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The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay

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The Power to Regulate “Commerce with Foreign Nations” in a Global Economy and the Future of American Democracy: An Essay

KENNETH M. CASEBEER*

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* Professor of Law, University of Miami. This essay represents the Law & Society genre by examining and critiquing legal doctrine and institutional practices from the standpoint of social theory and empirical policy. This essay also advocates a particular commitment to a robust or “thick” democracy as the basis or starting point of Constitutional interpretations. Workers need stronger democracy and vice-versa. Yet in a third sense, this is an essay because many of its challenges to present actions raise questions which need much fuller empirical investigation. In the same way, the theoretical framework lacks necessary nuances and “thick” specification. Many, research assistants have contributed to it, particularly: Carlos Mustelier, Rebecca Lawrence, and Peter Iacono. I have also greatly benefitted from discussions with colleagues Bernard Oxman, Patrick Gudridge, and Marnie Mahoney. This work and its companion, *The Empty State and Nobody’s Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000), constitute part of a larger manuscript on the State and Democracy.

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[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

Justice Holmes, *Missouri v. Holland*.¹

[The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. . . . The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. . . . Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Justice Jackson, *H. P. Hood & Sons, Incorporated v. Du Mond*.²

I. POPULAR SOVEREIGNS WANT DEMOCRACY TO WORK

The great American experiment of a government legitimized by

1. 252 U.S. 416, 433-34 (1920).

2. 336 U.S. 525, 537-39 (1949).

popular sovereignty promised a government of law, not a government of personal power or military force.³ Respect for the “popular sovereign” State, thus requires an authentic democracy. Democracy in turn, must be measured by actual practice in order to preserve accountability of government under the Constitution.⁴ Citizens should therefore choose their representatives confident that policies enacted into law will be set in forums representing all those affected or “taxed.” Thus, the demand for popular sovereignty over a legally limited government derives directly from the democratic principle animating the American Declaration of Independence: No taxation without representation. This much the Constitution requires of our democracy!⁵

Under this structural commitment to democracy, the extent of Congressional power⁶ at the millennium will inevitably reflect the factual reality of market organization as the socially chosen method of defining the relationship between the division of labor and community life. Empirically and historically, social stability depends, in part, on the correlation between actual legitimization of the distribution of power and the workability of the historical context of organization of economic and social relations.⁷

The United States might have made constitutional choices other than popular sovereignty. While such speculations are more fit for intellectual sport, the fact is that commitment to democratic inclusion requires a system of enacting laws that reflects the interest of all citizens.⁸ Using the republican form of government as an excuse to insti-

3. THE FEDERALIST NO. 1, at 33 (James Madison) (C. Rossiter ed., 1961).

4. Compare for example the German Supreme Court's decision upholding the constitutionality of the Treaty of Maastricht, subject only to future “federalistic” delegations of power remaining consistent with the right to democracy embedded, although not in textual language, in the German Constitution.

5. I take this truth as self-evident. There are many who demean popular sovereignty by taking it to mean merely acquiescence in the current regime. Such an argument would justify all regimes of government, and therefore none. In turn, all republican forms of government under popular sovereignty require some explanation of their inherent democratic deficit. “Consent” requires a differentiation from “acquiescence.” Too often our Constitution's legitimacy has been ignored by new aristocrats who would bend the Constitutional document to decrease institutional responsibility to democratic forms. See John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283 (1999); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The Author will defend authentic democracy as required by popular sovereignty. Those who would start the legitimacy question assuming a more undemocratic principle should be forced to defend the resulting inequalities and inequities as Constitutionally just.

6. U.S. CONST. art. I, § 8.

7. On history, see E.P. THOMPSON, “THE RULE OF LAW,” *WHIGS & HUNTERS: THE ORIGIN OF THE BLACK ACTS* 258 (1975).

8. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION PART III* (1992); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLICS: 1776-1787* (1998).

tute rule by aristocracy must be repudiated.⁹ Rather, healthy legitimation of governance through democratic practices will be signified by the robust debate and compromise or conflict which is the expected behavior of pluralistic majorities. Such pluralism embodies diversity (almost literally) as instituted in multiple representative but distinctly defined forums. The same pluralistic assumption requires decisions to be made inclusively. Thus, without revoking a commitment to democracy in government, and market organization of the economy, the current material reality of a finance driven market of investments of globally organized capital management can be politically regulated only as a matter of foreign affairs.

Under the United States Constitution, such powers reside solely in the Federal Government. They are prohibited to the states, first, expressly; second, by the supremacy of the Constitution and Federal law; and third, by the structure of the federalism required by the Constitution. The great principle of popular sovereignty¹⁰ requires this Constitutional outcome. The Declaration of Independence was based upon it.¹¹ The principle of "No taxation without representation" requires it. Therefore, the Supremacy Clause requires it.¹² The most important constitutional opinion in Supreme Court history centers on it.¹³ Yet the present Supreme Court seems to reject these democratic principles and is poised to strike down the ability for the mass of the American population to compete internationally.¹⁴

This essay will confront the Rehnquist Court's "New Federalism," by arguing: First, the economic health of the American people, at least at this historical point in time, depends on recognizing that the capitalist form of State/Market organization of socio-economic relationships has "won" on a global basis.¹⁵ From this assumption, Section II of this

9. See *supra* note 5.

10. "We the People . . .," U.S. CONST. Pmbi.

11. "We hold these truths to be self evident, that all men are created equal." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

12. U.S. CONST. art. VI.

13. *McCulloch v. Maryland*, 17 U.S. (4 Cranch) 316 (1819).

14. For the problems globalization creates for democracy, see Eyal Benvenisti, *Exit and Voice in the Age of Globalism*, 98 MICH. L. REV. 167 (1999).

15. For those who would wish some other form of more egalitarian socio-economic organization would replace the present regime, this essay's agenda argues: First, the working population needs stable employment organizations in order to mobilize to increase and locate human capital investment in their communities. Second, political powers of workers in alliances will need to demand provision of educational and technical assistance from the State. These aims can only be attained if democracy can be re-invigorated and subject to numerical majority interests. Neither civil society, nor the State sector alone can effectively transform current social practices. While in the short run such an agenda may seem imperial or insensitive to other nation's workforces, effective democratization of other economies depends materially on strengthening inclusive democratization in the United States. The agenda is not intended as giving

essay describes the doctrinal backdrop of national power within such a globally organized economy. Section III links Constitutional power to the structure of the Rehnquist Court's system of interpretation. Further, the essay argues that the global economy, absent a world regime, will be shaped by Nation-State negotiation of terms of trade, labor standards, etc., and nationally organized competitiveness policies. Section IV reconnects the importance of competitiveness to democracy, particularly to the people who work and depend upon the availability of work in the new global labor markets. In this context, perhaps curiously, protecting workers in this country will in the short term require promoting the success of international investment in the United States in order to attract geographically mobile production to regional labor pools. These labor pools respect no state lines or municipal boundaries. They are regional concentrations of population. Such population concentrations in massive urban areas potentially wield great voting power, unless thwarted by balkanized district and municipality units. The United States Supreme Court's "New Federalism," by privileging suburban enclaves of wealth, and their residents' ability to exclude themselves from regional problems, is exactly perverse to the coordinated multi-state localism necessary to compete globally. Thus, promotion of American workers' competitiveness and protecting labor standards simultaneously, can only be pursued by democratic national control as a matter of foreign policy, and as procedurally required by the Compact Clause.¹⁶

II. COMMERCE WITH FOREIGN NATIONS UNDER GLOBAL FINANCE CAPITAL MARKETS

This self-inflicted danger to democracy exists even though the Supreme Court at the beginning of the Rehnquist era reaffirmed the federal power to ensure national protection of American citizens' competition as a key commitment of the Constitution's design. In *Michelin Tire Corporation v. Wages Tax Commissioner*, Justice Brennan, speaking for the majority, said:

[1] [t]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; [3] and harmony among the States might be disturbed unless seaboard States, with their crucial

up on social transformation or as a tool of coopting worker formed political action. As Hegel suggests, the way to overcome the present requires going through it and coming out the other side.

