NAFTA AND FEDERALISM IN THE UNITED STATES

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Writing even a brief note on the implications of NAFTA for federalism in the United States is onerous. Probably all that needs to be said is this: NAFTA confirms the nearly complete dissolution of federalism as a significant feature of U.S. constitutionalism.

Constitutional federalism is an element of constitutional design aimed at restricting the power of the central government. It has two aspects. First, it can be seen as a design element that the courts may enforce, just as they enforce other elements — like the Bill of Rights — aimed at restricting governmental powers.

Even before NAFTA this aspect of federalism had been reduced to an almost symbolic role. After the New Deal the Supreme Court withdrew from any effort to restrict national power to act directly on the people of the United States. According to the Court, Congress can impose whatever obligations it chooses on the people, without regard to the desire of some or even all states to regulate their residents differently, or not at all.

Not much was then left of judicially enforceable federalism. The Court's most recent confrontation with the problem, in *New York* v. *United States*,[1] suggests a discomfort with allowing Congress to regulate the states as states — that is, in their governmental capacities, or with respect to their "fundamental" operations, or something like that. I am deliberately vague here because I doubt that the doctrine that will emerge over the next decades from *New York* v. *United States* is likely to be much more precise, or more satisfying, than alternatives the Court has already abandoned as unworkable.[2] Judicial enforcement of federalism will soon be a mere stylistic ornament on the Constitution, serving no particularly useful function except perhaps to remind people in the U.S. that we once had a federal system.

The reasons for the degeneration of judicially enforceable federalism bear on the subject of this essay. The Supreme Court abandoned its effort to preserve a sphere within which states could freely act because it came to believe that the national economy was so interconnected that Congress could not be denied the authority to impose regulations of whatever sort it wanted, wherever it wanted to. States could not be free to regulate in the face of Congressional desires because the Court believed the economic system was fundamentally national, not local.

NAFTA is symptomatic of the further transformation of the U.S. economy. Now the U.S. economy is global, not national. If the Court refused to help the states resist the exercise of national authority in a national economy, it surely will not help them resist the exercise of supra-national authority in a global economy.

The globalization of the U.S. economy affects the second aspect of federalism as well. Federalism is part of the *political* structure of U.S. government.[3] States as states, and as representatives of particularly localized interests, still have some influence on the development of national policy. With respect to important economic issues, however, that influence has decreased significantly. In part, this results from the nationalization of the economy: no longer are many particular interests peculiarly localized; "interest groups" have national rather than local constituencies, and organize nationally to influence Congress.

NAFTA and the globalization of the U.S. economy, for which it is a metaphor, further reduce the importance of federalism as a political element in U.S. government. Multinational corporations are more important political actors, with respect to the matters that concern them, than state governors. NAFTA itself may be only a minor contributor to the erosion of political federalism, but globalization is not.

One small doctrinal area of U.S. constitutional law may illustrate the broader issues I have raised. The U.S. Constitution authorizes Congress to regulate interstate and foreign commerce. For over a century the Supreme Court has interpreted this authorization as having a negative implication: states may not regulate interstate and foreign commerce in ways that interfere with that commerce. The Court has identified two kinds of interference. Some state laws may impermissibly *discriminate* against interstate and foreign commerce, while other laws may impermissibly *burden* that commerce.[4] In recent years the Court has been working its way toward the conclusion that all facially discriminatory laws are unconstitutional, and that it will invalidate facially neutral laws which have been challenged as unduly burdensome only in extreme cases.

The reasons for this conclusion are many, but I wish to focus on only one.[5] Everyone agrees that Congress has the power to override state laws that either discriminate against or excessively burden interstate or foreign commerce. The localistic impulse to raise money, or improve the competitive position of local industries, is so widespread, however, that no one can realistically expect Congress to override state laws at all systematically. The courts are a convenient administrative mechanism for striking discriminatory or burdensome laws from the statute books.

The Supreme Court's judgment in recent years has been that nondiscriminatory but burdensome regulations of *interstate* commerce are not a serious problem for the national economy. Precisely because the economy has become nation-wide in scope, relatively few such regulations are adopted; the interests that are adversely affected have enough political clout within each state to make it difficult for such statutes to be enacted. The political protection for out-of-state interests against discriminatory legislation, in contrast, is much weaker. Almost by definition, the interests adversely affected by discriminatory laws are located outside the state and have no significant representation in it. And, given the burdens on Congress of supervising state laws, the Court appears to have concluded that it should persevere in its traditional role to invalidate discriminatory laws.

The Court must soon decide what it should do about state laws that, without discriminating against *foreign* commerce, nonetheless impose substantial burdens on it.[6] Two paths are open to the Court, but they lead to the same conclusion.

(1) The Court might apply to foreign commerce the same relatively abstentionist tests it has developed in connection with interstate commerce. Recent decisions do little more than hint that the doctrinal rules governing foreign commerce are different from, and more stringent than, those governing interstate commerce. On this path the Court would reject any distinction between interstate and foreign commerce. It would then invalidate facially discriminatory laws and uphold laws with a merely disparate and burdensome impact.

(2) The Court might distinguish between interstate and foreign commerce, finding the threat that states would adopt laws burdening foreign commerce significantly greater than the threat that they would adopt laws burdening interstate commerce. It could then maintain its abstentionist doctrines where interstate commerce is involved, but vigorously police state laws that burden foreign commerce.

In either event states are unlikely to come out of the process with the ability to exercise significant regulatory authority. If the Court becomes more vigorous, that conclusion follows almost directly: state regulatory authority will be subject to constant and intense scrutiny by the national courts.

If the Court remains abstentionist, the argument needs some additional steps. Although the national courts would not supervise states, the chances are large that *Congress* would. The reason is, again, that multinational corporations are likely to have significant influence in the national political arena even if they are weak in particular states. They will lobby to get Congress to override local laws they find unacceptably burdensome. And, because foreign trade and therefore foreign policy are implicated, Congress is likely to be responsive to the appeals of these multinationals. In the end, authority will have flowed to the central government.

My argument can be summarized in this way: just as the economy's *nationalization* led to the centralization of governing authority, so too will the economy's *globalization*. The continuing restriction on local power to resist multinational corporations may be regrettable, but it is inevitable. The remedies, if they exist, lie somewhere other than with concern for federalism.❑

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Endnotes

1. *New York* v. *United States*, 112 S.Ct. 2408 (1992).

2. See *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). For my comments on *New York* v. *United States*, see Mark Tushnet, "Why the Supreme Court Overruled National League of Cities" Vanderbilt L. Rev. (forthcoming).

3. Indeed, the most prominent advocates of judicial withdrawal from the enterprise of enforcing federalistic limitations on national power support their position in part by asserting that the nation's political structure provides sufficient protection to state interests. That argument is criticized in a forthcoming article by Larry Kramer in the Vanderbilt Law Review.

4. The Court has distinguished between state laws that discriminate on their face against interstate or foreign commerce and state laws that have a discriminatory impact. The distinction functions as the reason the Court invalidates only some "discriminatory impact" laws as unduly burdensome while allowing states to enforce other "discriminatory impact" laws with other unduly burdensome, although arguably not discriminatory, laws.

5. A second important reason is the resurgence of the argument that relatively formalistic doctrines, like the anti-facial discrimination rule, are more suitable for courts to apply than are more functional ones that, for example, focus on whether a regulation's burdens are excessive compared to its benefits.

6. The underlying issue is raised in the pending *Barclay's Bank* case, involving a constitutional challenge to California's imposition of a tax based on the world-wide operations of a multinational corporation with some operations in California.