power” between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’ . . . [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”) (internal citations omitted); *see also* *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O’Connor, J., dissenting) (“[O]ur federal system provides a salutary check on governmental power.”).

¹⁵ *See, e.g.*, Rapaczynski, *supra* note 11, at 395-408.

¹⁶ 501 U.S. at 458 (“This federalist structure of joint sovereigns . . . increases opportunity for citizen involvement in democratic processes . . .”).

authority than Alexis de Tocqueville, “who understood well that participation in local government is a cornerstone of American democracy.”¹⁷

Third, political responsiveness and accountability are believed to be encouraged when states compete for mobile citizens who can vote with both their hands and their feet.¹⁸

Justice O’Connor wrote for the *Gregory* Court that federalism “makes government more responsive by putting the States in competition for a mobile citizenry.”¹⁹ Responsiveness and accountability are distinguishable but related because one way to ensure responsiveness is not through exit but through voice²⁰ – that is, voting politicians out of office or pressuring them. This is often what is meant by accountability.

Fourth, value pluralism is promoted when state policies are allowed to differ along various dimensions of cultural difference.²¹ Contemporary examples abound, including some of the most controversial issues in American culture: abortion, the death penalty, gay marriage, and

¹⁷ *FERC v. Mississippi*, 456 U.S. at 789 (O’Connor, J., dissenting) (“[F]ederalism enhances the opportunity of all citizens to participate in representative government. Alexis de Tocqueville understood well that participation in local government is a cornerstone of American democracy.”) (discussing 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (H. Reeve trans. 1961)).

¹⁸ See, e.g., COOTER, *supra* note 9, at 129-30 (analyzing the circumstances in which mobile citizens contribute to efficiency in the delivery of local public goods); Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS.* 149 (1992) (arguing for competition among states); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in *PERSPECTIVES ON PUBLIC CHOICE* (Dennis C. Mueller ed., 1997) (providing necessary and sufficient conditions for the existence of an efficient allocation of citizens across jurisdictions); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956) (providing the first formulation of the mobility problem).

¹⁹ 501 U.S. at 458.

²⁰ See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

²¹ See, e.g., *Gregory*, 501 U.S. at 458 (“This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society . . .”).

physician-assisted suicide. Whatever one thinks of value pluralism normatively regarding a particular issue, it is uncontroversial descriptively that uniform federal rules prevent different parts of the country from governing themselves in ways that vary across the nation. This is the case whether the federal rule takes the form of a constitutional decision by the Court,²² a proposed constitutional amendment,²³ or a federal statute interpreted by the government to have broad preemptive effect.²⁴

Fifth, social problem solving can be encouraged when states are permitted to act as policy “laboratories.”²⁵ Justice Brandeis offered perhaps the classic formulation of this rationale, admonishing the Court that “[t]o stay experimentation in things social and economic is a grave

²² See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming the core of the constitutional right to abortion articulated in *Roe*); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the execution of persons who were under 18 years of age at the time they committed their capital crimes is prohibited by the Eighth and Fourteenth Amendments); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that that the execution of mentally retarded persons is prohibited by the Eighth and Fourteenth Amendments).

²³ See, e.g., Jim Rutenberg, *Bush Calls for an Amendment Banning Same-Sex Nuptials*, N.Y. TIMES, June 4, 2006, § 1, at 30. Cf. *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas law making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the Fourteenth Amendment). In *Lawrence*, the Court dramatically overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), announcing a right of sexual privacy in the home that extends to homosexuals. But the Court appeared ambivalent about whether the right sounded in liberty or equality, see 539 U.S. at 575, avoided the language of fundamental rights or strict scrutiny, *id.* at 578, and suggested that the issue of gay marriage was distinguishable without explaining why or how, *id.* If the Court followed to its logical conclusion its defense of the dignity of intimate homosexual relationships and the state’s lack of authority to demean homosexuals, *id.* at 560, 567, 575, and 578, prohibitions of gay marriage would almost certainly violate equal protection. Yet the Court explicitly avoided this conclusion. *Id.* at 578.

²⁴ See, e.g., *Gonzales v. Oregon*, 126 S.Ct. 904 (2006) (holding that the federal Controlled Substances Act does not permit the Attorney General to forbid doctors from prescribing federally regulated drugs for use in physician-assisted suicide under state law permitting the practice).