16. U.S. CONST. art. I, § 3, cl. 2.

ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.¹⁷

Point [1] emphasizes the exclusively national character of foreign commerce regulation, including reaching any activity affecting foreign relations, and thus, the prohibition of local officials undertaking independent intervention in those relations. Point [3] requires a form of the principle, "No taxation without representation."

However, such recognition has not, prevented the Rehnquist Court from promulgating its "New Federalism," a set of doctrines limiting Congressional power constitutionally impossible to square with *Michelin's* reasoning. Despite repeated failures to craft any workable doctrines supporting such gambits,¹⁸ these new judicially invented restrictions on democracy create Constitutional contradictions. Thus, citizens, lawyers, and lower courts are left adrift, trying to settle cases of conflicting state and national authority. This present status of Constitutional confusion and contradiction is more than a matter of hard cases and difficult interpretations. The corner into which the current Supreme Court has painted us is due neither to accident, misunderstanding, nor framer's myopia. It is time to conclude that the present Court's Constitutional agenda of devolution of government to local enclaves of wealth is simply wrong and harms all of us.¹⁹

A. *With Foreign Nations: The Capital of Finance Capital[s]*

What role will American competitiveness play, positive or negative, in fitting into the new economic reality? As it develops, law, legal institutions, legislated policies, regulations, tax and subsidy, will certainly both reflect and shape events and conflicts over this future. Yet, historical change rarely appears in the heat and immediacy of the present, usually becoming clear only in hindsight. For instance, it is now commonplace to understand the 1970's as a watershed era of change in the American polity, economy, and geo-politics.²⁰ At the time, war and the civil rights movement precipitated intense political crises. Now, the collapse of the American steel industry among others under international

17. 423 U.S. 276, 285-86 (1976).

18. See, e.g., Justice O'Connor's abandonment of the Tenth Amendment gambit of *National League of Cities v. Usery*, 426 U.S. 833 (1976), in *New York v. United States*, 505 U.S. 144, 160 (1992).

19. For elaboration on the new constitutional liberty as exhausted by exclusion from enclaves of protected propertied wealth, see Kenneth Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000).

20. See RICHARD J. BARNETT & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* Part Three (1994).

competition seems similarly pivotal. Along with the reorganization and retrenchment of American industrial production, the beginning of the service economy, and a half-hearted conversion from a war economy, we also see the accompanying destruction of "good," stable, industrial jobs initially fought for by industrial unions, which have virtually collapsed. Over eighty percent of working Americans now work in the services sector. Union penetration of the labor market currently stands at about fourteen percent and only six and a half percent of the service industry is unionized. That is down from a high of approximately thirty-five percent of the work force in the 1950's.²¹ Not surprisingly, the average family income is now no more in real dollar terms than in 1975.²²

What remains seldomly recognized is that international industrial competition over cheaper labor and environmental costs has promoted a continuing race to the bottom of production costs.²³ We might have predicted these changes as the inevitable result of the shift from industrial control of capitalism under regional geographic control, to the dominance of international finance in investment decisions.²⁴ Yet our society now has awoken and laments the complete lack of national or geographic loyalty of capital flows.²⁵ In part, due to flexible assembly/production, short term gains can be realized by moving to cheaper labor costs. The world economy now faces a worldwide production overcapacity similar to what effectively caused the Great Depression of the 1920-30's. Thus, investment now shifts from low wage production in leading developing countries to even lower wage populations elsewhere, leaving behind still competitive production facilities and populations with rising standard of living expectations.²⁶ This leap-frog game now bows to finance investment rather than production itself.²⁷ While financial investors seek maximum short-term returns, the concentration of

21. For an explanation of the legal role in this decline, see Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WIS. L. REV. 1, (1990).

22. See Simon Head, *The New Ruthless Economy*, N.Y. REVIEW, Feb. 29, 1996, at 47.

23. See Robert Howse, *The World Trade Organization and the Protection of Workers*, 3 J. SMALL & EMERGING BUS. L. 131, 136 (1999).

24. See Timothy A. Canova, *The Disorders of Unrestricted Capital Mobility and the Limits of the Orthodox Imagination: A Critique of Robert Solomon, Money on the Move: The Revolution in International Finance Since 1980*, 9 MINN. J. GLOBAL TRADE 219, 221 (2000).

25. On the effects on government and consequences for citizens, see SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1998); on workers, see Maria L. Ontiveros, *A Vision of Global Capitalism That Puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27 (1999).

26. See David McNally, *Globalization on Trial: Crisis and Class Struggle in East Asia*, MONTHLY REVIEW, Sept. 1998, at 1.

27. GLOBAL UNEMPLOYMENT: LOSS OF JOBS IN THE 1990's (J. Eatwell ed., 1996)

economic power is even more centralized, private, non-geographical, and subject to little Nation-State control.²⁸ Moreover, financial mobility, alone among the factors of production, moves instantaneously and invisibly in the digitized world.

There is no doubt that most of the services and goods produced in America are still consumed domestically. But, the health, stability, and relative value of all economic activity in our domestic economy will inevitably and increasingly depend on trade balances, the velocity of money, currency valuation, and access to internationalized capital pools. All of these factors involve substantial government policy formation and representation in foreign negotiations.

At what political level will our national competitiveness policy be legislated? Will the servicing of capital flows and their managers be centered in the United States? In response to the current economic reality, where does the interest of our nation and citizens rest today? It seems that in the near future, investment capital driven by short-term maximization will be subject to attempted capture by highly diversified trade blocs.²⁹ The European Community currently races ahead of other potential blocs in terms of political institutions and infrastructure. The Eastern Asian rim, while politically anarchic and faced with the sleeping giant of China, seems another likely group. Both possesses a finance capital in Germany and Japan respectively. All of this occurs while the United States, standing alone, remains powerful. However, even so, this country has pushed through NAFTA as a counter free trade zone for North America.³⁰ All three trade blocs though are centered on lead nations of the so-called first world.

If the obvious self-interest of the American hemispheres comes to fruition, the capital of finance for the region will reside in the most economically stable and powerful country, the United States. Leadership is ours' to lose. But, a free trade market, by definition, makes it possible for the United States to lose. Finance needs services and high technology. Such market infrastructure in the computer age is highly mobile. The ability of the United States to remain the economic center of the world will depend on sufficient investment in human capital in order to

28. See JEREMY BRECHER ET AL., *GLOBALIZATION FROM BELOW* 1-19 (2000).

29. Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900 (1996-97).

30. President Clinton seemingly sought to make his second term legacy a bold geopolitical attempt to flank our competitors. By calling for an entire Americas Free Trade Zone, he was seeking to create an unprecedented North/South hemispheric trade axis capable of economically resisting dominance by any other trade bloc. That effort continues. See E. Alden, A. Bounds, & C. Dyer, *The Americas: U.S. Push for Trade Pact Faces Hurdle*, FINANCIAL TIMES (London), Feb. 16, 2001.

convince the finance sector to be serviced in the United States, primarily by our nationals. If finance driven globalism is inevitable, the political system must be able to promote a position of preeminence as a matter of national interest.

B. *With Foreign Nations: The Clause*

Addressing the issue of foreign economic policymaking in their own time, the Framers wrote the Foreign Commerce Clause to be a grant of power separate from the Interstate Commerce Clause. The Framers of the Constitution cannot be interpreted to have included separate clauses within the same sentence of an enumerated power and have meant the first clause written to have no independent meaning. It is not mere surplusage. This is clear as a matter of grammar, the textual relation of Congressional power to other branches and other levels of government, and as a matter of Framers' intent.

