

## NAFTA and Federalism: Are They Compatible?

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### ABSTRACT

Some commentators have argued that federalism can undermine the strength of government, especially in international affairs and capitalist development. This perspective argues that multilateral trade agreements, such as NAFTA, are more difficult to achieve and weaker in effect when negotiated and implemented among federal countries. However, an analysis of the process that created NAFTA and its actual economic accomplishments, so far, strongly suggest that the opposite is true: that federal systems, such as Canada, Mexico, and the United States, benefit from that experience of “shared governance” in relation to globalization, especially as it reflects the complexity of sovereign integration, critical to the practical success of that process.

**Key words:** federalism, globalization, shared sovereignty, constitutional law and government, capitalist development, multilateral negotiations

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## INTRODUCTION

In a famous article written in 1939, Harold Laski concluded that federalism was obsolete (Laski, 1939).<sup>1</sup> The rise of “giant capitalism,” he argued, demanded the development of governmental institutions that could match it in size and power. However, the fragmentation of power under federalism undermined the strength of government and encouraged corporations of national scope to play off one level of government against another. Thus federalism interfered with the effective management of an advanced capitalist economy. Extending Laski’s analysis to the contemporary era of globalization, some commentators have argued that the rise of multinational corporations has raised similar questions about the adequacy of the nation-state (Cerny, 1995: 595-625; Hirst and Thompson, 1995: 408-442; Evans, 1997: 62-87). Not everybody shares this view. As Milton Esman has noted, “Globalization with its challenges to state sovereignty in the economic domain is not a mandate from heaven, nor is it a technological necessity. It is largely a matter of social choice and of continuous contestation” (Esman, 2002: 385). But whatever its implications for nation states, globalization, with its potential for (limited) supranational governance, raises anew questions about the compatibility of advanced capitalism and federal arrangements.

Turn to a quite different perspective. In 1951, Senator John Bricker of Ohio, a conservative Republican, proposed a constitutional amendment designed to defend states’ rights and federalism against intrusion by the federal government under the treaty power.<sup>2</sup> The Bricker Amendment itself went through several formulations. The 1951 version, for example, mandated that “no treaty shall be made abridging any of the rights and freedoms recognized in this Constitution” and that “executive agreements shall not be made in lieu of treaties;” whereas the 1954 version attempted to ensure that treaties would not be self-executing: “[an] international agreement shall become effective as internal law in the United States only through legislation by the Congress.” But the amendment’s main thrust, throughout, remained the same, namely, to overrule *Missouri v. Holland* (252 U.S. 416 [1920]), which had recognized that the federal government could ratify treaties or other international agreements that in effect trumped powers guaranteed to the states by the Tenth Amendment.<sup>3</sup> Such

<sup>1</sup> The pertinence of Laski to this analysis was suggested by Axel Hulsemeyer (2004: 1) and this paragraph relies upon Hulsemeyer’s account.

<sup>2</sup> This account of the Bricker Amendment relies on Tannenbaum (1988) and Davies (1993).

<sup>3</sup> Some commentators have suggested that, even at the time it was proposed, the Bricker Amendment was a historical artifact, given the U.S. Supreme Court’s expansive interpretation of congressional power under the Commerce Clause in the wake of the New Deal.

international agreements, Bricker contended, threatened the federal balance of powers established by the Constitution.

From the perspectives of both Laski and Bricker, then, the relation of federalism to agreements such as the North American Free Trade Agreement (NAFTA) is problematic. For Laski the problem involves federalism, which, he insisted, prevented the aggregation of governmental power necessary to manage an advanced capitalist economy. In addition, federalist particularism could impede the implementation of policy; indeed, the more decentralized a federal system, the more acute the problem was likely to be (Hulsemeyer, 2004: 5).<sup>4</sup> Laski's frequent correspondent, Justice Oliver Wendell Holmes, concurred, noting "how often a local policy prevails with those who are not trained to national views" (Wendell Holmes, 1921: 296). In contrast, Bricker believed that international agreements such as NAFTA threatened to extend federal control over policy areas over which only state governments had heretofore exercised jurisdiction. Beyond that, by imposing uniform requirements on the states, such agreements would unduly limit the states' regulatory autonomy, ultimately augmenting federal power at the expense of state power. Some recent scholars have endorsed Bricker's critique (Tangeman, 1996: 243-270; Long, 1995: 231-264; Kincaid, 2003: 74-76).

This article explores the concerns raised by Laski and Bricker, examining the challenges that NAFTA poses to federalism and *vice versa*. Such an examination is particularly pertinent because all three signatory countries to NAFTA (Canada, Mexico, and the United States) have federal systems. Initially, I sketch the political background of NAFTA, the process of its adoption, and the institutions that it constructs. Next, I look at the division of power between the federal government and subnational units (states or provinces) within the three signatory countries to determine in what respects NAFTA might be expected to have an effect on federalism, and *vice versa*. I then examine the constitutional and political factors that serve to guarantee the appropriate division of powers. I conclude with some reflections on what my findings suggest about the concerns voiced by Laski and Bricker.

