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Federal States in the Broader World

Matthew Schaefer

FEDERAL STATES IN THE BROADER WORLD

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I would like to take a look at how federalism affects foreign relations law in the United States. About ten years ago some scholars began questioning the foreign affairs orthodoxy, what is sometimes referred to as foreign affairs exceptionalism, in U.S. constitutional law.[1] They came to be known as the revisionist scholars.

Three features characterize foreign affairs exceptionalism. The first feature is Executive Branch preeminence in foreign affairs, in contrast to congressional control. The second feature is judicial law making in foreign affairs. The third feature is the irrelevance of federalism.

I am only going to focus in on this third feature, the irrelevance of federalism, and the extent to which this feature remains true, or should remain true, today.

The relationship of federalism to U.S. foreign affairs has two aspects to it. First, what limits does the U.S. Constitution place on state involvement in foreign affairs? Second, what limits does the Constitution place on the Federal Government's ability to use its international agreement making powers to impinge on state regulatory authority?

Let us start with the first aspect, the limits on state foreign policy making in the U.S. Constitution. Here we look at not only the ability of the federal government to preempt certain state activity, but also at whether the U.S. Constitution itself, even in the absence of federal government actions, prohibits certain state activities in foreign affairs. This latter limit is what is called the Dormant Foreign Affairs Doctrine. It is termed dormant because these limits apply even when the federal government has not acted, or, in other words, when its foreign affairs power lies dormant.

The Dormant Foreign Affairs Doctrine was laid out in a 1969 Supreme Court case called *Zschernig*.[2] The Supreme Court has never struck down a law on that basis again. What they struck down in the *Zschernig* case was not a state law on its face, but rather a state law as applied. In essence, there was

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[*] Schaefer bio.

[1] *See, e.g.*, Symposium, *Foreign Affairs Law at the End of the Century: Part II- Role of the States in Foreign Affairs,* 70 U. COLO. L. REV. 1223, (Fall 1999); Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism,* 83 VA L. REV. 1617, (1997).

[2] Zschernig v. Miller, 398 U.S. 429 (1968).

a statute that denied inheritance rights to certain heirs from communist countries if they could not show that a U.S. citizen would have a reciprocal right to take inheritances in that country and that such inheritances would not be subject to confiscation. State court judges took the application or interpretation of these laws as an opportunity to criticize the Soviet Union and communist governments. The Supreme Court found that this dicta by state court judges had more than some incidental effect on U.S. foreign relations and struck the law down as applied. The test created in *Zschernig* is whether the state activity has more than some incidental or indirect effect on U.S. foreign relations. In other words, the test of *Zschernig* is a threshold effects test.

Revisionist scholars question the existence or need for the Dormant Foreign Affairs Doctrine. They, in essence, say the U.S. Constitution allows the federal government to preempt state activities when they have harmful effect on U.S. foreign relations and that the Court should not be independently applying constitutional limits on state activities in foreign relations.

However, I think there is reason to question the geopolitical and functional underpinnings of this revisionist school. Revisionists rely on the end of the Cold War as reason to end the Dormant Foreign Affairs Doctrine.[3] They argue that the doctrine arose out of the Cold War era. While it is true that *Zschernig* was decided at the height of the Cold War, there are numerous problems with this argument by revisionist scholars.

First of all, as Mr. Farber indicated, we see the beginnings of a Dormant Foreign Affairs Doctrine much earlier than 1969. You see Court statements, Supreme Court statements, speaking of an exclusive federal power over foreign relations as early as the 1820's. In fact, the origin of the Supreme Court's view of federal exclusivity in foreign affairs may be found in an 1820's case in which Vermont tried to negotiate the extradition of a criminal back to Canada.[4] Although that action by Vermont was struck down under the Compact Clause, which prevents states from entering into compacts with foreign governments without the consent of Congress, there is also language in the opinion that suggests a broader federal exclusivity over foreign affairs. One sees this view in opinions all the way through the 1800's, the early and mid-1900's and culminating in the *Zschernig* opinion. A necessary concomitant of federal exclusivity over foreign relations is a Dormant Foreign Affairs Doctrine. If the federal powers are exclusive, then there are no concurrent powers in the states. Whether the federal government is

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[3] *See, e.g.*, Curtis Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1105 (1999).

[4] Holmes v. Jennison, 39 U.S. 570 (1840).

utilizing that power or not, the states are prohibited from engaging in foreign affairs. Although the Dormant Foreign Affairs Doctrine was not formally established, in terms of being the central or key element in striking down a state measure until 1969, it's origins or theoretical underpinnings can be traced back to a century and a half before the *Zschernig* case.