²⁵ See, e.g., *Gregory*, 501 U.S. at 458 (“This federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government . . .”); *FERC v. Mississippi*, 456 U.S. 742, 788-89 (O’Connor, J., dissenting) (“Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth.”) (footnotes omitted). But see Rapaczynski, *supra* note 11, at 408-14 (criticizing the experimentation rationale for federalism).

responsibility.”²⁶ This rationale for federalism is distinct from the one sounding in value pluralism. One does not enter a laboratory in order to resolve a conflict over values that are constitutive of personal and community identity. Rather, one enters a laboratory when the implicated values are generally shared and disagreement concerns matters of empirical causation. For example, Americans might better understand the tradeoff between vehicle speed and safety if states set different speed limits on their highways.²⁷

Finally, the efficient delivery of local public goods (or alleviation of local public bads) by states saves various costs when they make more cost-effective choices than the federal government would make for the nation as a whole. For example, Rust Belt states favored national emissions standards for factories to reduce or eliminate a competitive advantage enjoyed by Sun Belt states in the competition for new industry. If the only standards were air quality standards, the Sun Belt states could offer less pollution control because their air was cleaner. So the Rust Belt states lobbied for a federal requirement that every new factory of a certain type had to install the same abatement technology.²⁸

²⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

²⁷ Value conflict could also be implicated in this example. Communities in certain parts of the country might trade off liberty and safety differently from people in other parts of the country. Yet every region of the nation would benefit from sound empirical evidence that clarifies what the actual tradeoffs are.

²⁸ See generally B. Peter Pashigan, *Environmental Protection: Whose Interests are Being Protected?*, 23 *ECON. INQUIRY* 551 (1985) (analyzing votes on critical Clean Air Act amendments and verifying that Rust Belt legislators voted to nationalize these rules); see also Robert Glicksman and Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 *LAW & CONTEMP. PROBS.* 249, 285 (1991) (observing that “when differential geographical benefits are at stake, congressional voting patterns fall out along remarkably congruent geographical lines, suggesting that congresspeople are aware of the legislation’s geographic implications, and that they vote consistently with the theory of pessimistic pluralism”).

All of values canvassed above are typically believed to be promoted by federalism.²⁹ Commentators have debated vigorously whether a federal system actually advances them.³⁰

II. THE IMPACT OF INTERNATIONAL DELEGATIONS ON FEDERALISM VALUES

It is instructive to analyze systematically whether international delegations advance or undermine federalism values on balance. Professor Swaine has argued ably that “legislative authority conferred on international institutions . . . indirectly promotes a more specific constitutional value: the diffusion of political authority prized by federalism.”³¹ International delegations, in other words, “provid[e] a bulwark against the concentration of political power in the national government that is consistent with the ambitions of federalism.”³²

²⁹ The term “federalism” may be employed not in the sense of protecting state control (which is how I use it for purposes of this inquiry), but in the distinct normative sense of achieving the optimal vertical division of authority between the federal government and the states. *See supra* note 7 and accompanying text. When federalism is understood in this distinct sense, the foregoing discussion of the values of federalism is incomplete. For example, uniformity is a value of federalism so conceived, and preemptive federal action may be needed to vindicate it. An uncontroversial example is a national public good like military defense.

³⁰ It is possible that state autonomy could undermine federalism values in certain situations. For instance, federal regulation might advance accountability to a greater extent than would state regulation if citizens were more attuned to the legislative activity of their national representatives than to the work of their state ones. If it could be demonstrated systematically that nationalization advances federalism values to a greater extent than does state autonomy, then the proffered connection between state control and federalism values would dissolve. Most defenders of federalism values, however, are unlikely to conclude that the values commonly associated with federalism would be better advanced without federalism than with it. For recent discussions of federalism values, see STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 56-69 (2005). *See generally* DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Siegel, *supra* note 8, at 1648-51; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903 (1994). For an overview of the normative federalism debate in American constitutional law and citations to the literature, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 109-12 (2d ed. 2005).

³¹ Swaine, *supra* note 1, at 1501.