Although this article focuses on NAFTA, its findings may have broader implications. After all, NAFTA is hardly the only international agreement to which Canada, Mexico, and the United States are parties—Canada, for example, is a member of the World Trade Organization, G-8, and a host of other agencies—and these accords may, likewise, involve areas of concern to their component units. Moreover, regional trade agreements like NAFTA have proliferated in recent years—according to one

<sup>4</sup> This seems consistent with the argument of Helen Milner that the absence of domestic consensus, which would seem particularly likely in a federal system with its structure of divided rule, would retard international cooperation (Milner, 1997) and the discussion of how her theory relates to NAFTA (Tamayo, 2001: 67-90).

account, 133 such agreements were negotiated from 1990 to 2001— and, often, these too have federal signatories so the potential problems identified by Laski and Bricker may have arisen in those contexts as well (Duina, 2006: 1; Robert, 2001). And, of course, the European Union, the most ambitious supranational economic and political arrangement, includes both federal countries such as Germany and quasi-federal systems such as Spain and Italy, thus raising similar concerns.<sup>5</sup>

## CREATING NAFTA

Although there were no trilateral institutions in North America prior to NAFTA, the rationale for an agreement on trade liberalization at the continental level existed long before the treaty was negotiated (McKinney, 2000: 16). The United States was the primary market for Canadian and Mexican exports and Canada and Mexico two of the largest purchasers of American goods.<sup>6</sup> But, for agreement among the three nations to occur, there first had to be a convergence of perspectives on trade, investment, and financial openness. Initially, the movement toward economic integration was bilateral. The election and reelection of Ronald Reagan installed in the White House a president strongly committed to free trade, and the 1984 victory of the Progressive Conservative Party gave Canada a prime minister, Brian Mulroney, likewise interested in dismantling trade barriers. Moreover, after U.S. flirtations with protectionism in the late 1970s, Canada had a strong interest in ensuring access to U.S. markets and the means to resolve trade disputes, while the United States wanted to address some of the issues that had stalled the multilateral GATT talks during the 1980s (McKinney, 2000: 3-5; Hulse Meyer 2004: 90). Negotiations between the two countries led to the adoption of the Canada-U.S. Free Trade Agreement (CUSFTA), which went into force in 1989 and had immediate effects: Canadian exports to the United States in sectors liberalized by CUSFTA increased 33 percent in value between 1988 and 1992 (Winham and Grant, 1995: 28).

Mexico and the United States also shared common interests, particularly in resolving long-standing issues relating to trade, investment, and workforce mobility. However, for a long time, Mexico resisted economic openness, seeking to protect domestic producers from international competition. This changed with the election of President Carlos Salinas in 1988. Salinas's election inaugurated a "neoliberal rev-

<sup>5</sup> Although it is beyond the parameters of this article, comparison of the European Union and NAFTA is particularly valuable. For pertinent literature, see MacMillan (1995), Potter (1995), and Pastor (2001; 2002).

<sup>6</sup> Between 1975 and 1995, the U.S. share of Canadian exports rose from 25 percent to 75 percent and by the early twenty-first century was over 85 percent. See Simeon (2003: 132) and, more generally, Whiting, Jr. (1995).

olution" in Mexican economic thinking and, as part of this revolution, Mexico committed itself to trade liberalization (Levy and Bruhn, 2006: 247). Thus, in August, 1990, a year after CUSFTA went into effect, President Salinas proposed trade negotiations to President George H. W. Bush, and Canada subsequently joined the bilateral negotiations after being guaranteed that "nothing that was agreed upon in CUSFTA could be revised" (Morales, 2006: 116).

Agreement among the three countries was reached in 1993. The basic premise of NAFTA was regional economic integration, which would be achieved by removing barriers to trade and investment. Yet there were limits to the economic integration sought in NAFTA; for example, the highly contentious topic of worker mobility was left unaddressed. The agreement also did not seek to harmonize the regulatory or tax systems of Canada, Mexico, and the United States. Federalism and its consequent diversity undoubtedly played a role here. Subnational taxes are relatively unimportant in Mexico, accounting for less than 20 percent of overall tax revenues. But in Canada and the United States, almost 50 percent of tax revenues are collected through taxes imposed by state or provincial and local governments. Moreover, in contrast with practices in Canada, state income taxes in the United States are collected separately, and the regulations governing them are seldom harmonized with federal regulations or with those in other states (Cockfield, 2005: 34-35).

NAFTA was ratified virtually without debate in Mexico, where the Institutional Revolutionary Party (PRI) controlled both the executive and legislative branches and only a simple majority in the Senate sufficed for ratification (Pastor and De Castro, 1998: 17-18). In Canada, making treaties is a prerogative of the executive, requiring no legislative approval, so although the treaty was controversial, negotiation of NAFTA was tantamount to its adoption.<sup>7</sup> In the United States, it was a different story.<sup>8</sup> NAFTA excited strong opposition from organized labor and other Democratic Party constituencies, and it also drew fire from Ross Perot, the major independent candidate in the 1992 presidential election, who claimed that approval of NAFTA would produce a "giant sucking sound" of jobs draining away to Mexico (Kincaid, 2003: 50). On the other hand, business interests and the governors of more than three-quarters of the states supported the initiative. Bill Clinton, who succeeded President Bush in 1993, made his support of NAFTA contingent on the negotiation of separate agreements on labor and the environment. Even with these agreements, opposition to NAFTA remained sufficiently widespread that the agreement was unlikely to gar-

<sup>7</sup> Anti-NAFTA sentiment did contribute to the defeat of the Progressive Conservative Party in the 1993 general election, although the Liberal Party did not repudiate the treaty.

<sup>8</sup> Useful overviews of the ratification process in the United States are provided by Mayer (1998) and Ackerman and Golove (1995).

ner the two-thirds majority required for Senate ratification of a treaty. So President Clinton presented NAFTA as a congressional-executive agreement, which required only simple majorities in the House and Senate for adoption. The accord was ratified in November, 1993 by votes of 234-200 in the House and 61-38 in the Senate and it went into effect on January 1, 2004.