The three commerce clauses have different relationships to different sovereignties. Foreign commerce regulation must necessarily take account of international laws and treaties, not only for implementation of international obligations, but also for harmonization of domestic and foreign market practices. After all the United States is the international person for purposes of fulfilling international obligations, and foreign states may hold the United States accountable for compliance with all international obligations, whether effected by the federal government or local officials.³¹ Moreover, increasingly, the United States makes international agreements by Congressional-Executive agreements.³² Whether by treaty or statutory authority, these foreign policies must be the supreme law of the land and therefore preempt competing state policies by occupation of the field of foreign affairs. Just as matters affecting foreign commerce must be a broader power than the power to regulate commerce among the states, so preemption under the dormant Foreign Commerce Clause must be greater because of its foreign policy content than preemption involving domestic regulation. Police powers of the states undoubtedly overlap interstate commerce powers in a way that conduct of foreign policy of the nation cannot allow.

31. Notice the tension this creates between the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1994 and Supp. V. 1999), and the Supreme Court's invention of states sovereign immunity under the Eleventh Amendment.

32. See *Made in the USA Foundation v. United States*, 242 F.3d 1300 (11th Cir. 2001), where the Court held that whether a Congressional-Executive Agreement (in this case NAFTA) must follow Senate confirmation of treaties involves a political question unfit for judicial determination. The district court had reached the merits arguing, "The Treaty Clause does not constitute the exclusive means of enacting international commercial agreements, given Congress's plenary powers to regulate foreign commerce under Art. I, § 8, and the President's inherent authority under Article II to manage our nation's foreign affairs." *Id.* at 1302.

The Foreign Commerce Clause by itself has had little doctrinal elaboration which may contribute to an older misconception that since the Interstate Commerce Clause is judicially unlimitable, the Foreign Commerce Clause need not be reached as a source of legislative power.³³ Thus, the foreign commerce power remains unfit for judicial limitations even if the current Court purports to find an internal limit to interstate commerce.³⁴ However, if identical laws are unconstitutional on the accident of whether Congress invokes the interstate clause or the foreign clause, something is most probably wrong with the doctrine of interstate commerce being promulgated, rather than asserting there are no foreign policy issues included in regulating global economic activity.

The actual doctrinal history of the Foreign Commerce Clause has been treated with remarkable consistency by the United States Supreme Court, and across markedly different periods of Supreme Court ideology of federalism and changing historical views on interstate commerce.

Not surprisingly, the economic dominance of globalism emerges only in the past decade. After all, it took the Great Depression to finally remove resistance to the notion that the relative value of goods and services could no longer be limited to local, regionalized, or limited markets. Economically, the national common market had been established substantially earlier than its recognition in court opinions.³⁵

While transportation may have linked some markets for more than a century, it was unable to link consumers and goods across large dis-

33. This conception traces the reliance on the Interstate Commerce Clause subject only "to the wisdom and judgment of the people" back to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), a judicial deference returned to in 1937 in *Jones & Laughlin v. NLRB*, 301 U.S. 1 (1937), and reaffirmed in *United States v. Darby*, 312 U.S. 100 (1941).

34. Yet, for example, even experts on foreign affairs, such as Professor Louis Henkin, are subject to misinterpretation on this point. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972). Henkin treats the subsidiary question of preemption as if the dormant Interstate Commerce Clause describes the same relationship of state and federal interest as that of the dormant Foreign Commerce Clause. In the seventies, the Supreme Court found no enforceable limits on interstate commerce power. Dormancy under the Interstate Commerce Clause, or indeed directions under the Export-Import clause, assumed Congressional policy controlled the national common market. If local differences counseled regional actions, Congress could choose whether to consent to state controls. The Interstate Commerce Clause was unlimitable when the Congress acted. There was no occasion to base federal policy power extension on foreign commerce control. Its doctrinal separation and the exclusivity of the commerce clauses are reduced to footnotes. In reading Henkin, it must be remembered that preemption succeeds to an act of admitted federal sovereignty. The second edition allocates only two pages on the topic, acknowledging but not analyzing the relevance of *United States v. Lopez*, 514 U.S. 549 (1995), to foreign commerce, conceding the point of this article, the connection between the global economy and foreign policy, to be a barrier to continue simply assuming the Interstate and Foreign Commerce Clauses provided the same legislative powers.

35. See the origins of the substantial relationship doctrine of *Jones & Laughlin v. NLRB* in the 1914 *Shreveport Rate Case*, 324 U.S. 342 (1914), a suppressed doctrine under the dominant ideology of dual sovereignty supporting liberty as contract.

tances quickly until this century. By the 1930's, rapid technological change and mass production created an oversupply of goods that could not be cleared from the market even with the advances in transportation.³⁶ While the long run could be relied upon to shake out failing producers to regain an equilibrium of supply and demand, the accompanying lowered demand of the unemployed for goods had created an oversupply of labor as well. Surpluses of people rotting in the fields and streets could not be stomached in the same way as unwanted refrigerators, corn, or milk. Starving people wanted to restabilize the market starting yesterday, not a promise of market self-correction in the long run. Yet a politically isolated Supreme Court allowed states and their individual constituencies to opt out of nationally coordinated solutions to short term market gluts convincing none of the hungry of the fairness and legitimacy of balkanized markets propped up by old legal formalisms.³⁷

Until the late 1970's, the Supreme Court's complete deference to the only legislative forum representing all of us — consumers, producers, labor, and capital, and the interdependence of all of us produced by the increasing rationalization of supply and demand — allowed Congress via the Supremacy Clause to supplant great areas of formerly state policymaking. The need to regulate or not to regulate had to expand to meet the changed nature of modern market operation.³⁸ Resort to the Foreign Commerce Clause during this time was unnecessary in the light of the expanded interstate commerce clause.³⁹ But, the dying regime of states' rights could not have controlled the Foreign Commerce Clause anyway:

The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce. . . . 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. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the federal power has been exerted. To permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create.⁴⁰

36. See ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1995).

37. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

38. See *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949).

39. See Martin S. Flaherty, *Are We to be a Nation? Federal Powers vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999).

40. *Bd. of Trs. of the Univ. of Illinois v. United States*, 289 U.S. 48, 57, 59 (1933).

Infrequency of use, however, did not mean ignorance of the Foreign Commerce Clause by the courts. By any method of constitutional interpretation — plain language, original intent, structure of the document, ratification, historical evolution, values of liberty, contemporary contextual realism — the Foreign Commerce Clause is central to our constitutional system and to continuing faith in the rule of law.

First, reviewing the plain language of the three commerce sub-clauses contained in the Constitution, reveals that they are prepositionally different. Congress has the power to “regulate commerce *with* foreign nations, and *among* the several States, and *with* the Indian tribes.”⁴¹ For example, trading with the Indian tribes, a separate, though surrounded, sovereignty, is not considered to present the same regulatory issues as commerce among the states, no matter that the presence or absence of state government might theoretically change relative domestic powers.⁴²

Second, under an original intent interpretation, the Framers, and those in early government, for reasons other than future economic globalism, were vitally and constitutionally concerned with the regulation of commerce with foreign nations.⁴³ First, the economic reality was that the survival of independence hinged upon strengthened foreign commerce and the remaining need to import many essentials from England and Europe. Also, historically in the early days of Enlightenment, market succession to mercantilism meant the market was separating from government command.⁴⁴ Ideologically, much of the revolution was fought over market independence from the British crown’s control and taxation. Further, as a matter of political-economy, constitutional ratification required a national guarantee of foreign commerce regulation, as also embodied in the various slavery clauses of the text.

