

FEDERALISM AS INTERSYSTEMIC GOVERNANCE: LEGITIMACY IN A POST-WESTPHALIAN WORLD

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Federalism is a widespread form of government throughout the world. Depending on the definition one employs, somewhere between forty percent and eighty percent of the world's population lives in a federal system.¹ Federal systems involve layerings of legal regimes: Laws promulgated by the national government and by subnational units apply concurrently. The growth of transnational governance provides an additional layer of regulation. Transnational regimes may take the form of bilateral trade agreements or of comprehensive multilateral conventions with complex implementing bureaucratic structures, such as the European Union. The existence of multiple, overlapping legal regimes is a pervasive feature of contemporary society. A transaction in Mississippi may well fall within the regulatory domains of Mississippi, the United States, and the North American Free Trade Agreement.²

Understanding the place of American federalism within this global realm of layered governance presents complicated questions. From one perspective, constitutional federalism in the United States provides an obstacle to

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¹ See DANIEL J. ELAZAR, *FEDERAL SYSTEMS OF THE WORLD: A HANDBOOK OF FEDERAL, CONFEDERAL AND AUTONOMY ARRANGEMENTS*, at xi–xv (2d ed. 1994) (asserting that more than fifty countries rely on federal principles to some extent and that more than eighty percent of the world's population lives in countries utilizing some kind of federal arrangement); RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 4 (2d ed. 1999) (noting that there are currently twenty-four federations comprising about two billion people or forty percent of the world population).

² See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2035–44 (2004) (describing the *Loewen* litigation, which involved such a confluence of law); see also *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 702 ¶ 119 (NAFTA Ch. 11 Arb. Trib. 2003), available at <http://naftaclaims.com/Disputes/USA/Loewen/LoewenFinalAward.pdf>.

transnational governing regimes. International agreements, and their resulting obligations, tend to result from the actions of the national government. To the extent that these international conventions impose restrictions on conduct within the United States, the agreements may interfere with the prerogative of the states. Globalization may be the enemy of federalism. A functional understanding of federalism in the United States, on the other hand, can connect federalism within the United States to these larger global trends. Common issues may arise in all systems of layered governance, whether federalism in one country or multilateral trade agreements. Overlapping regulations may provide certain general benefits, while also threatening to undermine other important values. A global perspective fosters learning about the systemic features of layers of governance.

Utilizing a functional understanding of federalism within the United States, this Essay seeks to draw lessons from the international context. I focus in particular on issues of democratic legitimacy. Popular sovereignty provides the primary source of legitimacy for contemporary liberal democracies, such as the United States.³ Ultimately, government must be of the people, as well as by the people and for the people. If the nation meets the prerequisites for democratic rule, then the laws that it promulgates enjoy a democratic imprimatur: taxation (and other regulation) only with representation. Laws that states or other subnational units impose on their own citizens enjoy a similarly strong democratic pedigree.

In a world of layered governance, however, the body promulgating a regulation may not precisely align with the regulated citizens. Popular sovereignty is difficult to realize on an international scale. Similarly, on the domestic scene, citizens of one state may be subject to laws that are made or enforced by other states or by the federal government. Two examples of this mismatch between the law being imposed and the targets of the law are extraterritorial regulation and intersystemic adjudication. The laws of one state may have profound effects on the citizens of other states. Cross-boundary influences are pervasive. The decision of California to impose one set of regulations may, as a practical matter, impose costs and benefits on citizens throughout the United States. Federal court enforcement of state laws constitutes another example of a mismatch of jurisdictions. The federal judges implementing the state laws are not part of the state political system. In brief,

³ See T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1996 (2004).

as laws spread over political boundaries, problems of political legitimacy multiply. The increasingly porous nature of borders undermines simple accounts of popular sovereignty.

As I explain, each of these challenges to popular sovereignty has occasioned a response that seeks to ameliorate the loss of legitimacy. Federal preemption of state law has been proposed as a solution to extraterritorial regulation, and federal court abstention aims to curb intersystemic adjudication. Both preemption and abstention are controversial doctrines that are justified in part by the concern for political legitimacy. Both doctrines threaten to undermine valuable interactions of state and federal laws and institutions. What is needed is a different conception of legitimacy in intersystemic governance, a conception that would not require the doctrines of preemption and abstention, “cures” which are often worse than the diseases they seek to remedy.

