Federalism Values and Foreign Relations

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In attacking the orthodox view of an exclusive, incontestable federal monopoly over foreign relations, Edward T. Swaine argues, revisionist scholars have so far failed to address the "ultimate challenge [of] locating new functions and values for the states in a globalized, yet federal, world." Both the criticism and the underlying intuition strike me as substantially correct. The revisionist attempt to rehabilitate federalism and the states presupposes that federalism serves some important value or values. In light of the momentous changes wrought by a global, interconnected world, those values cannot simply be assumed; they have to be identified and defended.

That said, Swaine's proposed search for "new functions and values" seems needlessly ambitious. The central dynamics of globalization—increased international mobility of capital and labor, international treaty arrangements that reach deep into formerly domestic affairs, the operation of domestic corporations on a global scale and, conversely, of foreign corporations in home state markets—do, of course, compel a re-thinking of domestic arrangements. Still, it seems likely that the "new" federalism values and functions will be extensions and modifications of the old ones. The real question is whether a globalized world renders familiar features of federalism more functional and valuable, or less so.

One set of traditional federalism values that might be thought to gain increased currency in a globalized world revolves around political participation. States have traditionally been viewed as being "closer to the people" than the national government. Now that the forces and institutions that shape our lives are even more distant, alien, and unresponsive, it has become all the more important to cultivate and protect local attachments, mores, policies, and voices.

An enhanced role for the states in international affairs on issues that might affect their citizens could improve the recognition and representation of local values, interests, and concerns.

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An alternative set of traditional federalism values center around the benefits of jurisdictional diversity and competition. Jurisdictional diversity makes it possible to accommodate a wider range of citizen-consumer preferences more of the time. Competition among governments, coupled with the option of an “exit” for dissatisfied citizens and businesses, disciplines interest group politics. On this view, federalism merits preservation (or restoration) against national and international arrangements alike, for substantially the same reasons. Federalism merits a firm defense especially now that international arrangements provide revenue-hungry governments and rent-seeking interest groups with enhanced opportunities to trump the salutary, disciplining force of jurisdictional competition.

Space constraints mercifully preclude anything resembling the full development of these two lines of argument and their implications for constitutional law and doctrine. The remainder of this article sketches the basic intuitions and presumptions that might inform a future analysis.

I strongly suspect that the “local participation” story is ultimately implausible. As an initial matter, the successful cultivation of local attachments does not appear to correspond, in any systematic way, to constitutional federalism arrangements. (It seems to work better in centralized France than in some federalist countries.) Even if that assessment is mistaken, the notion that local politics and participation might compensate for global alienation and dislocations is open to serious question. On some issues, more leeway for state governments would arguably help to counter civic alienation. By way of prominent example, the citizens of Massachusetts might feel better about themselves and their role in the world if they were permitted to register their disapproval of the government of Burma and corporations that deal with the SLORC (State Law and Order Restoration Council, or whatever that country and its junta may now be called). For the most part, however, globalization’s discontents arise from sources that are beyond the reach of state governments, and citizens’ sense of having lost control over some aspects of their lives cannot easily be compensated through more participation in some other venues and walks of life. Citizens whose 401(k) investments take a nosedive, courtesy of Indonesian kleptocrats or the International Monetary Fund, are unlikely to be mollified by opportunities for meaningful civic involvement on or with the Richmond city council or the Roanoke school board.

The “diversity-and-competition” story, in contrast, seems quite compelling. Federalism’s point, as this version of the story has it, is not to give citizens and their state and local governments a greater voice; rather, federalism’s point is to preserve citizens’ choice among competing sovereigns and their right to exit oppressive jurisdictions by voting with their feet, their modems, and their pocketbooks. Modern

technologies have greatly reduced the costs of exercising exit rights, thus rendering
their disciplining force much more powerful. That is why jurisdictional competition
is a much more salient and attractive notion now than it was, say, in the nineteenth
century.

This intuition is somewhat at odds with the conventional globalization story.
Increased international complexity and interdependence are commonly taken to
to entail: (a) greater cultural and economic homogeneity; (b) greater interdependence
and complexity, especially in economic and environmental matters; and (c)
accordingly, a substantially greater need for global cooperation and economic and
environmental management (through international organizations, agreements, or
some other means). Excellent theoretical and practical reasons, however, provide
ample cause for skepticism about the conventional move from (b) to (c), that is, the
notion that increased complexity and interdependence necessitate more central
political intervention.

Scholars in the tradition of Friedrich A. Hayek are bound to argue that increased
complexity, on a larger scale, is a powerful argument against political centralization,
not for it. Since the rigidities, inefficiencies, and unintended consequences of
government regulation increase with the scale and complexity of the regulated subject
matter, the idea of managing the world as a global commons is absurd. By the same
token, increased international interdependence arguably renders political borders
more, rather than less, important. The thought (or the slogan) of a "world without
borders" becomes rather unappealing, once one recognizes that a world without
borders is a world without exits. Free citizens and free markets need exits. The world
needs no tax "harmonization"; it needs and wants the tax havens that the
Organization for Economic Cooperation and Development is trying to wipe out.