³² *Id.*

The suggestion that international delegations diffuse political power seems plausible insofar as the federal government delegates authority that it would otherwise exercise, as opposed to delegating authority that the states would exercise.³³ This is a key distinction. Power is more diffused when fifty separate sovereigns regulate (or decline to regulate) than it is when one international body assumes control. Moreover, there is reason to question the force of the diffusion argument. Power diffusion is just one of many federalism values, and the conventional wisdom notwithstanding,³⁴ it is by no means clear that the diffusion of political power is the most important value of federalism. Much turns on the party to whom power is delegated. To illustrate with an absurd example, the diffusion argument would count for nothing if Congress delegated authority over certain matters of national defense to North Korea. Much also turns on whether diffusing power in fact helps to prevent tyranny. Having several sovereigns on one's "back" can make one less (or equally) free, not more.

Turning to the other federalism values discussed above, international delegations likely undermine all of them to the extent that such delegations reduce state regulatory control, as opposed to leaving state control unchanged and just reducing national control. Because this distinction is critical, I unpack it at the threshold. The relationship of an international delegation to the values of federalism depends on how the matter would be handled without an international delegation. If the issue would be left to the states but for an international delegation that shifts

³³ Even when the federal government delegates power that it would otherwise exercise, there is a distinct sense in which international delegations centralize, as opposed to diffuse, political power. After all, such delegations replace the independent choices of several or even many nations. Accordingly, international delegations seem both to diffuse and to centralize at the same time.

³⁴ See *supra* note 11. To be sure, power diffusion constitutes an advantage that a federal system enjoys over a regime of nationally managed decentralization. See Rubin & Feeley, *supra* note 30, at 927 (characterizing "federalism's role in diffusing governmental power" as an "important argument[] that genuinely support[s] the basic principle of federalism"). But because the federal government does not tend to engage in significant decentralization, see *infra* note 55, it is not clear wherein lies the force of this argument.

control supranationally, then – as I explore in detail below – the delegation would compromise all of the federalism values discussed in Part I.³⁵ If, however, the federal government would handle the matter but for a power transfer to an international body, then it is uncertain whether the delegation would compromise values of pluralism, experimentation, and local efficiency absent information about the relative inclinations of the federal government and the international body to decentralize. If neither the federal government nor the international body would decentralize to a significant extent (or both would decentralize to the same extent), then there would be no effect on these federalism values. An example would be a delegation concerning certain matters of national or international security by the United States to the U.N. Security Council. If instead the federal government would have decentralized to a greater extent than the international body, then the delegation causes net harm to these federalism values. If, however, the federal government would have decentralized to a lesser extent than the international body, then the delegation actually advances these values of federalism.

It is also uncertain whether participation, responsiveness, and accountability values would be compromised if the federal government would have handled the matter but for a power transfer to an international body. On the one hand, it seems fair to presume that international bodies are typically less participatory, responsive, and accountable vis-a-vis U.S. citizens than is the federal government.³⁶ Among other things, U.S. citizens can vote in federal elections; they never get to vote for, say, the individuals in leadership positions at the International Monetary Fund or the World Trade Organization (WTO). On the other hand, the delegation would advance these federalism values on balance if the international body decentralized (and thus

³⁵ This includes tyranny prevention for the reasons stated in note 33.

³⁶ See *infra* notes **Error! Bookmark not defined.**-39 and accompanying text (discussing the severe participation, responsiveness, and accountability problems that characterize international bodies).

empowered U.S. states) to a greater extent than the federal government would have done in the absence of the delegation, so that the resulting participation, responsiveness, and accountability gains on the state level more than compensated for the harm to these values caused by moving from the national to the supranational level. Once again, therefore, the net effect of the international delegation on federalism values turns on the relative likelihood that the federal government and the international body will decentralize.

If one limits the analysis to international delegations that reduce state regulatory control, matters become much less uncertain. Such delegations are likely to discourage political participation at the state level by undermining the utility of such participation. In some cases, it is true, transnational activist groups may gain more access to the international organization than they would otherwise gain locally. For instance, many international treaty conferences provide for observer status for human rights groups. There is a difference, however, between the democratic ideal of broad political participation and the heightened access sometimes afforded to certain small interest groups.³⁷ In any event, it seems unlikely as a general matter that U.S. citizens have more opportunity to participate effectively in democratic politics in the presence of an international delegation than in its absence.