Third, however important the federalist/anti-federalist debate over the origin of state and national domestic power, or today, over the devolution versus creation of national sovereignty underlying constitutional powers, the international legal powers of government have universally been restricted to the Nation. The Framers understood this point to be a matter of international law, which a revolutionary regime questing for foreign recognition could never ignore. Similarly, the “One Voice” theory of presidential negotiations has frequently been expressed in Supreme Court decisions,⁴⁵ and explicitly forbidden to the states. States

41. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

42. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 591-92 (1832).

43. See THE FEDERALIST NOS. 3, 4, 5 (John Jay), No. 42 (James Madison), No. 80 (Alexander Hamilton).

44. ADAM SMITH, THE WEALTH OF NATIONS (1776).

45. See *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); see also Michael G.

may only negotiate agreements with foreign governments with Congress's approval under the Compact Clause.⁴⁶

Our greatest Justice and constitutionalist even wrote on the subject. The clause was important to John Marshall's entire system of constitutional interpretation in the landmark domestic power case of *Gibbons v. Ogden*.⁴⁷ Marshall Wrote:

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.⁴⁸

In the previous paragraph in the opinion, on the other hand, Marshall acknowledges that, regarding interstate commerce, some economic activities must be considered local, as they are purely internal to a particular state. It is thus significant that Marshall both understood the Foreign Commerce Clause to be a separate power and found no internal geographic limits on economic regulation as a matter of foreign affairs. "With foreign nations" is a matter of sovereignty, and is distinguished from mere commerce "among the States."⁴⁹

In *Chirac v. Chirac*,⁵⁰ the Court was faced with the issue of whether property legally escheatable by Maryland must nonetheless be given to French inheritors under a treaty in force at the time of death, but subsequently broken. Holding the foreign affairs issue to be paramount, Marshall wrote in his opinion:

[The Treaty] renders the performance of the condition a useless formality. . . . This rule is changed by the treaty; and it seems to the Court that the new rule applies to all cases as well to those where the lands have descended by virtue of the [state] act as to those where

Keeley, Comment, *Barclay's Bank PLC v. The Franchise Tax Board: Has the Supreme Court Emasculated the One Voice Doctrine?*, 8 DEPAUL BUS. L.J. 133 (1995).

46. U.S. CONST. art. I, § 10.

47. 22 U.S. (9 Wheat.) 1 (1824).

48. *Id.* at 195.

49. Professor Bernard Oxman suggested that a careful reading of Justice Marshall in *The Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812), also implies that the Foreign Commerce Clause is a more expansive power than that of the domestic clause.

50. 15 U.S. (2 Wheat.) 259 (1817).

lands have been acquired without its aid. The general power to dispose "without limitation," which is given by the treaty, controls the particular power to enfeoff within ten years, which is given by the Act of Maryland.⁵¹

While the federal power to make treaties like the one at issue in *Chirac* stems from the Constitutional grant of control of foreign affairs, not from Congress's commerce power per se, there is simply no role for the states, however much the local power sensibly concerns local land. *Chirac* set the table for the modern reiteration of foreign affairs exclusivity in the face of the strongest and most traditional of state concerns, descent of property.

The most direct holding on the scope of the Foreign Commerce Clause, *Board of Trustees of University of Illinois v. United States*, revisits the intergovernmental immunity issue of *McCulloch* albeit in the converse, whether the federal government may tax a state entity in the name of foreign policy. The opinion speaks both to the preemptive effect of the power over foreign commerce and to the prohibition of judicial adventure to interfere with the pure policy decisions in regulating this commerce:

The Tariff Act of 1922 is entitled — "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes." The Congress thus asserted that it was exercising its constitutional authority "to regulate Commerce with Foreign Nations." The words of the Constitution "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend." It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. . . .⁵² [T]he judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce. . . . The purpose to regulate foreign commerce permeates the entire congressional plan. . . .⁵³ 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. . . . To permit states and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the

51. *Id.* at 274.

52. 289 U.S. 48, 56-57 (1933).

53. *Id.* at 58.

dominant purposes of the Constitution to create. . . .⁵⁴ The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.⁵⁵

Specifically regarding American citizens' future competitiveness, national preemption of state legislation regulating labor pools is a complete power. According to *Hines v. Davidowitz*, "Our system of government is such that the interest of the cities, counties and states, no less than the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."⁵⁶ The classic modern precedent on foreign policy preemption, *Zschernig v. Miller*, which defined the exclusiveness of federal power over foreign economic affairs, concludes:

For we conclude that the history and operation of this Oregon statute make clear that § 111.070 is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress⁵⁷. . . . The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.⁵⁸

Justice Stewart's concurrence in *Zschernig* quoted the *Chinese Exclusion Case* which prohibited state interference with federal control over immigration, which has been seen as a tool to either fill the labor market's need for domestic workers or to protect American workers and their jobs by Congressional adjustment of visa quotas. Stewart quoted: "For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."⁵⁹

Earlier in *Henderson v. Mayor of the City of New York*, the Supreme Court held that regulation of immigration at the port of New York for purely local conditions was preempted:

A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other

54. *Id.* at 59.

55. *Id.* at 57.

56. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

57. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

58. *Id.* at 440.

59. *Id.* at 442 (Stewart, J., concurring) (quoting *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)).

nations and governments.⁶⁰

But after 200 years, the current Court has suggested that states may discriminate against other states' citizens through the market participation of state owned businesses if Congress has been silent.⁶¹ This judicial development in itself hardly squares with the adoption of the Foreign Sovereign Immunities Act, attempting to relax immunities to international adjudication over market activities.⁶²

In the last term, the Supreme Court narrowly decided two cases on preemption grounds, avoiding the question of whether the new state sovereign immunity in combination with market participation, *sub silentio*, might overturn the prohibition on states pursuing an independent foreign policy from that of the nation.⁶³ In *United States v. Locke*,⁶⁴ a Washington State regulation designed to reduce the risk of pollution from ships was found to directly interfere with national trade legislation on tanker characteristics as obligations of international treaties. The most direct act of a state as a market participant occurred in *Crosby v. National Foreign Trade Council*.⁶⁵ Massachusetts acted as a market participant by purchasing market goods and services for the state. Yet, state entities were forbidden from dealing with companies doing business in Burma (now Myanmar), because of its brutal dictatorship. Thus, the Court was forced to decide whether a state could, as socialized market participants be free to discriminate against citizens outside the state in contradiction of both a common market and the nation's ability to conduct trade and other foreign policy. The Constitution would be turned on its head. But there is a greater danger. States could potentially use this new sovereign immunity doctrine to shield state market power from private law remedies. The resulting doctrine would destroy the nation's ability to conduct foreign policy without state embarrassments and deviations. Other nations and their nationals' interests in trade negotiations would be significantly lowered. Furthermore, the realistic accountability of regulation by Congress, would be removed, from the only forum representing aggregate competing interests in governmental decisions.⁶⁶ These consequences taken cumulatively, threaten authentic democracy as the basis of constitutional legitimacy and the rule of law.

60. *Henderson v. Wickham*, Mayor of the City of New York, 92 U.S. 259, 273 (1875) (emphasis in original).

61. See *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

62. 28 U.S.C. §§ 1330, 1602-1611 (1994 and Supp. V. 1999).

63. For a fuller discussion of the federalism issues raised, see Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000).

64. 529 U.S. 89 (2000).

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

66. For further critique, see Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 LOY. L.A. REV. 1283 (2000).

The Court struck down the Massachusetts legislation because it directly conflicted with authorized Presidential sanctions imposed upon the Burmese regime by the Congress.⁶⁷ Yet, it remains to be seen if there is room under *Crosby* to maintain international economic diplomacy where Congress has delegated statutory authority, suggesting dormant preemption. Justice Souter, writing for the *Crosby* majority, seemingly argues that foreign policy, including foreign economic policy, is exclusive to the federal government:

This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action.

