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Regulatory Federalism: A Reprise and Introduction

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SYMPOSIUM

REGULATORY FEDERALISM: A REPRISE AND INTRODUCTION

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This colloquium, like its predecessor, proceeds on the basis of a series of assumptions. First, it assumes that the *federalism* dimension of the *regulatory* state is an important one (just as is the *regulatory* dimension of the *federal* state). In introducing our first colloquium, I suggested that, although determining the content of public policy is critical in a democratic society, also critical is determining the level of government at which the choice of policy is made. Ingolf Pernice remarked then that a federal system is "any legal entity [which is] comprised of states for the purpose of pursuing certain common ends and which has been given, to this effect, the power to exercise limited but direct jurisdiction over their citizens, but where for all other fields of public action the individual states maintain their full autonomy."[1] If that is so, the inevitable question is where and, perhaps more important, how the demarcation between federal and state power should be drawn.

Assuming that policy on a given issue should, for one reason or another, be made at the federal rather than state level, the further question arises whether the general modalities of the federal intervention make a difference. One distinction drawn in our first colloquium was between federalizing the law (i.e., displacing state law with federal law) and harmonizing state law (i.e., imposing federal standards on state law). On that occasion we noted that while the European Community tends to favor using Community directives requiring the States to modify their laws to meet European Community standards, the United States favors outright federalization. Indeed, the Tenth Amendment, as explained in the

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[1] Ingolf Pernice, *Harmonization of Legislation in Federal Systems: Constitutional, Federal and Subsidiarity Aspects, in* HARMONIZATION OF LEGISLATION IN FEDERAL SYSTEMS: FIRST SYMPOSIUM OF THE COLUMBIA LAW SCHOOL AND THE LAW FACULTY OF THE JOHANN WOLFGANG GOETHE-UNIVERSITY FRANKFURT 15 (Ingolf Pernice ed. 1996) [FIRST SYMPOSIUM].

case of *New York v. United States*,[2] forbids federal commandeering of state legislative apparatus. But if, under this view, the federal government must pay for implementing its policies when the states refuse to do so, the consequence may well in the end prove to be less federal regulation,[3] with subsidiarity as the practical result. This awareness and others lead to my second assumption that, stylistically interesting though the difference between federalization and harmonization may be, both approaches equally raise the "level of government" issue.

Finally, I turn to the suggestion that we distinguish between, on the one hand, fixing the proper level for making policy on a given issue and, on the other hand, fixing the policy itself. Drawing such a distinction presents certain abstract merits — like enabling the level of government that has the greatest interest in a matter to assert that interest irrespective of its interest in any specific policy outcome. At first glance, the Community law principle of subsidiarity seems to presuppose that just such a separation can be made. It suggests that a polity can raise and answer the question of power allocation in an abstract fashion. But, even as the Europeans define it, subsidiarity cannot be treated in quite this way. The principle, we are told, dictates that policy be made at the Member State rather than the Community level, whenever the Community's policy objectives can satisfactorily be met through action taken at the Member State level. Under this view, the proper level of government action is not determined by reference to a defined policy area, but by reference to a defined policy objective. Ultimately, therefore, it is intellectually difficult, and perhaps impossible, to identify the most appropriate level of government in isolation from the most appropriate policy itself.

These, then, have been our basic assumptions: first, that level of government matters; second, that federalization and harmonization alike raise that issue; and third, that the *who* question invariably implicates the *what* question. It was on the basis of these structural assumptions that we launched the inquiry around which both this colloquium and its predecessor were organized. But we also thought we needed to organize the inquiry around a sampling of policy areas in which both regulation and federalism are issues. As Michael Bothe put it, the real question, even after a general constitutional distribution of powers has been laid down, "is the question [of] how the powers are actually used," which in turn is very largely a "political question."[4] "The attribution of specific powers to specific levels of government does not tell the whole story . . . ."[5]

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[2] 505 U.S. 144 (1992).

[3] "[F]ederalization may leave the states with less discretion with respect to particular subjects than harmonization but it is more respectful of the states' legitimacy as independent decision-makers . . . . [S]ome rule that limits the ability of the federal level of government to 'commandeer' the lower level may be as likely to promote subsidiarity as a rule that attempts to limit the subject matter jurisdiction of the federal level of government." Richard Briffault, *Paradoxes of Federalism*, *in* FIRST SYMPOSIUM, *supra* note 1 at 52-53.

[4] Michael Bothe, *Constitutional, Federal and Subsidiarity Issues*, *in* FIRST SYMPOSIUM, *supra* note 1, at 58.

[5] *Id.* at 59.