The use of this alternative avenue for ratification in the United States is problematic from the perspective of federalism. Opponents of the Bricker Amendment had insisted that the constitutional requirement of ratification of treaties by a two-thirds vote in the Senate, in which the states were equally represented, afforded the states adequate protection in the international arena. Whatever the validity of this claim –and it has been called into question since the ratification of the Seventeenth Amendment made the Senate more a “popular” and less a “state” chamber– treating treaties and executive agreements as interchangeable eliminates that protection for the states.<sup>9</sup> Some commentators, most notably Bruce Ackerman and David Golove, have argued that the movement to two-house ratification represented a valid, albeit informal, amendment of the Constitution (Ackerman and Golove, 1995). They insist that the Trade Act of 1974, which requires the executive to consult with all relevant congressional committees and provide 90 days notice of an intention to sign any agreement, provides an opportunity to give advice and promotes genuine discussion before the completion of an international agreement (Ackerman and Golove, 1995: 105).<sup>10</sup> Yet this suffices to protect the interests of the states only if members of Congress are committed to safeguarding those interests. What is clear is that the rise of the United States as a superpower has coincided with the desuetude of one of the principal constitutional guarantees for the states. Harold Laski would, undoubtedly, approve.

## THE GOVERNMENTAL MACHINERY OF NAFTA

Comparing NAFTA with the European Union, Patrick Glenn observed that “there is no Brussels in North America, and there are no North American directives bringing about uniformization or harmonization of North American” law (Glenn, 2001).<sup>11</sup> Stephen Clarkson concurred, noting that “[b]eyond the norms and rules [contained in the agreement], the constitution that NAFTA created for North America compris-

<sup>9</sup> On the effect of the Seventeenth Amendment, see Rossum (2001).

<sup>10</sup> The Trade Act is codified at 19 U.S.C., sec. 2101 (1988).

<sup>11</sup> For more detailed discussion of how the institutions of the European Union affect the sovereignty of its members, see Wind (2001).

es a weak executive, a non-existent legislature, an uneven set of adjudicatory mechanisms, an ineffectual bureaucracy, and almost no coercive capacity” (Clarkson et al. 2005: 171).<sup>12</sup> This is not to say that NAFTA created no institutions to supervise implementation or enforcement. Article 2001 created the North American Free Trade Commission (NAFTC) and assigned it responsibility for supervising the implementation of NAFTA, overseeing its further elaboration, resolving disputes that arose from interpretations of the agreement, and supervising the work of the committees and working groups it established. But in actuality, the NAFTC lacks the resources to undertake these responsibilities. It has no headquarters, no address, and no secretariat. Rather, NAFTC is really just a label for meetings of the signatory states’ trade ministers, and, as one commentator put it, the meetings “seem to be held mainly because the NAFTA agreement calls for them to take place at least once a year” (Clarkson et al., 2005: 238).

NAFTA also established 24 committees and working groups under the direction of NAFTC to monitor and direct implementation of each chapter of the agreement. The members of these bodies are chosen by the signatory countries so, in actuality, the committees and working groups are intergovernmental entities rather than supranational political institutions. Like NAFTC, they “have proven largely inconsequential in terms of governance” (Clarkson et al., 2005: 177-180). Indeed, NAFTA encourages independent arbitration and mediation to settle commercial disputes prior to hearings by the official panels that deal with complaints (Folsom et al., 2000: 249). Thus, it is difficult to dispute Clarkson’s conclusion that despite the requirements placed on the signatory countries and their component units, what is striking is the absence of machinery for implementation or enforcement, “the extent to which the political manifestation of transnational integration *has not* been formally institutionalized in North America” (Clarkson et al., 2005: 170). Put differently, the absence of supranational institutions with the capacity to implement NAFTA has placed responsibility squarely on the three signatories. In practice, this has meant that the three countries have sought arenas other than “NAFTA’s castrated Trade Commission” for resolving bilateral disputes, most frequently calling upon the World Trade Organization’s dispute settlement mechanism (Clarkson et al., 2005: 170). For present purposes, the key point is that NAFTA has produced a shallow, rather than a deep, integration of the three signatories, a free-trade area rather than an economic union (Kincaid,

<sup>12</sup> From a federalism perspective, what is interesting is that as the European Union has become more involved in governance, it has sought to ensure that subnational entities within its member states have a role in its operations. Thus the Maastricht Treaty, which expanded the power of the EU, also created the Committee of the Regions, which advises the Commission and Council on matters that have regional or local repercussions. For discussion of the implications of the European Union experience, see MacMillan (1995). For discussion of possibilities for greater North American integration that draw upon the European experience, see Hakim and Litan (2002) and Duina (2006).

2003: 64). Insofar as the institution of a supranational level of government might threaten federalism, NAFTA does not pose that danger.

A key exception to this pattern of institutional underdevelopment is the system of dispute resolution that NAFTA established for dealing with disputes between private investors from a signatory country and the government of another signatory.<sup>13</sup> Under Chapter 11 of NAFTA, these private investors may sue a signatory government, when they believe that it, or one of its state or municipal component units, has directly expropriated their property or has done so indirectly by imposing discriminatory or unduly burdensome regulations or by engaging in other arbitrary action. In such situations, NAFTA permits investors to bypass domestic courts and to bring their claims directly to an arbitration tribunal established under the International Center for the Settlement of Investment Disputes. Although permitting dispute resolution by independent tribunals rather than national courts might bolster investor confidence, it would also raise federalism concerns if the tribunals could direct state or municipal authorities to engage in, or refrain from, actions that lie within the scope of their constitutional powers.