Second, significant state activity or involvement in foreign affairs did not begin to occur until the 1950's and 1960's. There were certainly sporadic episodes throughout U.S. history, but no one can question that the involvement of states in foreign affairs did not dramatically increase until the 1950's and 1960's.

The other Cold War-related factor that revisionist scholars look to is that now the penalties that the U.S. will face as a result of state engagement in foreign relations are not as significant. In the Cold War, our very survival, our very existence, was at issue. Now, with the end of the Cold War, the revisionists argue that there is room for state involvement in foreign affairs because there is no longer this draconian penalty that may occur as a result of state involvement and state affairs.

I find this argument somewhat curious too. The Cold War had a kind of rationality; although I hesitate to use that word, in the regime of mutually assured destruction. Both sides knew the draconian penalty was so severe that they were going to avoid it. Clearly, the Soviets would not resort to such measures for minor irritants like state court judges criticizing communist governments

The situation is quite different now at the end of the Cold War. Some people had questioned why in the materials we had included this article by Sandy Berger on U.S. foreign relations.[5] This is where the relevance of that article becomes clear. Instead of vertical proliferation with the U.S. and the Soviets upping their own nuclear arms, we now have horizontal proliferation. We have dangerous weapons in the hands of governments that may not be so rational in using them and other weapons of mass destruction. But it is not primarily these draconian penalties that we need to fear as a result of state intrusions into foreign affairs. Retaliation can take many forms in an era of unrestricted warfare or non-military means of warfare, such as cyber warfare; or the spreading of false rumors that can injure financial markets and economies. Additionally, our adversaries are not as clear anymore. There are rogue states. There are splintering nations. Even allies of the U.S. sometimes find that it is convenient for certain reasons to backlash against the U.S. In short, there are more potential countries that can retaliate against the U.S. with a broader array of penalties beyond the draconian one most

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[5] Samuel R. Berger, *A Foreign Policy For A Global Age,* FOREIGN AFFAIRS, NOVEMBER/ DECEMBER 2000.

focused on during the Cold War. Thus, the end of the Cold War cannot be a reason for abandoning the Dormant Foreign Affairs Doctrine.

Another reason that is suggested by revisionist scholars for ending the Dormant Foreign Affairs Doctrine is that we now have what we call targeted retaliation in international affairs.[6] In other words, a foreign nation can target retaliation against a specific subnational (e.g. U.S. state) government. One of the key functional or policy reasons for prohibiting states from engaging in foreign affairs, and even the founders had this concern, was the risk that retaliation against a state action in foreign affairs would affect the nation as a whole. For instance, trade sanctions could affect states outside the state taking the foreign policy action. Revisionist scholars argue that increased contact, and increased communication, increased awareness by countries of the U.S. political system, have increased understanding of the internal allocation of power in the U.S. They argue that other nations are not likely to misascribe the actions of one state to the nation as a whole. In other words, there is no longer an externalities problem with states engaging in foreign relations. Retaliation can be targeted. It can be directly and discretely confined to the state taking the action. However, this pillar of revisionism is also problematic on many fronts.

First of all, it assumes that sanctions will only be economic. Economic sanctions are easy, at least as a theoretical matter, to target. Retaliation in forms like cyber warfare are much harder to target towards in a particular U.S. state.

Second, some countries may want to impose sanctions against a U.S. state but may have very little trade and investment with that state and indeed the U.S. as a whole because of U.S. federal government sanctions. Therefore, that foreign government may not even have the opportunity of sanctioning that state in an economic manner, either through trade or tax policy.

Third, there is the diversion problem with targeted sanctions. This is why countries are somewhat hesitant to use them. For example, in the so-called GATT beer cases between the United States and Canada, the United States did target retaliation against Ontario. However, the U.S. government was worried Ontario beer would be shipped to another province and then come into the U.S. via that other province. Diversion is always a problem with targeted retaliation, which makes foreign nations hesitant to use it.

Fourth, there is the problem of spillovers. Spillover effects are almost always in existence. For instance, in the Massachusetts Burma case, the European Union (EU) apparently threatened to target sanctions against razor

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[6] *See, e.g.*, Peter Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1267 (1999).

blades because of Gillette, a major razor blade manufacturer, is headquartered in Massachusetts. However, there are razor blades produced in other states. There are always going to be spillover effects into other states.

Fifth, sometimes foreign governments may elect to not target retaliation against a particular state, but instead use the retaliation to boost or reward important domestic political interests.

