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# Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination

Robert B. Ahdieh\*

*Even after the departure of two of its most prominent advocates – Chief Justice William Rehnquist and Justice Sandra Day O’Connor – the federalism revolution initiated by the Supreme Court almost twenty years ago continues its onward advance. If recent court decisions and congressional legislation are any indication, in fact, it may have reached a new beachhead in the realm of foreign affairs and international law. The emerging federalism in foreign affairs and international law is of a distinct form, however, with distinct implications for the relationship of sub-national, national, and international institutions and interests.*

*This article draws on the prism of “coordination,” as well as related analysis of standard-setting, to question two conventional assumptions about the relationship of sub-national, national, and international institutions. First, there is the common notion that a coherent foreign affairs regime requires “one voice” to speak for the nation. Second is the perception of some inherent conflict in the interaction of international norms and sub-national interests – a sense of international law as silencing (or at least disregarding) sub-national voices. Familiar as they are, both these claims are wrong. Coordination can be achieved in foreign affairs even with multiple voices. International law, meanwhile, may increasingly offer opportunities for states and localities to be heard. Once we appreciate as much, we can begin to develop a richer account of the interaction of sub-national, national, and international institutions, as “our federalism” reaches abroad.*

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\* Visiting Professor, Columbia Law School; Professor of Law & Director, Center on Federalism & Intersystemic Governance, Emory Law School. My immense thanks go to Paul Berman, George Bustin, Jeff Dunoff, Douglas Edington, Leslie Gerwin, Mark Janis, Bob Keohane, David Leheny, Peggy McGuinness, Deborah Pearlstein, Judith Resnik, Robert Schapiro, Kim Scheppele, and Peter Spiro, to my fellow panelists at the Return to *Missouri v. Holland* symposium, and to workshop participants at Princeton University’s Law and Public Affairs seminar, for their invaluable counsel and insight.

I believe that together not only can we lead California into the future . . . we can show the nation and the world how to get there. We can do this because we have the economic strength, we have the population and the technological force of a nation-state. We are the modern equivalent of the ancient city states of Athens and Sparta. California has the ideas of Athens and the power of Sparta.

– Arnold Schwarzenegger<sup>1</sup>

With a bit of the drama for which he is equally well-known, Governor Arnold Schwarzenegger has taken to casting his State of California as modern incarnation of the ancient city-states of Athens and Sparta. Even more dramatic, however, has been the extent to which the state has sought to make good on his rhetoric. Amidst widespread attention to insurers' handling of the claims of Holocaust victims in the late 1990s, California enacted legislation mandating the disclosure of all potentially relevant policies by any company seeking to do business in the state.<sup>2</sup> To similar effect, in the face of perceived federal inaction regarding the ongoing genocide in Darfur, the California legislature amended state law in 2006, to provide for state pension funds' divestment of any investment associated with Sudan.<sup>3</sup> Finally, to address the climate change crisis – the subject on which the state has perhaps been most engaged with foreign affairs and international law – California has joined with several Canadian provinces, the European Union, France, Germany, New Zealand, Norway, the United Kingdom, and others to establish the International Carbon Action Partnership, a group seeking to promote a “cap-and-trade” regime for carbon emissions.<sup>4</sup> California has not, however, been unique in such engagement with the world. Particularly on the issue of climate change, states and municipalities across the country have debated, promoted, and even adopted international norms, sought to coordinate lines of action with their foreign counterparts, and otherwise taken independent and collective action to address global warming.<sup>5</sup>

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1. Arnold Schwarzenegger, Governor, State of Cal., State of the State Address (Jan. 9, 2007) (transcript available at <http://gov.ca.gov/press-release/5089/>).

2. Cf. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

3. See California Sudan Act, CAL. GOV'T CODE § 7513.6 (West 2008) (added by 2006 Cal. Stat. ch. 442).

4. See Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Transnational Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).

5. See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 62 (2007). Besides California, in fact, a number of other states are also participants in the International Carbon Action Partnership.

In what follows, I explore the implications of such sub-national engagement with foreign affairs and international law through the prism of *coordination*. The prevailing account of the relationship of sub-national, national, and international institutions and interests sees a domestic regime of dual federalism embedded within a Westphalian order of states. This suggests a particular paradigm of coordination. In it, the effective operation of international legal norms (i.e., a desire for what I would term “externally directed coordination”) dictates the imposition of national standards on sub-national authorities (i.e., a pattern of “internally directed coordination”).

Two dimensions of this prevailing account of coordination in sub-national, national, and international relations stand out. The first is the centrality of national governance.<sup>6</sup> The nation is, quite literally, at the center of the equation: In its pursuit of *external* coordination, the nation imposes *internal* coordination. Equally relevant to the analysis herein is a second dimension, concerning the directionality of the engagement of sub-national and international institutions and interests. Implicitly, in the prevailing account of coordination in sub-national and international relations, influence and authority run from the latter to the former. Relevant interests and preferences originate at the international level and are (via national power) brought to bear at the sub-national level, and *not* vice-versa.

From these more conceptual dimensions of the architecture of coordination in sub-national, national, and international relations, there emerge two central assumptions of the study of foreign affairs and international law. Both, in a sense, can be said to speak to the voices that are heard (and not heard) in the interaction of sub-national, national, and international institutions. Effective engagement in foreign affairs, to begin, is said to demand that a nation speak with a single, national-level voice. International law, meanwhile, is widely understood to silence (or at least to disregard) sub-national voices. What follows, at heart, is an attempt to challenge these oft-repeated claims about *voice* in sub-national, national, and international relations.

To do so, this article explores the dynamics of sub-national, national, and international coordination today.<sup>7</sup> To begin, I suggest that the internally directed half of the conventional coordination account – *national* coordination of *sub-national* actors, in the service of *international* needs – appears increasingly inapposite. States and localities are increasingly engaged with

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6. In a sense, this can be understood as the essence of the Westphalian system. See Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 122-23 (2007).

7. While I draw on the lessons of game theory, my emphasis herein is not on the particular patterns of strategic interaction captured by coordination games. Cf. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54-55 (2d ed. 1980); Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 234-38 (2004). As I use it herein, the term “coordination” is intended more broadly.

foreign authorities and international questions. The externally directed half of the equation – that a single national voice is necessary for coordination – can likewise be questioned, with reference both to the theoretical literature of coordination, networks, and standard-setting, and to recent patterns of what I will term “horizontal coordination” among sub-national actors. State and local authorities are increasingly coordinating their engagement of international questions with foreign and domestic counterparts alike.

Growing state and local initiative in international affairs thus represents an important challenge to our conventional accounts of foreign affairs and international law. First, it belies notions of foreign affairs and international law as exclusively national in practice. Second, it undermines assertions that such exclusivity is necessary if chaos is not to ensue. Internally directed coordination by national authorities is thus of declining significance in the realm of foreign affairs and international law. Yet this need not dictate any decline in externally directed coordination. Such coordination simply takes a different form.

The foregoing suggests the preliminary outlines of a distinct account of the relationship of sub-national, national, and international institutions and interests. In broadest terms, that relationship can be understood to fall somewhere between the conventional dynamic of hierarchy, running from international to sub-national via national authority, and the threatened alternative of decentralized dis-coordination in foreign affairs and international law. In this, it may represent a third way, within which overlap and interdependence foster potential for recurrent engagement, learning, and coordination.<sup>8</sup> In exploring the changing dynamics of transnational coordination, then, we may begin to sketch a new account of sub-national, national, and international relations.<sup>9</sup>

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8. In this respect, the analysis herein resonates in important respects with the “new governance” literature, exemplified in the work of Mike Dorf and Chuck Sabel, Brad Karkkainen, Orly Lobel, Joanne Scott and Gráinne de Búrca, and Bill Simon, among others. See, e.g., LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Bradley C. Karkkainen, *Information-Forcing Environmental Regulation*, 33 FLA. ST. U. L. REV. 861 (2006); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004). It likewise invokes the essential aspiration of Harold Koh’s “transnational legal process . . . to empower more actors to participate.” Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656 (1997).

9. The pattern described above – of sub-national engagement in the creation, evolution, and internalization of international norms – holds significant implications for sovereignty and democracy-grounded critiques of international law. As Judith Resnik has argued, if the internalization of international norms occurs by way of executive and legislative action, as it commonly does at the state and local level, it is

In Part I, I successively describe the federalism revolution of recent years, the growing engagement of sub-national authorities with foreign affairs and international law, and the resulting changes in the dynamics of federalism in those areas. Thereafter, in two parts, follows the heart of my analysis – of the twin dimensions of coordination described above. Part II considers the ways in which increasing sub-national engagement with international norms undermines conventional notions of international law as silencing sub-national voices.<sup>10</sup> Rather than stifling sub-national voice, international law may increasingly do just the opposite, creating opportunities for states and municipalities to be heard. Part III, in turn, emphasizes the networks of states and localities that increasingly coordinate sub-national engagements in foreign affairs. Drawing on the analysis of standard-setting processes and networks, it emphasizes that such horizontal coordination may operate as an effective substitute for familiar patterns of centralized (i.e., national-level) coordination in foreign affairs.

Building on the foregoing, two final sections step back from the immediate questions of foreign affairs and international law to offer a broader account of the relations of sub-national, national, and international institutions and interests. In Part IV, I describe a regime of “intersystemic governance” as a potential framework for the analysis of this changing relationship. Successively, I describe the core elements of such a regime, note the continuing contributions of national authorities within it, and consider how it both is, and might be, exemplified in various concrete cases of multi-level governance. Part V takes this analysis a step further, to consider the normative attraction of such patterns of “intersystemic” interaction, the potential indications and contra-indications of its applicability and likely efficacy, and the resulting limits on its use.

In important respects, the legal literature has been insufficiently nuanced in its accounts of governance at both the international and the sub-national level. As to the former, we have tended to be overly focused on the singular question of a perceived lack of “legal” authority and hierarchy in international governance.<sup>11</sup> As to sub-national governance, meanwhile, we have simply been inattentive. In the face of these tendencies, what follows represents one

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quite fully democratic. See Judith Resnik, *Law as Affiliation: “Foreign” Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT’L J. CONST. L. 33, 53 (2008). Because it arises from the initiative of the political branches at the sub-national level, meanwhile, it is equally consistent with the demands of federalism. See *id.* The growing integration of international law through sub-national initiative, thus, blunts much of the “nationalist” critique advanced by Jack Goldsmith, Curt Bradley, and others. 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).

10. Cf. Resnik, *supra* note 5, at 35.

11. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1177 (2007).

effort to integrate international and sub-national governance into a common and collective – even coordinated – picture of the interaction of sub-national, national, and international institutions and interests.<sup>12</sup>

## I. FOREIGN AFFAIRS, INTERNATIONAL LAW, AND THE NEW FEDERALISM

Recent years have seen the continued advance of the federalism revolution first initiated by the Supreme Court in the early 1990s. Of late, in fact, federalism has even begun to play itself out in the traditionally federal spheres of foreign affairs and international law. We have thus seen a growing engagement of sub-national authorities in questions of foreign affairs and international law. Echoing patterns of “new federalism” in other spheres, however, such sub-national engagement has been characterized by a certain concurrency in federal and state participation.

### A. *The Federalism Revolution*

In the fall of 1994, during my first semester of law school, we were taught early (and often) that federalism was dead. In modern America, we learned, states were no longer a meaningful source of identity. Nor did they enjoy real power. Their nominal “sovereignty” should not be understood to limit federal authority – whether as a constitutional or even a political matter – in any way. There was, it is true, the small issue of *New York v. United States*.<sup>13</sup> There, the Supreme Court had recently struck down provisions of the federal Low-Level Radioactive Waste Policy Act, for its “[commandeering of] state governments into the service of federal regulatory purposes.”<sup>14</sup> But *New York* was the peculiar exception that proved the rule.

By the end of my first year, however, all that had changed.<sup>15</sup> On April 26, 1995, the Supreme Court issued its decision in *United States v. Lopez*,

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12. It bears emphasizing that the analysis herein seeks to elucidate the changing dynamics of U.S. federalism. Aspects of the political economy I describe below may well exist (as a descriptive matter) or be useful (as a normative matter) in other jurisdictions as well. In that spirit, I suggest various foreign and transnational analogues to the patterns of domestic interaction I describe. In doing so, however, I do not mean to suggest that the institutional dynamic I outline captures patterns of multi-level governance in all federal states.

13. 505 U.S. 144 (1992).

14. *Id.* at 175. One might arguably cite *Gregory v. Ashcroft*, 501 U.S. 452 (1991), as the very first intimation of the sea change that ultimately took place.

15. Perhaps providing an odd sort of support for the oft-repeated claim that Yale Law School does not teach law. See, e.g., Royce de Rohan Barondes, *Want Your Opinions Questioned or Reversed? Hire a Yale Clerk (And Don't Require the Bar)* (Apr. 3, 2008), available at <http://ssrn.com/abstract=1116343> (draft on file with author).

striking down the Gun-Free School Zones Act on the basis that Congress had failed to establish constitutional grounds for legislative action under the Commerce Clause.<sup>16</sup> While not an entirely unprecedented basis for the abrogation of federal law, before *Lopez* the Commerce Clause had not been heard from in sixty years.<sup>17</sup> Later years of law school brought more of the same, however, with *Seminole Tribe of Florida v. Florida* striking legislation down under the Eleventh Amendment,<sup>18</sup> *City of Boerne v. Flores* under the Fourteenth Amendment,<sup>19</sup> and *Printz v. United States* under the Tenth Amendment.<sup>20</sup> Nor did the federalism revolution stop there, with a succession of additional state sovereign immunity decisions – in *Alden v. Maine*,<sup>21</sup> *Kimel v. Florida Board of Regents*,<sup>22</sup> and *Board of Trustees of the University of Alabama v. Garrett*<sup>23</sup> – and a further Commerce Clause decision, in *United States v. Morrison*,<sup>24</sup> coming in the years since.

The resurgence of federalism in the United States has not been limited to the courts, moreover. Rather, a revitalized discourse of federalism has become a central feature of American politics. Candidates for elected office, perhaps particularly among Republicans, have been forced to attend closely to the demands of federalism. Congressional legislation, in turn, is often attacked or defended on grounds of federalism.

To be sure, no great consistency has been evident in the renewed embrace of federalism. The Court has not hesitated to assert strikingly broad claims of federal preemption.<sup>25</sup> Nor has it shied away from broad interpretations of the Dormant Commerce Clause,<sup>26</sup> of due process limitations on state punitive damages awards,<sup>27</sup> of the regulatory takings doctrine,<sup>28</sup> and even of

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16. 514 U.S. 549 (1995).

17. The Supreme Court had last struck down federal legislation on Commerce Clause grounds in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

18. 517 U.S. 44 (1996).

19. 521 U.S. 507 (1997).

20. 521 U.S. 898 (1997).

21. 527 U.S. 706 (1999).

22. 528 U.S. 62 (2000).

23. 531 U.S. 356 (2001).

24. 529 U.S. 598 (2000).

25. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000). Robert Schapiro has challenged the conventional perception of inconsistency in the Court's jurisprudence, offering a distinct analysis – and reconciliation – of its federalism and preemption caselaw. *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005). In both categories, he argues, the Court should be seen as defending a “dual federalist” allocation of exclusive, non-overlapping jurisdiction, be it to the states (in the Court's federalism cases) or to the federal government (in its preemption cases). *See id.* at 247-48.

26. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

27. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).



the Equal Protection Clause, in the *sui generis* case of *Bush v. Gore*.<sup>29</sup> Congress, meanwhile, has embraced an ever-advancing federalization of criminal law,<sup>30</sup> has preempted state securities law,<sup>31</sup> and – perhaps most strikingly – has stripped state courts of jurisdiction over a wide array of class actions.<sup>32</sup> The broad trajectory of the last twenty years, however, is fairly clear. The federalism revolution has continued its onward march.

### B. *New Voices in Foreign Affairs and International Law*

An important recent beachhead in the advance of the federalism revolution has been the realm of foreign affairs and international law. Even by the standards of a revolution, this represents a notable shift. Foreign affairs and international law – with some limited caveats – have been areas of particular insulation against sub-national participation.<sup>33</sup> If any area has been a realm of clear and exclusive national authority, this has been it. Yet even here, there are signs of a new federalism taking hold.

The academic literature might be seen to have taken an early step in this direction, including in its debates over the nature of customary international law (CIL). Traditional views of CIL as federal common law have been challenged in recent years by revisionist scholars including Curt Bradley and Jack Goldsmith.<sup>34</sup> Grounding their analysis in the demands of federalism, among other bases, the revisionists have argued that CIL should not be applied by the federal courts absent authorization by the political branches or action by the states to incorporate CIL into state law. Proponents of the traditional view have responded forcefully, challenging the theoretical and historical analyses behind the revisionist view, and insisting on the conception of customary international law as preemptive of inconsistent state law under the Supremacy Clause.<sup>35</sup> This debate over the nature of CIL continues to date, having now begun to receive attention in the Supreme Court as well.<sup>36</sup>

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28. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

29. See 531 U.S. 98 (2000) (per curiam).

30. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1018-19 (2006) (“[F]ederal criminal jurisdiction continues to expand at a feverish pace.”).