Yet this does not seem to be the case, as two highly publicized cases filed under Chapter 11, the *Metalclad* and *Methanex* cases, reveal. In the former case, *Metalclad*, a U.S. company, sued Mexico, challenging the power of a Mexican state and a municipal government to deny it a construction permit to build a hazardous waste treatment facility and their power to declare the place where it was to be built an ecological reserve (Meltz, 2002; Tamayo, 2002). The NAFTA panel ruled in favor of *Metalclad*, a decision upheld by a Canadian court to which the Mexican government appealed the ruling. In the second case, the *Methanex Corporation*, a Canadian company, unsuccessfully sued the United States seeking damages for the profits it would lose if California, because of a concern about contamination of drinking water, outlawed the use of a gasoline additive it produced.<sup>14</sup>

From a federalism perspective, what is striking in both cases is what was not at issue. In neither case did the complaining company challenge the constitutional authority of the component unit. Although in the *Metalclad* case the Mexican federal government put considerable pressure on the state and municipality to issue the construction permit, ultimately it had to recognize “the constitutional right of the municipality to deny the permit, as well as the right of both state and municipal governments to declare the area an ecological reserve” (Tamayo, 2002). And although

<sup>13</sup> This account of Chapter 11 tribunals relies on Meltz (2002); Ortiz Mena (2002).

<sup>14</sup> For detailed information on this case, see [http://naftaclaims.com/Disputes/USA/Methanex/Methanex\\_Final\\_Award.pdf](http://naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf).



the NAFTA tribunal was able to award monetary damages against the Mexican government, it could not issue an order to the state or municipality to allow the construction of the plant. Similarly, even if the Methanex Corporation had prevailed, the remedy would merely have been monetary damages, not rescission of the California regulation. Thus, NAFTA institutions do not pose the threat to the division of power between nation and state that Bricker feared.

## FEDERALISM AND THE IMPLEMENTATION OF NAFTA

NAFTA provides a test case of “how constitutional provisions influence the way in which countries adapt to the process of economic globalization” (Hulsemeyer, 2004: ix). What is crucial in these constitutional arrangements is both the division of powers or competencies between the federal government and the component units of the federation and, also, the mechanisms established to safeguard the constitutional allocation of powers. Let me offer some general observations about the distribution of powers under federal constitutions and then address the constitutional arrangements in each of the signatory countries.

First, a clear delineation of national and sub-national powers in the federal constitution can help reduce competency disputes: when the allocation of powers is clear, there is no basis for dispute. Nevertheless, there may be reasons, other than lack of skill in constitutional drafting, why federal constitutions do not clearly delineate national powers. A too-detailed delineation of those powers, particularly in a system in which residual powers lie with the component governments, may deprive the national government of the flexibility necessary to deal with unanticipated contingencies. In the United States, for example, even when concerns about a too-powerful federal government led the delegates to the 1787 Constitutional Convention to enumerate congressional powers, the language they employed (“regulate commerce among the several states,” “all powers necessary and proper to carry out the foregoing powers,” etc.) reflected a preference for flexibility over precision. They were willing to risk disputes over the distribution of power in order to avoid handicapping the federal government in its efforts to achieve national objectives.

Second, in most systems of divided powers, some powers are shared, and these concurrent powers can, also, lead to competency disputes. This concurrency may be either explicit or implicit. For example, Article 73 of the Mexican Constitution expressly defines several important powers as concurrent: taxation, education, health, preventive measures for public security, human settlements, economic and social planning, environmental protection, civil protection against national disasters, and

sports.<sup>15</sup> But the U.S. Constitution, because it does not delineate state powers, leaves questions of concurrency to implication.

Most federal constitutions confirm the supremacy of federal law in cases of conflict but disputes may still arise about whether a federal law conflicts with a state or provincial law or whether a state or provincial law frustrates the achievement of national goals. The situation may be even more complicated. Under the U.S. Constitution, for example, not only are some powers exclusive and others concurrent but some powers are partially concurrent. The power to regulate interstate commerce is a prime example of a partially concurrent power and a historically important one as well. As one commentator wryly put it, “Congress may regulate interstate commerce; the states may also regulate interstate commerce, but not too much (Powell, 1956: ix).” Even the most skilled drafter cannot draw the line between “all right” and “too much” so disputes inevitably arise that can only be resolved on a case-by-case basis.

Third, the structure of the federal government –and particularly of the national legislature– can also reduce the likelihood of competency disputes. In systems of divided power, most federal constitutions provide representation for the component units in a second chamber of the national legislature. The assumption is that these representatives will prevent the enactment of federal legislation that invades the prerogatives of the units they represent. However, senators in the United States and Mexico are popularly elected and senators in Canada are appointed by the Governor General on the advice of the prime minister, so none are directly accountable to state or provincial governments. In some federal systems, including the three signatories to NAFTA, the second chamber is at least nominally equal in authority to the first chamber in that all bills must be approved by both chambers in order to become law.<sup>16</sup> In others, the legislative powers of the second chamber depend upon the character of the bill under consideration. In Germany and South Africa, for example, the second chamber exercises only a suspensive veto on bills that do not implicate state concerns. But on bills that do implicate those concerns, the German Bundesrat has an absolute veto and the South African National Council of Provinces can only be overridden by a two-thirds vote in the National Assembly. This makes it unlikely that legislation will be adopted that invades the powers of state governments, and that, in turn, reduces the frequency of competency disputes.

<sup>15</sup> For discussion of concurrency under the Mexican Constitution, see Gutiérrez González (2005: 216-217).

