

Washington University Global Studies Law Review

Volume 13


Issue 3 *The Legal Challenges of Globalization: A View from the Heartland (Symposium Edition)*

2014

Globalization and United States Law Practice

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Recommended Citation

Frank L. Steeves, *Globalization and United States Law Practice*, 13 WASH. U. GLOBAL STUD. L. REV. 469 (2014), https://openscholarship.wustl.edu/law_globalstudies/vol13/iss3/9

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GLOBALIZATION AND UNITED STATES LAW PRACTICE

FRANK L. STEEVES*

ABSTRACT

This Article advances the idea that globalization of law is inevitable and that legal education and experience in the United States uniquely prepares attorneys to practice in an increasingly global legal environment. The reason is that the United States, with its fifty sovereign states, has allowed for the development of a full range of legal approaches to most modern business issues. As the laws and practices in other countries change to keep pace with the globalization of business, the results are often a reflection of elements previously debated, accepted, or rejected in one or more U.S. jurisdictions.

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“There is no such thing as a new idea. It is impossible. We simply take a lot of old ideas and put them into a sort of mental kaleidoscope. We give them a turn and they make new and curious combinations. We keep on turning and making new combinations indefinitely; but they are the same old pieces of colored glass that have been in use through all the ages.”

—Mark Twain¹

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1. Attributed to Mark Twain in a book by Albert Bigelow Paine. ALBERT BIGELOW PAINE, IV MARK TWAIN, A BIOGRAPHY, 1835–1910 1343 (1912).

I. GLOBALIZATION OF BUSINESS

Globalization, described by commentators as an “inexorable phenomenon,”² is also an incontrovertible phenomenon. It has wrought massive changes in every facet of our society with especially wide-ranging effects in commerce³ and employment.⁴ Without any master plan, the phenomenon has uncoupled certain facets of society from the control of individual states,⁵ and in a world where one remaining constant is that “knowledge is power,”⁶ globalization has altered our basic relationship to knowledge, resulting in nearly unlimited access to a virtually endless universe of information.

Although some scholars have asserted that globalization is nothing more than a continuation of a centuries-old phenomenon,⁷ no one can doubt that, where its modern global impact is concerned, “quantity has a

2. Alistair King, *Legal Globalization: Investigating the Effects of the “Inexorable Phenomenon,”* BARRISTER (Oct. 12, 2008), <https://www.justis.com/news/news-legal-globalization.pdf>.

3. For the entire period from 1950-2007, international trade expanded on average by 6.2%, which is a much greater rate than during the first wave of globalization from 1850 to 1913. WORLD TRADE ORGANIZATION, *WORLD TRADE REPORT 2008: GLOBALIZATION AND TRADE*, available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report08_e.pdf. As well, world trade has more than tripled between 1980 and 2002, while world output has “only” doubled, and this rise in trade relative to output is common across countries and regions. Mark Dean & Maria Sebastia-Barriel, *Why Has World Trade Grown Faster than World Output?*, 44 BANK OF ENGLAND Q. BULL. 310 (2004).

4. See, e.g., U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *INTERNATIONAL COMPARISONS OF ANNUAL LABOR FORCE STATISTICS, 1970–2012* (2013), available at <http://www.bls.gov/fls/flscompare/lfcompendium.pdf>.

5. DAVID B. GOLDMAN, *GLOBALISATION AND THE WESTERN LEGAL TRADITION; RECURRING PATTERNS OF LAW AND AUTHORITY* 31 (2007). In the globalized context, the greater certainty in the structure of the nation-state has been replaced by a blurring of its boundaries, characterized by two separate phenomena: (1) globalized localism, where “a local product [has] turned global,” and (2) localized globalism, where “a global phenomenon has a uniquely local effect.” *Id.* As another author puts it, “[t]he current social transformation, which is commonly called globalization, implies a ‘disembedding’ not only of markets, but also of other social structures from national contexts and their reconfiguration on a global plane.” Lars Viellechner, *The Constitution of Transnational Governance Arrangements: Karl Polanyi’s Double Movement in the Transformation of Law*, in KARL POLANYI, *GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS* 435, 437 (Christian Joerges & Josef Falke eds., 2011).

6. “Knowledge is power” is attributed to the English author, philosopher and advocate of inductive reasoning Sir Francis Bacon (1561–1626), as stated in his work *Religious Meditations, Of Heresies, 1597*.

7. “Literature which explores the notion of globalization in any depth acknowledges that its origins go way back.” GOLDMAN, *supra* note 5, at 27. “In opposition to the feudal governmental structures [of the 13th to 15th centuries], . . . the German free towns formed . . . [what would become] the Hanseatic league. . . . [.] a majorly economically unifying force in Europe embodying emerging ideas for good government. . . . [T]he Hanseatic league provides evidence for ‘a viable way of organizing economic and political activity in the absence of a central authority’, in contrast to the state model.” *Id.* at 119 (internal citations omitted).

quality all of its own.”⁸ This observation becomes particularly relevant in light of the significant expansion of global population and interconnections since the end of World War II.⁹

Different commentators emphasize different aspects of globalization; some outlining inherent weaknesses they believe could be cause for concern.¹⁰ Few, however, suggest an imminent unraveling of the networks that have made globalization possible. They instead emphasize a continuing need for these networks to evolve in the face of the ever increasing pressure to globalize.