This Essay draws on a particular debate in the transnational area to suggest a revised account of legitimacy in the domestic setting. The application of customary international law in courts in the United States has become the focus of intense controversy.⁴ One of the main axes of debate concerns the legitimacy of courts enforcing customary international law, which consists of rules not promulgated by the democratically elected authorities of any state or of the United States. This controversy helps to clarify more general issues of legitimacy in situations of layered governance, including federalism within the United States. The opponents of applying customary international law in domestic courts often rely on arguments based on federalism.⁵ In this light, it is somewhat ironic that I will argue that the customary international law debate actually helps to support the legitimacy of layered governance within the United States, which is to say, contemporary federalism.

Part I outlines a conception of “polyphonic” federalism. Relying on arguments that I have developed at length elsewhere,⁶ this Part explains why a polyphonic understanding of federalism is descriptively more accurate and normatively more appealing than its chief competitor, a dualist model of

⁴ Compare, 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, 861–70 (1997) (challenging the application of customary international law in domestic courts), with, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (criticizing Bradley and Goldsmith’s approach).

⁵ See, e.g., Bradley & Goldsmith, *supra* note 4, at 861–70.

⁶ See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285–88 (2005).

federalism. The Part further notes how the polyphonic conception connects federalism in the United States to broader, global trends of layered governance. Part II focuses on issues of democratic legitimacy that confront a polyphonic understanding of federalism. Drawing on debates about customary international law, Part III seeks to broaden the concept of legitimacy to take account of the new governance realities in the United States and throughout the world. The controversy over customary international law provides an example of an attempt to conceptualize legitimacy in circumstances in which political boundaries do not align with the jurisdictional reach of laws. Part IV takes the debate about legitimacy in the transnational context and translates it back into the domestic setting. The account of legitimacy developed in the international context sheds light on similar questions that arise within the layered governance regime of federalism within the United States.

I. FEDERALISM AS INTERSYSTEMIC GOVERNANCE

Polyphonic federalism may be understood in comparison to a traditional notion in the United States of dual federalism, or dual sovereignty. Dual federalism entails three related principles: (1) the federal government and the state governments exercise exclusive and non-overlapping authority; (2) authority between the national government and the states is allocated based on subject matters with the national government regulating certain topics and the state governments regulating others; and (3) the courts play an important and distinctive role in maintaining the boundary lines around the exclusive area of state control and the exclusive area of national control.⁷ In 1851 in *Cooley v. Board of Wardens*,⁸ the Supreme Court recognized the reality of some overlap in regulation.⁹ In that case, the Court acknowledged that both state governments and the federal government might regulate commercial activity.¹⁰ The Court then differentiated between commercial subjects that required uniform national rules and those on which local diversity was acceptable.¹¹

⁷ See Robert Post, *Federalism in the Taft Court Era: Can It Be 'Revived'?*, 51 DUKE L.J. 1513, 1526–37 (2002) (discussing this conception of dual federalism).

⁸ 53 U.S. (12 How.) 299 (1851).

⁹ *Id.* at 318–20.

¹⁰ *Id.* at 320.

¹¹ *Id.*

Dual federalism, though, represented the Supreme Court's dominant conception of federalism until the New Deal.¹²

The New Deal, and its ratification by the United States Supreme Court beginning in 1937, ended this traditional notion of dual federalism.¹³ With the vast expansion of federal authority, a strict division between state and federal regulatory domains became impossible. A theory of exclusive jurisdiction would oust the states of any meaningful power. Instead, concurrent regulation became the norm, with both the state governments and the federal government regulating vast areas, including family law,¹⁴ education,¹⁵ and crime.¹⁶

In the 1990s, the Rehnquist Court signaled a "Federalism Revolution" by reinstating certain features of the dual regime. Although the Court has accepted overlapping state and federal regulatory jurisdiction, the Court has attempted to construct certain enclaves of exclusive federal and exclusive state power. I term this approach *dualist federalism*. Like dual federalism, dualist federalism tries to protect domains of exclusive state and exclusive federal authority. Unlike dual federalism, dualist federalism acknowledges broad areas of overlap. Dualist federalism also conceives of a significant role for courts in protecting the exclusive enclaves that do exist.

The Roberts Court has maintained a commitment to dualist principles. At least five current Supreme Court Justices believe in a "truly local" domain and a "truly national" domain and that the courts must safeguard their boundaries.¹⁷ Unlike in the era of true dual federalism, this Court also recognizes a large

¹² See PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 162 (4th ed. 2000); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 508 (1997).

¹³ See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 17 (1950).

¹⁴ See, e.g., *Child Support Recovery Act*, 18 U.S.C. § 228 (2006).