Likewise, international delegations that erode state autonomy would appear to undermine political responsiveness by reducing interjurisdictional competition for mobile citizens. There is less (or no) competition when an international body limits choices in every subnational jurisdiction. International delegations would also seem to reduce accountability by, among other things, dampening the impact of the most common method of ensuring accountability: elections. This is of course familiar learning by now. Commentators have written increasingly about the

³⁷ See, e.g., Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 170-84 (1999) (discussing the influence of small interest groups on international institutions).

“democratic deficit” that characterizes international institutions, particularly the European Union.³⁸ As Swaine relates, “[i]nternational delegations give power to officials and institutions that ‘are not accountable, directly or indirectly, *exclusively* to the American electorate,’ and indeed may not be accountable to much of anyone at all.”³⁹

Although this discussion may seem somewhat abstract, there are well-known examples of international delegations that transfer regulatory control from U.S. states to international bodies, thereby compromising federalism values of participation, responsiveness, and accountability (among others). These include the WTO and NAFTA institutions. They have reduced state authority over such traditional areas of state regulation as trade and investment, the banking and insurance industries, government procurement, and alcohol.⁴⁰

It is also probable that replacing state autonomy with supranational regulatory control reduces the ability of citizens to express the distinctive value commitments of statewide majorities.⁴¹ When law moves supranationally, at least some of the values are likely to follow. I am not aware of international delegations that presently touch on such divisive issues as

³⁸ See Barry Friedman, *Federalism's Future in a Global Village*, 47 VAND. L. REV. 1441, 1475-79 (1994); BRADLEY & GOLDSMITH, *supra* note 1, at 408 (citing some of the literature). See also Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEOR. INQ. IN L. 1, 6 (“EU law is not democratically accountable in any obvious way. Although EU regulations purport to embody ‘treaties’ grounded in national consent, the unreality of this perspective is now commonly acknowledged; the notorious ‘democratic deficit’ of the EU has become a cliché.”) (2001).

³⁹ Swaine, *supra* note 1, at 1601-02 (quoting David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1699-1700 (2003)). Cf. Post, *supra* note 38, at 10-11 (“Constitutional theory stresses the question of constitutional authorship. All constitutional theorists address directly the issue of democratic legitimation either through the specific will of an articulate demos or through judicial responsiveness to a national ethos. The form of thinking that underlies constitutional theory thus renders the new international legal institutions anomalous and opaque.” (footnote omitted)).

⁴⁰ See, e.g., Swaine, *supra* note 1, at 1570-71; Friedman, *supra* note 38, at 1453-62.

⁴¹ This may be a good thing or a bad thing, depending on one’s view of the value commitments that the statewide majority wants to express.

abortion, gay rights, and assisted suicide. But the universe of potential value conflicts is much larger, and in any event it is not difficult to imagine a delegation concerning the judicial enforcement of certain rights that would conflict with the commitments of popular majorities in any number of U.S. states.

The death penalty comes to mind here. A number of international organizations have been addressing the validity of the death penalty. Anti-death penalty groups naturally conclude that they will receive a more sympathetic hearing from the international organizations than from many American politicians. This is because the death penalty continues to enjoy strong support in much of the United States (and therefore among elected officials), but the practice is unpopular among European elites.

Finally, international delegations that undermine state autonomy would seem to reduce local experimentation and the efficient delivery of local public goods by reducing the state regulatory control that promotes both values. One might object that international delegations often leave states free to experiment in all sorts of ways – that compliance typically requires a uniform state, but that the process of achieving it is free form. But this observation suggests only that some international delegations compromise local experimentation more than others, not that international delegations in general do not raise potentially serious concerns in this regard. There is less opportunity for state experimentation when an international body wills the end but not the means than there is when states retain sufficient control to will both the end *and* the means.

One might also object that sometimes there are externalities (whether positive or negative) that transcend the borders of nation states, and at other times there are economies of scale that exist at the supranational level. I of course agree. For instance, some cross-border

environmental problems, such as ozone depletion and global warming, may need to be addressed collectively. And perhaps the internationalization of intellectual property rights could be justified by economies of scale – i.e., one global patent application (and regime of monitoring and enforcement) rather than performing each of these functions country by country. When no interstate (let alone international) externality exists, however, the economic theory of public goods suggests that there are real informational costs associated with compromising state regulatory control.⁴²

In sum, transferring regulatory control to international bodies can undermine state regulatory control. But state regulatory control is needed to advance the values typically associated with federalism. Therefore, international delegations that reduce state autonomy compromise these values. This simple (as opposed to simplistic) logic reflects the reality that a core function of a federal system, which is to diversify locally, conflicts with the very *telos* of many international delegations, which is to harmonize supranationally. To be sure, I tender this point at a very high level of abstraction: there are different kinds of federal systems and a rich variety of international delegations. But in general, the two do seem to be at cross purposes at an elemental level.⁴³

⁴² See, e.g., Cooter, *supra* note 9, at 107 (“Assign power over public goods to the smallest unit of government that internalizes the effects of its exercise.”).

