INTERNATIONAL DELEGATIONS AND THE VALUES OF FEDERALISM

NEIL S. SIEGEL*

I

INTRODUCTION

Among U.S. legal scholars who specialize in foreign-relations law, there is a growing debate about the constitutional implications of international delegations.[1] Almost all of this debate has focused on separation-of-powers issues (especially the nondelegation doctrine and the Appointments Clause),[2] as well as on Article III concerns.[3] A prominent exception is Edward Swaine's provocative argument that international delegations diffuse political power and thereby vindicate the values of federalism.[4] "Federalism," Swaine submits, "superficially looks like a reason to dislike international delegations (and [it]

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* Associate Professor of Law and Political Science, Duke University School of Law. For instructive feedback, I am grateful to Karen Alter, Stuart Benjamin, Curtis Bradley, Erwin Chemerinsky, Barry Friedman, Oona Hathaway, Laurence Helfer, Judith Kelley, Barbara Koremenos, Mark Pollack, H. Jefferson Powell, and Michael Tierney. I thank Elizabeth McBrearty for able research assistance.

1. Following the lead of Curtis Bradley and Judith Kelley, I define an international delegation as "a grant of authority by two or more states to an international body to make decisions or take actions." Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 3 (Winter 2008). As Bradley and Kelley explain, international delegations take many different forms, leaving nations and subnational units of nations (for example, U.S. states) with varying degrees of regulatory control regarding the subject matter of the delegation.

2. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 272 (2d ed. 1996); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States–Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455 (1992); Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573 (1994); David M. Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331 (1998); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 121 (2000); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998).

3. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 398–400 (2d ed. 2006).

4. *See generally* Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494 n.3 (2004).

plays that role in national discourse about international engagements), but [it] in fact provides a strong warrant in their favor."[5]

Putting aside for a moment the persuasiveness of this claim, it is plain that the theory and practice of federalism are relevant to analyzing the law and politics of international delegations, including their costs and benefits.[6] American federalism endeavors to vindicate certain values by protecting the regulatory autonomy of U.S. states.[7] International delegations pose a potential threat to these values by undermining state control: such delegations may cause international bodies or foreign nations to exercise authority that would otherwise be exercised by the states.[8] Accordingly, it is worth thinking about the effects of international delegations on the values of federalism.[9]

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5. *Id.* at 1502; *see also id.* at 1613 ("Taking international delegations seriously reveals a constitutional character that serves, however inadvertently, many of the same ends as have the U.S. states. On this view, delegations of lawmaking authority to international institutions may promote the values underlying domestic federalism . . . ."); *id.* ("[D]iscovering legitimate bases for worrying about international delegations also provides a ground for resolving an extrinsic constitutional objection—federalism—and reveals a potential reason actually to embrace those delegations.").

6. Bradley and Kelley use the term "sovereignty costs" to refer to "reductions in [nation-]state autonomy through displacement of its decisionmaking or control." Bradley & Kelley, *supra* note 1, at 27. Because I approach this subject from the perspective of debates about federalism in U.S. constitutional law, I prefer to call reductions in national autonomy "autonomy costs." As used by the U.S. Supreme Court, the concept of "sovereignty" is a whole other kettle of fish; it is bound up with symbolic notions of the "dignity" of subnational states. The Court has even been willing to compromise the regulatory autonomy of the states in order to advance its conception of state sovereignty. *See generally* Neil S. Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 24, 35, 131 (2004) (distinguishing "sovereignty" in the sense of legal unaccountability for violations of federal law from "autonomy" defined as the ability of the states to govern; submitting that "[t]he Court's preference for sovereignty over autonomy is the most obvious hallmark of the 'federalist revival'" and arguing that "[a]ny set of federalism doctrines focused on autonomy must make preemption its primary concern"); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 39–40 (contending that the Court's preemption decisions are significantly more important for state autonomy than are the rulings articulating a robust conception of state sovereign immunity).

7. By "federalism," this article refers to a constitutional regime that aims to vindicate certain values (specified below) by affording significant protection to the regulatory autonomy of subnational states. In other words, this inquiry uses the term "federalism" in the sense of protecting state control, not in the distinct normative sense of achieving the optimal vertical division of authority between the federal government and the states. *See infra* note 35 (discussing these distinct conceptions of federalism). In this regard, this article adopts the terminology of the U.S. Supreme Court, which tends to conceive of federalism as a reason to limit federal power, not as a reason to validate its use. One should recognize, however, that federalism could reasonably be understood in the different normative sense just identified.