Admittedly, this line of argument cuts primarily in favor of diversity and
competition among countries or nation-states, and only secondarily and incidentally
in favor of domestic federalism. Some of those secondary considerations, however, are
quite persuasive.

(a) More competition is better. So, for example, international competition
between the United States and foreign countries for the location of
automobile plants is a good thing. It is even better, however, if South
Carolina can compete with Ohio, Michigan, Canada, and the rest of the
world by offering BMW a deep sea port, right-to-work laws, and state
troopers who care little about drivers who mistake the interstate highway
system near Spartanburg for the Autobahn.

5. For a discussion of OECD policy, see Lubna Kably, Haven on Earth? You Can Forget It if OECD Has
(b) Domestic federalism may set precedents or provide competitive models that can be scaled internationally. For example, successful and highly efficient state competition for corporate chartering\(^6\) demonstrates why international agreements on corporate chartering should probably take the form of reciprocal recognition of domestic charters rather than harmonizing standards. For another example, successful federalist regulation of internet privacy and consumer marketing information here in the United States might well show that appropriate choice-of-law and contractual rules are preferable to an international regulatory “privacy” cartel.\(^7\)

(c) A robust federalism may help to protect domestic diversity and competition against efforts to utilize international agreements as a means of bringing domestic “outlier” states in line with the aspirations of national elites and interest groups. The menace of international “policy laundering” is particularly acute in Europe, where regions rightly suspect that national policy elites are deliberately using the presumed demand for European integration as a means of undermining regional autonomy. The same concern, however, also applies in the United States, where the 2000 presidential election provided fresh evidence of a pronounced cultural divide that, to a remarkable extent, maps state lines. Most of the states that elected President George W. Bush—the Republican “sea of red” on the electoral map—administer the death penalty, some of them to minors. None permit homosexual unions. Many lack hate speech laws and “comparable worth” statutes. All of them lack much of the stuff that is now the warp and woof of international human rights covenants and conventions. The Democratic states, on average, conform more thoroughly to emerging international norms, and perhaps these states are more enlightened. Above a threshold of truly universal human rights guarantees (which all of the American states meet), however, citizen choice and jurisdictional diversity are vastly preferable to international regimentation.

What follows from competitive federalism values and priorities at the level of constitutional doctrine? Competitive federalism demands firm barriers against the imposition of centralizing international norms (whether through treaties, customary international law, or some other vehicle) on the states. Conversely, though somewhat

less obviously, it implies fairly tight and, if you will, “nationalist” restrictions on the states’ participation in international politics and against the extra-territorial projection of state sovereignty outside the ordinary, domestic channels of political participation.\(^5\)

The task of translating these general presumptions into constitutional doctrine ought to be approached with considerable caution. First, as Swaine observes, the constitutional context of foreign affairs federalism is poorly understood.\(^9\) Extending that observation, one must say that many of federalism’s constitutional doctrines and their basic applications are poorly developed and poorly understood even in the domestic context. Far from confounding a well-settled body of doctrine and precedent, foreign affairs issues add another layer of confusion. Second, the preservation (or, more precisely in the contemporary context, the restoration) of a competitive, “market-preserving” federalism is a very difficult endeavor.\(^10\) It is not simply a matter of appropriate legal and constitutional arrangements, but rather involves basic questions of social stratification, interest group constellations and alignments, and the range and intensity of social, ideological, and ethnic conflict.\(^11\)

One can say with some confidence, though, that competitive federalism requires, as a necessary condition, the existence of constitutional, judicially enforceable (and politically tenable) limitations on the national government’s powers. Absent such limitations, the national government will consistently and successfully accede to insistent demands for the suppression of state competition. This problem marks the constitutional battle ground of “enumerated powers” and, in particular, the Article I powers which, when interpreted with suitable generosity, enable Congress to circumvent the limitations that the constitutional text seems to impose. These enumerated powers are, prominently, the Spending Clause, the Commerce Clause, and, according to the traditional view, the treaty power.\(^12\)

At this particular front, foreign affairs federalism issues actually seem somewhat more manageable, both as a doctrinal and as a practical matter, than the

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8. The reverse priority of values—that is, an endorsement of a “civic participation” federalism—probably implies a reverse set of constitutional presumptions.


11. See Rodden and Rose-Ackerman, 3 Va L Rev at 1521 (cited in note 10). For my own humble efforts to identify (domestic) political conditions and dynamics that might facilitate competitive federalism, see Michael S. Greve, Real Federalism: Why It Matters, How It Could Happen (AEI 1999).