31. See, e.g., Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.).

32. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

33. See, e.g., *infra* notes 117-129 and accompanying text.

34. See, e.g., Bradley & Goldsmith, *supra* note 9.

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

36. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); see also Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

The last several years, however, offer far more explicit evidence of federalism's growing relevance to questions of foreign affairs and international law. A first example comes from Congress. In the face of ongoing human rights atrocities in Sudan, perpetrated at least under the blind eye of the Sudanese government, if not with its blessing and support,<sup>37</sup> the U.S. Conference of Mayors and states including Arizona, California, Illinois, Louisiana, and New Jersey, among other sub-national authorities, have taken various steps to sanction or condemn the Sudanese government.<sup>38</sup> Among these, Illinois enacted particularly strong legislation, including a series of divestment provisions that barred the state treasurer and state pension funds from investing in (1) entities affiliated with the Sudanese government, (2) companies doing business in Sudan, or (3) banks that do not impose reporting requirements on their loan applicants regarding their associations with the Sudanese government.<sup>39</sup> Citing the decision in *Crosby v. National Foreign Trade Council*<sup>40</sup> – in which the Supreme Court struck down Massachusetts legislation barring state entities from purchasing goods or services from companies doing business in Burma – the National Foreign Trade Council challenged the Illinois act, securing a favorable decision from the U.S. District Court for the Northern District of Illinois.<sup>41</sup>

More notable was what came next: With some prompting by Illinois' Senate delegation, on December 31, 2007, Congress enacted the Sudan Accountability and Divestment Act of 2007 (SADA) into law.<sup>42</sup> In sharp contrast with past sanctions regimes, SADA explicitly authorizes state and local divestment measures against Sudan. “[A] State or local government may adopt and enforce measures . . . to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, persons that the State or local government determines . . . are conducting or have direct investments in business operations” in Sudan.<sup>43</sup>

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37. See HUMAN RIGHTS WATCH, DARFUR DOCUMENTS CONFIRM GOVERNMENT POLICY OF MILITIA SUPPORT (2004), <http://hrw.org/backgrounder/africa/072004darfur.pdf>.

38. See U.S. CONFERENCE OF MAYORS, ADOPTED RESOLUTIONS (2007), available at [http://www.usmayors.org/75thAnnualMeeting/resolutions\\_full.pdf](http://www.usmayors.org/75thAnnualMeeting/resolutions_full.pdf); John B. Reynolds, III & Maureen E. Thorson, California, Illinois and Other States Have Sudan Divestment Legislation: What Do You Need to Know? (Oct. 5, 2006), [http://www.wileyrein.com/publication.cfm?pf=1&publication\\_id=12782](http://www.wileyrein.com/publication.cfm?pf=1&publication_id=12782).

39. Act to End Atrocities and Terrorism in the Sudan, Ill. Pub. Act 94-0079, June 27, 2005.

40. 530 U.S. 363 (2000).

41. *Nat'l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

42. Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516.

43. *Id.* § 3(b). In signing the legislation, the President appended what has been widely viewed as a peculiar signing statement, given the relevant context. He stated, in part:

With this, Congress opened the door to state and local involvement in just the kind of foreign affairs questions that have typically been claimed to fall – as a matter of necessity – within the exclusive orbit of the federal government.<sup>44</sup>

Only a few months later, the Supreme Court got in on the act, issuing its long-awaited decision in *Medellin v. Texas*.<sup>45</sup> The underlying issue in *Medellin* concerned U.S. compliance with an order issued by the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals*, regarding the Vienna Convention rights of a group of Mexican nationals sentenced to death in state criminal proceedings.<sup>46</sup> Specifically, the ICJ had directed the United States to provide “review and reconsideration of the convictions and sentences of the Mexican nationals,” without regard to any procedural default arising from their failure to raise their Vienna Convention claims in a timely fashion.<sup>47</sup> Given the conviction of the Mexican nationals in *state* court, however, the analysis in *Medellin* focused on whether the U.S. response to the ICJ decision could be dictated by the president – as he sought to do with a memorandum directing state courts to comply with the decision – or had to be left to the states to determine.<sup>48</sup> As to this question, the Supreme Court ruled for

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This Act purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy. However, as the Constitution vests the exclusive authority to conduct foreign relations with the Federal Government, the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.

Statement on Signing Sudan Accountability and Divestment Act of 2007, 43 WEEKLY COMP. PRES. DOC. 1646 (Dec. 31, 2007). Given the statute’s explicit authorization of state and local action, the only plausible meaning of the president’s statement would seem to be that he enjoys the power to override Congress’ will, in shaping sanctions policy toward Sudan.

44. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 423-24 (2003); *Crosby*, 530 U.S. at 381 (noting need for the President “to speak for the Nation with one voice in dealing with other governments”).

45. 128 S. Ct. 1346 (2008).

46. *Id.* at 1353; see *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

47. *Avena*, 2004 I.C.J. at 72.

48. Subsequent to the Supreme Court’s grant of certiorari, but prior to oral argument, the President issued a “Memorandum for the Attorney General,” entitled “Compliance with the Decision of the International Court of Justice in *Avena*,” which provided, in pertinent part:

“I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of

the State of Texas, holding that “neither *Avena* nor the President’s Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.”<sup>49</sup> In holding as much, the Court did not dispute that “the ICJ’s judgment in *Avena* creates an international law obligation on the part of the United States.”<sup>50</sup> Absent joint action by the federal executive and legislative branches, however, compliance with that obligation was not for the federal courts to secure.<sup>51</sup>

With this conclusion, the Court can essentially be understood to have sanctioned a critical role for the State of Texas – and the states generally – in determining the nature and scope of U.S. compliance with its Vienna Convention obligations.<sup>52</sup> In his concurrence with the judgment of the Court, Justice Stevens emphasized as much, in terms worth quoting in full:

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

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comity in cases filed by the 51 Mexican nationals addressed in that decision.”

*Medellin*, 128 S. Ct. at 1355.

49. *Id.* at 1353.

50. *Id.* at 1367.

51. It bears emphasizing that the Court did not question the ability of Congress and the President, acting jointly, to impose their will on state authorities. That no such joint action had been undertaken to that point, nor has been undertaken since the decision, however, lends support to the interpretation of *Medellin* I offer – one in which the State of Texas is central to our compliance with the ICJ’s decision. The implications of *Medellin*, as such, can reasonably be understood to be as much about the vertical question of federalism, as the horizontal question of separation of powers.

52. The pattern of institutional interactions that played out in the very first (of several) encounters between the U.S. Supreme Court and the International Court of Justice over the Vienna Convention on Consular Relations, in *Breard v. Greene*, 523 U.S. 371 (1998), might fairly be seen to have foreshadowed the central role given the State of Texas by the Court’s decision in *Medellin*. In *Breard*, the Court faced the question of whether it would issue a stay of execution requested by the International Court of Justice, to allow the latter to proceed with its review of the case. Over several dissents, the Court declined to grant any stay, and the State of Virginia proceeded with the execution, dismissing the personal entreaties of the U.S. Secretary of State to Virginia’s governor that Breard’s execution be delayed. See William J. Aceves, *Application of the Vienna Convention on Consular Relations* (Paraguay v. United States) – *Provisional Measures Order*, *Breard v. Greene*, 92 AM. J. INT’L L. 517 (1998). Like Texas in *Medellin*, Virginia might be said to have been given voice in *Breard*.

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.<sup>53</sup>

To a growing degree, incidents of sub-national engagement with foreign affairs and international law akin to those endorsed by SADA and in *Medellin* are not aberrations, but the norm.<sup>54</sup> Consider, by way of further example, the extensive involvement of sub-national authorities with foreign and international initiatives regarding the issue of climate change. More than 800 mayors, representing almost 80 million Americans, have endorsed the Kyoto Protocol.<sup>55</sup> At the state level, ten states have joined with the Canadian provinces of British Columbia and Manitoba, the European Commission, individual European countries, and New Zealand to promote transnational “cap-and-trade” initiatives. Another eight states joined with several Canadian provinces to establish the Great Lakes Agreement.<sup>56</sup>

Nor is climate change unique. To analogous effect has been the state and local response to the failure of the United States to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). By 2004, forty-four U.S. cities, eighteen counties, and sixteen states had considered or passed legislation related to CEDAW. Some jurisdictions have even gone so far as to implement its provisions as a matter of local law.<sup>57</sup>

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53. *Medellin*, 128 S. Ct. 1374 (Stevens, J., concurring).

54. Cf. Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2383 (2006) (suggesting emergence of category of foreign policy initiatives by state executive branch officials). In suggesting as much, I do not dispute the presence of countervailing tendencies as well. The Supreme Court articulation of broad foreign affairs preemption – to which SADA might be seen as a response – was thus issued only in 2000. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000). Even more recently, in 2003, the Supreme Court’s decision in *American Insurance Ass’n v. Garramendi*, 539 U.S. 396 (2003), offered an expansive account of federal power in the realm of foreign affairs, within which sub-national action was significantly constrained. Ultimately, then, the empirical question – one it is too early to resolve – is whether the data points that I emphasize herein represent a trend, or passing deviations from the longstanding norm of strongly national authority in foreign affairs and international law. Given the broader context described above, I suspect the former; I do not doubt for a moment, however, that one could fairly disagree.

55. See Resnik, Civin & Frueh, *supra* note 4, at 718-19.

56. See *id.* at 719-20.

57. See Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001); see also Resnik, Civin & Frueh, *supra* note 4, at 724. A recent, peculiar example of sub-national initiative in the realm of foreign affairs was the University of Massachusetts’ decision to strip Robert Mugabe, who had just brutalized his way to another term as President of Zimbabwe, of the honorary degree it had granted him

In a growing number of these cases, relevant state and local participation goes well beyond “symbolic” politics – the rubric under which sub-national engagement with foreign affairs and international law is often dismissed.<sup>58</sup> The enactment of CEDAW’s provisions in local law is one example. Divestment measures directed against Sudan are similarly substantive. Likewise, certain state and local commitments in the realm of climate change. To be sure, symbolic measures are common as well. Contrary to the standard implication, moreover, they are not without force and significance.<sup>59</sup> To a growing degree, however, the sub-national initiatives of interest herein go beyond rhetoric to impact actual policy.

I do not mean to suggest that the patterns of sub-national engagement emphasized herein represent wholesale, irreversible, or unprecedented change.<sup>60</sup> The trend I highlight has not yet risen to the level of structural change; it remains highly contingent. As a matter of doctrine, thus, the dominant position of the federal government in the hierarchy of foreign affairs and international law remains in place. The Supremacy Clause fully ensures as much.<sup>61</sup> Even as to the two examples highlighted above – the Sudan Accountability and Divestment Act and the Supreme Court’s decision in *Medellin* – national-level institutions were ultimately responsible for creating the space for relevant sub-national initiative.<sup>62</sup> Further, one could offer starkly different

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years before. See Peter Schworm, *UMass Voids Honor Awarded to Mugabe*, BOSTON GLOBE, June 13, 2008, at 4.

58. Cf. Robert Stumberg, *Preemption & Human Rights: Local Options After Crosby v. NFTC*, 32 LAW & POL’Y INT’L BUS. 109, 157 (2000).

59. Cf. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022-24, 2045 (1996).

60. To begin, there is prior precedent for the type of sub-national engagement I highlight. See generally Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457 (2004). More broadly, a history of sub-national engagement of the international might be seen in longstanding state law rules for the enforcement of foreign judgments. The critical question is whether such occasions for engagement are expanding their reach, and perhaps even emerging as a broader trend.

61. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

62. Separately, one might argue that we should distinguish these cases from one another, in that the federal political branches can be seen as encouraging sub-national initiative in the case of SADA, while the executive branch sought to constrain it (with the president’s memorandum) in *Medellin*. See *supra* notes 43-44, 48-49 and accompanying text. Such disaggregation of what I have cast as the “national” level of government (and of sub-national and international institutions and interests as well) is surely a useful element of the analysis. Cf. Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327 (2006) (analyzing distinct phenomenon of “executive federalism”); Ku, *supra* note

accounts of each example. *Medellin* could be read as purely a story of the *horizontal* allocation of power between the executive and legislative branches, rather than its *vertical* allocation between federal and state governments.<sup>63</sup> SADA, meanwhile, might be cast as a case of congressional avoidance, rather than the empowerment of states and localities.<sup>64</sup> Finally, one might cite any number of counter-examples to SADA and *Medellin*. Consider the Court's only slightly earlier decisions in *Crosby v. National Foreign Trade Council*<sup>65</sup> and *American Insurance Ass'n v. Garamendi*,<sup>66</sup> which point in just the opposite direction.<sup>67</sup>

I would not dispute much of the foregoing as important caveats to my analysis. On the other hand, the assertion of continued federal dominion over foreign affairs and international law may prove too much. That assertion, at heart, defines the degree of national versus sub-national power by reference to the scope of questions as to which federal authorities could – as a matter of doctrine – impose their will. If that is the relevant metric, however, one

54, at 2384 (engaging in analogous disaggregation in study of “gubernatorial” foreign policy). Given the present aim to analyze the implications of sub-national initiative in foreign affairs and international law, however, the analysis herein casts the national level of government in unitary terms, encompassing both the political branches’ sanction of sub-national action in SADA and the Supreme Court’s sanction of it in *Medellin*.

63. See *supra* note 51. Further, the interaction of Texas with international norms in *Medellin* might itself be framed in distinct ways. I cast it as an expression of state voice, with Texas empowered to determine how to apply the judgment of the International Court of Justice. Conversely, one might place emphasis on Texas’ decision to essentially reject any applicability of international law to its decision. I emphasize the former account, given that my analysis herein is not about the promotion and advance of international law, so much as about state and local participation. One might thus consider Texas’ involvement as normatively attractive or unattractive on the merits. My emphasis is on the process, however, and on sub-national engagement in it. See *infra* Part V.A.

64. On the other hand, Congress could have engaged in such avoidance by simply imposing its own half-measures against Sudan. With SADA, by contrast, it took the unprecedented step of giving explicit sanction to state and local initiative. It is the latter, I believe, that holds the real significance. That the relevant state and local initiatives of interest *predated* the adoption of SADA, furthermore, would seem to support an account closer to my own, of genuine state and local initiative, influence, and even power.

65. 530 U.S. 363 (2000).

66. 539 U.S. 396 (2003).

67. Of course, the underlying facts that precipitated *Crosby* and *Garamendi*, as opposed to the doctrine enshrined in the cases’ holdings, supports my account of increasing state and local engagement with foreign affairs and international law. That states and localities have *persisted* in such engagement even after those decisions, and have now begun to find support for that engagement, from both Congress and the Court, might be seen as even stronger evidence of the proposition that sub-national engagement is on the rise and is coming to be more widely accepted.

might argue that vast swaths of U.S. law and regulation – at least besides the criminalization of gun possession near schools (per *United States v. Lopez*) and the imposition of civil liability for domestic violence (per *United States v. Morrison*) – should be understood as “federal” in nature.<sup>68</sup> If the answer to my emphasis on the growing participation of states and localities in foreign affairs and international law is that the federal government still has the final word, then state law looks to be irrelevant far more generally. If we throw in *Missouri v. Holland*’s seeming authorization of *any* federal legislation adopted pursuant to a binding treaty,<sup>69</sup> in fact, the irrelevancy of state law becomes even starker – even encompassing gun possession in school zones and domestic violence! This obviously misses something about the nature of state versus federal authority.

My analysis of increasing sub-national engagement with foreign affairs and international law thus looks beyond the doctrinal authority for that engagement. Notwithstanding *Missouri v. Holland* and the still incredibly expansive scope of the Commerce Clause, states most assuredly *do* exist in the political economy of the United States.<sup>70</sup> And it is likewise in this sphere of our modern political economy that state and local engagement with foreign affairs and international law is increasing, and should be assessed. Across

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68. In an analogous spirit, Mark Roe has offered an account of corporate law as essentially federal, given the federal government’s capacity to preempt any state rule of corporate governance to which it objects. See Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 601 (2003). He is worth quoting at length:

Imagine that corporate law consists of four yes-no rules. Delaware decides yes or no for all four. Two come out (on average) as federal authorities wanted. One they find repugnant and replace. As for the fourth, the federal authorities find it objectionable but tolerable (or the authorities are divided), so they leave it in place. What is then left in Delaware is only what the federal authorities like or tolerate. Even without Delaware reacting strategically to the federal threat, the totality of Delaware corporate law in this scenario is principally what the federal authorities would want, even though Delaware nominally writes most of the rules. One could look at the situation I have just described and say, as observers normally might, that corporate law is 75% state-made (or conceivably 100%, because the federal portion is redefined as an affair external to the corporation and thus not vital to state corporate law). Instead, I submit, corporate law in this setting can be seen as up to 87.5% federal (25% from the rule the federal authorities take over directly; 50% from the two rules they observe, like, and leave alone; and 12.5% from splitting the one rule that they are indifferent to). Delaware gets to say the words, but only as long as the federal authorities tolerate its script.

*Id.*

69. See *infra* note 74 and accompanying text.

70. Contrary to the Supreme Court’s assertion in *United States v. Belmont*, 301 U.S. 324, 331 (1937), that “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally . . . the state of New York does not exist.”



numerous areas of law, something is different in the interaction of sub-national and international institutions and interests, by comparison with a decade or two ago. The latter cannot be explained by doctrine, which has shifted only in limited respects, if at all. But something has assuredly changed.

State and local engagement with foreign affairs and international law, as such, may not yet represent a wholesale shift. But it does represent a change – not primarily in doctrine, but in the reality of governance. Such change is not irreversible, nor is further change inevitable. It is a possibility, however, in a way different than it has traditionally been. At some point, moreover, one might expect this shift to become difficult to undo. Once states and localities have a real voice in U.S. foreign affairs and the making of international law, the political economy of domestic federalism – if not necessarily constitutional doctrine – may make them difficult to silence.<sup>71</sup>

### C. *The New Federalism of Foreign Affairs and International Law*

In evaluating the implications of the foregoing for the relationship of sub-national, national, and international institutions and interests, a first step is to appreciate the changing nature of domestic federalism. *Missouri v. Holland* – central as it is to the analysis herein – offers a useful point of entry.<sup>72</sup> In *Holland*, the Supreme Court considered the constitutionality of federal legislation regulating the hunting of migratory birds. In the lower courts, directly analogous legislation had been struck down for falling beyond the

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71. A final caveat is in order: I do not mean to paint an entirely rosy picture of the engagement of states and localities with foreign affairs and international law. The views pressed by states and localities are not likely to always be ones that any given observer will find attractive. Judith Resnik points, by way of example, to state and local efforts to promote the anti-foreign Bricker Amendment and to encourage heightened resistance to desegregation. See Resnik, *supra* note 5, at 89-90.