Clearly, rapid advancement in telecommunications technology has played the major role in the establishment and proliferation of these networks and in the creation of new transnational social structures.¹¹ These new social structures are, in turn, “[t]horoughly challeng[ing] the traditional rules on applicable law and jurisdiction”¹² that were devised for an entirely different technological age. New structures for data storage,

8. This quote is not clearly sourced but is attributed to Vladimir Lenin in JAMES F. DUNNIGAN, *HOW TO MAKE WAR* (1988). Numerous websites, however, including GoodReads.com, attribute it to Joseph Stalin commenting on Russian tank and troop production. Still others attribute it to Mao Tse-tung. However attributed and in whatever context, the many instances in which the sheer volume of one thing drastically affects another cannot be debated. One needs look no further to validate this statement than to sales figures for cheap beer on our nation’s college campuses.

9. As of June 30, 2012, the world population stood at approximately 7.02 billion, and the number of people with access to the internet stood at approximately 2.5 billion—roughly the population of the entire world in the mid-1950s. *Total Population of the World by Decade*, INFOPLEASE.COM, <http://www.infoplease.com/ipa/A0762181.html> (last visited Oct. 28, 2013); *Internet Users in the World: Distribution by World Regions—012 Q2*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited Oct. 28, 2013).

10. “Until very recently, globalization appeared to be quite robust The resilience of the world economy is sometimes, but erroneously, interpreted as a demonstration of the inexorable character of globalization. In reality, there are great vulnerabilities. The liberalization of transnational finance has come to play an increasingly greater role the in the globalized world. The rise of Sovereign Wealth Funds and the new importance of big countries as the last backstop of the financial system, have changed the way electorates and politicians view globalization. The pendulum is indeed swaying away from the marketplace, which has inherently democratic qualities, and toward big states and big power” Harold James, *The Future of Globalization: A Transatlantic Perspective*, FOREIGN POLICY RESEARCH INST. (June 2008), <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?lng=en&id=88458>.

11. See Viellechner, *supra* note 5, at 436. “Contrary to early assumptions, globalization may not be reduced to the formation of ‘one big self-regulating market . . . [but] instead . . . also includes other (non-economic) social structures Allegedly, these globalized social structures are as self-adjusting as transnational markets. They have been characterized as ‘transnational governance arrangements’ which generate ‘global law without a state.’ The self-regulating infrastructure of the Internet, governed by rules which have been dubbed as *lex informatica*, in allusion to the *lex mercatoria* of transnational markets, counts as the paramount example.” *Id.*

12. Morten M. Fogt, *Private International Law in the Process of Harmonization of International Commercial Law: The ‘Ugly Duckling’?*, in UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW: INTERACTION OR DEHARMONIZATION? 57, 66 (Morten Fogt ed., 2012).

and algorithms for its organization and retrieval,¹³ combined with an almost unlimited distribution infrastructure, have resulted in a single global “information commons” that makes the same content available to all with access—access that is not restricted by geography, financial resources, time of day, distance, school affiliation or, in all but a few notable exceptions, political environment.

Though previously bound to locally stored printed and electronic data, today, researchers also have the same geographically unbounded access to the “information commons” at historically unprecedented speed. For example, anyone in Xian, China, entering terms for a basic internet search is likely to receive the same information in the same amount of time as an individual entering those same terms in Duluth, Minnesota.¹⁴ This has revolutionized our existence and facilitated our transformation, both individually and collectively, from a patchwork of isolated communities into the most connected human community in history.

II. GLOBALIZATION OF LAW

Even in countries that are in the early stages of economic development, telecommunications technology is now ubiquitous¹⁵ and widely

13. The internet’s “tripartite role of being a global communication, transaction and transportation infrastructure has given rise to a variety of new technical applications and modalities of communications” RUDOLF W. RIJGERSBERG, *THE STATE OF INTERDEPENDENCE: GLOBALIZATION, INTERNET AND CONSTITUTIONAL GOVERNANCE* 55 (2010). “In contrast to the traditional ways of information transmission like radio contact or telephone systems, the Internet uses packet switching instead of circuit switching. As opposed to circuit switching, the packet switching technique does not require a dedicated connection between two communication points (or nodes) that remains established during the time of the communication,” as in circuit switching. *Id.* at 56. The massive global shift in telecommunications network architectures utilizing circuit switching to those utilizing packet switching created two great advantages over earlier systems: greater reliability and more efficient use of bandwidth, which “minimizes the time it takes for data to pass across the network, since a host does not have to wait for a line to be ‘free’ in order to be able to transmit the information.” *Id.* at 57. This change “has significant consequences particularly for the ability of States to fulfill their constitutional responsibilities since single States are no longer capable of controlling the exchange of information to the same extent as they used to.” *Id.* at 58.

14. All else being equal, this assumes a comparable level of access. A policy of internet censorship, for example, may impose limitations on this access of an entirely political, as opposed to infrastructural, nature.

15. A survey conducted by the Pew Research Center’s Global Attitudes Project on the availability and usage habits of mobile telecommunications and internet access in twenty-four “emerging and developing economies” highlights a number of interesting facts about this growing phenomenon. Concerning the availability of mobile telephones—in each country surveyed, more than half the population had one, and in five countries surveyed, more than 90% of the population owned one. *Emerging Nations Embrace Internet, Mobile Technology*, PEW RESEARCH CTR. (Feb. 13, 2014), <http://www.pewglobal.org/2014/02/13/emerging-nations-embrace-internet-mobile-technology/>.

available.¹⁶ Many of the changes in legal norms that preceded and followed the spread of modern communications technologies in developed countries have been adopted in less developed countries. With much greater access to knowledge has come a shift in power from public to private entities. This, in turn, has resulted in a shift from traditional notions of “international law” toward what is now referred to as the “globalization of law.”¹⁷ These shifts have diminished the powers inherent in the notion of the sovereign state, and have undermined a presumption of