Again, the state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the difference between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with foreign governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the Presidents maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics. When such exceptions do qualify his capacity to present a coherent position on behalf of the national economy, he is weakened, of course, not only in dealing with the Burmese regime, but in working together with other nations in hopes of reaching common policy and "comprehensive" strategy.⁶⁸

Importantly, the Court notes that the self interest that the Rehnquist Court usually applauds in municipal democracies inevitably interferes with foreign policy making.

C. *The Global Economy and False Federalism:*
*United States v. Lopez*⁶⁹

It is in *Lopez* that the Supreme Court delivered a potentially Constitution-changing decision on the scope of Congressional authority under the Article I, section 8, power to regulate commerce among the states. Reasoning that the federal structure of the Constitution demands judicial limitation of the enumerated and limited power to regulate commerce among the states, Chief Justice Rehnquist's decision in *Lopez* controversially reversed sixty years of consistent doctrinal deference to Con-

67. *Crosby*, 530 U.S. at 381.

68. *Id.* at 381-82 (citation omitted).

69. 514 U.S. 549 (1995).

gress's ability to regulate any activity relating to the health of the national economy. Chief Justice Rehnquist argued:

Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.⁷⁰

But, he concludes that the continuing deference established over sixty years must be ended, stating that, "[t]o do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do."⁷¹

Despite little attempt at internal coherence in the "we just won't do it" standard, the *Lopez* opinion stands as a potentially crippling barrier to competitiveness in nation-state negotiation over the terms of political control of the globalized market.

The failure of *Lopez* reasoning, however, is only of secondary importance to the main point of this essay. The more important question, however, not addressed in *Lopez*, is whether this opinion has any relevance to Congressional power over commerce with foreign nations and the exclusive national power to conduct foreign affairs. The incoherence of the opinion is important in the first instance because the entire Rehnquist system of Constitutional interpretation depends on the Court's finding a workable explanation of how and when interstate commerce power terminates within an unbroken market of supply and demand. Limiting federal power, no matter how arbitrarily, devolves policymaking to state and local governments.⁷² Over time such pure policy making by judges setting arbitrary distributions of authority will become hopelessly confused and unseemly, just as happened to *National League of Cities*' "traditional, state concerns" attempt to explain that a commuter railroad was not traditional, but a mass transit line was.⁷³ The

70. *Id.* at 556.

71. *Id.* at 567-68 (citation omitted).

72. Contrast the view of Chief Justice Rehnquist that judges have no business second guessing the democratic reasons for state regulations when Congress has not yet acted, to his unexplained new found ability to do precisely the same second guessing where Congress has spoken. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981).

73. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Lopez doctrine similarly has no beginning and no end. This is true whether the formal language of *Jones & Laughlin*, aimed at distinguishing the Liberty as Contract model of the Constitution from the return to John Marshall's understanding of national power, permits the word play of intended limits. After all, the Rehnquist Court assertions depend upon word manipulation of "among the several states" nie "interstate" nie "not Intrastate." The *Lopez* reasoning has and can have no relevance to the now more important question of Congressional power over commerce with foreign nations, and the exclusive national power to conduct foreign affairs.

Moreover, if the Foreign Commerce Clause means something, as surely it must, such power logically combines concern for national economic regulation with necessary considerations of foreign relations. Make no mistake. *Lopez* is wrongly decided on its own terms. And analysis of the Foreign Commerce Clause makes this even clearer.

Any activity that affects the international market of supply and demand for finance, goods, services, labor, land; all that and more non-market behavior, must be regulated, sometimes subsidized, by Congress as a matter of foreign policy, and negotiated through the sole voice of negotiation in international frameworks and institutions. Under the Foreign Commerce Clause, Congress must be able to extend power to intra-state activities by definition, and the judiciary becomes lawless and renegade if it usurps the functional powers given solely to the other two branches.

III. DESPERATELY SEEKING FEDERALISM: THE POLITICAL ECONOMY OF THE REHNQUIST SUPREME COURT

A. *Lopez and the Constitutional Contradiction Between International Competitiveness and Market Participation in State Service Delivery*

At the time of its framing, an unforeseen potential contradiction was structured into the Constitution; it was thought to be one of the major devices of checking and balancing the factionalism inherent in Madisonian political theory. The Framers choose the creation of a strong, but limited, federal government reserving residual, general police power for decentralized states. This scheme seemed like an extension and repair of the previous government under the Articles of Confederation. It was, however, much more. Such a division was necessitated by the prevailing enlightenment understanding that liberty depended upon protecting property to be used by individuals to satisfy their separate desires. Most importantly, without the preservation of local and regional economic base differences, the Constitutional document would never

have been ratified.⁷⁴

Such preservation of local economic autonomy, including slavery, seemed natural. While the prosperity of the nation depended upon foreign trade and a domestic common market, demanded national regulation of the interstate transportation of goods, much of the commerce by necessity was purely local. Time and distance made a pure national market factually impossible. So, the Framers, included the limited power over interstate commerce, the Tenth Amendment, and the Supremacy Clause.

At the same time, if states are to exist at all, the power to react to local emergencies and unchangeable localized conditions, must be decentralized. Surely, any minimalistic notion of sovereignty must allow a government to raise taxes from its own constituents and to redistribute those resources in the form of services, goods, or law. Thus, if the Tenth Amendment protects this minimal sovereign autonomy of tax based market participation from federal control, then if the only power of Congress to reach interstate commerce exempted such market entities, the Supremacy Clause would become a truism that national power extends to the market as previously socialized by the state. In turn that would permit federal control of foreign relations and exclusive federal powers only once the states have acted, an extraordinary claim about federalism.

But, we no longer live in the Eighteenth century. The Framers could not foresee the new global economy. Perhaps theoretically, either the Tenth Amendment or the Supremacy Clause is a placeholder allowing what will be kept by the other sphere to be a mere residual of whichever sphere of regulation will be made the primary sphere by judicial interpretation. But there are limits to judicial adventures in political theory as well as limits to enumerated powers.

In this time in history supremacy must be protected. The power to regulate commerce with foreign nations must as a matter of international law be Nation-al. It cannot be shared. If the Supremacy Clause has *any* substance, foreign policy is Nation-al, and the Tenth Amendment is merely a truism.

What was obvious before *Lopez* was that every good or service, no matter how local or non-economic in character or extent, is linked to every other action valued in a market driven by the forces of supply and demand. A common market's health depends on its being common. This means there can be no local opt outs or local retaliation against the

74. Without the constitutionalized protection of slavery, and an accompanying restriction of the content of constitutional rights to positivistic protections, the Southern States would never have ratified the Constitution.

government or any foreign citizens. The common market cannot be balanced through judicial or other means, without ignoring the fact of supply and demand. Markets only exist under the explicit enforcement (i.e., regulation) under the authority of the State (not states). Lack of interference in so called market activities is itself a method of redistribution, thus, always an active choice rather than government “inaction.” There is no equilibrium, no balance point, no reconciliation, no matter how disingenuous or how formalistic the cover-up of these two constitutional sources of power intentions under national decision making.

As a matter of reality that no judge or judicial opinion can change, the two parts of our constitutional scheme must pass each other in the night, never meeting, regardless of their simultaneity of overlapping jurisdictional authority taken in isolation. In a democracy, we vote on which incommensurable prevails and, in a democracy, we vote in the only forum representing all those affected — the national Congress. If the constituencies in Congress would vote to follow a path like *Lopez*, competitiveness and thus all of our standard of living will be in some measure reduced. So be it; that is why we vote.