72. 252 U.S. 416 (1920). The Court's decision in *Holland* has been the focus of a vibrant literature of foreign affairs federalism. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713 (2002); see also Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003). The fascinating range of doctrinal questions surrounding *Holland*, however, is not the focus of the present analysis.

Commerce Clause powers of the federal government.<sup>73</sup> Before the Court, however, the operative issue was Congress' attempt to avoid that constitutional constraint by ratifying a treaty *that required the United States to adopt just such legislation*. Thus faced with the question of whether the United States could "violate" the constitutional limits of federalism on the grounds of the treaty power, the Court – per Justice Holmes – held that it could.<sup>74</sup>

*Holland* should be understood to follow naturally from the notions of federalism ascendant at the time of the decision. In 1920, a conceptual framework of "dual federalism" prevailed in both theory and practice. In the dualist perspective, state and federal governments were understood to enjoy "exclusive and non-overlapping spheres of authority."<sup>75</sup> As to some subjects, states were empowered to regulate, and the federal government was not; in others, the federal government had free range to act, but states were powerless. Within this paradigm, the central project of federalism was to define the bounds of state versus federal authority. In a scheme of dual federalism, thus, the critical task is one of line-drawing.<sup>76</sup>

Broadly, such dualism can be seen to reflect a visceral sense of law's project as one of categorization, clear definition, and line-drawing.<sup>77</sup> Justice Scalia has spoken of the "Rule of Law" as the "law of rules."<sup>78</sup> *New York v.*

73. In those courts, the hunting itself was construed as a purely intrastate activity, even if the birds had occasion to migrate across state lines. As such the Commerce Clause was held to be inapposite.

74. *Holland*, 252 U.S. at 433. As Justice Holmes put it:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.

*Id.*

75. See Schapiro, *supra* note 25, at 246; see also Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1526-37 (2002). But see Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105 (2008) (noting the *Holland* court's reference to decision of prior term, in *Carey v. South Dakota*, 250 U.S. 118 (1919), as suggesting an acceptance of concurrent state authority over the hunting of migratory birds).

76. See Schapiro, *supra* note 25, at 246; see also Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 820 (2004) ("[T]he dominant tendency in U.S. jurisprudence has been to view the projects of federal and state governance as essentially distinct and to solve intergovernmental conflicts by trying to establish clear boundaries between the two.')

77. See Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 865-66 (2006); see also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 579-80 (1988) (noting tendency to seek clarity in law).

78. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

*United States*, with its insistence on clear lines of federal and state accountability, was motivated by similar notions.<sup>79</sup> Within this construct, law serves as a mechanism of clarity and certainty.<sup>80</sup>

Whatever utility such line-drawing may once have had – whether in federalism or law more generally – it no longer captures the nature of American governance. Concurrent federal and state jurisdiction has become the norm across an array of subject-matter areas.<sup>81</sup> Patterns of “delegated program” federalism – in which federal regulatory authorities define goals to be pursued (or surpassed) through varied state and local initiatives – are no longer the exception, but the rule.<sup>82</sup> Environmental law is the paradigmatic case of this pattern. But jurisdictional overlap is evident across the breadth of U.S. law and regulation. For all the effort to rationalize corporate versus securities law as *state* versus *federal* law, the law in action – and increasingly even on the books – makes it difficult to do so.<sup>83</sup> Education law, particularly after adoption of the No Child Left Behind Act, offers yet another case of such overlap.<sup>84</sup>

If the cases of SADA and *Medellin*, as well as other examples cited above, are any indication, it may be increasingly plausible to think of the dynamic of federalism in foreign affairs and international law as operating along these lines as well. Sub-national participation is not displacing national authority in foreign affairs and international law, as would follow from a dualist orientation to exclusivity. Rather, emerging state and local voices supplement national power; they are redundant of it.<sup>85</sup>

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79. 505 U.S. 144, 168-69 (1992). To similar effect was the insistence in *United States v. Morrison*, 529 U.S. 598 (2000), on a constitutionally mandated distinction “between what is truly national and what is truly local.” *Id.* at 617-18 (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995)). See generally Resnik, *supra* note 75; Resnik, *supra* note 5.

80. Broadly, the analysis herein can be understood to challenge the conventional orientation to clarity in law and its study. Rather, as in the debate over standards versus rules, see, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976), my argument finds significant potential utility in ambiguity and complexity. See Ahdieh, *supra* note 77; Rose, *supra* note 77.

81. See Schapiro, *supra* note 25, at 246.

82. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1565-66 (2007). Buzbee explores the recent attempt to displace this norm, by enactment of federal regulatory ceilings rather than floors. See generally *id.* See also Anna Wilde Mathews et al., *State, Federal Powers Collide*, WALL ST. J., Feb. 1, 2008, at A8.

83. See Robert B. Ahdieh, *From “Federalization” to “Mixed Governance” in Corporate Law: A Defense of Sarbanes-Oxley*, 53 BUFF. L. REV. 721, 730-34 (2005).

84. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

85. Between the Supreme Court’s decision in *Holland* in 1920, and the recent examples of SADA and *Medellin* that I emphasize herein, of course, a great deal of relevant history and jurisprudence might be identified. Given my focus on the

In what follows, I engage the resulting patterns of sub-national, national, and international interaction from the vantage of “coordination.” By dissecting this multi-level relationship into distinct prongs of “internally directed coordination” and “externally directed coordination,” I believe, we may gain insight into the underlying dynamics at work. To begin, we discover the possibility that international law may increasingly function as a means to integrate additional voices – including those of state and local governments – into transnational discourse. Contrary to conventional assumptions, meanwhile, these additional voices need not imply anything for the degree of coherence/coordination in U.S. foreign affairs. Effective coordination may arise even out of a decentralized domestic regime; it will simply be coordination of a different kind.

## II. FROM COERCION TO VOICE: INTERNATIONAL LAW, NATIONAL COORDINATION, AND SUB-NATIONAL ENGAGEMENT

What are the implications of the growing engagement of sub-national authorities with foreign affairs and international law, for our prevailing sense of tension and conflict in the relationship of international norms and sub-national interests? In assessing as much, it is useful to begin with the conventional understanding of coordination across sub-national, national, and international institutions and interests, out of which such notions of conflict arise.

As commonly understood, the coordination dynamic at work in sub-national, national, and international relations might be dissected into external-ly and internal oriented dimensions. Beginning with the former, international law can essentially be understood as a mechanism of “externally directed coordination.” International norms – and our foreign relations in pursuit of them – can thus be seen as means to align public and ultimately private behavior across national boundaries. A nation’s engagement with foreign affairs and international law is motivated, as such, by the ends of coordination.

What is the significance of dual federalism’s allocation of decision-making over this coordination function to national authorities? To appreciate as much, it is useful to demarcate the ends and means of the coordination dynamic at work. As already suggested, externally directed coordination can fairly be understood as the relevant coordination *ends*. By way of its foreign affairs and international law commitments, national authorities seek to coordinate policy with other nations. Transnational efforts to harmonize securities disclosure requirements in order to encourage capital market investment and the protection of domestic investors, for example, suggest this pattern.<sup>86</sup>

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present-day dynamics of the relationship of sub-national, national, and international institutions, I gloss over that history. The evolution that brought us from *Holland* to the present day, however, surely deserves further attention and study.

86. See, e.g., Allowing U.S. Issuers to Prepare Financial Statements in Accordance with International Financial Reporting Standards, Securities Act Release No.

Other regulation in the financial arena (including banking regulation),<sup>87</sup> information-sharing initiatives in various areas of law (including in criminal enforcement), and international rules of intellectual property are further examples.<sup>88</sup>

If externally directed coordination constitutes the relevant ends in foreign affairs and international law, “internally directed coordination” might be seen as the operative means. Externally directed coordination is thus achieved by way of some alignment (i.e., coordination) of internal policies as well.<sup>89</sup> In many cases – and perhaps most – an essential expectation behind the externally directed coordination function of foreign affairs and international law is the coordination of rules and standards within the nation generally, rather than the alignment of national policies alone. Thus do bilateral and multilateral agreements ordinarily seek to bind sub-national authorities as well.<sup>90</sup>

But such commitment has not conventionally been secured from sub-national authorities directly.<sup>91</sup> Instead, internally directed coordination has been the preferred means to those ends. In order to effectively coordinate transnational norms, thus, the traditional regime of dual federalism simultaneously emphasized both the importance of a single voice charged to express the nation’s policy externally and the need to empower that speaker to impose said policy internally. Hence the allocation of authority to the national gov-

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33-8831, Exchange Act Release No. 34-56217 (Aug. 7, 2007), available at <http://sec.gov/rules/concept/2007/33-8831.pdf>.

87. See Cally Jordan & Giovanni Majnoni, *Financial Regulatory Harmonization and the Globalization of Finance* (World Bank Policy Research, Working Paper No. 2919, 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=343260](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=343260).

88. In international intellectual property regulation, of course, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), 33 I.L.M. 1125, 1197 (Apr. 15, 1994), can essentially be understood as a standard-setting project.

89. International trade agreements might be suggestive, in their reliance on commitments by national authorities to secure access to markets otherwise regulated by sub-national authorities. Rules regarding the trade in services – including the practice of law, for example – may particularly be characterized by this dynamic.

90. Duncan Hollis has explored the variety of ways in which executive branch officials have sought to avoid the imposition of such internally directed coordination, in their negotiation and ratification of treaties. See Hollis, *supra* note 62, at 1372-86. He acknowledges the limited efficacy of many of these efforts, on the other hand, as well as the perhaps equally numerous occasions when the executive did not do so. See, e.g., *id.* at 1375. Judging by his overall account, moreover, it would seem that the incidence of treaty impingements on federalism has gradually increased over time, notwithstanding these efforts. In any case, finally, a conceptual framework of externally directed coordination driving internally directed coordination remains widespread.

91. Some contrast might be drawn between this pattern and the requirement of provincial consent to international treaties in Canada. See *infra* note 193 and accompanying text.

ernment to engage in foreign affairs and international norm-creation, and to bind sub-national authorities to the commitments that result. In a regime of dual federalism, thus, foreign affairs and international law represent a centralized (i.e., national) mechanism of both externally and internally directed coordination.

In the common parlance, however, the relationship of international norms and sub-national interests is not merely hierarchical, as implied by the construct of internally directed coordination functioning in the service of externally directed coordination. It is also sharply conflictive. A certain conventional wisdom has taken hold, which sees some significant tension between international law and institutions on the one hand, and the demands of U.S. federalism on the other.<sup>92</sup> In this fairly common account, international law at least stifles, if it does not silence, domestic voices beyond those of a narrow set of national actors responsible for the foreign affairs of the United States.<sup>93</sup>

The Supreme Court's paradigmatic "when federalism meets foreign affairs" case, *Missouri v. Holland*, suggests this sense of conflict.<sup>94</sup> As described above, in *Holland*, the Court held that Congress could essentially avoid the constitutional limits of federalism, pursuant to the treaty power.<sup>95</sup> On its face, this holding highlights the tensions between the international and sub-national that underlie the notion of conflict in their interaction. Even more telling, however, is the less visible inversion of the ends and means of coordination that lies behind the decision. At least occasionally, internally directed coordination may be more than the necessary means to the desired ends of externally directed coordination. In some national-level engagements with international law, internally directed coordination of the sub-national may be the end unto itself.<sup>96</sup>

In *Holland*, thus, the federal legislation in question essentially *predated* the treaty obligation that the Court held to authorize its adoption.<sup>97</sup> As described by Mark Janis, negotiation and adoption of the relevant treaty was not motivated by any international impulse.<sup>98</sup> Rather, it arose out of Elihu Root's

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92. Cf. Resnik, *supra* note 5, at 35.

93. The aggressive efforts to enact the Bricker Amendment can be understood in just this light. Supporters of the amendment at the sub-national level thus saw the United Nations and related international agreements as a threat to state and local rules and practices related to race. See Mark W. Janis, *Missouri v. Holland: Birds, Wars, and Rights*, in *INTERNATIONAL LAW STORIES* 207, 220 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007).

94. 252 U.S. 416 (1920).

95. *Id.* at 433.

96. In such circumstances, we might think of the application of international law as a species of pre-commitment. See Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 *TEX. L. REV.* 2055 (2003).

97. See Janis, *supra* note 93, at 209, 211.

98. See *id.* at 209-11.

sense that such a treaty was the best means to defend the underlying U.S. legislation against constitutional challenge.<sup>99</sup> In *Holland*, thus, international law became simply a vehicle to advance domestic policy ends. Rather than internally directed coordination as the means, and externally directed coordination the ends, just the opposite was the case in *Holland*. International law functioned as the means to coordinate domestic policy around a preferred national norm – or, less euphemistically, to impose national norms on sub-national authorities.<sup>100</sup>

The end result may look the same. At an underlying level, however, the lack of any externally directed coordination basis (or at least any genuine basis) for the imposition of international law means something different for the relationship of sub-national, national, and international institutions and interests. In such cases, the imposition of national standards on sub-national authorities is not an unavoidable consequence of the pursuit of other goals; rather, it is the whole point of the exercise. At a minimum, such cases may help to explain the strong notion of conflict between international norms and state and local interests.<sup>101</sup>

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99. See *id.*; see also Hollis, *supra* note 62, at 1368 (noting irony of Root's earlier condemnation of the adoption of treaties "under pretense"). Nominally, to be sure, new legislation was enacted following adoption of the treaty. That legislation tracked the pre-treaty Weeks-McLean Act in its basic elements, however, making clear the essential continuity of the federal legislative efforts to regulate the hunting of migratory birds.

100. One might draw some parallel between this pattern and the operationalization of human rights norms in Europe, as captured in Andrew Moravcsik's "republican liberalism" approach. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 225-26 (2000). There, in essence, international human rights instruments and institutions standardized (i.e., coordinated) human rights norms – not only across nation-states but within them as well – by way of internally directed coordination. Minimally, the analogy may be useful in highlighting the possibility that the instrumental use of international law, as a means to foster internally directed coordination, may promote normatively attractive values, notwithstanding its deviation from what we would conventionally consider legitimate dynamics of coordination in sub-national, national, and international relations. The evaluation of relevant legitimacy, this suggests, may depend on one's relative prioritization of substantive versus procedural norms. See *infra* Part V.A.

101. Perhaps unsurprisingly, the account of *Holland* I offer – in which the relevant international agreement is directed to internal, rather than external, coordination in the first order – has been expressly disavowed by federal authorities. As emphasized in a 1955 U.S. State Department circular:

Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. Treaties are not to be used as a device for the purpose of effecting internal social changes or try to circumvent the constitutional procedures in relation to what are essentially matters of domestic concern.

Whether as an end unto itself or motivated by the pursuit of externally directed coordination, however, the basic dynamic of internally directed coordination lies at the heart of sub-national, national, and international relations in a regime of dual federalism. By way of the Supremacy Clause, foreign affairs and international law operate as a vehicle for the exercise of national control over sub-national policy. Within a dualist frame, then, international law – and perhaps the international order generally – can fairly be conceived as a tool of sub-national constraint.

What becomes of this account, however, with the decline of dual federalism, as described above?<sup>102</sup> How are we to understand the interaction of sub-national, national, and international institutions and interests, as sub-national voices increasingly overlap with the national voice in foreign affairs and international law? As Illinois takes on Sudan and Texas faces up to Mexico, how does a coordination account of the relationship of sub-national, national, and international change?

In the case of sanctions against Sudan, and the interpretation of and compliance with the ICJ judgment in *Avena*, sub-national authorities play the part of active participants, rather than passive subjects. Given as much, a story of internally directed coordination as the means by which national authorities pursue the ends of externally directed coordination seems inapposite. This is only more evident in the *Holland*-type case, in which internally directed coordination is the end unto itself. With growing state and local engagement in foreign affairs and international law, internal coordination becomes more difficult for national authorities to direct. The prevailing notion of inherent conflict in the interaction of international norms and sub-national interests must also consequently give way.

While the decline of dualist line-drawing in the domestic sphere necessarily diminishes its relevance in the transnational sphere, however, it does not necessarily – or at least immediately – eliminate it. In innumerable areas, one would expect foreign affairs and international law to continue to function as mechanisms by which national authorities impose coordination norms on sub-national authorities, in the service of transnational coordination. Where dual federalism's sharp exclusivity has diminished, however – perhaps in the imposition of sanctions against rogue states, in the interaction of domestic courts and international tribunals, and in the regulation of climate change, as described above<sup>103</sup> – the relationship of sub-national authorities with international norms arguably begins to look like the design of national policy generally. International law, in a sense, becomes just another sphere of national regulation. While sub-national authorities do not enjoy any veto power over

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Janis, *supra* note 93, at 223 (quoting DEP'T STATE CIRCULAR No. 175, Dec. 13, 1955); see also Hollis, *supra* note 62, at 1370 & nn. 254-55 (noting additional official statements rejecting use of the treaty power in this fashion).

102. See *supra* Part I.C.

103. Paul Berman has offered a broad enumeration of areas in which such overlap can be identified. See Berman, *supra* note 11, at 1197-234.



it, they can involve themselves actively in its design and evolution, and may even enjoy some significant range of motion within it.

