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BOOK REVIEW

The Waning Federal Monopoly over Foreign Relations

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Review of Michael Glennon and Robert Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* (Oxford University Press, 2016)

The Cold War may seem like ancient history now, but once upon a time the United States and the Soviet Union denied each other's right to exist and had the firepower to back it up. It was more than a power struggle in the way of old European rivalries. It was a battle of ideologies, fueling fierce cultural prejudices in each country. But those prejudices had to be kept in check against the prospect of mutual assured destruction. It was a balancing act for the national government, and the President especially, to constrain Soviet power without provoking the sort of aggressive responses that risked spiraling out of control.

At the level of state probate court judges there was no such self-restraint. Faced with state laws that allowed non-citizens to inherit property only where the property would not be subject to confiscation in their state of nationality and that state allowed inheritance by U.S. citizen legatees, these low-level judges took the opportunity to engage in intemperate Commie-bashing. "If you want to say that I'm prejudiced, you can," blasted one Pennsylvania judge, "because when it comes to Communism I'm a bigoted anti-Communist." A California judge refused to "send any money to Russia," taking "judicial notice that Russia kicks the United States in the teeth all the time." A Montana Supreme Court justice lamented the lack of a reciprocity statute under Montana law, resulting in "financial aid to a Communist monolithic satellite, fanatically dedicated to the abolishing of the freedom and liberty of the citizens of this nation."

That was too much for the U.S. Supreme Court. In its 1968 decision in *Zschernig v. Miller*, the Court struck down the state inheritance measures even though no one in the federal government was complaining. The decision marked a zenith of the dormant foreign affairs power, under which the states are constitutionally barred from action that has more than "some incidental or indirect effect" on foreign relations. As Michael Glennon and Robert Sloane describe in *Foreign Affairs Federalism*, the decision had a pedigree dating back to the Founding. The Court had on many occasions rejected a role for the states in the making of foreign relations. The U.S. reports are strewn with pronouncements turning federalism on its

head in the context of foreign relations. The American constitutional system is ordinarily premised on the states as the default locus of government. When it comes to foreign relations, the states have been presumed to have no part at all.

This has always been something of an exaggeration, but not much of one. For much of the nation's history, so-called federal exclusivity presented a structural imperative. For purposes of international relations, the United States was processed by others as a unitary actor. That was true legally: traditional international law recognized the nation-state as the only entity with legal personality. Under international law, the nation was held responsible for the acts of its constituent units, private and public. The doctrine was also rooted in the sociology of international relations. In a world in which federal states and democracies were oddities both, other sovereigns were unlikely to differentiate among governmental units or comprehend any discretion on the part of subnational units to act independently of the national government.

Serious, potentially catastrophic difficulty could follow where states of the Union offended foreign sovereigns who then turned around and responded against the United States as a whole. In striking down a California statute requiring a shipowner's bond on certain noncitizen passengers (they would all have been Asian) in *Chy Lung v. Freeman* (1876), the Supreme Court posed the hypothetical case of a British woman deemed "lewd and debauched" by state authorities and the resulting claim for redress by the Queen of England. "Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations," concluded the Court. "It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" As Hamilton wrote in *Federalist* No. 80, "the peace of the whole ought not to be left at the disposal of the part."

In a global system premised on unitary state responsibility, the externalities of state and local action were intolerable. Subfederal decisionmaking would be systematically suboptimal. Foreign relations involved actors beyond American control. In the 19th century setting, war was a common result of disturbances between nations. In the mid-20th, the nation's survival hung in the balance. The Soviet Union may not have taken state probate judges very seriously, or indeed have noticed them at all. But why take the risk? In ordinary contexts, the states are laboratories of democracy. But it doesn't make much sense to allow experiments that have a chance of blowing up the building.

Of course, there has never been a way to neatly draw the line between the local and the global. Historically, the trickiest episodes involved state-level action where the international repercussions were unintended, as when South Carolina detained black British sailors (in the same way it detained free American black sojourners) or when rioters were inadequately punished for mob violence against Italian immigrants in late 19th century New Orleans. These and other episodes triggered serious protests from powerful countries, and yet the federal government was left without recourse to remedy the wrongs.

That state-level action threatened the national interest begged the question of who was best able to enforce against it. In most cases, the federal government's capacity to affirmatively trump state law has been unchallenged, certainly where a direct conflict exists between state and federal statutory schemes. The more contested

question is whether the courts should step in when no such conflict exists. Glennon and Sloane play this as a refrain: if a state risked offending a foreign power, Congress could always act to make things right. "[I]t's hard to imagine an egregious abuse of state power in the realm of foreign affairs," they write, "that the federal government would not step in to prevent." Leaving aside what qualifies as "egregious" in this context, that response doesn't take into account timing and political incentives. Congress has always been a slow ship to turn; foreign relations can be fast-moving. Before you knew it, the nation could be staring down a serious international dispute, the result of some provincial hotheadedness that could not be shut down quickly enough.

Political incentives have also left Congress at a comparative institutional disadvantage, retarding legislative action to correct subfederal action inconsistent with the national interest. In the Cold War context, for example, legislators were loath to look pro-Soviet. The courts, by contrast, were well situated to do the national government's bidding. In this context, moreover, the courts were unburdened by the kind of anxieties that led them to shy from other foreign relations controversies, especially those between the White House and Congress. The courts could quash state and local activity confident that the result would stabilize (or at least not destabilize) U.S. relations with foreign powers.