16. *Id.* Concerning internet access and usage, the survey revealed the following: in eight of the countries surveyed, more than 30% of the population’s cellphone was a smartphone, and in only two countries surveyed was the percentage of smartphones less than 10%; in every country but two, more than 70% of the population who access the internet also use social media. Among those with access, more than 80% used the internet daily in four countries surveyed, and more than 60% used it daily in thirteen countries, with only five countries reporting a less than 50% daily usage rate. *Id.*

17. SOL PICCIOTTO, *REGULATING GLOBAL CORPORATE CAPITALISM* 67–72 (2011). “The first modern TNCs [transnational corporations] had emerged in the 1880–1914 period, with some further growth in the 1920s.” *Id.* at 68. World War II stifled the growth of TNCs for a time, but upon its conclusion, the international community, most notably its strongest members, sought to further liberalize international trade by establishing the IMF and the World Bank at the conference of Breton Woods, and later, through the adoption of GATT. But, there was an insufficient degree of international consensus to significantly reduce restrictions on capital movement, which could have stunted the growth of multinationals. To get around this limitation on possible strategies of growth, TNCs utilized Foreign Direct Investment (FDI) as opposed to portfolio investment, which allowed them to “reinvest their foreign earnings and raise loans abroad through their foreign subsidiaries, thus avoiding capital movement restrictions.” *Id.* This marked a “very significant qualitative change in the world economy, since it involved *the international integration of economic activity internalized within firms.*” *Id.* But the very real logistical difficulties of organizing and managing a global business made the eventual rise to power and prominence on the part of TNCs anything but a foregone conclusion. “The competitive advantages of TNCs were not due to closer international political integration, but the converse: it was their ability to take advantage of and manage *differences* in the social, political and economic conditions between countries which powered their rapid growth.” *Id.* Through judicious manipulation of the relative comparative advantages between jurisdictions in these early days of “globalization”, the largest TNCs grew sufficiently to draw “smaller and medium-sized firms” in their wake, “result[ing] in deeper international integration, undermining some of the mechanisms of national state economic management.” *Id.* at 69. The success of TNCs first in the manufacturing and raw materials sectors made possible the rise of corresponding multinational “banks and financial firms” that “follow[ed] their domestic clients abroad to provide them with investment banking and other wholesale financial services.” *Id.* The upshot was that “[b]y the late 1960s, the impact of TNCs became increasingly evident” and “entail[ed] a significant *concentration* of capital, [which] . . . clearly posed a challenge to national states and to existing methods of international economic coordination, . . . [making] them a prime target for regulation.” *Id.* at 70. The main outcome of attempts to regulate international businesses was a series of soft-law codes and guidelines.” *Id.* at 71. Ironically, this inapplicability of traditional public international law to TNCs allowed them to grow increasingly powerful without any direct means to regulate that growth in power, leading to a shift in power from public to private, wherein sovereign states have often found themselves subordinate to capital, a phenomenon that has only “been exacerbated as they have increasingly competed among themselves both to attract investment and to promote the interests of ‘their’ TNCs.” *Id.* at 72. This modern international phenomenon closely mirrors both the historical and modern domestic U.S. process of interstate competition for business.

states' inviolability as the ultimate form of political and legal organization.¹⁸

When surveying literature on the increasing globalization of law,¹⁹ four mechanisms driving this shift stand out. The first involves the conduct of individuals in the course of private commercial dealings. The second involves one jurisdiction's adoption of another's laws on an already-addressed set of legal issues. The third is harmonization, where laws of separate jurisdictions are not adopted per se, but are made more similar to each other to decrease conflicts that could arise between them. The fourth is the establishment of supra-national legal frameworks that circumscribe existing sovereign state law.

A. *Conduct of Individuals*

Of the four principal mechanisms through which globalization of law both follows and leads globalization of business, the most prevalent and simplest stems from the conduct of individuals. Where sovereign states do not provide a framework that allows transnational corporations to conduct transnational business, or where the sovereign state's legal framework impedes commerce, multinational corporations have simply provided their own binding legal framework.²⁰ Frameworks, clauses, and contracts are then copied, applied to new situations in different countries with different parties, and copied again.

18. See, e.g., SILVIA FAZIO, *THE HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW* 6 (2007). "One of the most relevant consequences in terms of the transformation of the concept of the nation state is the loss of sovereignty," owing to a rise in various forms of transnational risk that can only be addressed by "unified and international efforts." *Id.*

19. Whether those sources seek to advance an argument about how such shifts collectively impact the global practice of law is immaterial to the point at issue. Many of them, it should be noted, do not, instead contenting themselves with a narrower focus on the changes of substantive doctrine from a wholly self-contained, legal-academic point of reference.

20. GOLDMAN, *supra* note 5, at 274 (2007). The problem of predictability in commercial dealings with those not viewed as members of the same community is one with longstanding historical roots of sufficient significance to have given rise to the *lex mercatoria*, an "historically developed body of law, independent of national law . . . governing the 'international, commercial and financial legal order,'" and which contained a number of well-defined general principles meant to apply to such transactions. *Id.* One commentator subsequently concluded that the modern *lex mercatoria* has gained enough acceptance internationally to justify "expand[ing] his definition . . . to [include] more universalistic principles of wider application, including procedural fairness, protections against fraud, bribery, market manipulation, money laundering and also fundamental principles of environmental protection." *Id.* at 275. In the context of private commercial transactions, this universality may be "signified by [sufficient agreement amongst] a particular industrial community, unconstrained by territory." *Id.* It bears noting, too, that in the age of commerce that includes not only goods, but services as well, that "universality" would, by the extension of the same logic, also extend to "particular communities" competing in the same non-industrial sector. *Id.* at 274–75.