International law, in this account, ceases to involve anything uniquely objectionable to sub-national authorities.<sup>104</sup> They might object to some incident of it on the merits – or perhaps even for its overuse – but not simply because it is international. States and localities thus commonly decry proposed federal legislation based on its substantive content; likewise, they often dispute the excessive federalization of law in one area or another.<sup>105</sup> International law, as we move from dual federalism to an emerging regime of shared federal and state jurisdiction, might be expected to be treated in a similar vein.<sup>106</sup>

Yet we might even go a step further. Ultimately, our conception of the relationship of international norms and sub-national interests – what we have traditionally seen as an arena of coercion and conflict – might come to look entirely different. Recall, once again, the growing engagement of states and localities with foreign affairs and international law that motivates the present analysis. With SADA, Congress can essentially be understood to have created an opportunity for states and localities to address the atrocities in Sudan. Likewise, the Court's decision in *Medellin*, with its functional placement of responsibility on the states to determine the nature and scope of U.S. compliance with *Avena*. The examples of the Kyoto Protocol and the Convention on the Elimination of All Forms of Discrimination Against Women are to similar effect. In each case, as described above, the relevant international norms have created a focal point for sub-national participation.<sup>107</sup>

In these cases, rather than silencing sub-national authorities, the discourse of foreign affairs and international law might instead be seen as giving them an opportunity to be heard. It creates, in essence, opportunities for state

104. This assumes, of course, that sub-national participation at the international versus national level is not structurally limited in some way. Critiques of particular international institutions as anti-democratic in ways distinct from domestic administrative processes are thus relevant here. Where sub-national authorities are precluded from participation in international decision-making processes – as in the Security Council, the International Monetary Fund, and the World Trade Organization – the dynamic of participation and voice I describe is inapposite. A further advance in the pattern I suggest herein might thus involve a progression from heightened *national* receptivity to sub-national participation, to *international* embrace of such participation as well.

105. Congress' aggressive federalization of criminal law in recent years might be critiqued on the latter grounds, for example. *See supra* note 30 and accompanying text.

106. Duncan Hollis outlines a distinct dimension of the decline of internally directed coordination, in his analysis of executive federalism. *See* Hollis, *supra* note 62. His suggestion of increasing executive branch efforts to avoid international commitments that impinge on domestic federalism is thus directly in line with the analysis herein.

107. *See supra* notes 55-57 and accompanying text.

and local authorities to give wider voice to their policy priorities and interests. In this dynamic, rather than operating as obstacle or constraint, international law, norms, and institutions offer a venue for sub-national authorities to promote their interests. As we move from dual federalism to jurisdictional overlap among federal, state, and local authorities in foreign affairs and international law, then, the latter may shift from means of coercion to mechanism of voice.<sup>108</sup>

How might foreign affairs and international law serve as a mechanism of voice? At the most basic level, sub-national authorities' participation in the discourse of foreign affairs and international law may simply offer them another occasion to speak up. In this case, the utility of international law to sub-national authorities is simply one of redundancy. If I can press my interests in additional fora, thus, the prospect of success may be that much greater. The real potential for foreign affairs and international law to enhance the participation of sub-national authorities, however, goes deeper.

For one, by joining in the discourse of foreign affairs and international law, states and localities may be able to engage a wider universe of similarly situated policymakers and supporters more generally. State officials in the United States may thus be better able to press their preferred policies in criminal law or other relevant spheres in conjunction with Canadian provincial officials. The quality of relevant policy proposals might also be expected to increase through such engagement, with some presumptive impact on the potential for success. At a minimum, the imprimatur of widespread usage, even across national lines, might be useful to state and local policy entrepreneurs.

Further, it seems plausible that the engagement of sub-national priorities under the rubric of foreign affairs and international law may lend those priorities a salience they otherwise would lack. Where issues of concern to states and localities are engaged at the transnational level, they might be expected to receive relatively greater national attention as well. International law may thus offer a kind of focal point effect in getting the concerns of states and localities on the table.<sup>109</sup>

In this account of sub-national participation and voice, to be sure, international law begins to mean something different. Yet, as we move away from a dualist notion of law as mechanism of line-drawing – as a tool of clarity and certainty – this may be entirely appropriate. To a growing extent, we may be wrong to think of law primarily as what ends up in a courtroom. Modern law and regulation encompass something far broader than

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108. As noted above, *see supra* note 9, this account obviates much of the “nationalist” critique of international law as anti-democratic and contrary to federalism. The internalization of international law by state executive and legislative officials is both democratic and fully consistent with the demands of federalism.

109. In some limited subset of cases, of course, relevant treaty provisions may explicitly give voice to sub-national authorities. *See, e.g.*, Hollis, *supra* note 62, at 1378.

determinate mechanisms of command and control. We may thus do better to think of law as offering a starting point for dialogue – a normative framework for analysis and action. As often as anything, it may serve as statement of norm and aspiration. Such law is “soft,” yet it may be no less consequential than its “harder” analogues. More importantly, it may be no less “law.”

In this spirit, I have previously explored the function of law and regulation as a source of non-coercive “cues” in fostering desirable coordination.<sup>110</sup> Where relevant parties require some effective signal as to the mechanism or ultimate equilibrium of coordination, expressive public acts may help to provide it. In its potential empowerment of sub-national authorities, one might imagine a role of just this sort for international law. International norms might thus function as a source of focal points for coordination among sub-national authorities. This may be an especially important function, in fact, as we consider the role of such “horizontal coordination” in refuting long-standing predictions of chaos, if states and localities were to engage with foreign affairs and international law – and the consequent insistence on “one voice” in foreign affairs.

### III. THE NEW COORDINATION

The introduction of sub-national voices to the shaping of U.S. foreign affairs and international law must necessarily impact our engagement with the world. As “foreign affairs” become intertwined with “local affairs,”<sup>111</sup> and the states and localities begin to speak to questions of foreign affairs and international law, a singular voice of U.S. foreign policy becomes increasingly difficult to identify.<sup>112</sup> Enactment of the Sudan Accountability and Divestment Act and the Court’s decision in *Medellin* highlight as much. With Congress’ decision, Sudan’s potential interlocutors in any diplomatic negotiation over sanctions now extend beyond the federal government. States and localities – or at least ones capable of impacting assets and entities of interest to the Sudanese government – must be engaged as well.<sup>113</sup> In *Medellin*, one might

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110. See Ahdieh, *supra* note 7.

111. See Resnik, *supra* note 5, at 35.

112. See Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006) (suggesting diminished focal quality of traditional mechanisms for internalization of human rights norms).

113. Alternatively, Sudan might continue to focus exclusively on the federal government, seeking congressional alteration of SADA. Even the latter would impose somewhat greater burdens on Sudan, however, by comparison with a negotiation directed exclusively to the federal executive authorities, and exclusively to the scope of federal sanctions. More importantly, once states and localities have been empowered to act against states such as Sudan, it may be difficult to strip them of that power. As with coffee mugs, so with legislative authority. A kind of corporate “endowment effect” might make it difficult to withdraw state authority once it has been

find similar evidence of the altered vantage of the United States' foreign counterparts. Following the Court's decision, even as the State of Texas considered its next step, Mexico was doing so as well – with targeted sanctions directed against Texas among its possible avenues of recourse.<sup>114</sup>

In Part II, we saw the ways in which the integration of sub-national voices diminishes the internally directed coordination function of international law – its function as constraint – perhaps even replacing it with a role in giving heightened voice to state and local authorities. What can we expect this “polyphony” of voices to imply for the *externally* directed coordination function of foreign affairs and international law? While Part II challenged the notion that international norms necessarily silence sub-national voices, what about the claim that a coherent foreign affairs demands “one voice”? Here, I question this familiar claim as well, arguing that it disregards both the possibility and the reality of what I will term “horizontal coordination.”

Again, it is useful to start with the conventional baseline – standard notions of the implications of federalism's devolution of decision-making authority. In the traditional account, the shift from federal authority to state and local autonomy represents a move to a kind of autarky. Essentially, it sees a move from a regime of hierarchy to the only other possibility – an open, free, and *uncoordinated* market. As Michael Greve has framed it, federalism involves the “individual, uncoordinated exercise of state sovereignty in a federal republic.”<sup>115</sup>

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given. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1236 (2003).

114. See Peter Spiro, *Making Texas Pay for Its Sins, or Why Ernesto Medellin May Live out His Days in Prison*, OPINIO JURIS, Mar. 25, 2008, <http://opiniojuris.org/2008/03/25/making-texas-pay-for-its-sins-or-why-ernesto-medellin-may-live-out-his-days-in-prison/>. As Peter Spiro has argued, in the face of the changing law, politics, and economics of international relations – and the resulting emergence of sub-national entities as what he terms “demi-sovereigns” – there is increasing potential for “targeted retaliation,” by which foreign states can direct retaliation for perceived wrongs at those specific sub-national jurisdictions that are the source of the perceived wrongdoing. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1261-70 (1999). Scale may be critical to this dynamic, with states likely to be more plausible subjects of targeted retaliation than localities. In any case, though, where foreign entities can direct their response to a particular sub-national target, concerns about the externalities attendant to sub-national foreign policy decision-making necessarily diminish. See *id.* at 1260-62. On the other hand, it is at least plausible that – as with the consistent targeting of WTO-authorized withdrawals of concessions at politically sensitive regions within the target nation-state (e.g., against the export of oranges, a major crop of the State of Florida) – foreign states may target retaliation *not* against the wrongdoer, but against those states with the greatest capacity to pressure the actual target state to come into line.

115. See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 322 (2003).

For its advocates, this is the essential attraction of federalism. It gives voice to state and local authorities, and to the citizenry for whom they are believed to most effectively speak. More broadly, federalism is seen as beneficial for its fostering of competition and its encouragement of heightened variation in the policy choices of states and localities. As to each of these benefits, autarkic – or atomistic – state decision-making is a critical assumption.

In certain spheres of law and regulation, conversely, this embrace of autarkic competition and variation are seen as federalism's critical weaknesses. In certain areas of economic policy, in products liability rules, in environmental protection, in the design and maintenance of redistributive policies, and elsewhere – competition and variation are considered the *problem*, not the solution. Here, we find the story of federalism as *chaos*. Or perhaps less derisively, as *dis*-coordination. In these circumstances, federalism is seen to offer a cacophony of voices, where we need the coherence of one.

Perhaps no set of issues has been more widely seen to fall within this sphere than foreign affairs and international law. Here, our commitment to the need for “one voice” has seemed to come by acclamation. Once again, the examples of sanctions policy toward Sudan and compliance with the International Court of Justice's decision in *Avena* are suggestive. In the litigation over Illinois' Sudanese divestment statute – as in the litigation of Massachusetts' sanctions legislation against Burma, a decade earlier<sup>116</sup> – the central issue was the asserted danger of sub-national engagement with questions of foreign affairs. In announcing its suit, the National Foreign Trade Council (NFTC) spoke of the need for the president to “have the flexibility to craft foreign policy that combines incentives and disincentives intended to change the behavior of foreign governments,” and of the tendency of “sanctions imposed by individual states or local governments [to tie] the president's hands.”<sup>117</sup> Responding to the district court's ruling in its favor in Illinois, the NFTC invoked *Crosby v. National Foreign Trade Council*: “The essence of [the Supreme Court's] ruling was that the President makes foreign policy, not the legislature and the governor of Massachusetts. And, he does not need fifty states, or lots of cities and counties, coming along with sticks and carrots which conflict with his [balance of incentives].”<sup>118</sup> Subsequent resistance to the federal-level Sudan Accountability and Divestment Act proceeded on similar grounds.<sup>119</sup> Even the Senate report on the legislation referenced the

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116. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

117. Press Release, Nat'l Foreign Trade Council (Aug. 17, 2006), available at <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1814&Category=All>.

118. Press Release, Nat'l Foreign Trade Council (May 21, 2007), available at <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1863&Category=All>.

119. “The NFTC fully supports efforts to bring peace and stability to Darfur, but encouraging states and local governments to levy sanctions against Sudan is not the

asserted tension between coordination and dis-coordination in the design of U.S. foreign policy.<sup>120</sup>

The amicus briefs in *Medellin* raised similar concerns in defending the president's "memorandum" and its directive to state courts to comply with the *Avena* judgment. The American Bar Association emphasized, for example, that "[i]n matters of international relations, federal interests are both paramount and exclusive of state interests."<sup>121</sup> It further cited the Supreme Court's statement in *Hines v. Davidowitz* that the "full and exclusive responsibility for the conduct of affairs with foreign sovereignties" lies with the federal government, and its insistence that "the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."<sup>122</sup> In international relations, above all areas, it is critical to "ensur[e] that the entire country speak with one voice."<sup>123</sup>

The amicus brief submitted by Dean Harold Hongju Koh and the Lowenstein Human Rights Clinic, on behalf of former U.S. diplomats, was even more explicit. Allowing the State of Texas to go its own way, the brief argued, would "promot[e] precisely the kind of diplomatic failure that

answer . . . [W]e continue to believe that it is in the best interests of the United States and our allies for the federal government to set foreign policy, not states." Press Release, National Foreign Trade Council (Oct. 17, 2007), available at <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1903&Category=All> (describing legislation as "subcontracting foreign policy to the states").

120. See S. REP. NO. 110-213, at 3 (2007) (Sudan Accountability and Divestment Act of 2007) ("The Committee recognizes that this legislation involves balancing two important interests. The first is the singular authority of the Federal Government to conduct Foreign Policy. The second is the ability of State and local governments to invest or divest their funds as they see fit. The Committee believes it has struck an appropriate balance by targeting state action in such a way that permits state divestment measures based on risks to profitability, economic well-being, and reputations, arising from association with investments in a country subject to international sanctions.").

121. Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 11, *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 1886208 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) ("[C]oncern for uniformity in this country's dealings with foreign nations . . . animated the Constitution's allocation of the foreign relations power to the National Government.") (internal quotation marks omitted)).

122. 312 U.S. 52, 63 (1941). The brief further cited *Board of Trustees of University of Illinois v. United States*, 289 U.S. 48, 59 (1933) ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."), and THE FEDERALIST NO. 80, in which Alexander Hamilton insisted that "the peace of the whole ought not to be left at the disposal of a part." See THE FEDERALIST NO. 80, at 500 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

123. Brief of the American Bar Association, *supra* note 121, at 13.

prompted the creation of the treaty power in the first place.”<sup>124</sup> The frustrations of the Framers with the “dysfunctional” federal-state allocation of power under the Articles of Confederation<sup>125</sup> “taught that permitting the States to impair the nation’s treaty obligations would significantly impede the conduct of the fledgling nation’s foreign affairs.”<sup>126</sup> “As the text and structure of [the applicable constitutional] provisions make plain, where our nation’s foreign policy is concerned, the Constitution does not recognize dual sovereignty.”<sup>127</sup> Most memorably, the amicus brief quotes the language of *United States v. Belmont*: “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, . . . the state of New York does not exist.”<sup>128</sup>

As to both Sudanese sanctions and *Medellin*, thus, resistance to the participation of sub-national authorities in foreign affairs and international law was grounded in a “chaos theory” of sorts. The engagement of foreign states, the logic goes, cannot be conducted at multiple levels.<sup>129</sup> As an exercise in externally directed coordination, it requires internally directed coordination. No other path to coordination is viable.

But does the growing participation of sub-national authorities in foreign affairs and international law-making in fact dictate a loss in coordination? Is there any alternative to the implicit autarky – even chaos – that the standard account of federalism implies?

Contrary to the conventional wisdom, there is. The new voices of sub-national authorities need not dictate any loss in coordination. Rather, it is simply the nature of such coordination that changes. In place of familiar, centralized patterns of coordination, the coordination dynamic at work in the engagement of sub-national authorities with foreign affairs and international law is *horizontal* in nature. Coordination can be achieved, and perhaps can even be expected; it simply cannot be dictated.<sup>130</sup>

124. Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner at 17, *Medellin*, 128 S. Ct. 1346 (No. 06-984), 2007 WL 1886206.

125. *See id.* at 17-18.

126. *See id.* at 17.

127. *Id.* at 20 (citing THE FEDERALIST NO. 42 (James Madison) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”)).

128. *Id.* at 20-21 (quoting *United States v. Belmont*, 301 U.S. 324, 331 (1937)).

129. To related effect, Jide Nzelibe has questioned the conventional grounding of the president’s foreign affairs authority in the claim that the executive is relatively less parochial than Congress. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006). Given the structure of presidential elections and the collective decision-making of Congress, just the opposite may be true.

130. It bears reiterating that my emphasis herein is on patterns of *domestic* coordination. Of course, analogous dynamics of coordination play out across national borders as well. The nature of coordination in the latter context is no less in need of our attention, but is simply not the focus of the present analysis.

One can appreciate as much from both a conceptual and an empirical perspective. Let us begin with the former. The study of standard-setting processes, and the broader game theoretic literature on so-called “coordination games,” can be helpful in highlighting the changed dynamics of coordination, as growing sub-national engagement with foreign affairs and international law moves us from the line-drawing exclusivity of dual federalism to concurrency, overlap, and complexity in our domestic political economy. An understanding of this literature at once alleviates our conventional worry about the possibility of dis-coordination, while also suggesting distinct perils that may warrant our attention.

In the growing literature on technical standard-setting, three mechanisms of coordination have commonly been emphasized.<sup>131</sup> The first two possibilities – the poles of the relevant range – echo the federalism literature. *De jure* standard-setting involves the centralized imposition of a common standard. In the technical sphere, such *de jure* standard-setting is exemplified by the European Union’s recently initiated P2P-Next standard-setting process for internet broadcasting.<sup>132</sup> The design of coordinated policies at the national level and their imposition on sub-national authorities, of course, is the *de jure* standard-setting of federalism.

At the other extreme, *de facto* standards are those that evolve through the atomistic decision-making of individual actors. Such standards essentially arise from the market. Among other *de facto* standards in the technical realm, the most familiar may be the Microsoft Windows operating system and the widely used PDF format for document delivery.<sup>133</sup> In federalism, this is the dynamic evoked in Michael Greve’s talk of federalism as the “individual, uncoordinated exercise of state sovereignty in a federal republic.”<sup>134</sup>

By contrast with the federalism literature, however, the standard-setting literature also acknowledges a third possibility. Variouslly termed either “group” or “committee” standard-setting, coordination here is neither a product of centralized decree, nor of a purely market dynamic in which atomistic decision-making may or may not produce coordinated results. Rather, in this case, substantive coordination is born of *actual* coordination. In group standard-setting, networks of relevant actors directly engage one another in vari-

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131. See Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 *FORDHAM L. REV.* 1125, 1135-37 (2002); see also Robert B. Ahdieh, *The Role of Groups in Norm Transformation: A Dramatic Sketch, In Three Parts*, 6 *CHI. J. INT’L L.* 231, 244-45 (2005).