⁴³ Cf. Friedman, *supra* note 38, at 1447 (“This process of harmonization [associated with globalization] will have an important impact on American federalism. In part, non-uniformity is inherent in the idea of American federalism—the notion that fifty different states and numerous local governments can go their own way in developing regulatory frameworks.”); *id.* at 1460 (“There are forces at work bringing the world closer together, but those very same forces demand greater uniformity and coordination and regulation. The result is a narrowing of the state regulatory sphere.”).

In the foregoing analysis, I have taken care not to conflate the values of federalism with state opposition to international delegations.⁴⁴ This is because little of normative consequence turns on whether state officials oppose international delegations. In other words, it is important to distinguish the values of federalism from the views of state officials.

In other settings, state officials are sometimes eager to cede regulatory authority to the federal government. Daryl Levinson, for example, has observed that “state officials who are primarily interested in maximizing political support will have no reliable interest in decreasing federal power (or, the equivalent, in increasing state power).”⁴⁵ Similarly, Steven Calabresi notes that “it is sometimes in the interest of state and local officials for *them* to pass the buck on the hardest problems of government by deferring to the folks in Washington, D.C.”⁴⁶ From the standpoint of normative federalism, therefore, the views of state officials are beside the point. The relevant benchmark, rather, is the impact of the proposed action at issue on the values of federalism.

In the context of international delegations, the views of state officials tend to be a good proxy for the preservation of federalism values to the extent that the officials want to preserve their own autonomy rather than ceding power to the federal government, to an international

⁴⁴ See Swaine, *supra* note 1, at 1613 (referencing “the headaches that state governments posed for reaching, and abiding by, international agreements”). See also MICHELLE SAGER, ONE VOICE OR MANY? FEDERALISM AND INTERNATIONAL TRADE (2002) (providing an account of the conflicts between the federal government and the states over NAFTA).

⁴⁵ Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 941 (2005) (“[T]here is no logical relationship between the policy interests of state citizens and the amount of regulation flowing from the federal government or left to the states. Federal regulation and spending obviously can, and often does, benefit state-level constituencies. Consequently, state officials who are primarily interested in maximizing political support will have no reliable interest in decreasing federal power (or, the equivalent, in increasing state power).”) (footnotes omitted).

⁴⁶ Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 797 (1995) (“[Federalism] is not always of value to state and local officials. To begin with, it is sometimes in the interest of state and local officials for *them* to pass the buck on the hardest problems of government by deferring to the folks in Washington, D.C.”).

body, or to another nation. But regardless of whether this is the case regarding particular delegations, the relevant normative question is not what state officials prefer, but how the delegations impact the values of federalism. This impact, I suggest, is negative when the delegations reduce state control.

III. THE CONTRAST WITH ANTICOMMANDEERING DOCTRINE

One way to illustrate the impact of international delegations on the values of federalism is to contrast international delegations that reduce state control with federal laws that require state officials to enact, to administer, or to enforce a federal regulatory program. The U.S. Supreme Court has prohibited any form of commandeering in order to safeguard the federalism value of accountability, even though the Court's doctrine leaves the states with less regulatory control in certain situations. Accordingly, reasonable minds may differ regarding the net impact of commandeering on the values of federalism.⁴⁷ By contrast, international delegations that reduce state autonomy compromise *both* political accountability and state regulatory control.

The Tenth Amendment experienced something of a federalism revival during the 1990s, when the Rehnquist Court breathed new life into the amendment's seemingly truistic language.⁴⁸ First, in *New York v. United States*, the Court held that Congress could not order state

⁴⁷ For a fuller discussion than I provide in the following pages, see generally Siegel, *supra* note 8.