Ingolf Pernice and I believed that the most useful way to launch this second colloquium would be by sharing our reflections on what the initial survey of policy areas may have shown or failed to show, not only about our assumptions, but about the demarcation of regulatory power in federal systems in general. One possibility would be precisely a refutation of one or more of the basic assumptions that we had made — assumptions about level of government mattering, about federalizing and harmonizing being basically alike, and about policy and power to make policy being inseparable. A second issue is whether upon reflection, and borrowing Richard Briffault's terms, we have "a federal system after all, despite the lack of a significant constitutional limitation on federal power or constitutional reservation of particular subjects to the states."[6] This means examining the adequacy of the guarantees in the European and American Constitutions that their respective states shall enjoy a separate and independent existence and an important role in the organization of the federal government. Third and finally, one wonders, based on our survey, whether European and American federalisms, viewed separately or together, show any consistent pattern across different regulatory sectors.

I.

I will be very brief about the first two issues, and less brief about the third. My first conclusion about the reports and comments is that nothing in them undermines the three basic assumptions upon which we proceeded. To that extent, they are reassuring. As to whether, despite the indeterminacy of the constitutional limits on federal power, the states enjoy a separate and independent existence and an important role in the organization of the federal government, the reports and comments do not leave a great deal of room for doubt.

II.

Turning to the third issue — the prospect of consistent patterns across policy sectors within the United States, within Europe, and possibly even between the United States and Europe — we need to be more cautious. We need to be more cautious, if only because the reporters and commentators often failed to indicate whether, in speaking of their subject matters in their federal systems, they were speaking descriptively or prescriptively.

The reports and comments on environmental law insisted on drawing distinctions. Speaking of Europe, Rehbinder thought that a high degree of Community-wide environmental standard-setting for products could be justified on the basis of the need to dismantle non-tariff barriers to trade in goods, but that Community-wide standards should not be imposed on processes in the absence of significant spillover effects and externalities. Rehbinder also questioned whether the Community's environmental regulation was too one-

[6] Briffault, *supra* note 3, at 50.

directional, in setting standards that permit states to be more environmentally stringent, but preclude them from being more environmentally lenient if they so choose and might justifiably so choose. He believes Member States have good reasons to pursue distinctive environmental policies: not only are their environmental conditions different, but more important, they have different social and economic priorities. While agreeing that the Community should be alert to the risk that disparate environmental regulation will cause "fragmentation" of the Community, he nevertheless calls for a greater measure of what he terms "regional justice" or, even more colorfully, "substantive regional due process." He finds such normative flexibility all the more necessary, due to the serious problem of "implementation and enforcement gaps" associated with the unfunded mandates and attempted commandeering on the basis of which Community law federalism operates.[7]

If Rehbinder sounded a democracy and accountability theme in arguing for more flexible European standards, his colleague Steinberg reached the same conclusion on the basis of efficiency criteria. Warning that problems are not global merely because they are universal, Steinberg argued that regionally-differentiated standards offer greater promise of efficiency. Thus, except when faced with substantial environmental externalities (or other truly global considerations), Europe should welcome and exploit the advantages of regulatory differentiation.[8] As an impetus, Steinberg would specifically give national parliaments standing in the Court of Justice to challenge environmental and other measures as being in violation of the principle of subsidiarity, a prerogative they do not now have.[9] Even he would admit, however, that access to the courts will accomplish little in the absence of justiciable substantive standards for measuring subsidiarity, standards that may need to be developed on a sector-by-sector basis.

Michael Young's prescription for U.S. federalism in the environmental law field is ultimately not very different from these. He finds that where environmental issues are heavily regional rather than national in nature, and where more or less local values (rather than some national consensus) prevail, both democratic values and efficiency values militate in favor of keeping regulatory competence at the state and local level.

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[7] "[T]here certainly are better methods for achieving flexibility of Community law and differentiating between different groups of Member States according to their ability to achieve ambitious environmental policy goals than an uncoordinated 'two speeds' Europe through implementation and enforcement gaps." Eckard Rehbinder, *Regulatory Federalism: Environmental Protection in the European Community*, *in* FIRST SYMPOSIUM, *supra* note 1, at 76-77.

[8] Rudolf Steinberg, *The Subsidiarity Principle in European Environmental Law*, *in* FIRST SYMPOSIUM, *supra* note 1, at 83-85.

[9] Steinberg views giving Member State governments standing to challenge measures on subsidiarity grounds as inadequate because of their temptations to compromise local preferences. Failure to provide adequate recourse to the Court of Justice on subsidiarity challenges might well, in his opinion, cause the German Constitutional Court to deliver on its threat to treat Community law as invalid and unenforceable in Germany if violative, in its judgment, of the Community principle of subsidiarity.