132. See *New Technologies*, *COMM. DAILY*, Feb. 20, 2008.

133. Notably, in 2005, the PDF system was adopted by the International Organization of Standards (ISO), and thereby became what some usage of the parlance would term a “*de jure*” standard. See Betsy Fanning, *PDF Standards*, *AIIM E-DOC MAG.*, July 1, 2007, at 58.

134. See Greve, *supra* note 115, at 322.



ous seriatim (i.e., one-on-one) or collective patterns of discourse.<sup>135</sup> Coordination thus arises through negotiation.

The related literature of “networks” adds further texture to this possibility. Walter Powell famously wrote of networks as a form of organization that constitutes “neither market nor hierarchy.”<sup>136</sup> Such networks do not exhibit the internalization of economic functions and resulting dynamic of hierarchy that are characteristic of the firm.<sup>137</sup> On the other hand, they involve something more than arm’s length contracting – the conventional counterpoint to the firm.<sup>138</sup> Transactions instead occur “through networks of individuals engaged in reciprocal, preferential, mutually supportive actions.”<sup>139</sup> In a network dynamic, as such, “individual units exist not by themselves, but in relation to other units.”<sup>140</sup>

The dynamic of group standard-setting, network organization, and related forms of what I would term “horizontal coordination” offer critical insights into the implications of the growing participation of sub-national authorities in foreign affairs and international law.<sup>141</sup> At heart, the shift from dual federalism’s placement of exclusive decision-making authority at the national level, to a multiplicity of voices in foreign and international affairs, can be understood as a progression through each of the standard-setting possibilities outlined above. As noted above, the dynamic of *de jure* coordination is evident in national-level policy-making. The introduction of sub-national voices, in turn, moves us to the second possibility – of *de facto* standard-setting. Here, any degree of externally directed coordination in foreign affairs and international law is dependent on the atomistic decisions of a growing universe of sub-national authorities. To be sure, coordination re-

135. In various areas of high technology, such group standard-setting is quite common, with the Internet Engineering Task Force (IETF) being perhaps the most prominent example. See The Internet Engineering Task Force, <http://www.ietf.org> (last visited Sept. 26, 2008); see also Berman, *supra* note 11, at 1222-23; Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 542 (2003).

136. See Walter W. Powell, *Neither Market Nor Hierarchy: Network Forms of Organization*, 12 RES. ORG. BEHAV. 295 (1990).

137. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975).

138. See *id.*

139. See Powell, *supra* note 136, at 303.

140. See *id.* The study of transgovernmental networks – most prominently in the work of Anne-Marie Slaughter – draws this link even more explicitly. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041 (2003); see also Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002).

141. The coordination game literature likewise speaks to this dynamic of interaction. See *infra* notes 229-37 and accompanying text.

mains possible. In many technical areas, in fact, standardization has been achieved in just this way.<sup>142</sup> Any coordination that arises, however, involves no actual coordination – no affirmative engagement – among relevant states and localities.

Such is not the case as we move to the third phase. Dynamics of group standard-setting, as suggested above, involve the active pursuit of coordination. Sub-national authorities, in this dynamic, rely on various group structures and processes – networks of a sort – to foster necessary coordination in their otherwise atomistic decision-making. Externally directed coordination can thus be secured – but simply by a different means. Given as much, such patterns may represent an attractive approach in areas where coordination is a pressing need, such as foreign affairs and international law.

Such horizontal coordination among sub-national authorities, moreover, might be seen to involve no difference in kind, but simply one of degree. Even absent sub-national participation, international coordination must today be achieved without the benefit of any centralized mechanism of coordination.<sup>143</sup> The making of international law, as such, is already a kind of group

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142. Aspects of international banking regulation might be seen to have developed in this fashion. See David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 573-80 (2005); see also Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005).

143. This highlights a crucial distinction between domestic and transnational dynamics of coordination. With notable exceptions, the latter circumstances are characterized by the absence of what we might term a “decider.” In the work to which I trace my own analysis of multi-tiered coordination – what I will describe *infra* as “intersystemic governance” – Robert Cover and Alexander Aleinikoff highlighted a pattern of “dialectical federalism” arising from the overlapping jurisdiction of state criminal courts and lower federal courts exercising habeas jurisdiction. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). In Cover and Aleinikoff’s account, the Warren Court began the process, by outlining open-ended principles regarding the constitutional rights of criminal defendants. State criminal courts were called upon to apply these principles in the first instance, from the perspective of their dominant commitment to crime control. On habeas review, in turn, the lower federal courts would apply the same principles, but from their distinct perspective of constitutional policy-making. Because neither could decisively dictate end results – the state courts could disregard approaches propounded by the federal courts, while the federal courts could consistently grant habeas relief to those convicted in state courts – the federal and state courts were forced to engage in a recurrent, dialectical interaction, out of which new paradigms of constitutional criminal procedure emerged. After some period of such legal innovation, however, the Court would finally step in, to bring closure to the dialogue. See *id.* at 1046-68.

In the transnational settings to which I have analogized the latter pattern, by contrast, there is no Supreme Court empowered to bring closure. Thus, in the engagement of domestic courts with investor-state dispute settlement tribunals established under the North American Free Trade Agreement, no authority – including, in

rather than *de jure* standard-setting. Sub-national engagement with foreign affairs and international law simply increases the size of the relevant group. However much it may increase the complexity of transnational coordination, then, sub-national engagement in foreign affairs is hardly inconsistent with the latter. In a sense, it has no significance for the essential nature of such coordination – other than from the vantage of national-level policy-makers, who no longer enjoy the same pride of place.<sup>144</sup>

Turning from the theoretical framework of horizontal coordination to empirical manifestations of it, recent years have seen a growing practice of a kind of group standard-setting among sub-national authorities. Coordination has not been lacking, but has arisen from an array of more or less formalized associations of state and local officials. In recent work, Judith Resnik has thus highlighted substantial evidence of what she terms “horizontal federalism” and “translocal institutionalism.”<sup>145</sup> In these cases, sub-national entities are actively coordinating with one another to address policy questions of common interest.

Examples of such networks include the National League of Cities, the National Governors’ Association, the U.S. Conference of Mayors, the National Association of Attorneys General, the National Conference of State Legislatures, and the National Conference of Chief Justices of State Courts. Similar associations operate across national borders, including United Cities and Local Governments, a transnational association of municipalities, and the International Carbon Action Partnership, in which ten U.S. states and two Canadian provinces have joined a number of national governments to promote a “cap-and-trade” system for carbon emissions.<sup>146</sup> Less structured epistemic communities of sub-national officials can also be identified, particularly in more technical fields of regulation.<sup>147</sup>

The policy questions falling within the purview of such horizontal networks of local officials are wide-ranging. Besides climate change, recent

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important respects, the state parties themselves – is in a position to end the discussion. See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2063 n.136 (2004). In the transnational context, as such, dialectical engagement across jurisdictional lines is not simply the means to some clear and discrete end, but rather the end unto itself.

144. Consider, by way of analogy, the dissolution of the Soviet Union into its constituent republics. While the latter increased the number of parties around the international table, it did not alter the underlying dynamics of international relations in any substantive way.

145. See Resnik, *supra* note 5, at 34, 44.

146. See *supra* note 4 and accompanying text. Other examples include the International Union of Local Authorities and its 1990 spinoff, the International Council for Local Environmental Initiatives (ICLEI), and a prominent coalition of sixteen of the world’s largest cities (also directed to the reduction of greenhouse gas emissions). See Resnik, Civin & Frueh, *supra* note 4, at 719.

147. See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992).

areas of emphasis have included food safety, the rights of women, and human rights generally.<sup>148</sup> The crisis in Darfur, for example, has been the subject of recurrent discussion by the U.S. Conference of Mayors.<sup>149</sup> A growing number of states are exploring divestment measures directed against Sudan, meanwhile, often in consultation with states with relevant measures already on the books.<sup>150</sup> In these and other fields, state and local authorities have come together to agree on common policies and to coordinate efforts at promoting their policy choices among other states and localities, at the national level, or even transnationally.

Such efforts might fairly be understood as cases of group standard-setting – mechanisms by which aligned, or at least relatively aligned, policies can be articulated and established. Rather than the *de jure* standard-setting of national-level decision-making, or the policy-making chaos commonly predicted to arise from devolution of decision-making to sub-national authorities, here we find something different. Policy alignment is accomplished without resort to centralized coordination. An increasingly coordinated policy on Sudan arises not from the exclusive authority of the federal government to make such policy, but from a decentralized, yet still proactive, dynamic of horizontal coordination.

Even as new voices emerge in foreign affairs and international law, and we move from dual federalism to shared and overlapping jurisdiction, commonplace expectations of chaos and policy disarray may therefore be overstated. There is no necessary loss of externally directed coordination, even with the decline of dual federalism and familiar patterns of internally directed coordination. Other mechanisms are available to achieve such coordination – and perhaps can even be expected to achieve it – where relevant policy gains demand as much.

Such horizontal coordination among sub-national authorities in foreign affairs and international law might be expected to take various forms. One can appreciate as much with reference to potential networks directed to the imposition of sanctions. At one extreme, one might imagine a small group of states and/or municipalities committed to the imposition of sanctions against a particular target, such as Sudan, who informally engage one another to coordinate their sanctions policies and thereby maximize their efficacy. At the other end of the spectrum lies the seemingly less probable scenario of a well-structured network of sub-national authorities, governed by majoritarian principles, such that policy choices of the majority are binding on all participants. Between these extremes, one might see varying levels of structure,

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148. To be sure, the impetus for coordination across these (and other) areas varies widely, from true externalities, to reasons related to the internal politics of the relevant jurisdictions. The ultimate dynamic of horizontal coordination, however, is analogous.

149. See *supra* note 38 and accompanying text.

150. See Resnik, *supra* note 75, at 1131 n.138) (noting efforts at coordination in development of sub-national sanctions policies).

from sub-networks operating within existing organizations such as the National League of Cities or the National Governors Association to free-standing networks,<sup>151</sup> and varying levels of permanence, ranging from a network focused singularly on Sudan or some other particular sanctions target to a standing “sanctions committee” of a sort, populated by interested states and/or localities.<sup>152</sup> Additionally, one might observe varying levels of coercion, with the majoritarian scheme noted above being at one extreme and complete freedom to deviate from the will of the group at the other – perhaps depending on the extent of variation in relevant state and local preferences.<sup>153</sup>

Significantly, even the latter remains coordinative in nature, notwithstanding its inability to promise perfect alignment of sanctions policies across states and localities. To begin, even with an entirely voluntary regime of coordination, the greater ability of participants to engage in relevant trade-offs may produce greater congruence than would otherwise be achieved. More broadly, even purely voluntary coordination may encourage a distinct mindset among its participants. As Alexander Aleinikoff has put it:

In these [interactive] spaces, states generally seek to be ‘good citizens.’ That is, they recognize (or others press them to recognize) a responsibility to the system as a whole. The idea is not that all actors will agree upon or conform to particular transnational norms, but rather that they are likely to act in a manner that supports the overall process of dialogue and accommodation . . . both because of the commitment that interconnectedness fosters and also because of states’ perceived self-interests.<sup>154</sup>

At a minimum, such engagement might be expected to reduce the sharpest conflicts in relevant policy, even if it does not produce a single, unified policy. This may be a sufficient level of coordination, moreover, depending on the operative goal of a given sanctions regime. Even the decision of a pair of jurisdictions – let alone a large group of states or localities – to impose sanctions may impact a target state, even if other states or localities refuse to follow suit. Of course, the extent of isolation is necessarily lower in the latter

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151. Cf. Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL’Y REV. 1, 19-24 (2004) (exploring development of new networks by piggy-backing on established ones).

152. One might reasonably expect gradual movement along this spectrum of institutionalization with the passage of time.

153. For example, a sub-national jurisdiction might have a relatively large population of Sudanese immigrants and thus enjoy significant business ties to the country. Another might be the primary place of business of an oil services company that works extensively in Sudan. Both would likely be more resistant to the imposition of sanctions, by any level of government.

154. T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT’L L. 479, 485 (2008).

case. In many sanctions regimes, however, the detrimental impact to the target state may be achieved even without complete isolation.

In Part II, we saw that the conventional notion of international law as a mechanism by which sub-national voices are silenced is increasingly unsustainable. Given increasing sub-national participation in the creation and application of international law, prevailing notions of the latter as a mechanism of internally directed coordination, operating in the service of externally directed coordination, require reconsideration. In this part, in turn, it has become evident that such a decline in internally directed coordination need not undermine the possibility of externally directed coordination. The familiar notion that a single, national voice is necessary for effective foreign affairs also proves false. Coordination can be achieved, even with the engagement of a multiplicity of state and local voices in foreign affairs. By contrast with conventional, top-down coordination, this new coordination of foreign affairs is simply horizontal in nature.

#### IV. THE INTERSYSTEMIC GOVERNANCE OF SUB-NATIONAL, NATIONAL, AND INTERNATIONAL RELATIONS

From the foregoing, it becomes apparent that our prevailing notions of voice in the relationship of sub-national, national, and international institutions and interests are increasingly unsustainable. As states and localities participate to a growing degree in the creation, evolution, and implementation of international law, it is increasingly implausible to conceive of the latter as a mechanism by which national authorities impose coordination on sub-national authorities. Given the potential for horizontal coordination, meanwhile, a coherent foreign policy does not require that only “one voice” – of national authorities – be heard in foreign affairs.

Where does this leave us? Given the foregoing, what might we expect the relations of sub-national, national, and international to look like in the years ahead? In the balance of this analysis, I want to explore the possibility that patterns of what I have termed “intersystemic governance” might offer a useful frame of reference for exploration of this question. As the account of coordination offered above makes eminently clear, the growing integration of sub-national voices involves no displacement of national voice. It is a story of addition, rather than substitution – what Robert Schapiro has called “polyphony.”<sup>155</sup> A regime of intersystemic governance in sub-national, national, and international relations, as such, puts us somewhere between the traditional *hierarchy* of national policy-making in foreign affairs and international law, and the commonly threatened *market* alternative of dis-coordination and chaos. What more can we say, however, about what may emerge in the place

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155. See Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

of dual federalism and the “one voice” of national authorities in foreign affairs and international law?

For many years, academic study of federalism has failed to fully integrate the changes generated by the shift away from dual federalism in the United States. A wave of recent scholarship, however, has begun to address this gap. Across an array of substantive areas, and in various descriptive, normative, microanalytic, and trans-substantive ways, scholars including Alex Aleinikoff, Paul Berman, Bill Buzbee, Erwin Chemerinsky, Kirsten Engel, Vicki Jackson, Renee Jones, Jason Mazzone, Judith Resnik, Mark Roe, Mark Rosen, Robert Schapiro, Bob Thompson, and Phil Weiser have begun to explore dynamics of “polyphonic federalism,” “pluralism,” “horizontal federalism,” “convergence, resistance, and engagement,” “interactive federalism,” “collaborative corporate governance,” “dynamic federalism,” and the like.<sup>156</sup> Important differences aside, the common refrain throughout this body of work has been a shift from the line-drawing of dual federalism to the identification – and even embrace – of overlapping jurisdiction.

My own work invokes the rubric of *intersystemic governance* to describe patterns of domestic and transnational governance<sup>157</sup> that are emerging as we abandon our fetish with the claim of discrete and exclusive jurisdiction offered by dual federalism.<sup>158</sup> Contrary to the traditional project of law – to parse out and allocate jurisdiction, and otherwise categorize and draw lines – I have suggested that we do well to embrace jurisdictional overlap and a resulting interdependence of formally independent governmental authorities. Rather than something to correct or fix, jurisdictional overlap – and the com-

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156. See, e.g., T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004); Berman, *supra* note 11; Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004); Resnik, *supra* note 5; Schapiro, *supra* note 155; Robert B. Thompson, *Collaborative Corporate Governance: Listing Standards, State Law, and Federal Regulation*, 38 WAKE FOREST L. REV. 961 (2003). Paul Berman has arguably gone the furthest in exploring the nuances of these patterns – under the rubric of “legal pluralism.” See, e.g., Berman, *supra* note 11.

157. See, e.g., Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007) [hereinafter Ahdieh, *Modern Jurisdiction*]; Robert B. Ahdieh, *The Dialectical Regulation of Rule 14a-8: Intersystemic Governance in Corporate Law*, 2 J. BUS. & TECH. L. 165 (2007) [hereinafter Ahdieh, *Rule 14a-8*]; Ahdieh, *supra* note 77.

158. I have done my own share of experimentation in the choice of relevant verbiage, variously referring to “intersystemic adjudication,” “intersystemic regulation,” “dialectical regulation,” and “mixed governance.”

plexity implicit in it – is something to accept and even seek to integrate into relevant legal regimes.<sup>159</sup>

In what follows, I begin by highlighting some of the central elements of a regime of intersystemic governance. While not comprehensive, this brief overview paints a rough picture of the patterns of governance I have in mind. I then consider the continuing contributions to be made by national authorities in a regime of intersystemic governance. Finally, I explore various exemplary cases, from which we might draw a fuller picture of what intersystemic governance would portend for the relationship of sub-national, national, and international institutions and interests, both in foreign affairs and international law, and beyond.

### A. *The Elements of Intersystemic Governance*

A handful of the central features of regimes of intersystemic governance help to paint a picture of its general nature: jurisdictional *overlap*, the centrality of *coordination*, *interdependence* of formally independent regulatory institutions, and an important role for *persuasion* in determining regulatory effect.<sup>160</sup> These elements may not always be present in the interactions I would place under the umbrella of intersystemic governance.<sup>161</sup> Yet they seem relatively likely to appear.<sup>162</sup>

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159. See Ahdieh, *supra* note 143, at 2063-64; see also Ahdieh, *supra* note 77, at 879-96.