¹⁵ See, e.g., *The No Child Left Behind Act*, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–6578 (2006)).

¹⁶ See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 902–29 (2000) (discussing "federalization" of criminal law); see also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 993 (1995) ("The current increase in federal criminal jurisdiction is in fundamental tension with the values of decentralization promoted by federalism.").

¹⁷ See *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local."); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (internal quotation marks omitted)).

realm that is not under the exclusive control of either the states or the federal government. The central tenets of dualist federalism could be stated as follows: (1) the federal government and the state governments exercise exclusive and non-overlapping authority *in some areas*; (2) *with regard to these areas of exclusive jurisdiction*, authority between the national government and the states is allocated based on subject matter, with the national government regulating certain topics and the state governments regulating others; and (3) the courts play an important and distinctive role in maintaining the boundary lines around the exclusive area of state control and the exclusive area of national control, *while acknowledging a broad area of overlapping authority*.¹⁸

The polyphonic approach to federalism rejects the three central tenets of dual federalism and takes issue, as well, with the modified dualist restatements. Polyphonic federalism emphasizes that, as a descriptive matter, states and the federal government in fact exercise extensive concurrent authority.¹⁹ From education to securities regulation to narcotics enforcement, both the states and the federal government play active and overlapping roles.²⁰ It is unrealistic and unwise to try to pry apart state and federal involvement. An account of the appropriate roles of the states and the federal government cannot turn on an analysis of whether a subject is “truly local” or “truly national.” In contemporary society, the dichotomy of “truly local” and “truly national” has no substance. Expertise or responsiveness or ease of redistribution may suggest the superiority of state or federal regulation, but subject matter as such should not be relevant in choosing the appropriate level of government to be the primary regulator. Polyphonic federalism rejects the quixotic quest to discover the “truly local” so that it might be separated from the “truly national.”²¹

Whereas the critical projects for dualist federalism are first, how to define the distinctive state and federal spheres, and second, how to draw firm boundaries around them, the projects of polyphonic federalism are quite different. The key question for polyphonic federalism is how best to manage

¹⁸ See Schapiro, *supra* note 6, at 250–52 (describing dualist federalism).

¹⁹ *Id.* at 285.

²⁰ *Id.* at 246 (citing The No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–6578 (2006))) (education); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 592 (2003) (securities regulation); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 675–76 (1997) (criminal law).

²¹ See Schapiro, *supra* note 6, at 285–88.

the overlap and interaction of state and federal power. As I have discussed in detail elsewhere, the concurrence of state and federal power promotes several benefits, including a plurality of regulatory perspectives, a dialogue among regulators, and a system of redundancy to guard against errors by state or federal regulators.²² At the same time, overlapping regulation may threaten values of uniformity, finality, and accountability.²³ The goal is not to attempt a general separation of state and federal power, but rather to maximize the benefits of concurrence while minimizing the disadvantages. Indeed, in the polyphonic conception, it is the very interaction of state and federal authorities that best achieves the goals of federalism. Finally, once federalism is understood in these interactive terms, courts play a much diminished role. Courts have little institutional capacity to manage the complex issues of overlap. Courts are good at drawing lines, but polyphonic federalism does not require lines to be drawn. Executives, legislators, and administrative agencies are superior to the courts in managing the functional questions of overlapping regulation.²⁴

In this regard, the polyphonic perspective conceives federalism as a particular instance of intersystemic governance. By intersystemic governance, I mean the situation in which laws owing their authority to different centers of power apply to a particular setting. A regulated entity, be it a person, a corporation, or a political subdivision, finds its conduct controlled by the laws of more than one political authority.²⁵ From a polyphonic perspective, that is the key feature of federalism. Federalism is a system in which there are multiple nodes of political authority within a country. Polyphonic federalism focuses on the creative overlap of these different legal regimes.

By moving away from a historical and doctrinal focus to a functional and pragmatic one, the polyphonic perspective links the study of federalism within the United States to the broader themes of intersystemic governance. In the transnational context, it would be unusual for only one set of laws to apply. NAFTA, the European Union, and the World Trade Organization (WTO), for example, have rulemaking mechanisms that promulgate laws that overlap broadly with national legal systems. The world is full of law; it overflows with law, much of which cannot be contained within existing political boundaries.

²² *See id.* at 288–90.

²³ *See id.* at 290–94.

²⁴ *See id.* at 294–96.

²⁵ *Id.* at 288–90.