Hence, the foundation for all commercial relationships—the contract—has become increasingly standardized in ways that diminish and in some cases nullify application of local law. For example, corporations not willing to be subject to the law and procedure of local countries began insisting on agreements governing how commercial disputes were to be resolved.²¹ Arbitration clauses replaced local judicial remedies.²² Choice of law and venue clauses gave parties a way to sidestep the law of the jurisdiction in which a claim was brought.²³ Liquidated damages provisions replaced local laws on the scope of damages otherwise recoverable.²⁴

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards then tied the new evolving global regime together by mandating that all signatories enforce the international arbitral awards decided under another signatory's law.²⁵ The number of signatory states²⁶ together with the aggregate amount of capital assets represented by

21. Here, we are speaking of, most significantly, International Commercial Arbitration.

22. GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 35 (2012). "It seems tautological—but not always the case in practice—that any arbitration clause must set forth the parties' agreement to arbitrate," *id.* at 35, and satisfy various form requirements, *id.* at 73. "The most significant and prevalent of these is the 'writing' or 'written form' requirement, together with related requirements," some rooted in international arbitral conventions, and some in domestic law, on a case-by-case basis. *Id.* at 73–74.

23. Selection of the arbitral seat, which is a legal construct that allows parties to select where "[a]n international arbitration has its legal [as opposed to its geographic] domicile," allows parties to choose the "national arbitration legislation applicable to the arbitration, which governs a wide range of 'internal' and 'external' procedural issues in the arbitration." *Id.* at 105. Choice of law clauses, usually considered the vehicle by which parties can choose the substantive—as opposed to procedural—law applicable to an arbitration nonetheless can have a bearing on certain types of legal questions that are viewed as substantive law in some jurisdictions, but procedural law in others, such as "statutes of limitations, and rights to legal expenses and interest," and which therefore may be "arguably subject to [that] forum's rules." *Id.* at 258.

24. *Id.* at 295–97. Liquidated damages served as such a replacement at least insofar as the contractually stipulated amount is viewed as properly compensatory, as opposed to excessive and thereby punitive.

25. "The New York Convention made a number of significant improvements in the regime of [international arbitration as defined in certain international conventions] Despite the Convention's brevity and focus on arbitration agreements and awards, the significance of its terms can scarcely be exaggerated." *Id.* at 20. This is no casual claim, given that the convention was drafted in such a way that its implementation was left to national legislative processes, which made possible a lack of de facto uniformity across jurisdictions. *Id.* However, obtaining such uniformity "has accelerated in recent decades, as national court decisions have become increasingly available in foreign jurisdictions and national courts have increasingly cited authorities from foreign and international sources in interpreting the Convention." *Id.* at 21.

26. As of April, 2013, 146 of the 193 United Nations Member States have adopted the New York Convention. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, WIKIPEDIA, http://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards#Parties_to_the_New_York_Convention. While the editors prefer a citation to U.N. SECRETARY-GENERAL, *MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL CH.*

parties to these agreements²⁷ now allow for a functioning system of private remedies. The success of these efforts²⁸ has ensured greater fairness and predictability in business dealings and has created leverage to seek similar results more broadly through public channels of governance.²⁹

B. Adoption of Another Jurisdiction's Laws

Adopting the substantive law of another jurisdiction also plays a major role in the global convergence of law. With an increasing number of regional organizations that possess some degree of power to establish supra-national norms of governance,³⁰ individual sovereign states may be bound by law that has not been adopted through their own legislative processes. They are therefore no longer immune from pressure by extra-territorial interests who seek to apply their legal norms through non-standard mechanisms.

Moreover, adoption is not limited to narrow or specific laws. Adoption can include a wide range of doctrinal norms and principles from many areas of law, including anti-trust, securities regulation, intellectual

XXII: COMMERCIAL ARBITRATION, available at <https://treaties.un.org/doc/Publication/MTDGS/Volume%20II/Chapter%20XXII/XXII-1.en.pdf>, several U.S. courts have accepted Wikipedia as a legitimate source. See, e.g., *Alfa Corp. v. OAO Alfa Bank*, 475 F. Supp. 2d 357, 361–62 (S.D.N.Y. 2007). This acceptance is itself further evidence of the effects of increased global communication on the globalization of international law.

27. See *infra* note 62.

28. This success can be seen in the following general trends, taken from data on ICC arbitrations over the twelve year span from 2000–2012: requests submitted grew just over 40%; the number of parties submitting requests grew over 45%, with 74% of that increase being private parties; the number of nationalities represented by Arbitrators chosen grew 31%; claims in excess of one million U.S. dollars increased 41%; and the number of awards rendered increased 47%. *Statistics*, INTERNATIONAL CHAMBER OF COMMERCE, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/> (last visited Oct. 28, 2013).

29. The degree of harmony on this point over the goals of the public and private sectors is summed up quite well by a 1992 statement made by Robert Barry, a former U.S. ambassador to Bulgaria. “We do not have government-to-government agreements Our task is to promote the growth of the private sector rather than to encourage the growth of new bureaucracies.” Ole Hammerslev, *The European Union and the United States in Eastern Europe: Two Ways of Exporting Law, Expertise and State Power*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 134, 139 (Yves Dezalay & Bryant G. Garth eds., 2011).