8. Because this article traces out the impact of international delegations on the values commonly thought to be advanced by a federal system, the domestic political structure is conceived of not merely as a cause of international law and legal institutions, but also as an effect. Ernest Young implicitly does the same in examining how globalization puts pressure on the American constitutional structure. *See generally* Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 538 (2003). For a classic exercise in "reasoning from international system to domestic structure," see Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881, 882 (1978).

9. This problem is hardly of importance only to American federalism. *See, e.g.*, FEDERALISM, UNIFICATION, AND EUROPEAN INTEGRATION (Charlie Jeffery & Roland Sturm eds., 1993) (exploring "the problems which have emerged from the perspective of the Länder following the incorporation of the former GDR into the Federal Republic and the progressive incursions of the European Community into policy areas formerly reserved to the Länder by the Basic Law"); Daniel Halberstam, *Comparative*

This inquiry conducts such an examination and concludes that the relationship between an international delegation and federalism values depends upon what would happen in the absence of the international delegation. When the delegation replaces regulation by the federal government that would have displaced state choices anyway, then the delegation has no effect on state regulatory control, but an uncertain net effect on federalism values. The impact turns on the relative inclinations of the federal government and the international body to decentralize.

When, however, there would be no federal regulation in the absence of an international delegation, so that the delegation reduces the autonomy of subnational states, then the justifications for international delegations, whether constitutional or prudential, do not include the values commonly understood to be associated with federalism. In this situation, the submission that international delegations diffuse political power is unpersuasive: power is more diffused when fifty states maintain their regulatory autonomy than when one international body is awarded control. When international delegations reduce state autonomy, moreover, they compromise every other value that federalism is commonly thought to advance.

To be clear, international delegations are here to stay. Like "[m]ost nations today," the United States "participate[s] in a dense network of international cooperation that requires [it] to grant authority to international actors."[10] The very pervasiveness of international delegations indicates that they offer significant benefits—from reducing transaction costs, to solving coordination and collective action problems that single nations—let alone subnational states—cannot solve on their own, to protecting certain basic human rights.[11] When international delegations help to internalize a supranational externality, all that U.S. states may lose is the ability to continue not being able to solve a problem on their own. Moreover, subnational states may avail themselves of international law, including international delegations, as a source of legislative inspiration in the face of the federal government's refusal to act.[12]

Federalism and the Issue of Commandeering, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 242–43 (Kalypso Nicolaidis & Robert Howse eds., 2001) (discussing how the German Länder demanded and secured a more prominent role in the German government's dealings with the EU).

10. Bradley & Kelley, *supra* note 1, at 1.

11. *See, e.g.*, Bradley & Kelley, *supra* note 1, at 25–27 (referencing the literature); Oona Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115 (Winter 2008) (discussing various benefits of international delegations).

12. *See, e.g.*, Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 245–46 (2001) ("[I]n the absence of federal ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), San Francisco has incorporated principles of CEDAW into binding local law. In the death penalty context, where the federal government has not yet opted to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights . . . , aimed at the abolition of the death penalty, a handful of cities have urged their states, and in some cases the federal government, to support a moratorium, relying on the United Nations Commission on Human Rights' call for such a moratorium." (footnotes and internal quotation marks omitted)); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 667 (2001) ("Within the

At the same time, it makes scant sense to conceive of the compromising of federalism values potentially caused by international delegations as a benefit sounding in the values of federalism, even if some other kind of benefit is at stake. The purpose of this article is neither to bury international delegations nor to praise them. Its aim, rather, is to analyze carefully one cluster of costs potentially associated with them.

Part II discusses the values of federalism. Part III examines the impact of international delegations on the values of federalism. Part IV illustrates the tension between federalism values and international delegations by contrasting such delegations with instances of "commandeering" based on their relative impact on federalism values. The U.S. Supreme Court has prohibited Congress from commandeering—requiring state officials to enact, to administer, or to enforce a federal regulatory program—in order to safeguard the federalism value of accountability, even though the Court's doctrine leaves the states with less regulatory control in certain situations.[13] By contrast, international delegations that reduce the autonomy of subnational states compromise *both* political accountability and state regulatory control.

Part V clarifies the thesis of this inquiry. Most importantly, it explains why the analysis does not imply, let alone demonstrate, that international delegations are unconstitutional, whether in general or in their particulars. A brief conclusion summarizes the argument.