<sup>16</sup> The actual operation of this may depend on whether the federal system has a presidential or parliamentary government. In Canada, for example, the parliamentary convention of “responsible government” reduces the influence of the Senate, as does its appointive character (Knopff and Sayers, 2005: 120-121). Limited powers for federal chambers are typical of parliamentary systems, as Australia, Germany, and South Africa illustrate.

## THE UNITED STATES

Article VI, section 2 of the U.S. Constitution states that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” This supremacy clause, as it has been called, confirms that federal law prevails over incompatible state law. However, the Tenth Amendment to the Constitution states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This amendment makes clear that the federal government is a government of limited, not plenary, powers and that the residual powers (those not delegated to the federal government) are reserved to the states. It also implies that the category of residual powers is not a null category: that the grants of power to the federal government should not be interpreted in such a way that no powers are left to the states.

Among the powers that the drafters of the U.S. Constitution clearly intended to lodge in the federal government was the power over foreign affairs.<sup>17</sup> As James Madison observed in *The Federalist*, #42, “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.” Several Supreme Court rulings confirm that the exercise of national powers in foreign affairs supersedes state prerogatives. Thus, in *Perpich v. Department of Defense* (1990), the court unanimously upheld a congressional authorization for training National Guard troops outside the United States, despite gubernatorial objections. When the Massachusetts legislature sought to express its disapproval of the government of Myanmar by forbidding the state government from purchasing goods or services from companies that did business in that country, the court in *Crosby v. National Foreign Trade Council* (2000) struck down the state law because it conflicted with the national government’s policy toward Myanmar. Similarly, in *American Insurance Association v. Garamendi* (2003), the court struck down a California law designed to force European companies to pay on unpaid insurance policies of victims of the Holocaust. However, in *Crosby* and *Garamendi*, the court focused on the conflict between federal and state policies, specifically avoiding the more general question of whether the Constitution precludes all state involvement in foreign affairs (Wilson, 2007: 746-788).

Although the Federal Constitution does not expressly confer the foreign affairs power on the federal government, it does grant important powers to Congress, to

<sup>17</sup> This paragraph relies on Rossum and Tarr (2007: 223-224). The cases cited are: *Perpich v. Department of Defense* (496 U.S. 334 [1990]), *Crosby v. National Foreign Trade Council* (530 U.S. 363 [2000]), and *American Insurance Association v. Garamendi* (539 U.S. 396 [2003]).

the president, and to the president acting in conjunction with the Senate. Thus, Article I, section 8 authorizes Congress to regulate foreign commerce, to lay duties, to raise and support armies and navies, to declare war, and to define and punish piracies and felonies committed on the high seas and offenses against the law of nations. The president is named commander-in-chief of the nation's military forces, given the power to receive ambassadors, and authorized to exercise the "executive power" (U.S. Constitution, art. II, sec. 1-3). With the advice and consent of the Senate, the president also can make treaties and appoint envoys (U.S. Constitution, art. II, sec. 2). Finally, the states are expressly prohibited from entering into treaties or alliances, and they cannot without the concurrence of Congress impose duties on imports or exports, keep troops or ships of war during peacetime, or enter into agreements with a foreign power (U.S. Constitution, art. I, sec. 10).

Of particular importance is the federal government's authority to enter into treaties and other international agreements. Although the Tenth Amendment of the United States Constitution confirms that residual powers rest with the states, the Supreme Court, in *Missouri v. Holland* (1920), made clear that the treaty power is not merely instrumental to carrying out the other powers assigned to the federal government but, rather, is an independent grant of authority. Put differently, the federal government can address, via the treaty power, subjects that it could not reach through the other powers assigned to it. And Congress can enact laws "necessary and proper" to carry out the nation's treaty obligations, even if it could not enact similar laws in the absence of those obligations. Federalism thus does not pose an obstacle under the Constitution to the implementation of a treaty. As Justice Holmes put it in his opinion of the court in *Missouri v. Holland*, "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could" (252 U.S. 416, 433).

## MEXICO

Article 40 of the Mexican Constitution declares that "it is the will of the Mexican people to organize themselves into a federal, democratic, representative Republic." Yet, historically, Mexico has had a highly centralized federal system, both because of the broad powers conferred on the federal executive and because of the domination of politics by a single political party, the PRI. In recent years, with the rise in party competition, a "new federalism" has emerged in Mexico—a development, interestingly enough, coinciding with the country's adoption of a neoliberal economic policy of which NAFTA is a prime component.

Looking to the constitutional text, one finds important parallels to the United States Constitution. Article 133 of the Mexican Constitution affirms the superiority of federal law over state law in terms reminiscent of the U.S. supremacy clause: "This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union." And Article 124 confirms that residual powers remain with the states in terms reminiscent of the Tenth Amendment: "The powers not expressly granted by this Constitution to federal officials are understood to be reserved to the states." The use of "expressly" in Article 124 might seem to suggest a greater decentralization of power than is found under the U.S. Constitution. But, given the great detail with which the Mexican Constitution spells out the powers of the federal and state governments, there are very few powers that are not expressly granted. Moreover, Mexican "municipalities and states remain dependent on the national government for most of their funding and are ultimately constrained by their financial limitations" (Levy and Bruhn, 2006: 107). This limited taxing authority of states and municipalities, together with the Mexican Constitution's emphasis on concurrent powers, has also contributed to centralization within the Mexican federal system. Finally, the Mexican Supreme Court has ruled that the Constitution establishes a hierarchy of laws with treaties ranking just below the constitution and above both federal and state legislation (Gutiérrez González, 2005: 217; Garza, 2000: 286-292). As a result, not only do treaties such as NAFTA have direct effect domestically but any law, federal or state, which conflicts with treaty obligations is invalid.