30. At a glance, these include: the African Union, which covers the entire continent of Africa, except for Morocco; the European Union, with twenty-eight member states; the Organization of American States, with thirty-five member states; the Caribbean Community, with fifteen member states; the Arab league, with twenty-two member states; ASEAN, with ten member states, but with an aggregate population more than double its aggregate land-mass; the South Asian Association for Regional Cooperation, with eight member states; and, the Commonwealth of Independent States, with nine member states. *Regional Organization*, WIKIPEDIA, http://en.wikipedia.org/wiki/Regional_organization. See *supra* note 26 for a discussion of Wikipedia as an increasingly accepted source of legal information.

property, corporate law, governance, bankruptcy, tax, criminal law, civil rights statutes, and labor standards.³¹

The prevalence of the “adoption” phenomenon has led one scholar to assert that, because of the size and global impact of the U.S. economy and businesses, it is now possible to argue that this process is in fact an “‘Americanization’ of international commercial law.”³²

C. Harmonization of Laws

Efforts to harmonize national bodies of law as a means of preventing or minimizing risk and uncertainty from increased interconnectedness³³ have also contributed to global legal norm convergence. These efforts, public and private,³⁴ take many forms³⁵ and occur on all levels between states, legislatures, state agencies, and even heads-of-state.³⁶ They have been used to mitigate the effect of transnational actions by non-governmental entities, and also to “gap-fill” during the application of private-law in international disputes.³⁷ There are numerous examples of successful legal harmonization in existence³⁸ and numerous new harmonization projects

31. PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 32 (2012).

32. See FAZIO, *supra* note 18, at 8–9.

33. *Id.* at 10.

34. In other words, through the explicit diplomatic channels traditionally associated with sovereigns, or through the increasing efforts of private organizations undertaking such work.

35. The most significant broad distinction here is between international legal instruments of a binding nature (“hard-law”), which tend to include binding obligations but are harder to amend—not to mention adopt—versus international legal efforts that do not contain binding obligations, known variously as “soft-law.” Soft-law has the advantage of ease of adoption, as it lacks such binding obligations. The importance of this facet of soft-law to the successful establishment of new international legal accords seems likely only to grow when one considers how lengthy and arduous the successful adoption of hard-law international accords has historically proven to be. In this regard, the CISG makes for a good example, in that it took nearly fifty years to draft and become accepted widely enough to be relevant in the conduct of transnational commerce. Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, in UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW, *supra* note 12, at 109, 122.

36. Two states can independently harmonize their own laws through interagency cooperation across jurisdictions regarding the enforcement of existing law, through independent, national legislative efforts in each country to adopt new, more similar laws, and through the negotiation and adoption of international treaties, which is generally the prerogative of the executive branch acting pursuant to its own power, as opposed to that it has delegated to an agency.

37. Del Duca, *supra* note 35, at 114–15. In this regard, “the UNIDROIT project on Principles of International Commercial Contracts involved preparation of a restatement of international contract law” the principals of which were designed to help deal with the uncertainty that arises when disunified national rules still play a role in applying unified law. *Id.*

38. For example, the multi-jurisdictional database on national interpretations of CISG, and the terms left up to domestic legal interpretation. An example of this phenomenon can be seen when

proposed.³⁹ By providing a middle ground that allows autonomy and community, harmonization has helped increase the speed of legal norm convergence beyond that attributable solely to individual conduct or outright adoption.

D. Supra-National Legal Frameworks

Since the end of World War II, a host of public and private international institutions⁴⁰ have gained significant power⁴¹ that was previously thought to reside exclusively in sovereign states. The purposes of these organizations are wide ranging. Some seek to facilitate the

surveying comparatively, “[w]hat constitutes ‘reasonable time’ for notice giving in Art. 39 of the CISG. [V]arious interpretations from different CISG states run from four days being untimely to four months being timely. And, given that the failure to comply with the notice requirements means, with few exceptions, a complete lack of remedies, this is a very serious provision for a buyer suffering from a non-conformity of goods.” Camilla Baasch Andersen, *Uniformity and Harmonization by Case Law: The CISG and the Global Jurisconsultorium in Unification and Harmonization of International Commercial Law*, in UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW *supra* note 12, at 175, 179–80. Also in this regard is the growing practice of independent international judiciaries looking to each other’s work as persuasive authority, explained in the following quote from a judge on the Inter-American Court of Human Rights: “Human rights treaties such as the European and American Conventions have, by means of an interpretative interaction, reinforced each other mutually, to the ultimate benefit of the protected human beings. Interpretative interaction has in a way contributed to the universality of the conventional law on the protection of human rights. This has paved the way for a uniform interpretation of the corpus juris of contemporary International Human Rights Law.” ANTONIO AUGUSTO CANCADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* 590 (2d ed. 2013).

39. For example, one author proposes what she calls “the global jurisconsultorium,” explaining it as a “[t]erm . . . [that] describe[s] the duty to share international scholarship and cases in the pursuit of autonomy of terms under the CISG. The word jurisconsultorium defines an obligation to refer to what others are doing in other jurisdictions when sharing law, requiring scholars to refer to the work of scholars from other member states and requesting judges and legal counsel to find inspirational authority in CISG precedents from other member states.” Baasch Andersen, *supra* note 38, at 181. This suggestion is especially relevant in regard to international conventions like the CISG that leave major components of their implementation to domestic legal processes to define, and for which “[t]here is no International Commercial Court to monitor (its) application.” *Id.*

40. ALINA KACZOROWSKA, *INTERNATIONAL TRADE CONVENTIONS AND THEIR EFFECTIVENESS: PRESENT AND FUTURE* 135 (1995).

The spectacular growth of international trade over the last 40 years together with the increasing economic interdependence of the world has challenged the traditional regulation of international business transactions by national laws. . . . Fortunately, the winds of change have blown through international trade law. The process of unification of international trade law has been energetically, though not always successfully, promoted by many organizations [including] United Nations bodies and specialized agencies . . . , intergovernmental organizations . . . , and non-governmental organizations.

Id. at 135–36.