II

THE VALUES OF FEDERALISM

A federal system entails a vertical division of regulatory authority between the national government and subnational states.[14] Commentators specializing in constitutional law, political science, and economic analysis have argued that a federal system vindicates important values by protecting the regulatory autonomy of the subnational states.[15]

First, a powerful check on the abuse of government power is said to exist when multiple levels of government compete for regulatory authority and political power is diffused.[16] James Madison famously identified federalism as part of "a double security" that "arises to the rights of the people."[17] The federal

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United States, localities are turning to international law as a model for their own lawmaking. . . . And, as of 2000, nine states, the Territory of Guam, sixteen counties, and thirty-eight cities have enacted ordinances calling on the United States to ratify CEDAW.").

13. *See, e.g.*, Siegel, *supra* note 6.

14. *See, e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 103–04 (2000).

15. This inquiry assumes (but does not show) that a federal system in fact advances what are herein denoted "federalism values." *See infra* Part IV (clarifying the scope of the argument).

16. *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 380–95.

17. FEDERALIST NO. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to

and state governments, Madison insisted, "will control each other, at the same time that each will be controlled by itself."[18] Two centuries later, Justice O'Connor would invoke the intentions of the Framers on behalf of the Court in *Gregory v. Ashcroft*.[19] She identified the tyranny prevention championed by the Framers as "the principal benefit of the federalist system."[20]

Second, democratic self-government is supposed to be facilitated when there exists a robust space for participatory politics at levels closer to the people who are governed.[21] Federalism, observed Justice O'Connor for the Court in *Gregory*, "increases opportunity for citizen involvement in democratic processes."[22] On this point, she referenced Alexis de Tocqueville, who "understood well that participation in local government is a cornerstone of American democracy."[23]

Third, political responsiveness and accountability are believed to be encouraged when states compete for mobile citizens who can vote with both their hands and their feet.[24] Justice O'Connor wrote for the *Gregory* Court that

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the rights of the people."). *But see* FEDERALIST NO. 10 (James Madison) (arguing that minority rights will be less vulnerable to majority tyranny in a heterogeneous, extended republic).

18. FEDERALIST NO. 51 (James Madison).

19. 501 U.S. 452 (1991). In *Gregory*, Missouri state-court judges asserted that the mandatory retirement age in the state constitution violated the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34 (2006). 501 U.S. at 456. The Supreme Court issued a "clear statement" rule of statutory interpretation. Justice O'Connor wrote for the majority that the Court will construe federal law to apply to important state government activities only if Congress issues a clear statement that it wants the law to apply to the states in these circumstances. *Id*. at 461. Because the ADEA lacked such a clear statement, the Court concluded that the federal antidiscrimination law did not preempt the state's mandatory retirement age. *Id*. at 467. In so holding, the Court underscored the importance of the Tenth Amendment in protecting state autonomy. *Id*. at 461 ("This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."); *id*. at 463 ("[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at the heart of representative government. It is a power reserved to the States under the Tenth Amendment . . . .") (internal quotations omitted).

20. *Id*. at 458 ("Perhaps the principal benefit of the federalist system is a check on abuses of government power. 'The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties."' . . . [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.") (internal citations omitted); *see also* FERC v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting) ("[O]ur federal system provides a salutary check on governmental power.").

21. *See, e.g.*, Rapaczynski, *supra* note 16, at 395–408.

22. 501 U.S. at 458.

23. FERC v. Mississippi, 456 U.S. at 789 (O'Connor, J., dissenting) (discussing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 181 (H. Reeve trans., 1961)).

24. *See, e.g.*, COOTER, *supra* note 14, at 129–30 (analyzing the circumstances in which mobile citizens contribute to efficiency in the delivery of local public goods); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992) (arguing for competition among states); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, *in* PERSPECTIVES ON PUBLIC CHOICE (Dennis C. Mueller ed., 1997) (providing necessary and sufficient conditions for the existence of an efficient allocation of citizens across jurisdictions); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (providing the first formulation of the mobility problem). *But see* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 387–88 (1997) ("[W]hen moves occur, they tend to be for reasons largely unrelated to government policy decisions: We move because our work takes us elsewhere, or because of marriage or some other

federalism "makes government more responsive by putting the States in competition for a mobile citizenry."[25] Responsiveness and accountability are distinguishable but related. One way to ensure responsiveness is not through exit but through voice[26]—that is, voting politicians out of office or pressuring them. This is often what is meant by accountability.