⁴⁸ The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The text of the amendment makes explicit what is implicit in both the enumeration of powers allocated to Congress in Article I, § 8 and the bedrock distinction between a national government of limited powers and state governments of plenary powers. *See, e.g., New York v. United States*, 505 U.S. 144, 156-57 (1992) (“The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.”); *United States v. Darby*, 312 U.S. 100, 123-24 (1941) (“The amendment states but a truism that all is retained which has not been surrendered.”).

legislatures either to regulate low-level radioactive waste in accordance with federal instructions or to take title to the waste.⁴⁹ Then, in *Printz v. United States*, the Court decided that Congress could not order state executive officials to help conduct background checks on would-be handgun purchasers on an interim basis.⁵⁰ In both cases, the Court supported its conclusion by stressing the importance of political accountability. In *New York*, for example, Justice O'Connor wrote for the Court that

where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.⁵¹

The Court's exclusive focus on accountability caused it to impose a ban on commandeering whose categorical nature is extraordinary in U.S. constitutional law.⁵²

⁴⁹ *New York v. United States*, 505 U.S. 144 (1992) (holding that the "take title" provision of the Low Level Radioactive Waste Policy Amendments Act of 1985 constitutes unconstitutional compulsion and commandeering of the governmental capacity of state governments).

⁵⁰ *Printz v. United States*, 521 U. S. 898 (1997) (relying on a Tenth Amendment anti-commandeering rationale in holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act).

⁵¹ *New York*, 505 U.S. at 168-69. See BRADLEY & GOLDSMITH, *supra* note 1, at 400 (discussing the Court's accountability concerns).

⁵² For example, it is blackletter law that the Constitution allows classifications basis on race if the governmental interest is sufficiently weighty. For a recent instance in which the Court reiterated that racial classifications trigger strict scrutiny, as opposed to a categorical bar, see *Johnson v. California*, 543 U.S. 499, 505 (2005).

The Court prohibits commandeering in all circumstances even though this form of federal regulation implicates a tradeoff between political accountability and state regulatory control.⁵³ Specifically, *New York* and *Printz* advance federalism values to some extent by addressing the accountability problems that commandeering can cause and by requiring the federal government to internalize more of the costs of federal regulation before engaging in regulation. At the same time, however, anticommandeering doctrine undermines federalism values when the (clearly constitutional) alternative of preemption is reasonably available and the commandeering ban thus places states in danger of losing regulatory control in a greater number of future instances.⁵⁴ Direct federal regulation limits state regulatory power to a greater extent than does commandeering as a general matter, and state regulatory control is needed to advance the values believed to be associated with a federal system. If direct federal regulation removes states from the regulatory scene, it is difficult to advance political participation, to encourage political responsiveness and accountability through interjurisdictional and intrajurisdictional competition, to express the distinctive value commitments of statewide majorities, to create laboratories of experimentation, and efficiently to deliver local public goods.⁵⁵

⁵³ See generally Siegel, *supra* note 8.

⁵⁴ Preemption is the constitutional principle derived from the Supremacy Clause, U.S. CONST. Art. VI, providing that if a conflict exists between valid federal law and state or local laws, federal law controls and the state or local laws are invalidated on the ground that federal law is supreme. See, e.g., *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”) (internal quotation marks omitted); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (concluding that federal law trumps state laws that “interfere with, or are contrary to the laws of Congress” because “[i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it”).

⁵⁵ In response, one could invoke Rubin and Feeley’s distinction between federalism as a constitutional requirement and the managerial concept of decentralization. See Rubin & Feeley, *supra* note 30, at 910 (“Decentralization is a managerial concept; it refers to the delegation of centralized authority to subordinate units of either a geographic or a functional character.”). Even in a world without

Consider now international delegations of regulatory power that would otherwise be exercised by the states. Such delegations do not merely compromise political accountability.⁵⁶ They also compromise state regulatory control.⁵⁷ In other words, there is no tradeoff at the theoretical level, just an unambiguous compromise of all of the federalism values whose vindication depends upon state autonomy. This set of values includes not just tyranny prevention (because an international body is unlikely to perform the role of diffusing power as well as fifty states).⁵⁸ For the reasons discussed above, this set also seems to include every other value of federalism.