Yes, the mere existence of the states in some sense makes the people of this country less competitive by envisioning a crazy quilt of differing local regulations. Lack of uniformity in turn reduces their very freedom and mobility as conceived by pursuit of markets for their resources.⁷⁵ Whether the outcome is good or bad, whether something other than economic liberty is desirable, as I hope it would be, is irrelevant. The question is at what level of government should the political democracy set the terms of competition, period.

B. *The Importance of “No Taxation Without Representation”*

Against this global economic and political reality, the Rehnquist Court incoherently pursues a social agenda of increasing local powers that protect the right of personal exclusion from property protections within enclaves of buffered and gated wealth.⁷⁶ Often, this municipal autonomy is defended as necessary to preserve Brandeisian local experimentation and local options in such fields labeled as traditionally state controlled, such as education. The Court thus leads the constitutional debate to interminable jurisdictional wrangling over state and federal government *actors*, while avoiding the arena affecting the population

75. On the importance of federal judicial protection of Congressional statutory requirements of uniformity in business regulation in another setting (ERISA), see *Egelhof v. Egelhof*, 532 U.S. 141 (2001).

76. See Peter M. Shane, *Federalism’s “Old Deal”: What’s Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000).

most directly — the international economy. This is no accident. The *judicial* overturning of Congressional power to regulate commerce *among the states* becomes anachronistic and irrelevant to a world economy of negotiated trade regimes among nations.

The simultaneous attempt to limit the scope of federal civil and Constitutional rights⁷⁷ and Congressional powers,⁷⁸ work together protecting a liberty of exclusion of “undesired” citizens from legally protected local enclaves of propertied wealth.⁷⁹ The resulting ability to locally secede from joint community problems depends on state political power to structure such local communities’ powers to insulate. Such powers under the current Court must be made independent from appeal to either Congress or the federal courts by the mass of the population of urban areas, even if the seceding communities of wealth ultimately depend on the availability and price of the labor their residents employ.

Such a program should not succeed, and will not succeed without a workable in practice solution to the “federalism problem” of foreign affairs. The house of cards falls here. It should. The theory behind twenty years of Court activism is undemocratic and repressive *and* regressive. Localities are important to liberty, but the stability of communities will evaporate without protection of their economic bases, and the wish to call our communities home will follow without a fair link to democracy in choosing how our communities of people can and will compete.⁸⁰

In order to justify any judicial opinion enabling the judiciary to set the relative limits of federal versus state legislation, and therefore to look some place other than a democratic forum for that resolution, any Justice will have to meet three doctrinal burdens: (1) Is there any method for resolving the Constitution’s contradiction that can be explained as anything more than rejecting the democratic resolution of incommensurables? (2) Is there a doctrinal formulation consistent with the answer to one, which also workably distinguishes between cases in fact? (3)

77. See *Warth v. Seldon*, 422 U.S. 490 (1975); *Rizzo v. Goode*, 423 U.S. 362 (1975); *Lyons v. City of Los Angeles*, 461 U.S. 95 (1983); *Allen v. Wright*, 468 U.S. 737 (1984); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *DeShaney v. Winnebago County Dep’t Soc. Serv.*, 489 U.S. 189 (1989).

78. See, e.g., *Lopez v. United States*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

79. See Kenneth M. Casebeer, *The Empty State and Nobody’s Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000).

80. See generally Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000).

Does this doctrine not only work, but can it be adopted without overruling *McCulloch v. Maryland*'s principle of democracy and supremacy, "No taxation without representation"?

Surely there are many good reasons why, in the only forum representing all of us, we will trade off trade maximization, and wealth maximization for other values, including local options, experimentation, and different mixes of services. Especially under our bicameral Congress, the states themselves are represented in Congress. The constituents electing mayors, governors, and state legislators, were after all the same constituents electing congressmen. More importantly, the Senate provides each state with two votes regardless of population differences. But, just as surely as adequate representation, in turn, no segment of us gets to impose their will on the rest of us.

Authentic democracy depends upon popular participation in the forums representing all those affected by the decision. Participation depends upon fair political process and not divorcing the enjoyment of economic value from the production of economic value. If the masses of our population cannot be employed, or if their employment will not sustain a living wage, democracy will serve the few at the expense of the many. There is no good constitutional reason to make that outcome a self-fulfilling prophecy by blocking access to the only forum by which the working majority of our population can pursue the preservation of an economic base of marketable employment. More than jobs are in jeopardy. More than standard of living is in jeopardy. More than the personal security flowing from stable social institutions is in jeopardy. A livable polity of democratic stakeholding is in jeopardy.⁸¹

Our Constitution should be interpreted to protect the popular sovereigns. There is no better way to do so than by reinforcing democracy.⁸² There is no worse way than by protecting privilege and exclusion; especially when such privilege owes no allegiance to the producers of wealth who cannot escape the locations upon which nations have arisen. Indeed, the health of local and regional labor pools demands a local focus, but from a negotiated trade regime linking such pools globally, it cannot be based on the antiquated understanding of consumption autonomy promulgated by the Rehnquist Court.⁸³

81. See BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

82. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

83. For a third view begging the challenge posed here, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998).

IV. THE CONSTITUTION OF DEMOCRACY IN A GLOBAL ECONOMY

A. *We the People do the Work Around Here*

The key to community viability is human capital investment. Local geographies may have competitive advantages for many naturally, and publicly or privately produced reasons. The one economic variable that is generic to any exploitation of pre-existing advantage, though, is productivity. Productivity under free conditions can be changed most through education. In our history, even when funded by nationally collected revenues, states have largely governed education through their municipal governments and decentralized special districts called school boards. Education has become the linchpin of communities' social values, morality, religion, and economy. "If you do not like where you live, move to a more congenial social environment." This shibboleth has always been used politically to prevent uniformity feared to result if uniform national requirements in education were ever attempted. Chief Justice Rehnquist acknowledges and rejects the Congressional policy involved in *United States v. Lopez*:

The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.⁸⁴

But educational performance standards under individual states' control potentially decrease mobility and competitiveness. Justice Breyer states in his dissent:

[T]hat four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally; that 12 percent of urban high school students have had guns fired at them; that 20 percent of those students have been threatened with guns; and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools. And, they report that this widespread violence in schools throughout

84. 514 U.S. 549, 563-64 (1995) (citations omitted).

the Nation significantly interferes with the quality of education in those schools.⁸⁵

Justice Breyer then documents the importance of educational attainment to the health of the national common market:

Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. As late as the 1920's, many workers still received general education directly from their employers—from large corporations, such as General Electric, Ford, and Goodyear, which created schools within their firms to help both the worker and the firm. Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school. As public school enrollment grew in the early 20th century, the need for industry to teach basic educational skills diminished. But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic growth in the early years of this century is traceable directly to increased schooling; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one; and that the economic returns to this investment in education exceeded the returns to conventional capital investment.⁸⁶

Furthermore, access to international markets depends increasingly on the general flexibility of today's working population, Justice Breyer continued:

"[o]ver the long haul the best way to encourage the growth of high-wage jobs is to upgrade the skills of the work force. . . . [B]etter-trained workers become more productive workers, enabling a company to become more competitive and expand."

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations.⁸⁷

Empirically, how has local educational autonomy performed? How prepared are our children for the intensity of world competition?⁸⁸ Justice

85. *Id.* at 619 (citations omitted).

86. *Id.* at 620 (citations omitted).

87. *Id.* at 620-22 (alterations in original) (citations omitted).