In the field of labor law, Mark Barenberg discerned still finer distinctions. He posited four different models of American labor federalism: 1) national uniformity (the law of collective bargaining and pension rights), 2) federal minimum standards (employment discrimination, health and safety, and wages and hours), 3) state implementation of federal criteria (welfare and Medicaid), and 4) state primacy (workers' compensation and the law of unjust dismissals). It appears to be his thesis that the allocation of labor law issues among these different models reflects a sensitivity to the problems of "social dumping."[10] The German authors staked out positions that were quite different from Barenberg's and quite different from each other's. Weiss claims that the Community may have erred in pursuing what he calls a "perfectionist perspective" in labor law harmonization,[11] by pursuing uniform sets of substantive rights and duties, rather than more attainable, and ultimately useful, structural harmonization. Simitis, on the other hand, believes that labor law is an area that raises such serious issues of human welfare and dignity that the Community simply cannot afford to indulge in the presumed benefits of regulatory competition and public choice.[12] Federalism in this particular area should, in his view, unashamedly promote the introduction of progressive, individual rights-oriented measures, that is to say "close the gap between the working conditions in its Member States and . . . set . . . the pace for constant improvement of the working environment."[13] Under his view of the field, a "race to the bottom" is simply intolerable.

This "race to the bottom" is precisely the risk that Professors Goldschmid and Lowenstein tend to see in America's failure to federalize or harmonize state corporation law — a risk admittedly compensated for in part by its willingness to federalize and vigorously enforce securities law in the interest of investor protection. In reaching this conclusion, Goldschmid invoked the following test: action should be taken at the highest government levels on issues that are "basic," that term denoting issues "that are truly important and that are likely to be improperly regulated . . . at lower governmental levels."[14] Curiously, neither of the German speakers was persuaded that regulatory competition among states had seriously prejudiced the American public, and neither thought that it was likely to prejudice the European public either. Fritz Kübler believes, in fact, that in the United States regulatory competition has been a "permanent incentive for corporate law reform;"[15] and Helmut Kohl doubts, on the basis of the "real seat

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[10] Mark Barenberg, *Federalism and American Labor Law: Toward a Critical Mapping of the "Social Dumping" Question, in* FIRST SYMPOSIUM, *supra* note 1, at 105.

[11] Jon Appleton, *Summary: Subsidiarity and Harmonization within Federal Systems; Contradiction or Necessary Parts of the Same?, in* FIRST SYMPOSIUM, *supra* note 1, at 191 (quoting Weiss).

[12] Spiros Simitis, *Labor Relations - The European Union's Problem Child, in* FIRST SYMPOSIUM, *supra* note 1, at 125.

[13] *Id.*

[14] Harvey J. Goldschmid, *Harmonization of Corporate Law in Federal Systems: A United States Perspective, in* FIRST SYMPOSIUM, *supra* note 1, at 168.

[15] Friedrich Kübler, *"Legislative Competition" and Corporate Law Reform: Some Questions from a European Perspective, in* FIRST SYMPOSIUM, *supra* note 1, at 172.

rule" of incorporation prevalent in Europe, that the "Delaware effect" is, in any event, a realistic concern there.[16]

Despite their many evident divergences, the reports and comments have this important and too easily overlooked fact in common: they are less concerned with the ultimate allocation of rulemaking power in a given area than with the soundness of the reasoning by which that allocation is made. Thus, while all of the reports and comments take federalism and the demarcation of powers seriously, all seem to be less interested in the *what*, or even the *who*, of the demarcation than in the *how* of it.

Of course, asking the *how* question inevitably means asking the *why* question as well. Certainly, in the European Community it has been helpful in thinking about harmonization to ask whether (and to what extent) state law is being harmonized in order, on the one hand, to eliminate internal non-tariff barriers to trade (i.e. in pursuit of "negative integration") or, on the other, to establish a minimum level of social protection (i.e. in pursuit of "positive integration"). In the internal market context, the principle of subsidiarity may be thought of as seeking to ensure that local autonomy is not interfered with, unless the gains in mobility of the factors of production are substantial and palpable; in other words, even though market integration could conceivably be cited to justify total standardization in every field, subsidiarity reminds us that at some point the putative gains in market integration are simply not worth it.

On the other hand, in areas where the Community is exercising the right to set substantive standards of social protection, subsidiarity offers a somewhat different rule of decision. It suggests that the Community set minimum standards only (with states allowed, within limits of course, to exceed them), that these standards address only the essentials of any given matter, and that states even be given the right, in compelling circumstances, to fall short of them.