Among the powers expressly granted to the federal government is the conduct of foreign affairs. Article 89 of the Constitution authorizes the president to "appoint ministers, diplomatic agents, and consuls general, with the approval of the Senate," to "dispose of the permanent armed forces, including the land army, the marine navy and the air force for internal security and exterior defense of the Federation," and to "direct diplomatic negotiations and make treaties with foreign powers, submitting them to the ratification of the federal Congress." Article 73 assigns trade matters to Congress, as well as giving it the power to "enact laws in regard to nationality, the legal status of foreigners, citizenship, naturalization, colonization, emigration and immigration, and the general health of the country." It also authorizes Congress to "enact all laws that may be necessary to enforce the foregoing powers, and all others granted by this Constitution to the branches of the Union." Article 117 prohibits states from "mak[ing] any alliance, treaty or coalition with another State, or with foreign powers." Although the policy areas addressed by NAFTA and its side agreements (economic development, labor relations, and environmental protection) are

all concurrent powers under Article 73 of the Mexican Constitution, national policy has dominated in those areas. Given the supremacy of federal law and the assignment of power over international trade to the federal government, it is not surprising that the adoption of NAFTA has had no significant effect on the division of power between nation and state in Mexico.

## CANADA

The constitutional arrangements in Canada differ substantially from those in Mexico and the United States. The Constitution Act of 1867, formerly known as the British North America Act, establishes the allocation of powers between the federal government and the provinces. Section 91 lists 29 areas of exclusive federal jurisdiction, and it also assigns residual powers to Parliament, authorizing it “to make laws for the Peace, Order, and good government of Canada in relation to all Matters not . . . assigned exclusively” to the provinces. Section 92 details 16 legislative powers assigned to the provinces, including “all Matters of a merely local or private Nature in the Province.” Under the Canadian Constitution, the federal government has exclusive power to make treaties, and these treaties can address matters within the exclusive legislative jurisdiction of the provinces. Provinces cannot make treaties. They may, however, be able to forge international agreements of less-than-treaty status dealing with matters of provincial concern, although this remains disputed (Trone, 2001: 39-40). What is distinctive about the constitutional arrangements in Canada is that treaties negotiated under the act are not directly applied as Canadian domestic law but must, instead, be implemented by legislation. Moreover, in implementing treaties, the federal government does not exercise plenary authority. Thus, the Canadian Constitution is unique in distinguishing between the making of international treaties and their implementation (Hulsemeyer, 2004: 92).

This lack of plenary authority is not apparent from the constitutional text itself. A federal power to implement treaties might seem to derive from two sources. Section 132 provides that the federal Parliament “shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.” And Section 91, as noted above, authorizes Parliament “to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters, not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.” However, in the *Labour Conventions Case* (officially titled *Attorney General of Canada v. Attorney General of*

*Ontario*, 1937), the Judicial Committee of the Privy Council, which at that time exercised ultimate appellate authority, struck down three federal statutes that implemented treaties and, in doing so, it denied that those provisions gave the federal government a general authority to implement treaties (AC 326 at 350 [1937]).

The Privy Council held that the power to implement treaties found in Section 132 was inapplicable because the treaties at issue were not entered into by the United Kingdom on behalf of the British Empire. Moreover, because the Canadian Constitution lacked any specific power to implement treaties entered into by virtue of Canada's own international personality, "there is no such thing as treaty legislation as such" (AC 326 at 351 [1937]). Thus, where the power to implement a treaty resided, whether in the hands of the federal government or of the provinces, depended on the constitutional allocation of powers for purely domestic concerns. As the Privy Council put it, "When the ship of state now sails on larger ventures and into foreign waters, she still retains the water-tight compartments which are an essential part of her original structure" (AC 326 at 353 [1937]).

Although the ruling has been widely criticized, the *Labour Conventions Case* remains authoritative law and, therefore, the power to enact legislation to implement a treaty follows the normal federal division of powers so that only provinces can enact implementing legislation in their areas of jurisdiction. Thus, as in the case of NAFTA, Canada often seeks inclusion of a "federal state clause" in its treaties, informing signatories that the fulfillment of Canada's obligations may depend on the cooperation of provincial governments (Knopf and Sayers, 2005: 125). The necessity of provincial cooperation was particularly clear with regard to the side agreements to NAFTA on labor and the environment, because they touched directly on areas under the jurisdiction of the Canadian provinces.<sup>18</sup>

## FEDERALISM, POLITICS, AND NAFTA

Federalism is, of course, not merely a matter of law or of constitutional boundaries patrolled by courts. Rather, federalism also creates a politics. The division of authority within a federal system has profound implications for the way in which politics is conducted, and, conversely, political factors help maintain the balance of power between the federal and state or provincial governments. There is a substan-

<sup>18</sup> For a detailed treatment, see Hulse Meyer (2004: Chapter 5). Perhaps not surprisingly, the chapter is titled "Implementation with a Hitch."

tial literature, particularly focusing on U.S. federalism, highlighting how political factors safeguard the division of powers and the experience with NAFTA confirms their importance.<sup>19</sup> Canada, the most decentralized of the three federations in NAFTA, serves to illustrate those effects.