This plurality of overlapping legal regimes is not new. In the West, for example, this legal polyphony was the norm until the modern period.²⁶ Ecclesiastical law, municipal law, and trade law all overlapped and intersected. A variety of bodies exercised political authority and the accompanying lawmaking power. On the broader scale, empires required overlapping legal regimes. Local law and imperial law governed people's lives. The Roman Empire and its various successors embodied such complex legal systems. The growth of the modern nation-state led to simpler and more uniform legal regimes. States claimed exclusive authority over their subjects and often sought to centralize legal authority. A unified sense of sovereignty came to lie with the nation-state.²⁷ With that backdrop, federalism provided a solution to the problems posed by the unitary sovereignty of the nation-state. In Justice Kennedy's words, in creating federalism, the framers "split the atom of sovereignty."²⁸ First the atom of sovereignty had to be created; then federalism could split it.

This functional perspective moves away from a conception of federalism in the United States as another aspect of American exceptionalism and toward a view of contemporary federalism in the United States as part of a global reconceptualization of governance. Situating federalism in this contemporary global context highlights the importance of comparative study. From this perspective, one can learn more about the functioning of federalism in the United States by attending to current events in Brussels or in Davos today than by focusing on what happened in Philadelphia in 1787.

II. LEGITIMACY AND INTERSYSTEMIC GOVERNANCE

Understanding federalism as a system of overlapping governance highlights concerns for the legitimacy of the governing structure. Although the nation-state arose without a necessary commitment to democracy, democratic accountability has come to be a central legitimating feature of the modern, liberal nation-state. That legitimacy initially rested upon two features, in particular, of the modern state. First, under the Westphalian model, the nation-state enjoyed exclusive sovereign authority. Ultimately, the Westphalian state

²⁶ See Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315, 347–53 (discussing the polyphony of English legal culture and its influence during early colonization of America).

²⁷ See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 453–59 (2002).

²⁸ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

enjoyed complete control over the laws that applied within the state.²⁹ Second, the state became committed to democracy. Democratic structures ensure that laws, in some sense, emanate from the people. Ultimately, the citizens of the state make the laws that apply to them. Self-government is the norm. If citizens become dissatisfied with their laws or their leaders, mechanisms exist to allow them to change both. The change may not be immediate, but it can be accomplished over time. In a Westphalian democracy, the nation-state has ultimate authority over all of the laws that apply within its borders, and its citizens enjoy complete control over the government.

In a contemporary setting of intersystemic governance, this story of Westphalian democratic legitimacy no longer applies with full force. Laws promulgated by one polity have effect in other polities. Many factors account for the increasingly porous nature of legal boundaries. Transactions often have transnational effects, subjecting them to multiple schemes of regulation; and international agreements have greater domestic impact, both because of their increasing number and because of their increasing likelihood of applying to conduct within a state, rather than simply to the conduct of a state. In this sense, citizens are subject to regulations and legal institutions not of their own making. Fears of “world government” or “globalization” reflect these concerns. The policies of one country may have a substantial impact in other jurisdictions. Regulations may emanate from international bodies, such as the WTO, which do not fit into the traditional model of a democratic state.

Recently, the issue of the influence of international law in the legal system of the United States has aroused such concerns for legitimacy. The controversy over the citation of foreign legal authority in domestic judicial opinions reflects this unease.³⁰ How can it be consistent with democracy for judges in the United States to use foreign sources in interpreting the law of the United States? Citizens in the United States have no control over the content of foreign law. So, how can it be legitimate for judges to impose these foreign legal rules on the people of the United States?

In Part III, I will focus on a related controversy, concerning the application of customary international law by courts in the United States. This Part,

²⁹ See Berman, *supra* note 27, at 453–59.

³⁰ See, e.g., Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116–18 (2005); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 85–86 (2005); see also Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005); Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005).

however, highlights the purely domestic analog of these international disputes. As a structure of intersystemic governance, federalism raises similar concerns for democratic legitimacy. Citizens of individual states are subject to laws made by people in other states. The decline of dual federalism heightened these problems of legitimacy. Dual federalism invoked a jurisdictional matching principle that generally comported with democratic principles. In local matters, each state exercised exclusive control. The citizens of each state made the laws governing themselves in these areas. In national matters, the federal government, accountable to all the citizens of the United States, made the laws. Citizens could experience the laws as the product of their democratic participation, either as citizens of a state or as citizens of the United States. With the end of dual federalism, the states and the national government promulgate overlapping schemes of regulations without a clear jurisdictional match.