88. KNOWLEDGE AND POWER IN THE GLOBAL ECONOMY (D. Crabbard ed., 2000).

Breyer concludes:

At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts, and, presumably, to high school dropout rates of 20 to 25 percent (up to 50 percent in inner cities). Indeed, Congress has said, when writing other statutes, that "functionally or technologically illiterate" Americans in the work force "erod[e]" our economic "standing in the international marketplace," Pub.L. 100-418, s 6002(a)(3), 102 Stat. 1469, and that "[o]ur Nation is . . . paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling." H.R.Rep. No. 98-6, pt. 1, p. 19 (1983).⁸⁹

The premise of the *Lopez* rhetoric is that the gun possession statute in question is an unconstitutional interference with the rights reserved to the states by the Tenth Amendment. The federal act's enforcement threatened under that authority invades the sovereignty of the state.

This is the same debate made over jurisdiction in the harvesting of migratory birds crossing state geography. At the heart of *Missouri v. Holland* was a treaty between the United States and Canada to ensure that migratory birds would be protected in certain periods because of the economic and resource importance of such birds.⁹⁰ If state hunting permits sanctioned the destruction of migratory flocks as they traversed the local geography, then the more important long term benefits of the birds' international movement to foreign citizens would be unfairly eliminated by a political minority's jurisdiction. This is why the interstate commerce power must be able to stop monopolistic state balkanization of the market. It is even more important when market regulations, such as migration, must be concluded in a treaty. Justice Oliver Wendell Holmes contradicts the *Lopez* reasoning in his *Holland* opinion:

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the

89. See *supra* note 84.

90. 252 U.S. 416 (1920).

present supposed exception is placed.⁹¹

Thus, Justice Holmes concludes, "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein."⁹²

Nor is the *Holland* doctrine thought by Holmes to be limited to treaties and enabling legislation only. According to Holmes, the same supremacy principle applies to all Congressional powers where individual states are not competent. For instance, it applies when one state might hoard part of a market promoting trade retaliation by the other states and citizens. Their remedy must be retaliatory since, by definition, the outsiders cannot vote in the poaching state.

So, should American labor be less protected than migratory birds? Both, the incentives of the finance driven economy to acquire flexible skills that are mobile, and the shifting geography of jobs in the component assembly production and service sectors, make economic activity part of a fluid market process like migration. In *Local 116 v. United States Secretary of Labor*, the union appealed the Secretary of Labor's determination that its workers did not qualify for benefits under the Trade Assistance Act of 1974 because the local plant firing them had not lost gross product revenue because of new product line sales.⁹³ The court found otherwise because the lost jobs from the discontinued product increased the need for import substitutions. In short, local component production affects the internationally assembled final product. The court the reasoned:

Labor, however, ignores the fact that Honeywell could have increased sales and/or profitability by out-sourcing production work to foreign firms and/or affiliates, thereby slashing its domestic

91. *Id.* at 432.

92. *Id.* at 435.

93. 793 F. Supp. 1094 (Ct. Int'l Trade 1992). Honeywell operates plants in York, Pennsylvania; Phoenix, Arizona; Golden Valley, Minnesota; and Amiens, France. The products manufactured at these various Honeywell plants supplement the Fort Washington product line. Ms. Brown also found these plants are not considered by the Company to be competitive with the products produced at the Fort Washington plant. Specifically, the products made at the subject plant consist of controllers, programmers, recorders, motors, pyrometers, multiplexers, transmitters and valves. According to company officials, production at the subject plant since about June 1987 primarily consists of assembly work. Honeywell purchases printed circuit boards, both domestic and foreign made, to be assembled into instruments and control systems. *Id.* at 1095.

The court continued, "On May 18, 1990, [the Department of] Labor determined that the workers formerly employed at the Honeywell Fort Washington plant were not eligible to receive worker adjustment assistance benefits on the basis that sales production did not decline." *Id.* at 1096.

workforce requirements as alleged by Mr. McKenna, President of Local 116 from March 1989 through March 1991. These allegations were not investigated by Labor and should have been. Although Honeywell's profitability and sales may not have been negatively impacted by such out-sourcing to foreign companies, its domestic workforce has been significantly impacted because the total sales and production figures are not broken down and therefore do not reflect the impact of imports.⁹⁴

In finding that the Trade Assistance Act applied to terminated workers whose jobs were lost by either lost sales or import substitution, the court reasoned that production, like migration, transits local stopping points in a fluent and everchanging pattern of local conditions.⁹⁵

Under more democratic functioning, the debate on overcoming subordination will at least include argument on access to conditions of production under a division of labor that includes and allows all to participate meaningfully at a meaningful time.⁹⁶ After all, each of us should be more acutely aware of how prevailing divisions of both economized and socialized work in daily life permit us, if at all, to have any self-control over how we each make our lives. We should also be aware of how much of that access to productive conditions are the product of political subordination.

Taking the language and structure of the Constitution seriously means seeing the document as a dynamic blueprint, the purpose of which is democratic social organization. The social relations necessary to produce organization depend upon the social relations necessary to produce the human conditions whereby a correlative organization makes sense. To make sense of these required relations, it must be recognized that people are defined, in part, by their membership in multiple relationships and these relationships tie the division of labor to democracy. We produce who we are, what our joint possibilities can be, and what costs those possibilities will require. A fair organization must link rights substantively to this inevitably inter-dependent social process.⁹⁷ All must be accountable and responsible, or privilege will be imposed over those whose experience of their identity is subordinated.

Democracy is the decisional politics of free individuals. Free individuals, however, depend on the conditions of their interdependency

94. *Id.* at 1097.

95. *Id.* at 1095.

96. A substantive view of the *Carolene Products* judicial role will a priori lead to a substantive version of *Goldberg v. Kelly*, 397 U.S. 254 (1970). For a philosophical method approximate to this view, but adopted on liberal grounds, see John Rawls' maxi-min principle in JOHN RAWLS, A THEORY OF JUSTICE (1971).

97. See, e.g., David Abraham, *Labor's Way: On the Successes and Limits of Socialist Politics in Interwar and Post-World War II Germany*, 28 INT'L LAB. & WORKING CLASS HIST. 1 (1985).

within a complex division of labor. If each self takes the measure of their power from their relations to the others within a system capable of social stability, indeed social advance, then a kind of equivalency is necessary for democracy in fact. That equality is not a license or a subsidy to consume goods or cultural experience. Here lies liberalism's fatal concession and mistake. Making distribution of wealth available for consumption the key framework of social analysis, misses the point that we make ourselves, we don't just buy our identities.⁹⁸ Rather, it is equal access to produce and contribute within a division of labor based on mutual recognition of one's own self in the conditions experienced by all others which is necessary to democracy in fact. Furthermore, it is the risks of being subordinated in a prevailing, thus historical, division of labor which leads us to demand democracy, and then authentic democracy, as the only structure by which to solve social conflict over the terms of social production.

If the system of rights is elaborated and extended under such favorable circumstances, each citizen can perceive, and come to appreciate, citizenship as the core of what holds people together. It makes them at once dependent upon, and responsible for, each other. They see that private and public autonomy presuppose each other in maintaining and improving necessary conditions for preferred forms of life. They intuitively realize that they can succeed in fairly regulating their private autonomy only by making an appropriate use of their civic autonomy, and that they are in turn, they are empowered to do so only on a social basis that makes them, as private persons, sufficiently interdependent. Thus, they learn to conceive citizenship as the frame for that dialectic between legal and actual equality from which fair and preferable living conditions for all citizens can emerge.⁹⁹

B. *Protecting Jobs is Protecting Communities and a Competitive Labor Force: Liberty as Stability and Mobility*

One response to unemployment under external competitive pres-

98. Contingent [work] makes sense when the worker is considered to be the commodity or product produced, rather than a human being. A commodity does not have a body, so it does not need health insurance. A product does not have a family, so it does not need paid vacation or family leave. A commodity does not have a future, so it does not need a pension, job security, training or promotional opportunities. A product does not have a heart, soul or brain, so it does not need to participate in the workplace community or decision making. A commodity does not live, so it does not need a living wage.