Federalism played an important role in the process by which NAFTA –and before it, CUSFTA– was negotiated.<sup>20</sup> Although the treaty power resides in the federal government, the Canadian provinces demanded “full participation” in the negotiation of NAFTA and the federal government was quite willing to oblige, particularly given the crucial role that the provinces would have to play in the treaty’s implementation. To promote federal-provincial cooperation, a Committee for the North American Trade Agreement (C-NAFTA) was formed, comprised of senior officials from both the federal and provincial levels. C-NAFTA met 10 times during 1991, when the actual negotiations among the three parties were commencing, so there was full consultation prior to the formulation of negotiating positions. The provinces also “were privy to all federal draft texts before they were tabled in the trade negotiations” (Hulsemeyer, 2004: 100). Far from interfering with effective negotiation, this collaboration promoted trust between federal and provincial officials and encouraged provincial implementation of the treaty provisions. Thus, despite the federal government’s constitutional responsibility for foreign affairs, what emerged in Canada was a “pattern of intergovernmental relations in international trade” that involved “a partnership of *de facto* concurrent jurisdiction” (Skogstad, 2002: 164). This national-subnational collaboration went considerably further in Canada than in either of the other signatory countries, although the United States, in 1988, did establish an Intergovernmental Policy Advisory Committee to the Office of U.S. Trade Representative to advise about state and local government concerns relating to international trade and trade agreements (Kincaid, 2003: 73).

During the negotiation of NAFTA, the North American Agreement on Labor Cooperation (NAALC), and the North American Agreement on Environmental Cooperation (NAAEC), one fear was that these international agreements would impinge on powers previously exercised by state and provincial governments. Undoubtedly, those who drafted the agreements expected that they would affect those governments to some extent. Thus, Article 105 of NAFTA requires that Canada, Mexico, and

<sup>19</sup> Within the U.S. context, the most celebrated accounts include Wechsler (1955) and Choper (1980). This perspective has influenced how the Supreme Court itself has viewed its responsibilities in safeguarding federalism. See, for example, *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528 [1985]).

<sup>20</sup> This account relies primarily on Simeon (2003) and on Hulsemeyer (2004: Chapter 5). For a pertinent, more general discussion, see Avery (1998: 282-305).



the United States each ensure that all necessary measures be taken by provincial and state governments to ensure compliance with NAFTA. Nevertheless, the influence of federalism is evident in the ways that the accord and its side agreements were shaped so as to limit their impact on existing state and provincial policies.

Among the provisions sensitive to the concerns of states and provinces were “standstill” provisions that “grandfathered in” preexisting provincial and state laws. The most important of these was Annex 1 of NAFTA, which basically exempted all existing non-conforming laws of the states and provinces from the rules outlined in the agreement. While this postponed potential conflicts under NAFTA, state and provincial laws enacted after the adoption of NAFTA would be subject to NAFTA standards so the discretion available to provinces and states in the future was limited. Furthermore, statutes enacted by the federal governments could preempt existing state laws, a potential worry, particularly in Mexico and the United States, given the concurrent policy responsibilities of the federal and state governments. Of course, the possibility of preemption existed even prior to the ratification of NAFTA, although NAFTA might have increased its likelihood.

Likewise important for state and provincial governments were the exceptions carved out in the agreements. NAFTA, for example, did not address itself to worker mobility, which was a significant concern for state and provincial governments. In some instances, it also exempted state and provincial governments from requirements imposed on federal governments. For instance, Chapter 10 of NAFTA prescribes rules regulating government procurement but it exempts state and provincial governments from coverage, although they, as well as the federal governments, are prohibited from employing investment-related performance requirements as trade barriers (Hulse Meyer, 2004: 98).

The labor and environmental side agreements reflect a similar accommodation of states and provinces. Neither NAALC nor NAAEC establish regulatory standards binding on the signatory countries and their subnational governments. Rather, the agreements merely call for domestic enforcement of domestic laws, despite the regulatory discrepancies between, for example, Mexico and the United States. Thus, Article 2 of NAALC, while announcing a shared commitment to “provide for high labor standards, consistent with high quality and productivity workplaces,” also “recogniz[ed] the right of each Party to establish its own domestic labor standards and to adopt or modify accordingly its labor laws and regulations.” Similarly, NAAEC “recogniz[ed] the right of each Party to establish its own level of domestic environmental protection and environmental development policies and priorities.” So the agreements did not interfere with preexisting state or provincial laws. The “bite” in these agreements was the requirement that the signatory governments enforce the laws they have adopted and

the potential for legal action if they failed to do so.<sup>21</sup> Annex 46 of the NAALC and Annex 41 of NAAEC also expressly provided for separate rules for their application in Canada with opt-in provisions for individual provinces, thus recognizing that provinces would control implementation in these areas of provincial responsibility.

## CONCLUSIONS

NAFTA's creation of a free-trade zone of the Americas clearly achieved the pact's dual objectives of promoting greater trade among the three signatories and encouraging cross-border investment.<sup>22</sup> Indeed, in the first seven years after NAFTA came into force, Canadian exports to the United States and Mexico rose 129 percent (Simeon, 2003; Hulsemeyer, 2004). Overall, intra-NAFTA exports grew at an average annual rate of 10 percent between 1994 and 1999 so that, by 1999, both Canada and Mexico directed almost 90 percent of their exports to the United States (Steinfatt and Contreras, 2001: 27). During the 1990s, U.S. exports to Mexico more than quadrupled and its exports to Canada more than doubled. Annual flows of U.S. direct investment to Mexico increased from US\$1.3 billion in 1992 to US\$15 billion in 2001, a particularly striking change in that from 1980-1993 total foreign direct investment in Mexico was only between US\$3 and U.S.\$5 billion a year (Weintraub, 2004: 13). From 1994 to 2000, U.S. investment in Canada increased from \$2 billion to \$16 billion, while Canadian investment in the United States jumped from \$4.6 billion to \$27 billion (Pastor, 2004: 126). Despite concerns that NAFTA would result in a dramatic loss of U.S. jobs to Mexico, "the United States experienced its largest job expansion in its history in the 1990s" (Pastor, 2004: 126), though the extent to which NAFTA caused this expansion is a matter of dispute.