12. The Necessary and Proper Clause, US Const Art I, § 8, cl 18, the usual suspect in the search for sources of presumed congressional omnipotence, is not listed in the text because it is not normally viewed as an independent grant of power.
corresponding domestic issues. Revisionists have urged a reconsideration of the doctrine of Missouri v. Holland. At the limit, the revisionist view pushes toward a set of rules that preclude the national government from doing to the states through international arrangements what it may not do to them under its domestic enumerated powers. The historical, textual, and conceptual arguments for this view are substantially better developed, and to my mind more persuasive, than are the analogous, embryonic attempts to develop a coherent theory that would limit congressional power under the Spending Clause. As a practical matter, moreover, it seems quite feasible to defend the principle that the national government may not "internationalize" its way around domestic constitutional constraints. In contrast, the analogous principle that Congress may not spend its way around those constraints is, notwithstanding its honorable Madisonian origin and pedigree, a political impossibility. Spending its way around constitutional limitations is what Congress does for a living, and one cannot easily articulate a line that would circumscribe that power without laying waste to the entire administrative state.

In addition to enforceable limitations on the national government's authority, a federalism that values jurisdictional diversity and competition requires doctrines that curtail both state protectionism and the extraterritorial projection of state sovereignty. Competitive federalism's central problem is not the threat of national impositions and "unfunded mandates" on states, but rather the states' demand for national intervention. Progressive, intervention-minded states face the constant challenge of accommodating powerful domestic interest groups. They seek to meet that challenge by exporting the costs of their regulatory regimes and by insisting on national "harmonization." While these strategies, when successful, may in some sense enhance "participatory" federalism values, they undermine competitive federalism. They do so, for example, by vitiating both the anti-interventionist states' policy choices and the citizens' ability to choose, from many diverse and competing states, the regime that best suits them.

While these considerations apply to federalism in general (prior to and independent from any globalization and foreign affairs complications), they supply an additional reason (additional, that is, to the traditional "one voice" rationale for a


federal foreign affairs monopoly) to be skeptical of a larger state role in international affairs. If the recent past is prologue, it is only a matter of time before the National Governors Association or the Union of Concerned States shows up at an international meeting to lobby alongside the usual interest group claimants for some international labor or environmental agreement. That commitment, in turn, can serve as a means of leveraging the states' demands in Washington, DC. Of course (one might object), the states already possess ample opportunities and institutional channels to press their demands for anti-competitive national legislation. That, though, is precisely the point: given that there are numerous domestic, constitutionally envisioned means through which intervention-minded states may seek to have their way, it seems ill-advised to provide them with an additional, international, extra-constitutional platform.

At the constitutional level, this line of thought counsels adherence to some "nationalist" legal doctrines, such as a fairly rigid interpretation of the Foreign Compacts Clause and a per se prohibition against facially discriminatory state action under the Commerce Clause, foreign and domestic. At the same time, competitive foreign affairs federalism should prompt more careful thought about doctrines that we currently lack—prominently, coherent rules and doctrines concerning state "exports" of regulatory and tax burdens, from products liability law to the taxation of interstate transactions. In this horizontal dimension, federalism's constitutional and sub-constitutional rules (such as conflicts and choice-of-law) are in considerable disrepair: in part because the policing of interstate regulatory aggression has been viewed as principally a congressional obligation; in other part because the post-New Deal judiciary believed that enforceable limits on state "experiments" that impose costs on outside parties would leave insufficient room for interest group politics.

It should therefore come as no surprise that international complaints over US domestic, state-based trade distortions have increasingly targeted state regulatory aggressions (as distinct from protectionism), such as state unitary taxation of foreign-based multinational corporations and more recently, Mississippi's tort law and

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17. In defense of a larger state role, one might argue that the national government cannot always be relied on to represent the states in international negotiations. That objection raises large and important questions. Those questions, however, go to the domestic arrangements concerning the organization and exercise of foreign affairs powers, as distinct from the states' independent participation on the international stage.

California's fuel additive regulations. The time may have come to rethink the extant substantive and procedural rules that facilitate state regulatory aggression. In this, as in many other respects, globalization presents an opportunity for federalism, rather than a threat. Nothing would be lost if international agreements and obligations were interpreted and enforced to curtail the mischievous state exports of regulatory and tax burdens that we have come to tolerate. The need to harmonize domestic arrangements with international trade obligations may even prompt us to revisit and reform, at long last, domestic federalism norms and arrangements that are flatly inconsistent with competitive structures and values. Our hopelessly dysfunctional and quite probably unconstitutional choice-of-law regime would be an excellent place to start.

Globalization is highly unlikely to serve states' rights values of empowering states. It may, however, serve the federalist objective of disciplining government at all levels, including the state level. If that hope makes me a nationalist, then I am a proud nationalist.