That's the historical angle on foreign affairs federalism, and it's why the need for the nation "to speak with one voice" went largely unchallenged as constitutional mantra. It wasn't a myth, as Glennon and Sloane assert: it was a necessity. But times have changed. Most importantly, the nation-state is being disaggregated as a matter of global sociology if not international law. Foreign actors have a sophisticated understanding of our federal system. They understand that when the states act, it may be without Washington's approval. That defuses the risk of undifferentiated response against the nation as a whole. There is a growing list of episodes in which foreign actors have looked to target subfederal jurisdictions directly. When, for example, Arizona enacted the immigrant-unfriendly SB1070 in 2010, Mexico responded by issuing a travel advisory warning off Mexicans from travelling to Arizona particularly, not the United States generally. Mexican President Felipe Calderon and President Obama stood firmly together at a May 2010 press conference against the Arizona measure. There was no danger that Mexico was going to hold the United States responsible for Arizona's transgression.

This dynamic of disaggregation and targeted retaliation largely eliminates the externalities of state-level action, which in turns undermines the case for an exceptional approach to federalism in the context of foreign affairs. It's from that direction that I ultimately agree with Glennon and Sloane's critique of recent Supreme Court decisions on the question. In *American Insurance Association v. Garamendi* (2003), the Supreme Court struck down on a dormant foreign affairs rationale a California statute requiring disclosure of Holocaust-era insurance policies. It wasn't quite *Zschernig*, insofar as the statute was causing actual damage to national foreign relations; the state measure was opposed by the executive branch (a position reflected in State Department policy statements), had provoked a negative response from the German government, and appeared to gum up a complex regime negotiated between the two countries to resolve WWII-related property claims. But in this case the executive branch, at least, could have directly preempted the state measure through the vehicle of a related executive agreement with Germany.

The test enunciated in *Garamendi* is awkward, looking to balance the proximity

of a challenged measure to traditional subfederal functions against the level of conflict created with federal policy. As others have pointed out, the former is too elastic. Legislating on Holocaust-related issues may not have been a traditional state function, but insurance regulation clearly is.

In any case, the Supreme Court is a lagging indicator on the question of foreign affairs federalism, and *Garamendi* will hardly be for all time. In this respect, *Foreign Affairs Federalism* may be overly doctrinal. Although the authors claim methodological agnosticism, to the extent that court decisions dominate the analysis they implicitly diminish the importance of historical practice. In the book's opening chapters, Glennon and Sloane describe the many ways in which states and localities have become more enmeshed in the global system. But they don't attribute constitutional meaning to those practices. That's a mistake, I think. In the past, various episodes that did not trigger judicial pronouncements reinforced the norm against subfederal foreign relations. These also go largely missing in *Foreign Affairs Federalism*. The Negro Seamen Act controversies of the antebellum era—hugely contested and illuminating of constitutional thinking on the subject—are among many examples from practice that may be more constitutionally consequential than judicial pronouncements on the question.

This is especially true with respect to the flipside question of the extent to which the federal government may be limited in the scope of its authority to constrain the states in the context of foreign relations. With respect to ordinary domestic matters, there are spaces beyond the reach of federal authority. Does the same apply to foreign relations? The constitutional flashpoint is the Treaty Power. Is it subject to ordinary Tenth Amendment limitations or does it independently expand federal reach? Justice Holmes emphatically extolled the latter position in his 1920 opinion in *Missouri v. Holland*, arguing (in an opinion that itself adverted heavily to practice) that the Treaty Power extends to all matters of international concern. That has where the doctrine has stood, at least until the Court's 2014 decision in *United States v. Bond*.

Panning out to include the posture of other constitutional actors tells a different story. Since *Missouri v. Holland*, the treatymakers have never—*not once*—used the Treaty Power to extend federal authority beyond the powers established under other constitutional allocations. The Senate has been aggressive in projecting a vision of federalism contrary to the Holmesian version, assiduously attaching so-called federalism understandings to the few human rights conventions it decides can be adopted consistent with its putative federalism values. Against that practice, the *Bond* decision looks insignificant, even if it did (as Glennon and Sloane somewhat idiosyncratically argue) undermine *Missouri v. Holland*. In the meantime, as the authors highlight, cities and states are adopting international conventions on their own (as when for instance San Francisco and other cities have adopted the Convention on the Elimination of All Forms of Discrimination Against Women, as yet unratified by the United States). As the Trump Administration takes office, progressive states are ramping up their connections to global climate change regimes. This activity suggests that the traditional framing of the constitutional question is being overtaken by events on the ground. Cities and states are going to be players on the global stage regardless of what the Supreme Court says about it.

On its own terms, *Foreign Affairs Federalism* supplies an important description and analysis of the full range of state and local activity implicating foreign relations, a welcome first book-length treatment of the subject. *Foreign Affairs*

Federalism will help lead constitutional actors, not least the courts, to understand the normalization of the subnational role in global affairs. The issue will become only more important in coming years as political polarization moves beyond the water's edge.

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