IV. CLARIFICATIONS

The discussion in Part I proceeded with an “arguendo” tone for a reason. I have assumed, rather than defended, the proposition that the values typically associated with federalism are values worthy of vindication. I have further assumed, rather than established, that a federal

judicially enforced federalism, they argue, Congress and federal agencies could design experiments and try different approaches to problems in different regions of the nation. Similarly, the federal government could legislate in such a way as to allow for regional participation, competition, expressions of value, and delivery of local public goods. (Tyranny prevention is another matter because the central authority decides how much decentralization takes place in a world without federalism.)

Professors Feeley and Rubin make some powerful political points and raise an intriguing theoretical possibility. But experience seems to show (it is difficult to establish empirically) that regional experimentation and encouragement of participation, competition, diversity, and local efficiency are not what tends to happen when Congress regulates. *See, e.g.*, Swaine, *supra* note 4, at 1582 (“[I]t seems doubtful that the national government has the right incentives to decentralize when it should.”); *see also id.* at 1581-83 (discussing the literature). This is not to say, however, that Congress could not choose to do some significant decentralizing. Indeed, decentralization is a concept that is analytically connected to a national perspective.

⁵⁶ *See supra* notes 38-39 and accompanying text.

⁵⁷ *See* BRADLEY & GOLDSMITH, *supra* note 1, at 408 (querying whether international delegations “simply move power even further away from U.S. states and localities”).

⁵⁸ *See supra* notes 33-35 and accompanying text.

system in fact advances those values. In other words, I have taken federalism values on the terms often accepted and I have made my argument within those terms. Accordingly, those who reject either of the above assumptions will have good reason to reject my conclusions. That said, I regard my assumptions as reasonable: commentators who care most about the values typically associated with federalism do not tend to conclude as a general matter that these values are better promoted without federalism than with it.

Further clarifications are in order. I have not offered a comprehensive cost-benefit analysis of international delegations. I have examined instead only a subset of the potential costs (i.e., those related to federalism values), and I have done so at a relatively high level of abstraction.⁵⁹ In other words, I have not investigated other kinds of costs possibly associated with international delegations,⁶⁰ nor have I engaged the potentially substantial benefits generated by such delegations.⁶¹ I therefore do not offer any general conclusions about the wisdom of delegations of authority to international bodies or other nations. Moreover, I have not opined on

⁵⁹ I should not be read as denying the obvious – namely, that international delegations vary widely along several dimensions in terms of their impact on state regulatory autonomy. Bradley and Kelley render the cost question more context-sensitive and tractable by fashioning a framework for assessing variations in the extent to which particular international delegations compromise the regulatory autonomy of nations. See generally Bradley & Kelley, *supra* note 1. Their four-factor typology—i.e., issue area, type of authority, legal effect, and autonomy of the international body—is also useful in tracing out the impact of international delegations on the values of federalism (when the authority delegated would otherwise be exercised by the states). For example, the impact is greater when the issue area is a traditional subject of state concern, such as education, criminal law enforcement, family law, taxation, or alcohol, than when the issue concerns, say, interstate or international commerce or matters of national security. Cf., e.g., Friedman, *supra* note 38, at 1460-61 (“Many of the regulatory areas subject to internationalization . . . increasingly touch upon the central role of the states, protecting the health and safety and welfare of their citizens.”). Moreover, legislative delegations compromise state autonomy to a greater extent than do information-gathering and reporting functions. In addition, international delegations with low legal effect obviously compromise federalism values to a lesser extent than do delegations with high legal effect. Finally, a less (as opposed to more) autonomous international body would likely be more compatible with the values of federalism.

⁶⁰ For an able discussion, see generally Bradley & Kelley, *supra* note 1.

⁶¹ For a survey of the literature, see *id.* at 8.

the constitutionality of international delegations, among other reasons because the associated costs and benefits do not provide the sole criteria of constitutional judgment.

These points are critical. As the Supreme Court has learned from painful experience,⁶² the Constitution does not disable the ability of government to address serious social problems in a reasonably efficacious way. The Court often insists on limits, but rarely does it impose categorical bars. Suggestions to the contrary tend to presuppose an unduly stringent conception of the law-politics distinction,⁶³ one that necessarily sounds as much in political opposition as it does in “neutral” constitutional analysis. In a world in which international delegations are pervasive and growing in number, reflecting a broad bipartisan consensus regarding their utility, it would be extraordinary to construe the Constitution as requiring the end of, say, participation by the United States in the U.N. Security Council—regardless of whether the United States possessed a veto.⁶⁴

⁶² See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001) (“The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court’s decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate. There will be attacks on judges and, ultimately, on the institution of judicial review. Even in the face of established precedent, law itself will come to be seen as nothing but politics.”) (referencing *Lochner v. New York*, 198 U.S. 45 (1905)).