160. See Ahdieh, *Modern Jurisdiction*, *supra* note 157, at 5; see also Ahdieh, *supra* note 143, at 2087-101. Most discussion of those situations in which these and similar characteristics of intersystemic governance are present focuses on the heightened degree of complexity, by comparison with “dualist” constructions of exclusive jurisdiction. When we look behind such complexity, however, I believe we may discern patterns along the lines posited in this section. See Ahdieh, *Modern Jurisdiction*, *supra* note 157, at 6-7.

161. Besides the four core characteristics described above, a pair of potential prerequisites to the emergence of intersystemic governance might also be noted. The first is some coincidence in the policy preferences of participating jurisdictions. In essence, some alignment of values and interests may be important both to relevant authorities’ front-end willingness to attempt coordination, and to their ultimate ability to achieve it. See Ahdieh, *supra* note 143, at 2108-10 (describing need for balance of “competing and complementary perspectives”); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1122-23 (1999); cf. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 590-91 (1996) (suggesting need for “common environmental norms” for “collaboration among decentralized governments” to succeed). It bears noting, however, that some internal coincidence of interests is likely also necessary for the development of an effective *federal* foreign policy. Thus, even national-level policies would be difficult to develop and sustain in a federal state, absent some alignment of norms across the communities and individuals that comprise it.



An initial feature of intersystemic governance, of course, is a degree of jurisdictional *overlap*.<sup>163</sup> State and local authorities increasingly share jurisdiction with the federal government in the regulation of particular individuals, institutions, and even conduct. In corporate and securities law, for example, I have described the ways in which the Securities and Exchange Commission was forced to share authority over Wall Street with then-Attorney General of New York, Eliot Spitzer. Conversely, the states – particularly following adoption of the Sarbanes-Oxley Act<sup>164</sup> – have been forced to share authority over corporate governance with Congress and the SEC.<sup>165</sup> Environmental law is characterized by similarly substantial overlap, with much of the implementation of relevant federal law coming by way of varied state and local initiatives. Such “delegated program” federalism, in fact, is arguably the norm in modern environmental regulation.<sup>166</sup>

A second feature of intersystemic governance, again obvious from the analysis above, is the centrality of *coordination*. Perhaps by way of response to increasing jurisdictional overlap, patterns of cross-jurisdictional coordination are increasingly central to a diverse range of regulatory questions. One manifestation of this has been the specific dynamic of horizontal coordination emphasized herein.<sup>167</sup> But the place of coordination in intersystemic governance is ultimately broader. Most notably, it operates vertically as well, in

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A second prerequisite to the emergence of intersystemic governance may be some repeat-player dynamic, with relevant sub-national entities engaged in recurrent interaction. See Ahdieh, *supra* note 143, at 2100. Such recurrence can be understood to serve two functions. First, it may foster trust and confidence, such that coordination is easier to achieve, even absent formalized – or readily utilized – mechanisms of horizontal enforcement. Additionally, repeat plays – particularly over a range versus a single set of issues – may encourage mutually beneficial trade-offs, as the distinct priorities and concerns of distinct participants are incorporated into the gains from trade. As with the first prerequisite, this seems fairly likely to be present in the sub-national context of interest herein. U.S. states and localities have a great deal to talk about.

162. A further point worth emphasizing is that I do not mean to claim that intersystemic governance is a universally applicable or effective mode of governance. To the contrary, as I will describe in Part V, various factors may make it more or less likely to be applicable and effective. For present purposes, my claim is limited to the suggestion that intersystemic governance may offer a useful approach to important aspects of foreign affairs and international law.

163. Paul Berman describes various incidents of such regulatory overlap, including the seminal litigation over the sale of Nazi memorabilia on Yahoo!, contrary to French law. See Berman, *supra* note 11, at 1160; *see also id.* at 1192.

164. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

165. See Robert B. Ahdieh, *From Federal Rules to Intersystemic Governance in Securities Regulation*, 57 EMORY L.J. 233, 237-40 (2007); Ahdieh, *Rule 14a-8*, *supra* note 157; Ahdieh, *supra* note 77, at 872-75; Ahdieh, *supra* note 83, at 755-56.

166. See Buzbee, *supra* note 82, at 1565.

167. See Resnik, *supra* note 5, at 44, 47-48.

the engagement among sub-national, national, and even international authorities. Thus, coordination represents the central dynamic of institutional engagement across jurisdictional lines in a regime of intersystemic governance. Further, intersystemic governance also recognizes a place for coordination across the public-private divide, encouraging heightened private involvement in regulatory design and implementation as well.<sup>168</sup>

A third characteristic of regimes of intersystemic governance is the *interdependence* of independently constituted regulatory entities. Robert Cover and Alexander Aleinikoff's suggestion that the development of constitutional criminal procedure under the Warren Court arose from the interdependence of state criminal courts and lower federal courts hearing habeas corpus claims is suggestive of this feature of intersystemic governance.<sup>169</sup> Each set of courts was formally independent, in that the state courts could issue convictions without regard to the lower federal courts' ideas about constitutional criminal procedure, and the federal courts could repeatedly grant habeas relief in such cases. Yet they were also dependent on one another as a systemic matter, given the substantial costs (and ultimate futility) of attempting to advance their policy goals in disregard of one other.<sup>170</sup> The interaction of former New York Attorney General Eliot Spitzer and the SEC in the regulation of Wall Street is likewise instructive, in their dependence on one another for the pursuit of their respective regulatory mandates.<sup>171</sup>

Finally, regimes of intersystemic governance often integrate a central role for *persuasion* in relevant law and regulation, as distinct from conventional hierarchical, command-and-control patterns of regulatory action.<sup>172</sup> In intersystemic governance, the quality of argument and analysis becomes critical to determining regulatory effect.<sup>173</sup> As suggested above, we have traditionally thought of law as a source of clear and determinate answers. To a growing degree, however, law may offer something different – and perhaps more. It might increasingly be understood as a starting point for dialogue, as a statement of norm and aspiration. Here, law serves a rhetorical function,

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168. Negotiated rulemaking and various forms of audited self-regulation are indicative of this possibility. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 649-57 (2000).

169. See Cover & Aleinikoff, *supra* note 143.

170. See Ahdieh, *supra* note 143, at 2090-91. Some analogy to this iterative dynamic between state and federal courts might be seen in the Sudan Accountability and Divestment Act's requirement that states and localities give notice to the U.S. Department of Justice when they enact divestment rules falling within the statute's safe harbor for sub-national action. See Sudan Accountability and Divestment Act of 2007, Pub. L. 110-174, § 3(c), 121 Stat. 2516. In essence, the latter might be understood as a procedural device to foster awareness of varied anti-Sudan measures, and potentially some constructive iteration in their evolution.

171. See Ahdieh, *supra* note 77, at 918-19.

172. Cf. Berman, *supra* note 11, at 1236-37.

173. See Ahdieh, *Modern Jurisdiction*, *supra* note 157, at 23-29; see also Ahdieh, *supra* note 143, at 2078 n.214.

rather than a determinative, adjudicatory, or prescriptive one. “Soft” as such law may be, it may be no less significant. To the contrary, in the relationship of sub-national, national, and international institutions and interests, it may be the essential medium – the operative language – of cross-jurisdictional interaction.<sup>174</sup>

Justice Stevens’ concurrence in *Medellin v. Texas* might be seen to suggest just this dynamic. Offering his own reconciliation of the international obligation imposed on the United States by the International Court of Justice’s decision in *Avena* and the majority’s characterization of the relevant treaty obligations as non-self-executing, Stevens concludes “[t]hat the judgment [being] ‘binding’ as a matter of international law says nothing about its domestic legal effect.”<sup>175</sup> In this gap between being binding and having effect, it is clear, the invocation of *law* would seem to suggest something distinct.

To similar effect is Stevens’ focus on the State of Texas.<sup>176</sup> Having gotten us into *Medellin* by failing to provide the defendant with notice of his right to consular access, Stevens insisted that it was now up to Texas to get us out of it.<sup>177</sup> No constitutional text or judicial doctrine could be cited to justify as much. To the contrary, the entire point of the *Medellin* decision was that no such legal obligation existed. For Stevens, however, Texas’ duty was no less an obligation for the lack of such explicit foundation. Its force simply rested on persuasive grounds instead.<sup>178</sup>

174. In a similar spirit, Alexander Aleinikoff has highlighted our present-day orientation to “late modern notions of sovereignty and law.” See Aleinikoff, *supra* note 154, at 483. “[These] conceptions, rooted in understandings of the nation-state now several centuries old, see law as an emanation of a sovereign who rules over a territory and a people.” *Id.* Within this conceptual framework, “[l]aw from outside the nation-state” is seen as a “challenge[] [to] sovereignty.” *Id.* From this perspective, furthermore, “[w]e may have difficulty seeing [less structured interactions] as establishing ‘law’ or norms.” *Id.* at 485. To this effect, he quotes Paul Berman:

Some who study international law fail to find real “law” there because they are looking for hierarchically-based commands backed by coercive power. In contrast, a pluralist approach understands that interactions between various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity.

Berman, *supra* note 11, at 1197.

175. *Medellin v. Texas*, 128 S. Ct. 1346, 1374 (2008) (Stevens, J., concurring). Broadly, Justice Stevens’ reading of the U.S. commitment to “undertake[] to comply” with decisions of the International Court of Justice can be understood in an analogous light. See *id.* at 1373.

176. See *id.* at 1375.

177. See *id.*

178. A final point deserves note, in outlining the core characteristics of intersystemic governance. Although my emphasis herein is on engagement among public

*B. The National Role in Intersystemic Governance of Foreign Affairs and International Law*

Having outlined the characteristics of intersystemic governance generally, further insight might be gained from consideration of the ongoing role that national authorities can be expected to play in an intersystemic scheme of sub-national, national, and international authority in foreign affairs and international law. If horizontal coordination among sub-national governments is a meaningful source of coordination in foreign affairs and international law, as described above, what role remains for national authorities in this regime of intersystemic governance? Several potential contributions might be cited.

To begin, national authorities play an important role in ensuring that systems of horizontal coordination among sub-national entities operate freely. Bias against state and local participants in relevant networks by non-participants may suppress efficient coordination, while abuses against non-participants by the members of such networks might generate excess coordination.<sup>179</sup> Federal rules may thus be critical in preventing abusive behavior by either non-participants or participants in relevant networks.

A less obvious role for national-level regulation arises from the potential for lock-in effects, where horizontal coordination is encouraged by network externalities and resulting coordination game dynamics. In tandem, two phenomena may foster such lock-in: first, the relatively strong preference for coordination in certain circumstances, and second, the fact that size matters in maximizing network efficiency.<sup>180</sup> Because of these phenomena, sub-optimal structures of coordination, and inefficient policy choices by dominant networks, may be relatively difficult to displace.<sup>181</sup> Given a single-minded focus

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authorities at the sub-national, national, and international level, important dimensions of the account I offer extend beyond the public sphere. Arguably, in fact, among the most notable features of the changes in governance I suggest is the increasingly *private* forms of public regulation, and the increasingly *public* dimensions of relevant private behavior. This makes perfect sense, given my emphasis on dynamics of standard-setting. As noted above, a significant role has been played in global standard-setting processes by private entities, such as the Internet Engineering Task Force and the International Organization for Standardization. While the present analysis is directed to the public side of the coin – given the need to better theorize the dynamic at work among public institutions – the role of private “regulators” warrants further attention as well. See Freeman, *supra* note 168.

179. One might also imagine a role for national authorities in regulating networks’ treatment of their own members. Cf. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 566 (2001) (noting potential complicity of law in permitting “traditional cultural leaders to silence internal dissent within cultural associations”).

180. See Ahdieh, *supra* note 7, at 223-26; Robert B. Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277, 296-322 (2003).

181. The dominance of Microsoft Windows, the QWERTY keyboard, and various DVD, HDTV, and other standards has thus commonly been seen to result from net-

on coordination and fear of non-participation in a dominant coordination framework, change may be difficult to achieve.<sup>182</sup>

In light of the potential for such lock-in, one might identify a national role in helping to shape the *expectations* of sub-national authorities.<sup>183</sup> Specifically, national authorities may help to overcome lock-in effects by acting to enhance the credibility of alternative policy choices or even networks. At the extreme, they can do so by way of federal preemption. In the latter case, of course, *de jure* coordination displaces horizontal coordination/group standard-setting as the operative mechanism of policy alignment. But far more limited interventions may suffice to achieve efficient results, given the shift in *expectations* rather than *incentives* that is the necessary means to overcome the coordination-driven lock-in effects described above.

In this spirit, I have previously suggested a role for non-coercive “regulatory cues” in helping to overcome network lock-in and related status quo biases.<sup>184</sup> Such cues function by reducing the salience of a dominant network or existing policy choice. Regulatory cues thus offer distinct focal points for potential coordination, facilitating movement away from an inefficient status

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work externalities, which produce strong “tipping effects” toward a single network, once one has established some lead over its competitors. See Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, J. ECON. PERSP., Spring 1994, at 117, 118; see also Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, J. ECON. PERSP., Spring 1994, at 93, 105-06.

182. It bears noting, on the other hand, that there are significant countervailing limits on the likely strength of network effects and coordination game dynamics in patterns of horizontal coordination among states and localities, given both the relatively limited number of participants, and some ability to participate actively in multiple networks. See Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 599 (1998) (noting importance of “exclusivity” in producing network externalities).

183. In coordination games, by contrast with the more familiar Prisoner’s Dilemma game, efficient outcomes depend not on alteration of players’ incentives, but of their expectations. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1657 (2000) (“Solving cooperation problems requires a change in payoffs. Solving coordination problems, however, just requires the right kind of expectations.”); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1622 n.40 (2000) (“In the case of coordination games, the law ideally will help solve the problem by changing parties’ expectations (rather than their incentives) . . .”). Given the absence of any incentive to defect, even from a sub-optimal equilibrium, the critical need is to align parties’ expectations of one another (e.g., where you will look for me if we are separated in New York; which side of the road you will drive on; whether you will swerve before impact in a game of Chicken).

184. See Ahdieh, *supra* note 7, at 245-55.

quo.<sup>185</sup> Significantly, however, such cues need not dictate coordination outcomes, as in *de jure* coordination, in order to do so. Consider, for example, the National League of Cities (NLC). If relevant national authorities were to acknowledge and actively engage a competing network of municipalities, perhaps in negotiating relevant policies or in its distribution of grant funds or subsidies, it could go a long way to enabling that up-start to compete effectively with the NLC.<sup>186</sup> In the face of sticky policy choices, meanwhile, convening conferences on a given policy alternative, disseminating relevant white papers, and similar non-coercive mechanisms might serve to reduce the lock-in of a given policy choice within a horizontal network of sub-national actors.

At the broadest level, finally, we might identify a role for national-level authorities in helping to frame the pursuits of horizontal networks of sub-national actors, in a fashion akin to the open method of coordination (OMC) and similar mechanisms of multi-level governance in Europe.<sup>187</sup> In these cases, European Union-level institutions establish benchmarks, including both qualitative and quantitative indicators. The implementation of those standards then plays out at the national level. Monitoring and review of such implementation, finally, is shared across levels.<sup>188</sup>

In the dynamic of horizontal coordination in foreign affairs and international law, one might imagine an analogous structure in which national authorities identify particular issues as priorities, or perhaps even dictate that *some* coordinated policy be achieved. The approach elected to such issues, however, including perhaps the scope of relevant coordination and its particular goal, would be left to sub-national authorities operating through varied structures of horizontal coordination.<sup>189</sup>

Of course, this is simply one of many possible iterations of intersystemic governance. It is suggestive, however, of the very different institutional framework – and distinct notions of law – that are at the heart of intersystemic governance. As the system of the OMC has been described, and might be said of regimes of intersystemic governance generally: “In many respects, the

185. See Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1284-85 (1997) (describing mechanism of “[n]orm seeding” by public entities, akin to regulatory cues).

186. See Ahdieh, *supra* note 7, at 301-02 (elaborating on mechanisms by which public authorities may help to displace inefficient networks).

187. See Gráinne de Búrca, *The Constitutional Challenge of New Governance in the European Union*, 28 EUR. L. REV. 814, 815-16, 825 (2003); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L.J. 343 (2005).

188. See de Búrca, *supra* note 187, at 825.

189. To be clear, this approach involves more than mere hortatory encouragement at the level of the European Union. It has real teeth as well. The critical point is simply the delegation of implementation authority, and resulting flexibility at that phase.

open method of coordination is . . . a third way between ‘pure integration’ and the logic of genuine intergovernmental cooperation. More open and less rigid than the former, the OMC is also more ambitious and better structured than the latter.”<sup>190</sup>

*C. Analogues of Intersystemic Governance in Foreign Affairs and International Law*

Having outlined the core elements of regimes of intersystemic governance and highlighted the distinct contributions that national authorities might make in such non-hierarchical, overlapping regimes, some further sense of the nature of intersystemic governance in foreign affairs and international law might be derived from the consideration of analogous patterns of law and regulation in other spheres. The analogy to the open method of coordination in Europe offered above, for example, suggests certain potential features of a dynamic of intersystemic governance in foreign affairs and international law, including benchmarking and structured mechanisms for feedback. Europe also offers other potential points of reference, including its “comitology” structure, and the European Court of Human Rights’ “margin of appreciation” doctrine. With the former, the European Commission engages the input and support of national governments prior to its adoption of implementing measures using an array of committee structures populated by Member State representatives.<sup>191</sup> With the latter, meanwhile, the ECHR has allowed room for variation in the national implementation of European norms – within a permissible margin of appreciation.<sup>192</sup> Similar structures and regimes of discretion might be useful in the interaction of sub-national, national, and international institutions and interests over questions of foreign affairs and international law.