The remainder of this Part explores two areas of domestic law in which polyphonic principles raise particular concerns for democratic legitimacy: extraterritorial regulation and intersystemic adjudication. In each area, the concerns for legitimacy give rise to potential responses with harmful effects. The perception of a legitimacy deficit gives rise to cures—federal preemption and jurisdictional matching—that are worse than the purported disease. This Part sketches the treatments, with their harmful side effects. Relying on insights drawn from the international context, Part III offers an alternative account of legitimacy that eliminates the need for these dangerous cures.

A. *Preemption as a “Cure” for Extraterritorial Regulation*

Federal preemption of state law has become an increasingly significant topic of federalism inquiry.³¹ Many scholars have criticized the robust preemption doctrine of the current United States Supreme Court. The Court has found state regulations and state common law decisions preempted by federal law, even without specific textual support.³² The absence of preemptive language has not prevented the Court from voiding state law on the theory that it interferes with the objectives of federal law.³³

³¹ See, e.g., FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS (Michael S. Greve & Richard A. Epstein eds., 2007); *Symposium: Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices*, 33 PEPP. L. REV. 1 (2005); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

³² See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

³³ See Nelson, *supra* note 31, at 228–29 (discussing “obstacle” preemption).

Some scholars have contended that the Court's aggressive use of preemption belies its commitment to federalism.³⁴ I have argued, to the contrary, that preemption doctrine aligns with the Court's dualist project.³⁵ The Court seeks to create not only exclusive enclaves of state regulation, but exclusive federal spheres as well. Preemption doctrine helps the Court to carve out and defend areas of federal prerogative. More receptive to concurrent state and federal regulation, the polyphonic perspective suggests greater caution in finding state law preempted. In the polyphonic conception, the federal government's choice of one regulatory option does not embody a rejection of state supplementation with alternative regulatory schemes.³⁶ The federal government, of course, retains the prerogative to preempt state law, but the courts should not lightly assume that the federal government is exercising that authority. For the same reason, polyphonic federalism generally counsels against federal regulators choosing to preempt state law. Federal preemption, pursuant to federal administrative fiat or robust judicial interpretation, eliminates the benefits of overlapping regulation.³⁷

Concurrent regulation may not always be appropriate. The question then becomes which situations require the exercise of preemptive authority. One argument relied on to justify preemption concerns the potentially extraterritorial effect of state regulation. Scholars argue that states may seek to apply their laws to those not represented in their political systems. States might attempt to impose costly regulations on out-of-state entities that happen to do business in the state.³⁸ States also might adopt regulatory schemes that have the practical effect of dictating standards in other jurisdictions.³⁹ If California, for example, demands that automobiles follow certain design standards, the scale of production might require companies to follow those guidelines and add the attendant costs to vehicles destined for other states as

³⁴ See, e.g., Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 70 (2005) (describing "hypocrisies" in the Rehnquist Court's treatment of federalism in preemption cases); Erwin Chemerinsky, *Empowering States when It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1324 (2004) (finding preemption cases inconsistent with the Court's other federalism cases); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343; James B. Staab, *Conservative Activism on the Rehnquist Court: Federal Preemption Is No Longer a Liberal Issue*, 9 ROGER WILLIAMS U. L. REV. 129, 183 (2003).

³⁵ See Schapiro, *supra* note 6, at 261–63.

³⁶ *Id.* at 296–97.

³⁷ *Id.*

³⁸ See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1386–89 (2006).

³⁹ See Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 17 (2000).

well. Either situation presents the potential for political-process failures. Jurisdictions would be imposing regulatory costs on those not democratically represented in the polity. The burdens could be characterized as taxation without representation. These regulations might be inefficient, as well as unfair.

In this context, federal preemption might appear to enjoy a democratic imprimatur. Imposing regulations at the national level allows all citizens to participate. States lose the ability to target out-of-state entities for special disabilities or costs. From this perspective, preemption appears as a guardian of democratic legitimacy.

While preemption may resolve this particular legitimacy concern, the costs of the cure are substantial. Professor William Buzbee recently has enumerated the pathologies of preemption.⁴⁰ Preemption prevents the interplay of state and federal law that constitutes one of chief benefits of federalism. The federal negation of state law eliminates the possibility of plurality, dialogue, and redundancy. The only voice is federal, and no backup system exists should the federal scheme fail. These costs might be justified if demanded by principles of democratic legitimacy. As Part IV explains, however, a reconceptualization of legitimacy resolves the problem without the harmful side effects of preemption.