Sixth, foreign governments may have an improved understanding of our internal allocation of power here in the United States. However, this does not suggest they will always elect to target retaliations since they certainly understand that the federal government retains the power to bring a state into compliance with international obligations. For example, instead of targeting retaliation against Massachusetts for the Massachusetts Burma law, a foreign government may instead target retaliation against a state represented by the committee chairman of the House Ways and Means Committee and Senate Finance Committee. Or if a Presidential election is coming up, a foreign government may target retaliation against the state that is going to be critical in an upcoming Presidential election.

Seventh, this notion does not take into account more subtle and hidden forms of retaliation like reduced cooperation in international organizations. Even if the U.S. federal government can somehow exercise it's power to prevent retaliation altogether, the U.S. government has now used that power on behalf of that one state and not on behalf of all of our citizens.

Eighth, the revisionists ignore other functional arguments against state foreign policy making, including considerations related to efficiency and expertise in foreign affairs.

Sometimes state sanctions against foreign governments are mentioned as useful experiments. However, these are uncontrolled experiments. We cannot tell whether a state sanction against a foreign government was successful or not, even if the foreign government changed its policy because there are so many other factors to take into account, including sanctions by other states, sanctions by the U.S. federal government, or sanctions by other foreign governments against this particular nation.

Finally, we need to address the issue of why the United States should not rely solely on preemption by the federal government to curb state foreign policy making. Why do we need this Dormant Doctrine? Do not the federal branches, the Congress and the Executive, have the time to police state activity in foreign relations? The response to this question requires a brief background on preemption. We have three types of preemption in U.S. law. The first type of preemption is express. The federal government says expressly the states are prohibited from entering the field.

The second type of preemption is conflict. There are two types of conflict preemption: Direct conflict, where it is physically impossible to comply with both the state and federal measure, and obstacles conflict, where it is not physically impossible to comply with both commands but the state law stands as an obstacle to achieving the full purposes of the federal act.
The third type is implied preemption. There are two types of implied preemption: Occupation of the field, where the federal regulation of the field is so extensive that states are preempted from entering the field, and dominant federal interest preemption, where in an area like foreign affairs courts more readily imply preemption of state activity.

In the Massachusetts Burma case, Massachusetts enacted a procurement law in early 1996 that imposed a ten percent negative preference against companies doing business in Burma. Federal sanctions were enacted later in 1996 and federal government did not expressly preempt the Massachusetts law. The federal law prohibited only new investment in Burma. As you can tell from the Massachusetts statute, it sought to penalize even existing investment in Burma. Since the federal government did not expressly preempt the Massachusetts law, was the Congress and President really trying to show they were in favor of the Massachusetts Act? I think you cannot really infer that from the lack of express preemption. The Congress and Executive Branch are well aware of other forms of preemption and may find it politically easier not to expressly preempt state law. Indeed, the Supreme Court found preemption on the basis of obstacles conflict. If they had not found preemption on the basis of obstacles conflict, there is a very good chance they would have found preemption on the basis of implied preemption.

The problems with solely relying on preemption to curb state actions are several. First, courts require some affirmative action by the federal government. For example, assume the federal government is aware of a foreign policy situation with a foreign government and they want to pursue quiet diplomacy. They do not want to jump into sanctions. Courts are going to be hesitant to find conflicts or implied preemption in those cases where there is no federal act. Thus, one problem with relying simply on policing of state conduct through preemption is that it does not protect federal efforts at quiet diplomacy.

Second, preemption findings by courts can at times appear somewhat disingenuous. Under the conflict and applied branches of preemption, courts are attempting to glean Congressional intent. The court is asking, "Did the Congress intend to preempt the state measure?" Ironically, in the Massachusetts Burma situation, it is probably the case that Congress and the Executive did not have any single intent on the pre-emption issue. Indeed

Massachusetts' federal representatives all clamored that the procurement statute was something that Massachusetts, as a state, should be allowed to do.

In contrast, the Dormant Foreign Affairs Doctrine can lead to more genuine analysis. It is based on the Constitution's structure, the Framer's intent, and the Supreme Court jurisprudence that has flowed throughout U.S. history viewing foreign affairs is an exclusive federal government matter.

Having criticized the revisionists, what about finding some common ground with them? I think we can do so when we turn to the standard of review under the Dormant Foreign Affairs Doctrine. I mentioned that in *Zschernig* the court established a threshold effects test, asking whether the state action has more than some incidental or indirect effect on U.S. foreign relations.

However, a threshold effects test is poorly suited to the courts. In fact, the courts themselves have admitted as much. They are poor judges as to what state actions are going to cross this threshold line. Courts realize the Executive Branch is in a better position to judge impacts on U.S. foreign relations. Thus, courts give some weight to Executive Branch views expressed in amicus briefs in these cases, all the while saying these views are not dispositive. If the Executive Branch views were dispositive, courts would relinquish their role as an independent arbitrator under the Constitution.