Some further insight into the potential intersystemic governance of foreign affairs and international law might be found in the distinctive role of Canadian provinces in shaping Canadian foreign affairs. Canada’s provinces – as a matter of both law and custom – actively engage questions within the ambit of foreign affairs. They participate, in both direct and indirect ways, in the negotiation of international agreements. They significantly influence federal positions in international trade and other disputes. As two observers have vividly described:

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190. Renaud Dehousse & Jean Monnet, *The Open Method of Coordination: A New Policy Paradigm?*, Paper presented at the First Pan-European Conference on European Union Politics, Sept. 26-28, 2002, at 4 (footnote omitted).

191. See Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 COLUM. J. EUR. L. 241, 310-11 (2005).

192. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316-17 (1997); see also Berman, *supra* note 11, at 1201-03.

Quebec, Alberta, and Ontario all maintain important political and economic offices in Europe, the Pacific Rim, and the United States, and British Columbia facilitates the sale of coal to Japan; the Government of Alberta helps shape the sale of natural gas and oil to the United States.

These four Canadian provinces are international actors. They design and implement international trade policies, promote exports, recruit foreign investments, conduct negotiations for economic and cultural exchanges with the governments of foreign countries, independently monitor domestic activities in other countries, and lobby foreign governments. Their bureaucracies and budgets devoted to international affairs are, in all four cases, substantial. And, whereas sometimes they act internationally in concert with the Government of Canada, they frequently act alone.<sup>193</sup>

The provinces are players in Canada's foreign relations, thus, in a way that U.S. states and localities traditionally have not been.

This pattern can be traced to Canada's embrace of just the approach one might find in the Supreme Court's decision in *Medellin v. Texas* – from which the State of Texas emerged as the critical decider of the domestic effects of international law.<sup>194</sup> As in the United States, the federal government of Canada has the exclusive power to bind the nation under international law. At least where the substantive questions at issue are ones traditionally left to provincial authority, however, the enactment of domestic legislation *implementing* any such international obligation is left to the provinces.<sup>195</sup> This regime – an artifact of Canada's gradual accession to independent sovereignty – has not been without its critics, who have pressed the need for “one voice” in Canadian foreign affairs.<sup>196</sup> But it has persisted.

Recent steps toward Canadian ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) suggest the very different dynamic of sub-national and national the Canadian approach engenders. To much fanfare, in March 2008 the Canadian parliament passed legislation implementing the ICSID Convention,

193. Elliot J. Feldman & Lily Gardner Feldman, *Canada*, in *FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNATIONAL UNITS* 176, 176 (Hans J. Michelmann & Panayotis Soldatos eds., 1990).

194. See *supra* notes 175-78 and accompanying text.

195. See Fabien Gelin, *The Constitution of Agreement: A Brief Look at Sub-Federal Cross-Border Cooperation*, 2006 MICH. ST. L. REV. 1179, 1186.

196. See, e.g., Jeffrey L. Friesen, Note, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415, 1434-35 (1994).



which gives authority to the federal government to ratify it.<sup>197</sup> Such ratification requires the authorization of all provinces, however, and only four have done so to date.<sup>198</sup> Given as much, the federal government has now issued an “invitation” to the remaining provinces to adopt relevant legislation.<sup>199</sup>

Such a regime can be deeply problematic, of course. The risk of holdout problems is substantial.<sup>200</sup> Structures to reduce the latter possibility can also be imagined, yet they would not be fail-safe. This might itself hold important lessons for the design of foreign affairs and international law, however, in the more complex world of intersystemic governance. Perhaps given the high stakes in these areas, institutional structures that mandate broad agreement, if not necessarily consensus, may be in order.

Finally, returning to our exemplary cases of Sudanese sanctions policy and *Medellin*, they too suggest further insight into what a dynamic of inter-systemic governance by sub-national, national, and international authorities might look like in the realm of foreign affairs and international law. The case of Sudan, to begin, highlights the dialectical quality of relevant interactions.<sup>201</sup> After Illinois adopted its divestment legislation, the National Foreign Trade Council (NFTC), a national interest group, challenged it in federal court. Illinois defended the legislation, but even as it did so, it encouraged efforts by its congressional representatives to enact federal legislation authorizing its action. When the NFTC prevailed in the district court, in turn, Illinois proceeded to withdraw its original statute, only to introduce a revised version of it after SADA’s authorization of analogous state and local initiatives.

This iterative dynamic seems likely to persist. There is, as such, no obvious break point in the dialectical pattern of interaction at work. It remains to be seen how other states and localities will respond to the new legislation. Will they adopt sanctions of their own given Congress’ blessing, or has the generative political moment passed? The latter, of course, is likely to impact how much of a precedent SADA itself proves to be. Will similar authorizations of state and local measures appear in future sanctions legislation? Final-

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197. See Orlando Silva, *Feds Near Ratification of ICSID – Important Tool for Canadian Investors Abroad*, MONDAQ BUS. BRIEFING, Apr. 8, 2008.

198. See *id.*

199. See David Dittman, *This One Goes to Eleven*, MAPLE LEAF MEMO, Apr. 4, 2008, at 3, available at [http://naftatrustclaims.com/sitebuildercontent/sitebuilder/files/dittman\\_nafta\\_04\\_04\\_08.pdf](http://naftatrustclaims.com/sitebuildercontent/sitebuilder/files/dittman_nafta_04_04_08.pdf).

200. Cf. John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT’L L. 229, 250 (2003).

201. Cf. Berman, *supra* note 11, at 1197; Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT’L L. 163, 178, 180 (2004) (describing international law as “iterative process”).

ly, even if such provision is made, will the scope of such authorization be similar to that of SADA, narrower, or perhaps even broader?<sup>202</sup>

*Medellin* is similarly instructive, particularly in highlighting the ways in which the interaction of sub-national, national, and international institutions in a regime of intersystemic governance may ultimately look quite different than what we would expect. The State of Texas' initial response to the International Court of Justice's decision, despite the president's subsequent directive to comply with it, was to resist the application of international law. It is useful to also recall, however, the very different response of the State of Oklahoma.

Almost immediately after *Avena*, to what can fairly be described as the significant surprise of most observers, the Oklahoma Court of Criminal Appeals, citing the ICJ's decision, granted the petition of one of the defendants named in the *Avena* judgment for a hearing on his otherwise defaulted Vienna Convention claim.<sup>203</sup> This, in turn, prompted the commutation of his death sentence by the governor.<sup>204</sup> Many interpretations of the Oklahoma decision might be offered. At a minimum, however, it highlights the complexity of the patterns of institutional interaction likely to play out as sub-national authorities join national authorities in the realm of foreign affairs and international law.

The case of the Oklahoma Court of Criminal Appeals also raises the question of how Texas might have chosen to proceed after the Supreme Court's decision. As emphasized by Justice Stevens, with the decision in *Medellin*, the compliance of the United States with its obligations under the Vienna Convention on Consular Relations was placed in Texas's hands.<sup>205</sup> In reality, it chose to stand its ground, disregarding that fact and executing *Medellin* on August 8, 2008. How might it alternatively have proceeded, however, in a regime of intersystemic governance?

In a recent article, Alexander Aleinikoff suggests a potential approach,<sup>206</sup> relying on Justice Breyer's dissent in another Vienna Convention case, *Sanchez-Llamas v. Oregon*.<sup>207</sup> To begin, Breyer conceded that the In-

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202. It bears noting that SADA authorizes only a limited set of state and local measures, rather than opening the door to any initiative that states or localities might choose to take against target states.

203. *Torres v. Oklahoma*, No. PCD-04-442, 2004 WL 3711623, at \*1 (Okla. Crim. App. May 13, 2004); see also Levit, *supra* note 200, at 171-72.

204. See *Oklahoma Court Halts Execution*, AUGUSTA CHRON., May 14, 2004, at A14. The striking nature of Oklahoma's decision becomes even more apparent when it is contrasted with the decision of the State of Virginia to proceed with the execution of Angel Francisco Breard, notwithstanding the request of the International Court of Justice for a stay of execution and the U.S. Secretary of State's direct entreaty to the governor of Virginia, to grant that request. See *supra* note 52.

205. See *supra* notes 175-78 and accompanying text.

206. See Aleinikoff, *supra* note 154.

207. 548 U.S. 331 (2006).

ternational Court of Justice's interpretation of the convention<sup>208</sup> did not bind the Supreme Court. Having acknowledged as much, however, he turned to a consideration of the Court's duty to give "respectful consideration" to the ICJ's decision.<sup>209</sup> Rather than adopting the majority's narrow and facially objectionable reading of the ICJ opinion, Justice Breyer engaged the opinion more closely, along with the ICJ's broader jurisprudence. Drawing on that analysis, in turn, he offered a narrower reading of the ICJ's decision, which the Court might plausibly have chosen to apply in the United States.

In Aleinikoff's view, this represents a functional approach to the "respectful consideration" due in *Sanchez-Llamas*.<sup>210</sup> More broadly, it may suggest a framework for the interaction of domestic and international institutions generally. In this approach, international law is neither binding law nor mere fodder for string cites.<sup>211</sup> It is central to the analysis, but not controlling of it. Domestic courts' engagement of it, in sum, is "moderate, respectful, and accommodating."<sup>212</sup> In the operation of regimes of intersystemic governance, just the same might be expected.

## V. THE TIME, PLACE, AND LIMITS OF INTERSYSTEMIC GOVERNANCE

Patterns of intersystemic governance, then, may have an increasingly important role in the interaction of sub-national, national, and international institutions. By way of conclusion, however, it is useful to consider what factors might make such a role more or less appropriate in any given case. To frame that analysis, I begin by outlining some of the normative grounds for an embrace of intersystemic governance. Even if intersystemic governance is generally attractive, however, it is important to consider when it is particularly likely to be relevant or useful. When might we choose to adopt a regime of intersystemic governance versus the alternatives of hierarchical engagement or a market dynamic? Finally, on the flip side of the latter coin, what should we acknowledge as the weaknesses of intersystemic governance?

### A. *The Normative Promise of Intersystemic Governance*

At least in the first order, the normative analysis of intersystemic governance turns on questions of process.<sup>213</sup> The critical optic is one of institu-

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208. *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

209. *See Sanchez-Llamas*, 548 U.S. at 601-02 (Breyer, J., dissenting).

210. *See Aleinikoff*, *supra* note 154, at 482-83.

211. *See id.* at 482.

212. *Id.*

213. In this, it echoes Berman's analysis of "global legal pluralism," which aspires not to agreement on norms, but rather on "procedural mechanisms, institutions, and practices." *See Berman*, *supra* note 11, at 1164-67 (noting that global legal pluralism "does not propose a hierarchy of substantive norms and values").

tional design.<sup>214</sup> The utility of intersystemic governance is not measured – at least primarily – by the achievement of preferred substantive outcomes.<sup>215</sup> If anything, its analysis resonates more in questions of legitimacy and accountability; yet it is a degree removed from the latter as well.

At heart, intersystemic governance speaks to how effectively our regulatory institutions achieve whatever substantive goals we set for them. The overlap, coordination, interdependence, and persuasion that characterize regimes of intersystemic governance thus speak to the ability of relevant regulatory institutions to advance the mandates they are assigned. As in the growing new governance literature,<sup>216</sup> such process efficiencies might generally be expected to foster desired results, and seem reasonably likely to play out in ways that are legitimate and accountable. At its core, however, intersystemic governance is directed to the fundamental efficacy of our public institutions – to the ways in which institutional design and process can best be harnessed in the service of desired policy ends.

My own evaluations of the normative utility of intersystemic governance thus begin with Robert Cover's explorations of "jurisdictional redundancy." In the face of widespread criticism of the expanding jurisdiction of the federal courts, Cover highlighted countervailing benefits of the resulting redundancy of federal and state jurisdiction.<sup>217</sup> Specifically, he noted its potential to reduce judges' pursuit of their self-interest<sup>218</sup> and their promotion of their preferred ideologies or other biases.<sup>219</sup> Further, Cover pointed to redundancy's capacity to encourage judicial innovation.<sup>220</sup>

In conventional legal analysis, redundancy – "overlap," as I characterize it – has been forcefully resisted, given the sense of law's project as one of "categorization, clear definition, and line-drawing."<sup>221</sup> From the latter vantage, intersystemic governance is a problem to be solved. In evaluating re-

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214. The study of intersystemic governance might thus be understood to fall within the orbit of organizational theory. Cf. HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* (2d ed. 1957).

215. In a sense, coordination dynamics are neutral as to substantive results. The choice of preferred norms within a scheme of coordination can thus be contested. From a game theoretic perspective, to similar effect, coordination equilibria are stable, but not necessarily optimal. See Ahdieh, *supra* note 7, at 236-37. As I will suggest below, this emerges as a potential critique of a coordination-driven regime of intersystemic governance in the relations of sub-national, national, and international institutions. See *infra* notes 260 and accompanying text.

216. See *supra* note 8.

217. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); see also Berman, *supra* note 11, at 1210-11.

218. See Cover, *supra* note 217, at 658-59.

219. See *id.* at 664.

220. See *id.* at 672-73.

221. See Ahdieh, *supra* note 77, at 867.

gimes of intersystemic governance, however, we do well to acknowledge certain benefits of overlap as well.

To begin, regimes of intersystemic governance may encourage a closer alignment of law and regulation with the functional *identity* of the subjects of regulation, be they institutions that combine national character with particular local ties, one among the growing number of regulatory questions of a cross-jurisdictional nature, or other cases of this sort. In the face of such entities and issues, a regulatory regime singularly and insularly grounded in a single jurisdiction is necessarily of diminished efficacy. It exhibits a regulatory mismatch of sorts, with regulatory institutions attempting to regulate entities or issues of a distinct scope than their own.

Another aspect of intersystemic governance's beneficial implications for identity turns on the varying influence of distinct types of interest groups at different levels of government. Given such variation – suggested in corporate law, environmental law, and elsewhere<sup>222</sup> – intersystemic governance may serve a kind of “balancing” function.<sup>223</sup> In essence, it may offer a political economy in which the entire range of voices engaged with any given policy question can be fully heard and integrated.

A certain dynamic of regulatory competition in regimes of intersystemic governance, meanwhile, might be expected to reduce patterns of *inertia* and foster desirable regulatory *innovation*.<sup>224</sup> As Cover and Aleinikoff described, the unavoidable engagement of state and federal courts under the Warren Court's habeas jurisprudence forced each to move away from their presumptive orientations in constitutional criminal procedure, acknowledging and integrating one another's distinct approaches.<sup>225</sup> In this way, a juris-generative process of innovation was fostered, in which both state and federal courts were full participants. A similar tit-for-tat dynamic of innovation might also be found in federal and state securities regulation, and perhaps in the overlap of federal and state remedies in the civil rights arena.<sup>226</sup> Any such contribution of intersystemic governance to reduced inertia and increased innovation may be quite critical. Law and regulation are naturally inclined toward the status quo and resistant to change.<sup>227</sup> Given as much, institutional

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222. See, e.g., Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 848 (2007).

223. A related possibility is that sub-national authorities may have greater capacity to secure compliance with certain international commitments – as with California and climate change mandates, for example – given the potential concentration of relevant domestic interests within the given jurisdiction.

224. Cf. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 37 (1998).

225. See Cover & Aleinikoff, *supra* note 143, at 1049-50.

226. See Ahdieh, *supra* note 77, at 885-88, 891.

227. See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813 (1998); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

schemes that reduce the former and encourage the latter are likely to be of significant value.

A final benefit worth highlighting is the ability of intersystemic governance to foster beneficial integration. While innovation, and its attendant variation, may be desirable in many circumstances, it will not always be so. Consider the context of human rights, in which we have committed ourselves to a certain universalism. Here, rather than innovation, the relevant goal has been a harmonization of law and regulation. Again, however, intersystemic governance may be useful. It may offer, in essence, a mechanism for incremental and relatively non-invasive patterns of integration. The top-down imposition of harmonized standards might thus be expected to engender a certain resistance, even if framed in the most universalistic of terms. Intersystemic governance, by contrast, may offer a way for jurisdictions to internalize universal norms gradually, on their own terms. Again, I do not mean to undermine the utility of intersystemic governance as a mechanism of innovation, nor the room it creates for variation and pluralism in *resistance* to harmonization. In those circumstances where harmonization is beneficial, however, intersystemic governance may offer an effective mechanism for its pursuit.

### *B. The Indicia of Intersystemic Governance*

Intersystemic governance, then, may have significant utility. Contrary to the conventional wisdom, overlap and complexity need not be denied, resisted, or stamped out. They may even deserve our embrace. Taking a step in this direction, it is useful to consider what contexts might render intersystemic governance relatively more beneficial or effective, by comparison with the alternatives of hierarchical interaction or an uncoordinated, free-market dynamic. What indicators might make intersystemic governance more or less likely to take hold and to generate the normative benefits outlined above?<sup>228</sup>

One clear set of circumstances in which intersystemic governance might be expected to be useful, following naturally from the analysis herein, would be those in which the relevant interactions take the form of so-called “coordination games.” To this point, my analysis of coordination has not emphasized coordination games particularly, but dynamics of coordination more generally. Regimes of intersystemic governance are likely to be especially effective, however, where coordination game incentives are present.