Fourth, value pluralism is promoted when state policies are allowed to differ along various dimensions of cultural difference.[27] Contemporary examples abound, including some of the most controversial issues in American culture: abortion, the death penalty, gay marriage, and physician-assisted suicide. Whatever one thinks of value pluralism normatively regarding a particular issue, it is uncontroversial descriptively that uniform federal rules prevent different parts of the country from governing themselves in ways that vary across the nation. This is the case whether the federal rule takes the form of a constitutional decision by the U.S. Supreme Court,[28] a proposed constitutional amendment,[29] or a federal statute interpreted by officials in the federal government to have broad preemptive effect.[30]

Fifth, social problem-solving can be encouraged when states are permitted to act as policy "laboratories."[31] Justice Brandeis offered perhaps the classic

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personal need, or perhaps because of climate and health. Thus, mobility may be overstated and poorly understood, and yet it is central to economic theories of federalism.").

25. 501 U.S. at 458.

26. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

27. *See, e.g.*, *Gregory*, 501 U.S. at 458 ("This federalist structure of joint sovereigns . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . . .").

28. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding that the execution of persons who were under eighteen at the time they committed their capital crimes is prohibited by the Eighth and Fourteenth Amendments); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas law making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause of the Fourteenth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that that the execution of mentally retarded persons is prohibited by the Eighth and Fourteenth Amendments); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming the core of the constitutional right to abortion articulated in Roe v. Wade, 410 U.S. 113 (1973)).

29. *See, e.g.*, Jim Rutenberg, *Bush Calls for an Amendment Banning Same-Sex Nuptials*, N.Y. TIMES, June 4, 2006, § 1, at 30. Recent calls for a constitutional ban on gay marriage are best understood in light of the Court's decision in *Lawrence*, *see supra* note 28, where the Court dramatically overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), and announced a right of sexual privacy in the home that extends to homosexuals. The Court appeared ambivalent about whether the right sounded in liberty or equality, *see* 539 U.S. at 575, avoided the language of fundamental rights or strict scrutiny, *id*. at 578, and suggested that the issue of gay marriage was distinguishable without explaining why or how, *id*. If the Court followed to its logical conclusion its defense of the dignity of intimate homosexual relationships and the state's lack of authority to demean homosexuals, *id*. at 560, 567, 575, 578, prohibitions of gay marriage would almost certainly violate equal protection. Yet the Court explicitly avoided such a conclusion, *id*. at 578, leaving this area of constitutional law in a state of ambiguity and uncertainty.

30. *See*, *e.g.*, Gonzales v. Oregon, 546 U.S. 243 (2006) (rejecting the Attorney General's position that the federal Controlled Substances Act allowed him to forbid doctors' prescribing federally regulated drugs for use in physician-assisted suicide under state law permitting the practice).

31. *See, e.g.*, *Gregory*, 501 U.S. at 458 ("This federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government . . . ."); FERC v. Mississippi, 456 U.S. 742, 788–89 (O'Connor, J., dissenting) ("Courts and commentators frequently have recognized that the 50 States

formulation of this argument, admonishing the Court that "[t]o stay experimentation in things social and economic is a grave responsibility."[32] This rationale for federalism is distinct from the one sounding in value pluralism. One does not enter a laboratory in order to resolve a conflict over values that are constitutive of personal and community identity. Rather, one enters a laboratory when the implicated values are generally shared and when disagreement concerns matters of empirical causation. For example, Americans might better understand the tradeoff between vehicle speed and safety if states set different speed limits on their highways.[33]

Finally, the efficient delivery of local public goods (or alleviation of local public bads) by states saves various costs when they make more cost-effective choices than the federal government would make for the nation as a whole. For example, Rust Belt states favored national emissions standards for factories to reduce or eliminate a competitive advantage enjoyed by Sun Belt states in the competition for new industry. If the only standards were air quality standards, the Sun Belt states could offer less pollution control because their air was cleaner. The Rust Belt states accordingly lobbied for a federal requirement that every new factory of a certain type had to install the same abatement technology.[34]

All of the values canvassed above are typically believed to be promoted by federalism.[35] Commentators have debated vigorously whether a federal system actually advances them.[36]

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serve as laboratories for the development of new social, economic, and political ideas. This state innovation is no judicial myth.") (footnotes omitted). *But see* Rapaczynski, *supra* note 16, at 408–14 (criticizing the experimentation rationale for federalism).

32. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

33. Of course, value conflict could also be implicated in this example. Communities in certain parts of the country might trade off liberty and safety differently from people in other parts of the country. Yet every region of the nation would benefit from sound empirical evidence that clarifies what the actual tradeoffs are.

34. *See generally* B. Peter Pashigan, *Environmental Protection: Whose Interests are Being Protected?*, 23 ECON. INQUIRY 551, 562–70 (1985) (analyzing votes on critical Clean Air Act amendments and verifying that Rust Belt legislators voted to nationalize these rules); *see also* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 285 (1991) (observing that "when differential geographical benefits are at stake, congressional voting patterns fall out along remarkably congruent geographical lines, suggesting that congresspeople are aware of the legislation's geographic implications, and that they vote consistently with the theory of pessimistic pluralism").

35. The term "federalism" may be employed not in the sense of protecting state control (which is how it is used here), but in the distinct normative sense of achieving the optimal vertical division of authority between the federal government and the states. *See supra* note 7 and accompanying text (flagging this distinction). When federalism is understood in this distinct sense, the foregoing discussion of the values of federalism is incomplete. For example, federalism so conceived may require uniformity in certain situations, and preemptive federal action may be needed to achieve it. An uncontroversial example is a national public good like military defense.

III

THE IMPACT OF INTERNATIONAL DELEGATIONS ON FEDERALISM VALUES

It is instructive to analyze systematically whether, on balance, international delegations advance or undermine federalism values. Professor Swaine has argued ably that "legislative authority conferred on international institutions . . . indirectly promotes a more specific constitutional value: the diffusion of political authority prized by federalism."[37] International delegations, in other words, "provid[e] a bulwark against the concentration of political power in the national government that is consistent with the ambitions of federalism."[38]

The suggestion that international delegations diffuse political power seems plausible insofar as the federal government delegates authority that it would otherwise exercise, as opposed to delegating authority that the states would exercise.[39] This is a key assumption. Power is more diffused when fifty separate sovereigns regulate (or decline to regulate) than it is when one international body assumes control. Moreover, there is reason to question the force of the diffusion argument. Power diffusion is just one of many federalism values, and the conventional wisdom notwithstanding,[40] it is not clear that the diffusion of political power is the most important value of federalism. Much turns on the party to whom power is delegated. To illustrate with an absurd example, the diffusion argument would count for nothing if Congress delegated authority over certain matters of national defense to North Korea. Much also turns on whether diffusing power in fact helps to prevent tyranny. Having several sovereigns on one's "back" can make one less (or equally) free, not more.

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36. It is possible that maintaining the autonomy of subnational states could undermine federalism values in certain situations. For instance, federal regulation might advance accountability to a greater extent than would state regulation if citizens were more attuned to the legislative activity of their national representatives than to the work of their state ones. If it could be demonstrated systematically that nationalization advances federalism values to a greater extent than does maintaining the autonomy of subnational states, then the proffered connection between subnational state control and federalism values would dissolve. Most defenders of federalism values, however, are unlikely to conclude that the values commonly associated with federalism would be better advanced without federalism than with it. For recent discussions of federalism values, see STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 56–65 (2005); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Friedman, *supra* note 24; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903 (1994); Siegel, *supra* note 6, at 1648–51. For an overview of the normative federalism debate in American constitutional law and citations to the literature, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 109–12 (2d ed. 2005).

37. Swaine, *supra* note 4, at 1501.

38. *Id.*

39. Even when the federal government delegates power that it would otherwise exercise, there is a distinct sense in which international delegations centralize, as opposed to diffuse, political power. After all, such delegations displace the independent choices of several or even many nations. Accordingly, international delegations diffuse and centralize at the same time.

40. *See supra* note 20 (quoting Justice O'Connor). To be sure, power diffusion constitutes an advantage that a federal system enjoys over a regime of nationally managed decentralization. *See* Rubin & Feeley, *supra* note 36, at 927 (characterizing "federalism's role in diffusing governmental power" as an "important argument[] that genuinely support[s] the basic principle of federalism"). But because the federal government does not tend to engage in significant decentralization, *see infra* note 73, the force of this argument is limited.