Maria B. Ontiveros, *A Vision of Global Capitalism that Puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 36 (1991) (footnotes omitted).

99. Jürgen Habermas, *The European Nation State Its Achievements and Its Limitations, On the Past and Future of Sovereignty and Citizenship*, 9 RATIO JURIS. 125, 135 (1996).

sure is the spitting into the wind approach of economic protectionism. The main reasons to propose isolationism, economic and political, are both disastrous in the near term. The economic claim is that sufficient domestic demand exists to support the high regulatory costs of environmental quality and high standards of living supported by high domestic wages. At the same time, lower cost or lower wage countries engage in unfair competition. Their impoverished populations would rather forego fair labor standards or decent living environments in order to bid away unprotected jobs. This is an unfair subsidy, however, to international business that can only be afforded by those competitors in the short term. Expectations will eventually rise in those countries. The political argument adds that other countries will provide direct subsidies to their own industries until our free marketeers are put out of business. Neither argument works.

While these arguments may have been rational during the industrial, State-capitalism era of our economy; the new, global finance capitalism demonstrates how irrational these arguments are. Economic growth will cease as investment, which is already out of national control, simply ignores "uncompetitive" industries. Moreover, our consumers will still want the advantages of cheaper goods produced elsewhere, and no one wants our overpriced exports. At best, protectionist regulations can only serve as immediate bargaining chips toward multilateral agreements on international market regulations.

True stability of high wage, high living quality economic production depends upon productivity superiority. If communities are not to be continuously destroyed and replaced elsewhere, it will be because the local labor force's ability to adapt and retain investment attractiveness affords a stable economic base. World trade in the future will link vibrant, highly qualified labor forces regardless of municipal boundaries or domestic political organization. The nation may still provide emergency risk pooling or cross subsidies as a matter of revenue and risk efficiency, but the viability of the economic base will depend less on geography than on the relative quality and productivity of the labor force.¹⁰⁰ As individuals become more mobile, specific locales will become more vulnerable, and community populations more volatile. In fact, some forms of labor will not be dependent upon geography. Mobility alone, however, does not diminish the human values of stable relationships, family support, and attractive living conditions. Moreover, internationally, labor is the least mobile of all factors of production except land, for which by definition there are international and cheaper

100. See Jack Lyne, *The Skills Gap: U.S. Work Force Woes Complicate Business-Location Equation*, SITE SELECTION, Aug. 1992, at 642.

substitutes. Economics may demand flexibility and mobility as important to the experience of freedom, but this assumes that there is somewhere worthwhile to go!

The real question of federalism is not the protectionism of local options, political exclusion of “undesirables,” protection of geographic property values, or refusal to acknowledge the dependence of accumulated wealth on the production of captive labor living in urban cores.¹⁰¹ The real question of contemporary federalism is the ability to sufficiently promote the competitive viability of any population to enable the creation of local institutions based upon stable relationships, (i.e., churches, cultural affinities, little leagues, the arts, and even diversity of life choices). Freedom to be different is ultimately dependant upon the labor force, not municipalities. Municipalities die, or become citadels under siege, without an economic base. An economic base for mass regional populations depends on the competitiveness of the population as a labor force magnet of productivity for internationalized finance.

The Constitutional question is no longer, if it ever was, the relative importance of centralized government versus local bureaucracy, unless the only purpose is an anachronistic protection of past privilege. The ability to set competitive economic policy, absent worldwide government, is now a matter of foreign affairs.

C. To Preserve and High Tech Geographic Culture and Nations Under Conditions of Finance Capital

It is sometimes predicted that globalism renders Nations irrelevant and impotent, or that Nations will engage in “race to the bottom politics” under conditions of prisoner’s dilemmas. It is predicted that even the wealthy social democracies of Europe will be forced to destroy their unions and dismantle their welfare states, a la Reagan and Thatcher. There is already pressure to do so. This is especially true under the dominance of finance.

Finance seeks maximum return in the short run. Its instantaneous mobility neither respects nor depends upon any geographic location. Its decentralization creates vast inequality of bargaining power, even with giant industrial concerns under conditions of flexible production and automation; indeed, even versus most countries in the world.

While culture arises from geographical location and historical experience, it is somewhat portable. But mobility, risks homogenization, thus minimizing diversity and threatening to compromise culture. If

101. See WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

geography and history count for any value in identity, indeed, if difference means anything at all to freedom, it will be because what we produce economically has some connection to the viability and stability of institutions that define and support such differences. One can legislate exclusion, but one cannot populate privileged exclusive enclaves without an economic base to support that population. It makes better sense to make one's population competitive and able to support community institutions and interaction of persons within a region, than to expect those who cannot afford the slopes of Aspen, the views of Monte Carlo, or even a single family dwelling, to all move to a job in Thailand, Nigeria, Paraguay, or wherever else the labor population of the week happens to be located. The degree of success in human capital development both reflects and supports the authenticity of democracy. Workers need stronger democratic practices, and vibrant democracy-in-fact needs stronger worker's voices.

V. CONCLUSION: THE GLOBAL ECONOMY IS A FOREIGN AFFAIR

The prohibitions against discrimination on entry of goods to the United States, and against tax or regulatory protectionism by the states set the historical stage to grant Congress the power to regulate commerce with foreign nations. Such power is enumerated independently from the power to regulate commerce among the states. Unless limited by judicial review of the impact on an individual's Constitutional rights of a particular exercise of Article I, section 8, clause 3; the power to regulate commerce with foreign nations is necessarily political; no *judicially* enforceable limits are available. The federal power necessarily reflects the degree of necessity that Congress govern even local activity as it bears upon the competitiveness of every citizen in a global economy.

Furthermore, judges cannot formulate a workable doctrinal formulation of any judicial enforcement of such limits. Any ability to limit Congress in the area of foreign affairs belongs to the people of the United States via their representation through Congress and the Presidency; and to the states as represented in the Senate expressly, and Congress generally. Even if judges could formulate a usable doctrine, they would still have to explain why the judiciary may legitimately contradict a fair democratic vote. In addition, those judges would have to explain how any doctrine can consistently exist with the foreign affairs powers of the Nation. Finally, any doctrine must survive the "No taxation (or regulation) without representation" requirements of Article I, sections 9 and 10, and the Supremacy Clause of Article VI as established in *McCulloch v. Maryland*.

The role of government in promoting production in a global economy becomes crucial to the standard of living of all citizens. Thus, all citizens should have a say in the industrial/finance policies of the nation. Even a traditional service function undertaken historically within an individual state cannot be allowed to opt out of uniform and affordable regulatory costs, which the international market for investment may or may not be willing to bear. For example, education is investment in human capital and will increasingly become one of the dominant variables in the locational stability of increasingly international, mobile jobs and the less mobile domestic workforces bidding on such production. When international product markets make it so, what is local becomes global, or the local loses investment attention. To avoid familiar domestic races to the bottom, national negotiation must seek favorable trade terms for uniform competition in access to consumable goods, at the same time promoting productivity and fair labor standards and a living wage within local specialization and flexibility. Whether our children will have jobs when they grow up, should not depend on the personal whim of federal judges and their fondness for country club communities. That is why Popular Sovereignty demands authentic democracy.

We the people, in order to protect our communities, and the jobs and division of labor those communities depend upon, and therefore, to provide the stability for a liberty based upon the relationships we build, as well as the liberty of mobility upon which free associations are premised, and which liberties belong to each of us; must be able to decide on the priority and extent of Nation-State economic policy in the only political forum open to all of us within an increasingly global market, on any matter affecting commerce with Foreign nations.¹⁰²

102. Author's variation on a constitutional theme.