Coordination game dynamics can be found in the proverbial case of trying to find a friend from whom you have been separated in New York City, in the decision on which side of the road to drive on, and in the selection of

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228. Notably, this is a question of importance, whether one sees the emergence of intersystemic governance as a relatively spontaneous process, or as a result of explicit institutional design choices. In either case, it is important to know what factors make intersystemic governance more or less applicable and effective.

technical standards.<sup>229</sup> In these cases, by contrast with the more familiar Prisoner's Dilemma, players have no incentive to defect from whatever equilibrium – optimal or sub-optimal – emerges.<sup>230</sup> Player *incentives* are not the issue, as such, but their *expectations* of one another.<sup>231</sup>

As Richard McAdams has empirically demonstrated, the legal literature has tended to focus distinct attention on Prisoner's Dilemma analyses of regulatory action.<sup>232</sup> Far less attention, by contrast, has been given to coordination game dynamics and the strategic incentives, potential inefficiencies, and potential role for law and institutions that follow from them. In recent years, however, this has begun to change, including in the study of international law.<sup>233</sup>

Critically, entirely distinct patterns of inefficiency can be expected to arise in coordination games, as compared with Prisoner's Dilemma games. At the front end, to begin, there may be significant barriers to entry. Because of the tendency of markets characterized by strong demand for coordination to “tip” to a dominant standard, relevant players may defer entry, for fear of electing the wrong horse in a strongly winner-take-all race.<sup>234</sup> Once a coordination equilibrium is established, meanwhile, we may observe strong lock-in effects. Given strong demand for coordination, players may not deviate from an established equilibrium, sub-optimal though it may be.<sup>235</sup> They may not

229. See, e.g., SCHELLING, *supra* note 7, at 54-55. By way of interesting trivia for those familiar with Schelling's famous empirical studies, I was sitting beneath the clock in Grand Central Station as I penned the sentences above. As it was not Noon, however, I did not expect I would meet anyone there.

230. In the classic Prisoner's Dilemma, co-conspirators are driven to elect individually and collectively undesirable strategies, given the options presented to them. Each knows that they will suffer a de minimus penalty, if both refuse to cooperate. But if one remains silent, while his co-conspirator confesses, the holdout will receive a severe sentence, and the “rat” none at all. If both confess, meanwhile, both will get a moderate sentence. Given these payoffs, the Prisoner's Dilemma teaches, the latter is the likely result – notwithstanding its individual and collective inferiority to the available result had both remained silent. See Ahdieh, *supra* note 7, at 229-30.

231. See *supra* notes 183-84 and accompanying text.

232. See McAdams, *supra* note 183, at 1654-55; Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. (forthcoming 2009); see also Ahdieh, *supra* note 7, at 229-30. To be clear, I do not mean to suggest that Prisoner's Dilemma analysis is unimportant in the analysis of international law – or law and regulation more generally. I suggest simply that coordination games may be no less important, in part because of their self-enforcing nature – the very fact that has often caused legal scholars to give them short shrift.

233. See, e.g., Paul B. Stephan, *What Story Got Wrong – Federalism, Localist Opportunism, and International Law*, 73 MO. L. REV. 1041 (2008); cf. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 459-60 (1998) (noting “shift from custom to code” in international law).

234. See *supra* note 181.

235. See *supra* notes 180-82 and accompanying text.

be willing to risk the loss of substantial “network” benefits, even in exchange from an increase in the “inherent” benefits of a given strategy choice.<sup>236</sup>

In such circumstances, regimes of intersystemic governance may play a salutary role. As described above, an important feature of such regimes is a heightened role for persuasion – even rhetoric – in the operation of law and regulation.<sup>237</sup> Such persuasion is, in a sense, the essential mechanism by which expectations may be altered in ways that alleviate coordination failure. More broadly, regimes of intersystemic governance may offer a more encompassing superstructure, permitting more effective coordination of the full universe of relevant coordination game participants.

Beyond cases characterized by coordination game payoffs, one might identify a number of other indicators likely to increase the prospect that intersystemic governance will take root, and constitute an effective scheme of law and regulation. While a detailed exploration of these factors is beyond the scope of the present analysis, their brief enumeration is useful in seeking to define the range of intersystemic governance’s applicability.<sup>238</sup>

To begin, a generally stable institutional context may be important to the emergence and operation of intersystemic governance.<sup>239</sup> For participants in such regimes, continuity may be correlated with the commitment – and perhaps the political capital – they are willing to put forth. In essence, if the already challenging task of cross-jurisdictional regulatory engagement is compounded by ambiguity as to the regulatory counterparts with whom one will engage, the effort may not be worth the candle.

Two other facets of relevant interactions across jurisdictional lines might also increase the likely attraction and efficacy of intersystemic governance. The first is some recurrence of interaction.<sup>240</sup> The greater the occasions for engagement, thus, the more some pattern – and perhaps a pattern of intersystemic governance in particular – is likely to take hold. Correlated with the latter, the more readily evident the reciprocity in such interactions, the more viable intersystemic governance is likely to be. In essence, the more the interdependence noted above comes in visibly reciprocal forms – “win-win” forms, if you like – the greater the potential for intersystemic governance to take hold.

Another predictor of the efficacy of intersystemic governance goes to the values of relevant participants – specifically, the extent of variation in those values.<sup>241</sup> Some degree of alignment in what I have termed the “perspectives” of the participating regulatory institutions is likely essential to any acceptance – let alone embrace – of intersystemic governance. On the other

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236. See Ahdieh, *supra* note 7, at 291-92.

237. See *supra* notes 172-74 and accompanying text.

238. In previous work, I have explored some of these elements in greater detail. See Ahdieh, *supra* note 77, at 911-14; Ahdieh, *supra* note 143.

239. Cf. Ahdieh, *supra* note 143, at 2099-101.

240. See *id.* at 2097-99.

241. See Ahdieh, *supra* note 77, at 912-13.



hand, such alignment can prove excessive. It is precisely in those circumstances in which relevant perspectives diverge, thus, that intersystemic governance is particularly useful.<sup>242</sup> In such circumstances, hierarchical patterns of engagement are likely to be resisted. By contrast, the give-and-take and inherent flexibility – the “margin of appreciation” – of intersystemic governance are likely to function well. As described above, it is in these situations that intersystemic governance may offer a fairly non-invasive mechanism to foster a greater alignment of values.

The nature of a given area of regulation may also make intersystemic governance more or less viable and effective. To begin, it may be more suited to those areas in which concerns of accountability and finality are relatively less salient.<sup>243</sup> The political salience of a given issue and its degree of contestation *within* a given jurisdiction might thus be important factors to consider in evaluating the potential role of intersystemic governance. Another factor might be the amount of uncertainty attendant to regulation in a given area. The greater the degree of uncertainty, the more intersystemic governance might be seen as a suitable approach – in a sense, to figuring things out.<sup>244</sup> By a similar token, intersystemic governance may be relatively more acceptable where the questions at issue are not seen as ones involving particularized expertise.<sup>245</sup> Where they are, observers may be more likely to perceive shared jurisdiction among multiple authorities as detracting from the expertise of whichever regulatory regime is believed to be more expert.

Conversely, the related question of the relevance of specialized information to regulation in a particular area might cut in the opposite direction.<sup>246</sup> The more central information is to regulation in a given sphere, the more the redundancy of intersystemic governance might be seen to serve a salutary function. If information is key, then multiple mechanisms for its generation might well be preferable.

Finally, a handful of factors cut both ways, in terms of the relevance and efficacy of intersystemic governance. To begin, this is true of numbers. The larger the number of relevant parties, the more difficult coordination will be to accomplish. On the other hand, the more difficult coordination is, the more institutionalized schemes of interaction such as intersystemic governance might be seen to play a salutary role. One might thus imagine a “sweet spot” of group size in maximizing the efficacy of intersystemic governance, with neither too many nor too few participants.

A similar analysis might be offered with regard to the importance of protecting specific and discrete individual rights in a given area of law and regulation.<sup>247</sup> Hierarchical regimes might be seen as relatively greater threats

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242. See Ahdieh, *supra* note 143, at 2095-97.

243. See Ahdieh, *supra* note 77, at 911.

244. See *id.* at 913.

245. See *id.* at 911.

246. See *id.* at 912.

247. See *id.* at 911-12.

to such rights, increasing the attraction of intersystemic governance. The latter, on the other hand, creates its own threats of ambiguity, inattention, and the like. Further, as described above, intersystemic governance may be less suited to the universalism that has traditionally characterized our approach to individual rights.

Finally, the relevant socio-political context may likewise cut either for or against intersystemic governance in a number of ways.<sup>248</sup> To begin, a strong culture of sovereignty, whether generally or as to a particular issue, may diminish the viability of intersystemic governance. Related to the latter, strong domestic institutions might either enhance resistance to intersystemic governance – if they encourage a jurisdiction’s sense of self-confident insulation – or reduce it, if such institutions prove more at ease with the interdependence that is characteristic of intersystemic governance.

One might also imagine a dynamic in which political institutions in a given jurisdiction use linkages to external institutions as a means of leverage.<sup>249</sup> This might be seen in the work of the sub-national networks described above. It likewise characterized the engagement of inferior national courts with supra-national courts in Europe, which helped to produce the European Union as we now know it.<sup>250</sup> In such circumstances, intersystemic governance emerges out of contested political economies in its participating jurisdictions. Analogous political dynamics within other jurisdictions might similarly serve as an impetus for regimes of intersystemic governance.

### *C. The Threat of Intersystemic Governance*

Finally, a few words should be said about the dangers of intersystemic governance. What do we lose with the overlap and interdependence that characterize such regimes? With an eye to the law’s longstanding resistance to these patterns, what are the threats of intersystemic governance?

To begin, it is useful to note the familiar critique of international law that intersystemic governance effectively avoids. In recent years, it has become routine to criticize any domestic application of international norms as an affront to our core principles of sovereignty, democracy, and federalism.<sup>251</sup> The account offered herein, however, fully avoids that critique.<sup>252</sup>

The processes described above are fundamentally democratic. International norms are internalized in domestic settings *not* by way of anti-majoritarian judicial institutions, but through political initiative. The pattern

248. *See id.* at 913-14.

249. *See id.* at 914.

250. *See* KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 47-50 (2001).

251. *See supra* note 35 and accompanying text.

252. The patterns I emphasize herein might thus best be analogized to the “norm portals” identified by Peggy McGuinness as vehicles for the domestic internalization of international norms. *See* McGuinness, *supra* note 112.

of sub-national engagement at the heart of the present analysis thus arises from the engagement of the political branches – state and local executive and legislative authorities – with foreign affairs and international law. It is, as such, fully democratic.<sup>253</sup>

Because it is state and local initiative that is at work, meanwhile, the critique of domestic internationalism on *federalism* grounds is likewise inapposite. Any internalization of international norms comes in this case at the sub-national level, in line with the dictates of federalism. In fact, if international law can increasingly be understood to create opportunities for sub-national authorities to be heard – to give voice to states and localities – internationalism may not merely be consistent with the impulses of federalism; it may advance them.

It is clear, on the other hand, that intersystemic governance does have its limits. Minimally, of course, where the various indicia of intersystemic governance outlined in Part V.B are lacking, intersystemic governance will be less appropriate. Given only episodic interaction, involving relatively non-information-intensive questions, over which values vary dramatically across relevant jurisdictions, intersystemic governance would surely seem out of place.

More affirmatively, intersystemic governance – with its iterative, incremental quality – may be less effective in the face of crises. In crisis situations, hierarchical patterns of cross-jurisdictional interaction might well be warranted. In such circumstances, it may be that the “chaos” account of sub-national engagement with foreign affairs and international law – and of intersystemic governance more broadly – is entirely appropriate.<sup>254</sup>

Perhaps related, intersystemic governance might be critiqued for increasing uncertainty. The predictability of law is surely diminished by the involvement of multiple regulatory entities with decision-making authority as to a given question of law or regulation. Thus, if two jurisdictions might potentially impact a given issue, and have distinct perspectives or positions on it, the uncertainty faced by a regulated entity is necessarily increased.<sup>255</sup> If my account of intersystemic governance as a source of innovation is accurate, moreover, such uncertainty is even greater.<sup>256</sup> In a regime of intersystemic governance, thus, each individual jurisdiction is more susceptible to innovation and reform. Of course, the degree of such uncertainty – and its signific-

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253. *See id.* at 839; *cf.* Berman, *supra* note 11, at 1183-84.

254. On the other hand, that this is the conventional wisdom should not cause us to be too quick to embrace it. As Deborah Pearlstein has analogously argued with reference to questions of national security, there may be little basis for the widespread view that concentration of emergency decision-making authority in the executive branch is to good effect. *See* Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COLUM. HUM. RTS. L. REV. 547 (2007).

255. The possibility of strategic forum shopping might be thought of as one facet of such uncertainty.

256. *See supra* notes 224-27 and accompanying text.

ance – is likely to vary across institutional and substantive contexts. At least in some, however, it may constitute a critical shortcoming of intersystemic governance.

Some, in fact, might suggest that the realm of foreign affairs and international law is just such an area. Thus, the inability of foreign jurisdictions to identify a distinct and singular counterpart in the United States as sub-national voice is enhanced, may be a perfect case of such uncertainty. Some foreign states, for example, have hesitated to extradite criminal suspects to the United States in recent years, given ambiguity as to what domestic entities could authoritatively commit to take the death penalty off the table.<sup>257</sup> With increasing capacity for targeted retaliation by foreign states against sub-national authorities, as described above, some of this concern may be diminished.<sup>258</sup> The same might be said where a strong domestic regime of horizontal coordination has taken hold. Nonetheless, the uncertainty attendant to intersystemic governance remains real, and is a factor counseling against its application in certain circumstances.

Other limits of intersystemic governance also deserve note. As emphasized above, intersystemic governance should not be understood to promise unvarying achievement of desired substantive ends.<sup>259</sup> Given as much, the stronger one's commitment to a given result, the more problematic intersystemic governance becomes. In the human rights context, for example, the implicit pluralism of intersystemic governance may not be a value to be embraced, but a threat to be avoided. More broadly, the embrace of multiple voices can – almost of necessity – be expected to sometimes integrate those inconsistent with the preferred views of any given participant, and even those of dominant majorities. In a sense, this is the very point of intersystemic governance. The process commitments of intersystemic governance, then, dictate some trade-off with universalistic or other substantive commitments as to ends. While such trade-offs may favor intersystemic governance in some circumstances, they might plausibly cut against it in others.

Finally, whatever process utility it might offer, the redundancy of intersystemic governance is also a source of procedural inefficiency. In this, redundant decision-making processes can be analogized to redundant systems of electronic data processing, long-distance communication, power generation, and the like. The latter are fail-safe mechanisms, which must be maintained constantly, yet only serve their critical functions episodically. Of course, this pattern is not perfectly replicated as we move from the technical to the legal/political context. Yet it maintains some force, with redundant

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257. See Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 518 (2003).

258. See *supra* note 117 and accompanying text.

259. The embrace of coordination, as such, leaves relevant substantive norms to be contested. See *supra* notes 214-215 and accompanying text.

mechanisms of governance sharing some of the inefficiencies of such technologies. Given as much, analysis of the returns on intersystemic governance in any particular context is necessarily in order. At least sometimes, it seems obvious, such a cost-benefit analysis will cut against redundancy.

### CONCLUSION

At a minimum, the analysis herein suggests the need to think differently about the nature of federalism. In this, it speaks to both federalism's critics and its proponents. For the former, there is the critical point of horizontal coordination. The advance of federalism, and the resulting emergence of new voices, entails no necessary implication for our ability to coordinate. Efficient coordination is consistent with both unitary and federal schemes, and with the allocation of significant decision-making authority over foreign affairs and international law to either the national or the sub-national level. Along much – if perhaps not all – of the spectrum from exclusively national to exclusively sub-national authority, coordination can be actively pursued and secured.

For enthusiasts of federalism, meanwhile, the foregoing counsels caution in what they should expect federalism to achieve. Federalism's asserted encouragement of diversity and variation, as well as its fostering of efficiency-inducing competition, have been among the most significant claims of its advocates.<sup>260</sup> Properly understood, however, greater room for variation and a dynamic of jurisdictional competition are *possible* results of federalism, but do not deterministically follow from it. Thus have some of the most zealous advocates of federalism resisted paradigms of horizontal coordination – what they commonly deride as “cooperative federalism.”<sup>261</sup> Rather, they embrace a particular pattern of federalism – “competitive federalism,” in which relevant sub-national jurisdictions compete with one another. As the examples of horizontal coordination offered herein make clear, however, variation and competition are far from inherent in the devolution of policy-making to the state or local level.

More broadly, the foregoing counsels a reconsideration of our traditional notions of the relationship of sub-national, national, and international institutions and interests. The analysis of coordination offered herein may thus suggest a framework for evaluating the oft-described decline of the nation-state. It is true that the centrality of national governance to the dynamic of sub-national, national, and international relations may be diminished. Thus, internally directed coordination, imposed in the service of externally directed

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260. See John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 112 (2004); see also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914-15 (1994).

261. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000).

coordination, may capture increasingly less of what is going on in the world. On the other hand, this may not signify the disappearance of the nation-state, so much as a flattening in the political economy of sub-national, national, and international relations. National governments may increasingly be one among equals – and perhaps still *first* among equals – rather than the distinctive fulcrum of decision-making authority. But they are not going anywhere. Certain forms of national authority, in fact, might even be expected to increase – as where national governments help to facilitate horizontal patterns of coordination.<sup>262</sup>

As importantly, the analysis herein offers a framework for advancing the systematic engagement of sub-national authorities with foreign affairs and international law. Contrary to longstanding assumptions, there is nothing to prevent the effective involvement of states and localities in these spheres. Efforts to foster the horizontal engagements likely to maximize the efficacy of state and local involvement are consequently in order.<sup>263</sup> As such horizontal coordination takes hold, a new dynamic of intersystemic governance might well be expected to emerge, in which sub-national, national, and international institutions enjoy overlapping jurisdiction, and face a regulatory interdependence likely to encourage creative new modes of law and regulation.

This highlights a final implication of the foregoing analysis – the need for heightened attention to questions of institutional design in the interaction of sub-national, national, and international authorities. Whatever utility it may once have offered, the paradigm of dual federalism embedded within the Westphalian state is no longer apposite. Given as much, it is necessary to reconsider our standard accounts of both domestic and transnational governance. The nation-state may not be disappearing, and World Government may not be waiting in the wings. Changes are afoot in the nature of both domestic and transnational governance, however, and deserve our attention. As we both evaluate existing institutions of governance and design new ones, we would do well to attend to the changing dynamics of coordination in sub-national, national, and international relations.

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262. See *supra* Part IV.B.

263. As are efforts to integrate sub-national voices more generally. See Resnik, *supra* note 75, at 1112-13.