Turning to the other federalism values discussed above, international delegations likely undermine all of them to the extent that such delegations reduce state regulatory control, as opposed to leaving state control unchanged and just reducing national control. This distinction is critical: the relationship of an international delegation to the values of federalism depends on how the matter would be handled without an international delegation.[41] If the issue were left to the subnational states but for an international delegation that shifted control supranationally, then—as explored in detail below—the delegation would compromise all of the federalism values discussed in Part II.[42]

If, however, the federal government would handle the matter but for a power transfer to an international body, then it is uncertain whether the delegation would compromise values of pluralism, experimentation, and local efficiency absent information about the relative inclinations of the federal government and the international body to decentralize. If neither the federal government nor the international body would decentralize to a significant extent (or both would decentralize to the same extent), then there would be no effect on these federalism values. An example would be a delegation concerning certain matters of national or international security by the United States to the UN Security Council. If instead the federal government would have decentralized to a greater extent than the international body, then the delegation causes net harm to these federalism values. For example, Congress has allowed states to regulate the insurance industry in ways that would violate the dormant Commerce Clause[43] in the absence of congressional approval.[44] This longstanding arrangement could unravel if the United States joined agreements containing delegations aimed at harmonizing the international insurance industry.[45]

If, however, the federal government would have decentralized to a lesser extent than the international body, then the delegation actually advances these values of federalism. This last scenario seems unlikely, however, because it is difficult to think of instances in which international bodies decentralize below the level of the nation state. Indeed, international law characteristically directs its requirements at nations, not at subnational states.

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41. Accordingly, any empirical research on the effects of international delegations on the values of federalism should avoid selection bias by thinking through alternative states of the world. *See infra* note 91 (discussing issues of research design). The most important alternative counterfactual (besides subnational control and supranational control) is control by the national government.

42. This includes tyranny prevention for the reasons stated in the text following note 39.

43. The dormant Commerce Clause is the constitutional principle that state and local laws are invalid if they place an undue burden on interstate commerce, unless the state or local government is acting with congressional approval or as a market participant. For a recent explication of the doctrine, see *Granholm v. Heald*, 544 U.S. 460, 472–73 (2005).

44. *See, e.g.*, Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 655 (1981) (holding that "the McCarran–Ferguson Act removes entirely any Commerce Clause restriction upon California's power to tax the insurance business").

45. *See, e.g.*, Barry Friedman, *Federalism's Future in a Global Village*, 47 VAND. L. REV. 1441, 1451–52 (1994) (discussing the international pressures for harmonization of the insurance industry).

It is also uncertain as a theoretical matter whether participation, responsiveness, and accountability values would be compromised if the federal government would have handled the matter but for a power transfer to an international body. On the one hand, it seems fair to presume that international bodies are typically less participatory, responsive, and accountable vis-à-vis U.S. citizens than is the federal government.[46] Among other things, U.S. citizens can vote in federal elections; they never get to vote for, say, the individuals in leadership positions at the International Monetary Fund or the World Trade Organization (WTO).[47] On the other hand, the delegation would advance these federalism values on balance if the international body somehow decentralized (and thus empowered U.S. states) to a greater extent than the federal government would have done in the absence of the delegation, so that the resulting participation, responsiveness, and accountability gains on the state level more than compensated for the harm to these values caused by moving from the national to the supranational level. Again, this scenario may be unlikely, but it does seem at least theoretically possible. Once again, therefore, the net effect of the international delegation on federalism values turns on the relative likelihood that the federal government and the international body will decentralize.

If one limits the analysis to international delegations that reduce the regulatory control of subnational states, matters become much less uncertain. Such delegations are likely to discourage political participation at the state level by undermining the utility of such participation. In some cases, it is true that transnational activist groups may gain more access to the international organization than they would otherwise gain locally.[48] For instance, many international treaty conferences provide for observer status for human-rights groups.[49] There is a difference, however, between the democratic ideal of broad political participation and the heightened access sometimes afforded to certain interest groups.[50] In any event, it seems unlikely as a general matter that U.S. citizens have more opportunity to participate effectively in democratic politics in the presence of an international delegation than in its absence.

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46. *See infra* notes 48–52 and accompanying text (discussing the participation, responsiveness, and accountability problems that characterize international bodies).

47. That said, the United States often enjoys considerable influence over the choices of leadership that are important to the United States.

48. *See, e.g.*, Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 223 (2002) ("Structural aspects of [international organizations], including provisions for access to documents and for observer or other forms of non-voting status, have . . . provided entry points for NGOs' growing participation in various forms of interstate diplomacy, including treaty making.").