41. FAZIO, *supra* note 18, at 36. The result of this has been described by some scholars as the creation of “autonomous legal orders which regulate legal issues for all their members,” as well as the inter-relations between “themselves and, through the development of similar legal techniques to regulate analogous legal situations, they almost create an ‘international law of organizations.’” *Id.*

conduct of transnational commerce and others seek to address the social issues arising from such commerce. Many have the power to join international conventions⁴² and create law that is binding on signatory states.⁴³

The proliferation of these institutions has been paralleled by the rise of Regional Organizations.⁴⁴ Regional organizations also often have power to override sovereignty at the national and sub-national levels. Membership in certain modern international commercial regulatory regimes may now allow private entities to bring claims directly against sovereign entities.⁴⁵ The capacity of regional organizations to adopt law also increases the number of mechanisms whereby private commercial interests may bind sovereign states contractually, with the same consequences for breach that would apply to parties in strictly private dealings. This capacity for private

42. *Id.* at 35.

Indeed, the 1986 Vienna Convention on the Law of Treaties provides that International Treaties ‘may be concluded between States and International Organizations and between International Organizations.’ Furthermore, the 1986 Vienna convention provides that the capacity of an international organization to conclude international treaties ‘will be regulated by the rules of the organization in question.’ Subject to the rules established in their own constitutional instruments or other internal legislation, International Organizations are capable of assuming an active position in international treaty making. However, the powers of International organizations to make law are not restricted to the conclusion of international treaties. In fact, many constitutional treaties of International Organizations confer the power to lay down legal provisions which are binding on Member States, whether conditionally or unconditionally.

Id.

43. *Id.* at 36.

44. *Id.* at 7. “Organizations for regional co-operation of varying capacity and effectiveness cover most areas of the world, and regional integration and collaboration have become a strong aspiration world-wide. Besides the EU and NAFTA, we can mention the examples of other economic blocs such as Mercosur, CARICOM, and ASEAN.” *Id.* “The explosion of regional trade agreements and their relevance to the world economy can be seen in the present day. Statistics demonstrate that over 60 percent of world trade takes place within regional trade agreements, whether on a completely free trade basis or through regional agreements which are seeking to establish complete free trade.” *Id.* at 56.

45. In this regard, there are two very significant examples. The first is the WTO, where “[t]he legalism of the WTO interacts with a legalization of national trade policy. The USA led the way, by establishing procedures in the Trade Act of 1974 for US firms and industry associations to file petitions on which the [United States Trade Representative] must act. The European Commission followed the USA in introducing procedures encouraging EU business interests to bring complaints.” PICCIOTTO, *supra* note 17, at 354. The second example is bilateral investment treaties, organized pursuant to international investment law norms, which extend the private international law norms of party autonomy beyond dealings solely between private entities to include the contractual relationships of a sovereign and a private entity. Making this norm applicable to treaties makes possible the inclusion of terms that prohibit, *inter alia*, regulatory takings, and that give private parties standing to drag a sovereign into private arbitral proceedings for the violation of such terms, seeking compensation. DAVID SCHNEIDERMAN, *RESISTING ECONOMIC GLOBALIZATION—CRITICAL THEORY AND INTERNATIONAL INVESTMENT LAW* 119–23 (2013).

parties to hold sovereign states liable would likely stun political theorists of past generations.

Viewed in their totality, these four mechanisms of legal norm convergence are producing great changes in where power and law resides. Driven by the expansion of global business, the traditional notion of sovereign states' power to control commercial relationships has been displaced in favor of a private global legal framework, with content that is influenced by, and often the product of, non-state actors.

III. U.S.-TRAINED LAWYERS MAY BE UNIQUELY SITUATED TO PRACTICE IN THIS GLOBALIZED LEGAL ENVIRONMENT

That modern commercial law is converging globally at the expense of state power is difficult to refute. That similar pressures drove a similar process of legal norm convergence in American jurisprudence might be more difficult to prove. Useful parallels, however, do exist.

At an early point in its history, American jurisprudence had similar economic pressures driving its legal norm convergence. This proposition is evident when one of the most foundational moments of early American Constitutional jurisprudence is considered. In *McCulloch v. Maryland*,⁴⁶ the U.S. Supreme Court grappled not just with a conflict between two statutes, but with fundamental questions about how to resolve conflicts between the laws of separate sovereigns.⁴⁷

The process used in *McCulloch v. Maryland*, now fundamental to American jurisprudence for more than two centuries, relied upon the same methods of harmonizing disparate sources of law playing out today on a global stage.⁴⁸ When viewed in hindsight, this process of development and

46. 17 U.S. (4 Wheat.) 316 (1819).

47. *Id.* “[T]he question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist. In discussing these questions, the conflicting powers of the General and State Governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.” *Id.* at 405.

48. As the United States expanded, territorial governments became states, and were integrated into the American federalist system, which simultaneously circumscribed their autonomy and put them on an equal footing as sovereigns with each of the other states in the Union, pursuant to the constitutional law doctrine of the same name. As the number of states in the Union grew, so too did the amount of potential conflicts inherent in the corresponding increase in distinct bodies of sovereign law, but so too did the number of sources from which a state could borrow non-domestic legal formulations. Scholars and practitioners began converging on a number of aspects of law, ultimately culminating in the establishment of professional organizations such as the American Law Institute, famously founded in 1923 by William Draper Lewis, Dean of the University of Pennsylvania Law School, and which sought to make the “improvement of law” its business by establishing a “permanent organization” dedicated to this purpose. *ALI Overview*, AMER. LAW INST., <http://www.ali.org/index.cfm?fuseaction=about.creation> (last visited Feb. 27, 2014). The foundation of the American Law

reconciliation was a micro-globalization precursor to the evolution of law now occurring around the globe.

