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KEEPING YOUR EYE ON THE BALL: THE SIGNIFICANCE OF THE REVIVAL OF CONSTITUTIONAL FEDERALISM

Mark Tushnet[†]

There is an old joke that I will adapt about the division of authority in a family. One spouse is responsible for making the important decisions: how long U.S. troops should stay in Bosnia, whether the Senate should ratify the chemical weapons treaty, how to fund Medicare permanently, and the like. The other is responsible for the less important decisions: whether to refinance the home mortgage, whether to talk with the school principal about the children's performance in school, and the like. The point of the joke is, of course, that the second spouse has more power than the first, notwithstanding the fact that the former was nominally responsible for decisions of wider scope.

My point about the recent revival of constitutional federalism is simple. Consider the issues over which states and localities are to be given constitutionally protected authority, and compare them with the issues over which they will continue to lack such authority. States can decide how to regulate guns near schools,¹ and perhaps to refrain from lending their assistance to the national government's gun control efforts.² They can refuse to pay their workers the national minimum wage until someone secures an injunction requiring them to do so in the future.³ They can break their promises about what they will do about dealing with low-level nuclear waste—at least until Congress gets around to tying some federal money to state compliance with federal requirements.⁴ Further, to make my point, I am willing to concede that there may be some extension of these holdings on

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1. See *United States v. Lopez*, 514 U.S. 549 (1995).

2. See *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub nom.*, *Printz v. United States*, 116 S. Ct. 2521 (1996).

3. Lower courts have so held, following *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996).

4. See *New York v. United States*, 505 U.S. 144 (1992).

the margins to protect state and local governments from additional forms of national regulation.

However, suppose a state responded to relocation of important industrial facilities overseas by imposing a tax of 25% of the assessed value of any plant whose operations were substantially reduced in the course of a corporate transfer of production overseas.⁵ Would that statute be protected by the new constitutional federalism?

First, we would have to think about the law of preemption. The federal WARN statute provides a much more limited response to plant relocations, requiring only notification of a plan to shut down operations. The statute was watered down in the course of enactment, which suggests that it would not be difficult to develop a reasonably powerful argument that the WARN statute preempts other state responses to the plant relocation problem.

Next, we would have to think about the dormant commerce clause. The hypothesized statute might be subject to close scrutiny because it is explicitly triggered by an act that involves crossing state lines. Indeed, it might be subject to even closer scrutiny because it implicates foreign commerce. The statute looks almost like a tariff on the export of capital, protectionism of the sort that the modern Supreme Court does not approve.

The state statute might also be subject to review through international trade processes, the World Trade Organization and North American Free Trade Agreement tribunals. Again, its apparent protectionism would make the tax a likely candidate for challenge, leading to a response by the nation's political leadership.

Even if the statute survived the preemption and dormant commerce clause inquiries, and putting aside international trade law implications, we would have to think about the likely political response. It does not take a genius to figure out that a large-scale lobbying effort seeking to obtain a federal statute expressly stating that no state shall impose a tax like the one I have described would quickly develop in Washington. And, although here one must speculate, I would not bet against the rapid enactment of such a federal statute.

5. I do not offer this as a comprehensive statutory proposal, and so I simply acknowledge here that difficult questions about how to draft such a statute would inevitably arise.

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The final question would be whether the courts would hold such a federal statute unconstitutional under the revived constitutional law of federalism. I cannot imagine that they would.

Certainly the doctrinal resources would be available to a court bent on upholding the state tax. For example, one can use the word "commandeer" to refer to almost anything that affects a state's ability to pursue the substantive policies it prefers. Nonetheless, we have to keep our eyes on the ball when thinking about the revived constitutional law of federalism. The ball here is the large-scale growth of national and particularly transnational corporate enterprises. That growth makes it extremely unlikely that the hypothesized state tax would actually go into effect. That conclusion, in turn, shows the limits of today's constitutional federalism.

I could end here by returning to the comment with which I opened: In a tongue-in-cheek version, the revived constitutional law of federalism leaves the important issues like gun control to the states and lets the national government deal with the minor issues such as the power of transnational corporations. However, that would hardly be satisfying.

It seems obvious that only transnational political institutions are likely to be in a position to control transnational corporations.⁶ As a first observation, note that it is hard to imagine any state government adopting a statute like the one I have hypothesized. The reason is that the state might be able to capture some value from the relocation of plants presently in place, but would not soon be the site of some new capital investment in industrial plants.⁷ Although current workers may have some local political influence, the track record is that those who seek to expand local employment by attracting new

6. I understand that there is some controversy over the extent to which the U.S. economy is dominated by transnational corporations. Their power in the U.S. economy may be limited by the fact that much economic activity now takes the form of the localized provision of services: Your local McDonald's restaurant has to be local even if the McDonald's corporation itself is transnational. I question the force of this observation, however. If your local government tried to regulate your local McDonald's in a way that the transnational corporation found unacceptable, you might find yourself without a local McDonald's.

7. The state can get a retroactive one-shot transfer from plant owners, but the benefit will dissipate as site location decisions are made in the future.

plants—frequently by offering tax breaks and the like—are more powerful.⁸

If the revived constitutional law of federalism has something to say about the really important issues, it is along these lines: Reviving the institutions of state and local government will somehow enhance the ability of transnational political institutions to control transnational corporations. We have the revived constitutional law of federalism at the beginning of the process, and something like an effective institution to implement the labor provisions of the North American Free Trade Agreement, or the social charter provisions in the European Union's constitutive documents, at the end.⁹ There is a catchphrase for this: Retreat to mount a stronger attack later. However, is there some account of how we can get from the beginning to the end?