B. Jurisdictional Matching as a "Cure" for Intersystemic Adjudication

The federal structure of the United States includes a fully developed dual judicial system, with federal trial and appellate courts and state trial and appellate courts. That structure is unusual. Most federal polities have a unified judicial system, generally characterized by lower courts associated with the states or subnational units and a national high court. Many countries have specialized federal trial courts, but the generalized trial functions of federal district courts in the United States are uncommon on the world scene.⁴¹

The existence of a dual court system creates the possibility of allocating cases based on the law at issue. Federal questions could be sent to federal court and state questions to state court, though of course cases raising both

⁴⁰ See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. (forthcoming 2007).

⁴¹ See WATTS, *supra* note 1, at 3; Ronald L. Watts, *Foreword: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941, 955–56 (2000).

kinds of issues would pose allocational difficulties. Instead, in the United States, the jurisdictions of the state and federal courts overlap extensively. Issues of state law commonly arise in and are adjudicated by federal courts; issues of federal law commonly arise in and are adjudicated by state courts.

Various doctrines exist to regulate these exercises of intersystemic adjudication. *Pullman* abstention⁴² and *Burford* abstention,⁴³ for example, channel certain kinds of state law issues from federal courts to state courts. Diversity jurisdiction⁴⁴ and supplemental jurisdiction,⁴⁵ along with their various statutory and judicially imposed limitations, regulate the flow of state law cases into federal courts. An underlying question concerns the normative status of these exercises of intersystemic adjudication. Intersystemic adjudication is endemic to the jurisdictional system of the United States. It cannot be eliminated without drastically altering the judicial structure. Intersystemic adjudication can, however, be increased or decreased.

Some scholars have questioned the appropriateness of intersystemic adjudication.⁴⁶ A central issue is the legitimacy of federal courts interpreting state law. When federal courts interpret and apply state law, they are enforcing the rules of a different jurisdiction. Federal judges, who stand outside the state constitutional system, thus participate in the fashioning of state law. The state law that emanates from federal court decisions in this sense lacks a democratic pedigree. The state constitution establishes a democratic system of state institutions, but the federal courts function outside of this structure. Federal judges are not part of the state constitutional system, nor are they accountable within the state constitutional system. As mediated through federal judges, state laws become rules imposed by a different jurisdictional system. In this sense, the citizens of the state are subject to law not of their own control. The principle of popular sovereignty suffers. The *Erie*⁴⁷ case in part responded to this problem. One of the concerns that led to the overruling of *Swift v. Tyson*⁴⁸ was a perception that federal courts were participating actively and unaccountably in the making of state law.

⁴² See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

⁴³ See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

⁴⁴ See 28 U.S.C. § 1332 (2006).

⁴⁵ See *id.* § 1367.

⁴⁶ See, e.g., Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1495 (1997); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1236 (2004).

⁴⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–78 (1938).

⁴⁸ 41 U.S. (16 Pet.) 1 (1842).

By contrast, when federal courts apply federal law, such legitimacy problems do not arise. The citizens against whom the laws are being applied are citizens of the United States and participate in the constitutional structure that undergirds the federal court system. As citizens of the United States, the individuals participate in the election of Presidents and Senators who nominate and confirm the judges, and they can participate in the altering of jurisdiction rules, or even of the Constitution itself. When considered as citizens of an individual state, the people do not have this control over the federal judicial structure.

Minimizing intersystemic adjudication appears as a cure for the problem of legitimacy. That solution, however, has its own problems. As I have discussed elsewhere, intersystemic adjudication may be beneficial in certain circumstances.⁴⁹ In particular, benefits may arise from the diversity of perspectives offered by different jurisdictional systems. State courts and federal courts can learn from each other as they both address topics of overlapping concern. Concurrent jurisdiction also can serve as a redundant, fail-safe mechanism should either judicial system fail in its obligations to enforce the law. To give just one example, the ability of state courts to offer broader standing rules for the enforcement of federal law may provide a valuable mechanism for the vindication of federal rights. An attempt to minimize intersystemic adjudication would eliminate these potential benefits of a federal judicial system.

These two examples of intersystemic governance—extraterritorial regulation and intersystemic adjudication—illustrate domestic challenges to issues of democratic legitimacy. Polyphonic federalism dispenses with a necessary match between polity and jurisdictional domain. Polyphony recognizes that political boundaries no longer demarcate fixed and independent legal systems. Legitimacy must come from a source other than direct democratic representation. What is needed is a conception of legitimacy that addresses the threat to democratic control without eliminating the advantages of intersystemic governance. The transnational domain, in which such legitimacy problems are endemic, helps to shed light on potential resolutions of these domestic concerns.