American legal education necessarily responded to the vast diversity of American legal experiences, as well as the efforts to reconcile those experiences. The value of American legal education lies not only in parallels between our federal system and newer transnational systems, but also in the sheer volume of law we have accumulated for more than two hundred years.⁴⁹ In addition, no political entity in existence today, including individual nations and groups of nations under the auspices of a regional organization, have as many separate sovereign states with distinct bodies of law as the United States. These sovereign fifty states are subject to aspects of a federal law that is itself divided into regional appellate variations. Each individual's body of law contains unique statutory, regulatory, common law, and even civil law elements, all of which were devised and promulgated in the face of pressures from rapid market-based economic growth. Indeed, the world has now embraced, nearly without exception, the same market-based private capital economic system that has existed in America throughout its existence.

The sheer number of distinct sovereigns means that law schools in the United States by necessity teach not only law of the states where they are located, but also that of other states. This exposes emerging lawyers to the scope of and processes for reconciliation of doctrinal variations between distinct bodies of law from the earliest moments of their training. This exposure continues into a U.S. lawyer's professional practice, where it is common to research, know, and cite laws of other jurisdictions, if not for precedent, at least for persuasive effect.

Institute was a direct response to the complexity and numerous variations of laws from various jurisdictions within the United States *Id.* Also famous in this regard, the National Conference of Uniform States Laws began working in conjunction with the American Law Institute in the 1940s in an effort to harmonize state law with respect to commercial transactions. *Frequently Asked Questions*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited Feb. 17, 2014). This resulted in the first edition of the Uniform Commercial Code, which was published in 1952. See *Commercial Law Research Guide*, GEORGETOWN LAW LIBRARY, <https://www.law.georgetown.edu/library/research/guides/commercial-law.cfm> (last visited Mar. 16, 2014). The Uniform Commercial Code is just one of nineteen (excluding superseded editions) codifications of suggested revisions in the law promulgated by the ALI in furtherance of their mission to "improve law" through harmonization across jurisdictions. AMER. LAW INST., *RESTATEMENTS AND PRINCIPLES OF THE LAW PUBLICATIONS CHECKLIST* (2012), available at <http://www.ali.org/doc/2012-checklist.pdf>. And, in addition to the restatements the ALI publishes, they also provide a wide variety of reports on various other legal subjects. *Publications*, AMER. LAW INST., <https://www.ali.org/index.cfm?fuseaction=publications.publicationscatalog> (last visited Feb. 17, 2014).

49. For example, the LexisNexis database contains 41 million U.S. cases (both reported and unreported), 6.9 million briefs, 3 million pleadings, and 10.7 million motions.

In a practical sense, regardless of jurisdiction, every legal analysis in the United States requires answers to two questions: (1) what law applies and (2) what is the content of that law? With a legal system as mature, diverse, and voluminous as that in the United States, opportunities abound for different laws to interact and influence each other in the face of doctrinal conflict. Answering these questions in a meaningful fashion requires the broad legal analysis fundamental to training in American law schools.

Comparing the length and methodology of legal educations in different jurisdictions provides further support for the argument that an American legal education is relevant for global practice. Knowledge obtained from doctrinal coursework is further enhanced by a variety of employment opportunities, which include conducting research for professors and summers spent working in a range of legal settings, such as law firms, corporations, non-profit organizations, and local, state, national, and international governmental agencies. The result is that a U.S. law student thinks in terms of a large spectrum of substantive law that contains, not surprisingly given more than 200 years of free market economic systems, extensive treatment of most common business issues.

Complementing this academic focus on laws of many jurisdictions is the professional examination and licensure process for lawyers in the United States, which increasingly follows a similar “no boundary” formula found in the creation and increasing prevalence of the Uniform Bar Examination (“UBE”).⁵⁰ This exam marked a departure from the more traditional form of state bar examinations that each confined itself to the laws of its own state. According to Erica Moser, president of the National Conference of Bar Examiners, “the idea is to have lawyers move across state borders with greater ease.”⁵¹ The president of the Missouri Board of Bar Examiners, Judge Cindy Martin, additionally said, “There is no downside. . . . It only enhances a law license.”⁵²

50. *General UBE FAQs*, NCBE, <http://www.ncbex.org/about-ncbe-exams/ube/ube-faqs/> (last visited Jan. 30, 2014). The UBE, which has been adopted in thirteen states since it was first tested in 2011, consists of a multi-state essay examination, two multi-state performance tests, and a multi-state bar exam. *Id.*

51. Heather Ratcliffe, *New Missouri Exam Makes Lawyers More Portable*, ST. LOUIS POST-DISPATCH (Apr. 28, 2010), http://www.stltoday.com/news/local/crime-and-courts/new-missouri-exam-makes-lawyers-more-portable/article_93d39301-da05-54fd-b977-d5d98a97421d.html. And, it bears noting, this enhanced professional mobility becomes that much more useful in today’s world of rapid information dissemination and retrieval, and the decreasing relevance of the sovereign state as the locus of legal norm establishment.

52. *Id.*

With American legal training, many U.S. judges and lawyers are asked to travel to developing countries to assist with rule of law projects.⁵³ One example is Lawyers Without Borders (“LWB”), a non-profit organization founded in 2000 in Hartford, Connecticut that is dedicated to international pro bono legal work.⁵⁴ LWB is a global group of volunteer lawyers who offer their services pro bono to rule of law projects, capacity building, and access to justice initiatives. LWB has been granted special consultative status with the Economic and Social Council Division of the United Nations, which includes an associated status with the United Nations Department of Public Information.⁵⁵ Some of LWB’s accomplishments include conducting trial observations in Ethiopia and Namibia, as well as judicial and lawyer training in Kenya and Liberia.⁵⁶ LWB also crafts transition road maps for countries undertaking large-scale restructurings of domestic legal systems, sponsors judicial and legal professional exchange programs, and is engaged in various research projects such as establishing case indices, digests and bench briefs, and collaborative research projects between students and law firms.⁵⁷ It has also developed mediation programming models and trial advocacy training in countries of need.⁵⁸

Another non-profit group, Law Without Walls (“LWW”), focuses on the global practice of law for both law and business students. For three months, students from American law schools team up with “academic, lawyer and entrepreneur mentors to develop business plans to tackle the main problems facing legal education practices today.”⁵⁹ The goal is to “develop implementable business solutions . . . and to cultivate new

53. See, e.g., Hammerslev, *supra* note 29.

54. *About Us*, LAWYERS WITHOUT BORDERS, <http://www.lwob.org/Pages/ContentPage.aspx?zkXbC2o7SrsQed9E8jw0qk153tFEXa5r99yEbki284%3d> (last visited Jan. 30, 2014).