Even worse, a threshold effects test allows a foreign government to file an amicus brief and claim a particular state action is affecting its relations with the United States. By giving weight to foreign government amicus briefs, it might be argued that courts have partially turned over the resolution of a U.S. Constitutional issue to a foreign government. Worse yet, courts may look at the mere existence of a World Trade Organization (WTO) dispute, regardless of whether the state measure is ultimately found to violate one of our trade agreements, as evidence the state action has an effect on U.S. foreign relations. This is another damaging result of applying a threshold effects test under Dormant Foreign Affairs Doctrine.

Motive or purpose review under the Dormant Foreign Affairs Doctrine would ask, "Is the purpose of the state measure to change or advance the policy of a foreign government?" I am not saying that this will lead to certain results in all cases, or that it does not have any problems itself. What I am suggesting is that it better suits the competence of courts. They are quite good at fleshing out the purpose behind enactments. It also suits the competence of state legislators and state officials. Sometimes we have to rely on state officials to do their constitutional duty, to uphold the federal constitution, and to apply these constraints themselves as they are developing the legislation. In fact, what you find is that many lower courts, although

they feel constrained by *Zschernig* test, will often point first to the motive or purpose of the state statute in their threshold effects analysis. That is some proof that the judges themselves are most comfortable examining motive or purpose.

Additionally, motive or purpose review poses much less risk to the benefits, or values, of federalism. The range of state measures that potentially could be captured by the threshold effects test far exceeds those that might be captured by motive or purpose review

In the time remaining, let me turn to the second aspect of the irrelevance of federalism. What limits are there on the federal government's use of its international agreement making powers based on our federal system of government? Let me step back up here.

The U.S. federal government enters into international agreements in two major ways. The first is the treaty clause method in which the President gains the approval of two thirds of the Senate for an agreement he has negotiated. The second is the Congressional Executive Agreement in which the President garners the approval of the simple majority of both Houses of Congress. The textural basis for Congressional Executive agreements is the Commerce Clause plus the Necessary and Proper Clause.

Returning to federalism limits on these two methods, one can imagine four theoretical possibilities.

The first possibility is that there are no federalism limits on the treaty power relying on *Missouri v. Holland* but that such limits are imposed on Congressional Executive Agreements. [7] Remember, the textual basis for Executive Congressional Agreements is the Commerce Clause combined with the Necessary and Proper Clause and it is in the interpretation of those clauses that the Supreme Court has revived federalism limits. This possibility is the strongest of the four because it is consonant with existing Supreme Court opinions.

The second theoretical possibility is that federalism limits apply neither to the treaty power nor to Congressional Executive Agreements because *Missouri v. Holland* is rationale relating to matters of the utmost urgency extends to Congressional Executive Agreements. The problem with this argument is that the Supreme Court in the cases dealing with federalism limits, the Commerce Clause and the Necessary and Proper Clause, has rejected national importance- type arguments.

The third possibility, one the revisionist school might argue for, maintains that the U.S. Supreme Court would reverse *Missouri v. Holland* and find that the new federalism limits, the limits that Professor Farber spoke

[7] Missouri v. Holland, 252 U.S. 416 (1920).

about, not only place limits on Congressional Executive Agreements, but also place limits on the treaty power.

The only theoretical possibility that is not plausible is that there are federalism limits on the treaty power, but not Congressional Executive Agreements. You would have to fly in the face of the U.S. Supreme Court precedents on both fronts to be successful with this argument.

Irrespective of these possibilities, the most important point for purposes of U.S.-Canada relations and negotiations in the WTO and in the hemisphere is that the limits that Professor Farber spoke about in the *Lopez*[8] case and other cases dealing with commandeering will not inhibit the federal government from entering into international trade agreement obligations binding the states in areas such as services, investment, government procurement and subsidies.[9] Instead, it is political constraints that may inhibit the federal government from pursuing liberalization of state measures in trade negotiations. Accordingly, state federal cooperation measures must be enhanced to reduce the political constraints on the federal government.[10]

Thank you.

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[8] United States v. Lopez, 514 U.S. 549 (1995).

[9] *See,* Matthew Schaefer, *Twenty- First Century Trade Negotiations, the U.S. Constitution, and the Elimination of U.S. State-Level Protectionism,* 2 J. INT'L ECON. L. ,71-111 (1999).

[10] *See,* Matthew Schaefer, *U.S. States, Sub-Federal Rules, and the World Trading System, in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 525, 540-41 (Bronckers & Quick eds., 2000).