⁴⁹ See Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1417–23 (2005).

III. LEGITIMACY IN A POST-WESTPHALIAN SYSTEM: THE CASE OF CUSTOMARY INTERNATIONAL LAW

The application of international law in domestic courts presents another example of intersystemic adjudication. Much recent debate has focused on the incorporation of international or foreign legal principles into domestic judicial decisions.⁵⁰ These debates provide a helpful point of reference in addressing the legitimacy concerns raised by intersystemic adjudication. Applying foreign or international law is more jarring than applying the law of another jurisdiction within the United States. Accordingly, extensive attention has been paid to legitimacy issues in the transnational context.

Certain applications of international law raise little concern. When the United States ratifies a treaty, the provisions of the treaty become binding federal law.⁵¹ Questions may arise about whether a treaty is self-executing or requires implementing legislation, but treaty law clearly becomes federal law through the ratification process. The legitimacy of treaty law raises few questions because ratification according to the process set forth in the Constitution satisfies democratic standards.⁵² Treaties, themselves, may be controversial, and their intersection with other domestic law may raise interesting issues, but their basic status as federal law remains uncontested.

Customary international law presents different issues. In contrast to treaty law, customary international law arises not from ratification of a document but from the actual practices of states. As one authoritative source puts it, customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁵³ Customary international law includes a broad array of rules, including immunity of foreign diplomats, the enforcement of legal judgments, and most controversially, human rights principles.⁵⁴ A fierce debate has arisen recently over the status of customary international law in domestic courts.⁵⁵ Does customary international law count as binding federal law in the same manner as ratified treaties?

⁵⁰ See *supra* note 30.

⁵¹ See U.S. CONST. art. VI.

⁵² See *id.* art. II, § 2.

⁵³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

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

⁵⁵ See *supra* note 4.

The question of the democratic pedigree of customary international law figures centrally in the controversy. Customary international law does not trace its authority to a formal political act, such as the ratification of an international agreement. Customary international law does not owe its status to a vote of a democratically elected legislature or even the agreement of a democratically elected executive. Is the application of customary international law in domestic courts a violation of fundamental principles of self-rule? Would courts be enforcing a law that does not emanate from the citizens of the polity? This arguable democratic deficit poses an obstacle to the legitimacy of customary international law in domestic courts.⁵⁶

Viewed in this light, the debate over customary international law represents an especially salient instance of intersystemic adjudication. This area helps to reveal responses that are relevant in the domestic context as well. Dean Alexander Aleinikoff has addressed this issue with particular perspicacity and has offered analysis with useful analogs in the domestic setting.⁵⁷

Dean Aleinikoff proposes that legitimacy need not derive from direct democratic control of the lawmaking process. Such direct control is lacking in many aspects of our political system, including agency rulemaking and judicial review. Instead, Dean Aleinikoff suggests that legitimacy flows from institutions operating in a “field of democratic control.”⁵⁸ Elements of this field include fair, transparent processes and the ultimate possibility of popular control. It is these kinds of considerations, he argues, “that make the Federal Reserve System, the Environmental Protection Agency, *Marbury v. Madison*, and the United States Congress fully acceptable aspects of an American constitutionalism dedicated to the premise of popular sovereignty.”⁵⁹ On this account, it is less the source of the legal principle, and more the character of the implementing and reviewing institutions, that provides the necessary element of democratic accountability. Customary international law, like other legal rules, flows over the borders into the United States. Its treatment and function once it enters the United States, rather than its origins, provide its legitimacy. In a post-Westphalian world, legitimacy must be assured through some process other than a unitary sovereign with an exact match between political boundaries and regulatory jurisdiction.

⁵⁶ See Bradley & Goldsmith, *supra* note 4, at 857.

⁵⁷ See generally T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004).

⁵⁸ *Id.* at 106.

⁵⁹ *Id.*

IV. FROM INTERSYSTEMIC GOVERNANCE TO FEDERALISM

The discussion of customary international law helps to place contemporary issues of federalism in the United States within a global context. The polyphonic regime of multiple, overlapping layers of authority characterizes both the relationship of states to the national government and broader, global governing trends. The nation-state is losing some of its monopoly of authority both in the international and in the domestic realm. Customary international law imposes binding norms that are not traceable to an authoritative act of the nation-state. Similarly, the states and the federal government enjoy concurrent and overlapping spheres of authority. Dual federalism attempted to preserve a Westphalian conception of sovereignty by making states sovereign in their own spheres, while the federal government enjoyed exclusive authority in others. The dualist attempt to preserve principles of monopoly of power, at least in certain areas, has now run its course.