55. U.N. Econ. & Soc. Council, *List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2013*, U.N. Doc. E/2013/INF/6 (Oct. 4, 2013).

56. *Our Projects*, LAWYERS WITHOUT BORDERS, <http://www.lwob.org/Pages/ContentPage.aspx?zkXbC2o7SrsQed9E8jw0qk1B9lBcPX6KETxFzjDgsKZk%3d> (last visited Jan. 30, 2014).

57. *Id.*

58. See, e.g., *About Us*, *supra* note 54; *Our History*, LAWYERS WITHOUT BORDERS, <http://www.lwob.org/Pages/ContentPage.aspx?KJRdbueokj4YIZOGOCH%2fJZTmRZDoGIHHKVXczrfApHMuHLWupfntQKodYMnxhUKfSrMbBU0ZwNeodtBr0q%2ftA1O7XsY0fDKC> (last visited Jan. 30, 2014); *Who We Are*, LAWYERS WITHOUT BORDERS, <http://www.lwob.org/Pages/ContentPage.aspx?KJRdbueokj4YIZOGOCH%2fJZTmRZDoGIHHzh1zwP%2bPbEVuOUu5H7Ja%2btmSNH1hOZfVCek8D2waBDJVf9CXsUln19MnVrTWzo2i> (last visited Jan. 30, 2014); *Our Accomplishments*, LAWYERS WITHOUT BORDERS, <http://www.lwob.org/Pages/ContentPage.aspx?KJRdbueokj4YIZOGOCH%2fJZTmRZDoGIHHKVXczrfApHOMuZSESXVT66EYUjWH4yCDDNrat3DjIj7SmBd14IaIrKAZTh45Ube> (last visited Jan. 30, 2014).

59. *Details*, LAW WITHOUT WALLS, <http://www.lawwithoutwalls.org/about-details/> (last visited Jan. 30, 2014).

platforms for relationships while honing problem solving, team building, technology, cultural competency, project management, entrepreneurship, and social networking skills that can be applied to every day practice.”⁶⁰ Past LWW participants have worked on international topics such as transparency, international arbitration, international regulatory issues, judicial interaction across borders, and the support of minority law students.⁶¹

The demography of the world’s largest economies over the last hundred years has changed considerably. Many multinational corporations have grown to rival and in some cases outstrip the economic might of entire nations.⁶² This rise has required stability and predictability, which has led to an increasingly well-defined private supra-national commercial and regulatory legal framework. This is a direct consequence of globalization of business, a process which is poised to continue unabated and which will require ever more insight and creativity on the part of legal professionals as we venture ever farther from norms of the past to chart an increasingly globalized future.

IV. CONCLUSION

Rule of law and successful free market-based economics go hand-in-hand. Communications and database technology have provided such broad access to information that international commerce and free market economies have become ubiquitous. This has led to interactions across borders with a scope never before seen or contemplated.

The development of law able to apply across borders is necessary to meet the needs of global businesses. Today, not only the rule of law, but also the legal profession itself may be experiencing that which U.S.

60. *Id.*

61. *About Law Without Walls*, LAWWITHOUTWALLS (last visited Jan. 30, 2014) <http://www.lawwithoutwalls.org/about/>. See also *About Law Without Walls*, LAWWITHOUTWALLS (last accessed Jan. 30, 2014), <http://www.lawwithoutwalls.org/about-schools/>, and *About Law Without Walls*, LAWWITHOUTWALLS (last accessed Jan. 30, 2014), <http://www.lawwithoutwalls.org/topics/>.

62. As of 2011, “63.4% (111) of the top 175 economic entities [in the world] are corporations.” D. Steven White, *The Top 175 Global Economic Entities, 2011*, ALL THINGS MARKETING (Aug. 11, 2012), <http://dstevenwhite.com/2012/08/11/the-top-175-global-economic-entities-2011/>. Considering one example in greater depth, in 2013 Wal-Mart stores had revenues of \$469.2 billion, *Wal-Mart Stores, Inc.*, FORTUNE (last visited Mar. 16, 2014), <http://fortune.com/fortune500/2013/wal-mart-stores-inc-1/>, which exceeded the respective gross domestic products of 164 countries, including Venezuela, Hong Kong, and Israel. WORLD BANK, GROSS DOMESTIC PRODUCT 2013 (2014), available at <http://databank.worldbank.org/data/download/GDP.pdf>. If Wal-Mart were a country, it would have had the 27th highest gross domestic product in the world. *Id.*

business and sovereign states experienced when they wrestled with how to establish predictability and fundamental fairness in cross-border transactions. Whether or not the same kaleidoscope of ideas and solutions is seeing one more turn, as referenced by Albert Bigelow in his biography of Mark Twain, communications technology will continue to advance and, as a result, the relevance of national borders will continue to diminish. This will, without a doubt, produce vast and expanding opportunities for lawyers who are trained, experienced, and able to work within and between many bodies of substantive law.