Nevertheless, unsurprisingly, NAFTA's opening of markets "impinge[d] both favorably and negatively on different interests" and different areas within the three countries (Weintraub, 2004: ix). According to one study, within the United States the lowering of trade barriers hurt the apparel, electronics, and transportation sectors of the economy, with North Carolina, Texas, Pennsylvania, New York, California, Georgia, and Tennessee losing the most jobs. Yet in terms of *net* loss of jobs, the same

<sup>21</sup> Some differences in the treatment of the signatory countries were apparent here. Mexico agreed to the imposition of sanctions, in the form of fines, if there was a "persistent failure" to comply with either its domestic environmental legislation or its laws regulating minimum wages, safety and security standards at work, and child labor. Canada refused to accept sanctions from another country and required that claims that it had failed to comply with its environment and labor standards would be handled in Canadian courts (Morales, 2006: 117).

<sup>22</sup> The most complete discussion of the pertinent data is found in Weintraub (2004).

study revealed that several of the states that lost the most jobs (including Texas, California, and New York) were also among those gaining the most new jobs (Bolle, 2003). So while some sectors of the U.S. economy suffered as a result of increased competition, it is harder to discern the differential effects of NAFTA in various states and regions.<sup>23</sup> In Canada, the economic benefits of NAFTA accrued to those provinces that adapted their public policy to take advantage of increased trade opportunities (Chambers, 2002: 110, table 4.3). In Mexico, the effects of NAFTA varied by region, with rural areas and the southern part of the country generally not receiving the same benefits that urban areas and northern states enjoyed (Morales, 2003). Indeed, one Mexican commentator lamented that the benefits of free trade did not “reach all regions and sectors of the country” and that “[m]ost of NAFTA’s benefits have accrued to a small segment of the country’s economy and to an even smaller number of primarily multinational firms” (Rozenal, 2002: 76-77).<sup>24</sup> Whatever the accuracy of this claim, NAFTA did not produce the sustained economic growth in Mexico necessary to deal with income disparities within the country (Weintraub, 2004: 11).<sup>25</sup>

These negative effects, however, hardly vindicate Laski’s claim that federalism interferes with the capacity of governments to manage advanced capitalism. Federalism was not the culprit. Rather, scholars have attributed these negative effects to factors such as the difficulty of combining developed countries and a developing country in a trade agreement and the pre-NAFTA conditions that made it hard for poorer regions in Mexico to participate in the productive opportunities NAFTA offered.<sup>26</sup> More positively, the successful negotiation of NAFTA and the benefits it produced, even if unevenly distributed, point to compatibility of federalism and advanced capitalism. Despite their federal arrangements, the three NAFTA signatories were able to negotiate, adopt, and implement a complex international agreement touching almost all aspects of their economies. Would NAFTA, NAALC, and NAAEC have been different had they been negotiated by unitary system? Probably. But the regional differences within the three countries would likely have made themselves felt, even in the absence of a federal structure. As Richard Simeon has noted, federalism is less a hindrance than a condition that citizens and politicians work with,

<sup>23</sup> Data indicate that, during the 1990s, 10 U.S. states experienced more than a 10 percent annual rate of growth in exports, 17 experienced seven to 10 percent, eight experienced five to seven percent, and 15 less than five percent (Chambers, 2002: 110, table 4.3).

<sup>24</sup> This is not necessarily a representative view: public opinion data reveal that a majority of Mexicans have a positive view of NAFTA (Moreno, 2002).

<sup>25</sup> Even a strong proponent of NAFTA has acknowledged that “free trade and increased foreign investment have skewed development and exacerbated inequalities” in Mexico (Pastor, 2004: 130).

<sup>26</sup> On the crucial effects of different levels of development, see Belous and Lemco (1995: ch. 11). On why poorer regions and households in Mexico were ill-equipped to reap the benefits of free trade, see Scott (2004).

around, and through (Simeon, 2003: 162). And in Canada, the United States, and –to a lesser extent– Mexico, they have become so used to working in a federal context that it ceases to be a serious problem.

That leaves Bricker’s concern that international agreements like NAFTA would invade the prerogatives of state governments and undermine federalism. Once again, the reality is more complex. Had NAFTA established supranational institutions like those of the European Union, perhaps there might have been cause for concern. But the institutions created by NAFTA hardly pose a threat. The United States –and Canada and Mexico as well– have resolutely refused to cede sovereignty to international institutions. Implementing NAFTA does not impinge on state or provincial power, because the constitutions of the three signatories all recognize the subject matter of the treaties, international trade and investment, as falling within the responsibility of the federal government. NAAALC and NAAEC may implicate areas in which states had been active but they impose no new regulations, merely requiring the enforcement of domestic law. Moreover, as this article has shown, the NAFTA signatories took state and provincial concerns into consideration in the agreements they reached.

Thus, “adding a global sphere extends the complexity, but in ways not so foreign to the already complex system” of decentralization and collaboration characteristic of federal countries (Galligan, 2003: 119). This is hardly surprising. If one views federalism not as a layer cake or, to change the metaphor, a system of watertight compartments but, rather, as “a complex system of multiple governments with shared sovereignty and overlapping policy jurisdiction,” a combination of shared rule and self-rule, then “its compatibility with globalization is more obvious” (Galligan, 2003: 88). NAFTA illustrates the compatibility, not the incompatibility, of federalism and globalization.

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