In the end, of course, no amount of analytic rigor will supplant talk about values and assessments about whether what we value is or is not prejudiced by allowing regulation to occur at one or another level of government. But clarity of thought — particularly on the *how* and the *why* — cannot possibly hurt.

III.

There is another, perfectly complementary approach that may help in circumstances such as these, where disagreements over values are bound to color our preferences on the "level of government" question. That approach may be described as an institutional or structural one. This approach posits that the best results, from a federalism point of view, will be attained if the decisional machinery operates under the right institutional ground rules.

In fact, there are rather clear signs of an ascendancy of institutional federalism in the United States. Recent Supreme Court decisions suggest that, in the Court's

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[16] Kohl attributes the absence of a "Delaware effect" in Europe to the so-called "real seat theory," according to which companies are required to incorporate in the jurisdiction where they principally conduct their business.

view, health in federalism depends not so much on the specific allocation of substantive policymaking power as on certain basic ground rules for the exercise of that power. As already noted, the decision in *New York v. United States*[17] suggests that the Tenth Amendment bars Congress from compelling the states to administer (i.e. commit enforcement resources to) federally-determined policies. The Supreme Court's more recent Eleventh Amendment ruling in *Seminole Tribe v. Florida*[18] largely bars Congress from subjecting the states to litigation and liability in the federal courts; this case law thus places certain structural limitations on Congress's power to determine the state governments' allocation of resources or to fix the terms on which the states may be held accountable in law. And even though the decision in *United States v. Lopez*[19] places limits on Congress's exercise of the interstate commerce power, those limits hardly amount to reserving specific subject matters for governance by the states. The *Lopez* case stands at most for the proposition that if Congress invokes the Commerce Clause, commerce must be implicated and such commerce must at least have a potential interstate dimension.

It may be significant in this "institutional" connection that the present colloquium includes a panel on public finance. That choice itself constitutes recognition of the fact that sectoral policy lines are not necessarily the most useful ones to follow in a comparative study of federalism. Federalism, after all, is not simply the result of the exercise of placing certain policy issues on the federal side and certain other policy issues on the state side of the boundary (while allowing still other issues to straddle the boundary altogether). It is also the result of institutional arrangements. Precisely because public finance law raises questions about the resource dependence of the states on the federal government, or of the federal government on the states, it illustrates a federalism based on institutional arrangements rather than on an allocation of subject matter competences.

Perhaps the most direct institutional strategy for strengthening federalism would consist of structuring federal decisionmaking so as actually to enhance the ability of state and local governments to make their interests known at the time the federal government determines whether, and if so how, to regulate. It is too late in the day merely to *assume* that our federal systems exhibit adequate political safeguards of federalism; but it is not too late to act to strengthen existing safeguards and introduce new ones. Put in the most general terms, we might pursue strategies that enhance the likelihood that representatives of state and local communities will have a precise and identifiable function to perform in the decisionmaking process. Reverting to the *who* versus the *what*, those representatives would focus more on the question of whether a problem exists, and whether the federal government should address it, than on the merits of the solution itself.

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[17] 505 U.S. 144.

[18] 116 S. Ct. 1114 (1996).

[19] 115 S. Ct. 1624 (1995).

Alternatively, the decisional focus of state and local governments might be on the different effects that various federal solutions would have on state and local communities — something along the lines of a "state and local government resources and autonomy impact assessment." My idea is that some creative institutional thinking might produce decisional processes that will more reliably yield federal measures — whether federalization or harmonization does not matter — "that [are] respectful of all relevant state and local needs, and all significant state and local differences."[20] Although the very task of weighing the interests of state and local communities in federal decisionmaking implies a heavy informational and judgmental burden, the representatives of those communities would seem to be in a good position to determine for themselves the issues on which their interests are most worth pursuing.

Interestingly, the European Community has from the very start institutionalized the influence of state interests in the formation of federal policy by structuring its principal legislative organ — the Council of Ministers — in a way that permits members to give voice to the interests of their states as they perceive them.[21] Clearly, judging by popular opinion, this has not provided an adequate set of political safeguards of federalism for Europe — which only shows that neither institutional nor allocational "quick fixes" will accomplish the task.

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[20] George A. Bermann, *Harmonization and Regulatory Federalism, in* FIRST SYMPOSIUM, *supra* note 1, at 44.

[21] Michael Bothe refers to this arrangement as *Politikverflechtung*, or "vertical political interlacing." Bothe, *supra* note 4, at 59.