⁶³ See generally Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. (forthcoming 2007); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation* (2007) (work in progress on file with author).

⁶⁴ The ability to exercise a veto ameliorates concerns about the autonomy costs of international delegations to a lesser extent than might at first appear to the case. Nations may want to avoid tempting other countries to wield their vetoes, and the force of a veto may be constrained by the default condition. See Swaine, *supra* note 4, at 1538-40 (discussing these matters).

In determining the wisdom or constitutionality of particular international delegations, however, it is important to avoid confusing a benefit for a cost or a cost for a benefit.⁶⁵ My analysis suggests that the values typically associated with federalism constitute costs, not benefits, of international delegations that reduce state control.

CONCLUSION

During my transition from clerking to teaching, I was struck by the radically different ways in which judges and academics tend to regard new and creative legal arguments. For example, suggesting with enthusiasm in a petition for certiorari that the main question presented is “novel” constitutes a good way to defeat one’s own claim to constitutional attention – and inexperienced advocates before the Supreme Court sometimes do just that. In the legal academy, by contrast, the coin of the realm seems to be arguments that are novel, provocative, and counterintuitive. There may be good reasons for this divergence; after all, different institutions often perform different core functions. But the magnitude of this difference in perspective is

⁶⁵ The federalism costs and benefits of international delegations are relevant not only, or even primarily, to judicial assessments of their constitutionality. Given the present pervasiveness of international delegations and the tradition of judicial deference to Congress and the President in the realm of international affairs, *see, e.g.*, Friedman, *supra* note 38, at 1466-71, it may be unrealistic to expect even a relatively federalist Supreme Court to intervene in this arena. Regardless of whether the Court continues to stay its hand, however, the various costs and benefits should be of abiding concern to the political branches themselves. After all, it is not clear on what other basis they ought they to act or decline to act. *Cf., e.g.*, Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1331, 1333 (doubting that the Court will resolve the nationalist-new federalist debate over the scope of the treaty power and encouraging the interpretive community “to actively engage in a normative dialogue over how the executive should carry the federalism banner and the larger implications of its doing so for U.S. foreign affairs”). By “Executive Federalism,” Hollis means “executive efforts to self-judge when and how federalism limits U.S. treaty obligations.” *Id.* at 1332. The Executive, he submits, “is well advised to carefully weigh the costs and benefits of the commitments it accepts.” *Id.* at 1334. The same admonition applies to Congress and the President when they must decide whether to delegate authority to international bodies or foreign nations.

arresting, particularly if one believes that good scholarship can help judges and elected officials to make better decisions.

Regardless of whether one agrees with me regarding this one potential purpose of the academy,⁶⁶ sometimes in law and life the conventional wisdom is in fact wise and the intuitive argument is fundamentally sound. One example, I have tried to show, is the relationship between international delegations that reduce state control and the values of federalism.⁶⁷ Enhancing the regulatory power of international bodies or other nations at the expense of state autonomy compromises the values that federalism is generally thought to secure. I do not suggest that international delegations are unconstitutional or cost-benefit inefficient, either in general or in their particulars. I have not come close to making the necessary case, and in all candor, I have no desire to try. But when states lose regulatory control, I do conclude that constitutional and cost-justified international delegations are constitutional and efficient despite—not because of—their impact on the values of federalism.

⁶⁶ I certainly do not believe that this is the only function of the academy, or even the most important one. In the area of constitutional scholarship, for example, meta-theoretical work is most prestigious, and it has proven deeply illuminating, even if many judges might disagree. For a crisp account of the transformation in “[t]he criteria and purposes of good legal scholarship” during the late 1970s and 1980s, see Post, *supra* note 38, at 10.

⁶⁷ See, e.g., Thomas M. Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes?*, in *DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY* 1, 3 (Thomas M. Franck ed., 2000) (“America’s decentralized and divided constitutional scheme does not fit easily the exigencies of the growing system of supranational regimes.”). Cf. Friedman, *supra* note 38, at 1472 (“Turning first to substantive regulatory authority, I cannot help but predict that globalization will be the cause of a quite substantial curtailment of state authority.”).