The development of intersystemic modes of governance has been more obvious and controversial in the international sphere. New governing institutions, such as the European Union and the World Trade Organization, emphasize with great clarity a cession of authority to transnational structures. The larger canvas of transnational governance facilitates the viewing of domestic trends. If customary international law can be understood within an underlying commitment to popular sovereignty, so too can intersystemic governance within the United States.

Indeed, the sorts of principles identified by Dean Aleinikoff are satisfied easily in the domestic setting. The federal and state laws all occur within a democratic field. With regard to the problem of extraterritorial regulation, states operate within the framework of the United States Constitution, including the protections against discrimination in its Equal Protection Clause and in its Dormant Commerce Clause doctrines. The structure imposes norms of procedural and substantive fairness on state regulations. Further, principles of free speech allow out-of-state entities to participate in the political debates within a given state, even if votes are limited to citizens of the state. Out-of-state money, of course, can “vote” as effectively as in-state money. Another kind of procedural check against cost-shifting is the very interconnectedness of the national economy. Given the widely dispersed economic stakeholders in any firm, including employees, investors, and suppliers, states would have difficulty targeting their regulations to have only out-of-state effects, even if they so desired. For the same reason, states would bear at least part of the

costs for any inefficient regulatory scheme that is promulgated. In this context of broad participation and shared interest, federal preemption constitutes an unduly blunt and generally unnecessary mechanism to protect an abstract principle of democratic control.

Similarly, the problem of the potential illegitimacy of intersystemic adjudication diminishes in importance. States always retain control over the content of their own laws, even if they are enforced by federal courts. This control represents an important distinction from the era prior to *Erie*. In that earlier period, federal courts would sometimes refuse to follow state statutes or state constitutions, as interpreted by state courts, if the federal court found that the state law violated more universal principles of jurisprudence.⁶⁰ Further, while federal courts are not part of the state constitutional system, they function in accordance with strong principles of due process. The constitutional system of the United States invests substantial resources into ensuring the fairness of federal court adjudications, including guarantees of life tenure, undiminished salaries, and high prestige. The federal commitment to the status of the federal courts helps to guarantee that state law will be applied by federal courts in an unbiased manner.

As in the international context, a field of democratic control and a fair process provide the key components of legitimacy. The matching of the jurisdiction producing the law with the jurisdiction applying the law no longer serves as the sole model of democratic legitimacy.

CONCLUSION

Placing federalism within the global context of intersystemic governance yields important insights. The central concerns of federalism—how to achieve the benefits of plurality, dialogue, and redundancy, without unduly sacrificing other important values, including uniformity, finality, and accountability—arise in all systems of intersystemic governance. This Essay has focused on one especially significant issue of accountability: the question of democratic legitimacy. This issue appears in a variety of different contexts when a disjunction arises between the promulgating authority and the regulated

⁶⁰ See, e.g., *Twp. of Pine Grove v. Talcott*, 86 U.S. 666, 677 (1873) (rejecting the Michigan Supreme Court's ruling that a statute authorizing issuance of bonds was unconstitutional); *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1863) (refusing to follow highest state court's most recent construction of its constitution).

entities. As layers of law flow over political boundaries, these disjunctions arise with greater frequency. The concern for the potential “democratic deficit” of transnational regulation has been widespread.

Similar questions of democratic accountability arise in the domestic setting. Understanding federalism within the broader context of intersystemic governance helps to identify these concerns and to address them. Dean Aleinikoff’s analysis provides one example of a solution to a transnational problem with broad domestic application. More generally, I have sought to illustrate the domestic benefits of an engagement with international issues. The particular constitutional system of the United States presents unique factors, but all constitutional systems, whether governing a single nation or an international institution, involve their own unique circumstances of history, culture, and structure. Nevertheless, comparative study can yield great insights. The value of democratic accountability is widely shared. The challenges posed by layered governance in a post-Westphalian world are pervasive. While the specter of incorporating foreign laws and foreign values haunts comparative studies in the United States, the kind of learning that I am advocating should not raise those concerns. Studying the mechanisms by which the values of liberal democracy are advanced in international regimes does not involve the importation of foreign species. Like the international exploration of physics, the international investigation of the physics of intersystemic governance should not present a threat to the constitutional values of the United States. Rather, taking account of the solutions and theories developed in the general study of intersystemic governance will greatly enrich the understanding of federalism in the United States.