Actually, there is, although the account involves a great deal of speculation about social and political dynamics.¹⁰ We need transnational political institutions to control transnational economic ones. Those transnational political institutions can develop along two lines. First, they might aggregate the power of national governments to offset the power of transnational corporations. Alternatively, they might aggregate the power of people acting through transnational political movements, sometimes called the new social movements—the greens with respect to environmental issues, the international human rights and women's movements with respect to labor conditions, and the like.

The emergence of important institutions of transnational economic power, and interesting though currently less important institutions of transnational political power, suggests a broader point about federalism. In the United States, we understand federalism to be a system of geographic distribution of political

8. For recent discussions, see Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789 (1996); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996).

9. It may be worth noting the role these international institutions play in the argument. Although they were obviously created to serve the interests of transnational capital and to ease the flow of goods and capital across national boundaries, they have the potential to be transformed into institutions that control transnational corporations as well.

10. I sketch some possibilities in Mark Tushnet, *A Public Philosophy for the Professional-Managerial Class*, 106 YALE L.J. 1571 (1997) (book review).

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power. Most observers believe that the state lines we now have, and to which the revived constitutional law of federalism responds, have little to do with the lines we ought to worry about in designing a government suitable to contemporary conditions. Economic regions, for example, do not always follow state lines. Even if a single economic region lies within one state, ordinarily that state encompasses other economic regions as well.¹¹ Also, the appropriate unit is the local government, community, or neighborhood. None of these entities receives constitutional protection in the revived law of federalism. We might understand current questions of political control of transnational corporations by viewing federalism as a subcategory within a broader set of institutional devices that distribute power. The new social movements, for example, suggest that we might see federalism and syndicalism as alternative methods of dispersing power in order to control larger institutions.

National politics in the United States suffers from what observers of the European Union call a democratic deficit. Popular participation in developing national policy is relatively low when measured by such things as voting rates in presidential elections. Further, the new social movements in the United States are themselves rather weak. We must somehow eliminate the democratic deficit if we are to begin along either route to control the economic power of transnational corporations.¹²

The hypothesis is that the revival of constitutional federalism might be a way of reducing the democratic deficit. People do not participate in national politics or the new social movements because they do not believe that their actions will have any political effects: They believe that everything they care about is decided above their heads in Washington or in corporate boardrooms.¹³ By guaranteeing that some political activity will

11. This is true in Europe as well, where there is increasing interest in regional organization that disregards national political boundaries without placing everything under the control of a single European government. For an astute early comment, see Giandomanico Majone, *Preservation of Cultural Diversity in a Federal System: The Role of the Regions*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM* 67 (Mark Tushnet ed. 1990).

12. I do not mean to assert that the democratic deficit is due directly to alienation resulting from people's realization that they have little effective power to control transnational corporations. It may well be due to alienation resulting from the apparent corruption of the political process through the influence of great wealth and a defective system of campaign finance regulation. Yet, there probably is a connection between these two sources of alienation.

13. This is not to deny that those who seek to control corporate activities are

actually make a difference in people's lives, a revived constitutional federalism might revitalize politics as a whole. Having discovered their political effectiveness through local political action, with results that no one can displace by seeking redress in Washington, people will begin to participate more vigorously in national politics and in new social movements. Letting people decide, through their local prosecutors and school officials, what they think is the best way to deal with the problem of violence in the schools will make people more active citizens. The slogan would be something like this: "Think Locally and Act Locally, and pretty soon you'll Think Globally and Act Locally, and eventually you'll Act Globally too."

This account, which is of course only a bare sketch, might even be true. However, I don't believe it. The dynamic implicit in the slogan I have invented seems right: Political action begins with local acts often, if not necessarily, oriented by local thinking, and if all goes well, it eventually turns to global acts oriented by global thinking. However, identifying the local acts that set the dynamic in motion seems to me quite important, and, frankly, the acts protected by the revived constitutional federalism do not seem to be the right ones.

My social theory leads me to think that the local acts that would work involve the work place and the school. We have left the development of educational policy largely to state and local governments as a policy matter, although national institutions—corporations supporting the production of equipment (including books) for schools and teachers' unions—have an important role. Certain kinds of charter schools and voucher programs might be useful ways of re-empowering people.¹⁴ The revived constitutional federalism might make some minor contributions in insulating experiments with charter schools and voucher programs from control not so much by the national government, but from these corporations and unions.¹⁵

completely ineffective. Indeed, among their allies are some representatives of corporations themselves, following a tradition of corporate responsibility of a *noblesse oblige* type. It appears, however, that corporate leaders who seek to continue this tradition may be facing gradual extinction from the pressures of market competition.

14. On the policy level, developing appropriate programs that will assist presently disempowered people to gain power is far more complex than simply saying, "Create a charter school and we'll let you run with it."

15. Presumably the form would be to loosen the constraints of the dormant commerce clause and the preemption doctrine.

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But when we reach the work place, we run up against precisely the same constraints that I raised in the plant relocation hypothetical. That is, local efforts to create relations in the work place that would make people more politically effective outside the work place are likely to be defeated by invoking constitutional doctrines that have not yet been, and are unlikely to be, restructured in the new federalism. Further, they are unlikely to be restructured because doing so would require that the democratic deficit have already been eliminated, while the goal of local acts to deal with workplace issues is to eliminate that deficit. The route that runs between local political acts to control the workplace and the national government is obstructed by the democratic deficit itself.

There is a case to be made that the new constitutional federalism might actually deal with the important issues. However, I would place more weight on general cultural transformation than on constitutional doctrine in hoping for political action to deal with the power of transnational corporations. The revival of constitutional federalism seems either pointless or utopian.