49. *See, e.g.*, Knut Dormann & Louis Maresca, *The Role of the Red Cross in the Development of International Humanitarian Law: The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments*, 5 CHI. J. INT'L L. 217, 220, 222–23, 226, 229 (2004).

50. *See, e.g.*, Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 170–84 (1999) (discussing the influence of small interest groups on international institutions).

Likewise, international delegations that erode subnational state autonomy would appear to undermine political responsiveness by reducing interjurisdictional competition for mobile citizens. There is less (or no) competition when an international body limits choices in every subnational jurisdiction. International delegations would also seem to reduce accountability by, among other things, dampening the impact of the most common method of ensuring accountability: elections. This is of course familiar learning by now. Commentators have written increasingly about the "democratic deficit" that characterizes international institutions, particularly the European Union.[51] As Professor Swaine relates, "[i]nternational delegations give power to officials and institutions that 'are not accountable, directly or indirectly, *exclusively* to the American electorate,' and indeed may not be accountable to much of anyone at all."[52]

Although this discussion may seem somewhat abstract, there are well-known examples of international delegations that transfer regulatory control from U.S. states to international bodies, thereby compromising federalism values of participation, responsiveness, and accountability (among others). These include the North American Free Trade Agreement (NAFTA) and WTO institutions. They have reduced state authority over such traditional areas of state regulation as trade and investment, the banking and insurance industries, government procurement, and alcohol.[53] As my colleague Ernest Young colorfully conveys, "NAFTA and the WTO set up a scheme in which the statutes enacted by democratically-elected state and national legislatures can be declared invalid by supranational tribunals that make life-tenured federal judges look like models of democratic accountability."[54]

It is also probable that replacing subnational state autonomy with supranational regulatory control reduces the ability of citizens to express the distinctive value commitments of statewide majorities.[55] When law moves supranationally, at least some of the values are likely to follow. The universe of

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51. *See, e.g.*, Friedman, *supra* note 45, at 1475–79; BRADLEY & GOLDSMITH, *supra* note 3, at 408 (citing some of the literature); Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEOR. INQ. IN L. 1, 6 (2001) ("EU law is not democratically accountable in any obvious way. Although EU regulations purport to embody 'treaties' grounded in national consent, the unreality of this perspective is now commonly acknowledged; the notorious 'democratic deficit' of the EU has become a cliché.").

52. Swaine, *supra* note 4, at 1601–02 (quoting David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1699–1700 (2003)); *see also* Young, *supra* note 8, at 542 ("The American people expect that certain decisions affecting them will be made through specified constitutional processes by people who are accountable to them."). *Cf.* Post, *supra* note 51, at 10–11 ("Constitutional theory stresses the question of constitutional authorship. All constitutional theorists address directly the issue of democratic legitimation either through the specific will of an articulate demos or through judicial responsiveness to a national ethos. The form of thinking that underlies constitutional theory thus renders the new international legal institutions anomalous and opaque." (footnote omitted)).

53. *See, e.g.*, Swaine, *supra* note 4, at 1570–71; Friedman, *supra* note 45, at 1453–62.

54. Young, *supra* note 8, at 538.

55. This may be a good thing or a bad thing, depending on one's view of the value commitments that the statewide majority wants to express.

potential value conflicts is large, including international delegations that touch on such divisive issues as abortion[56] and gay rights.[57] It is not difficult to imagine international delegations concerning the judicial enforcement of certain rights that would conflict with the commitments of popular majorities in any number of U.S. states. The death penalty provides an apt example. To the chagrin of anti-death-penalty groups, capital punishment continues to enjoy strong support in much of the United States (and therefore among elected officials). Because the European Union has condemned the practice,[58] opponents of the death penalty naturally conclude that they will receive a more sympathetic hearing from international organizations that have been addressing the subject than from many American politicians.

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56. The European Court of Human Rights (ECHR) recently provided a good illustration of delegations implicating divisive issues of individual rights. On March 20, 2007, in the case of Tysiac v. Poland, the ECHR concluded that Poland had violated the right of privacy in the European Convention on Human Rights by failing to provide an abortion to a woman whose pregnancy exacerbated her vision problems (severe myopia) to the point of blindness. *Available at* http://www.echr.coe.int (last visited Feb. 1, 2008) (follow "Case Law" hyperlink; search for "tysiac," then follow "Case of Tysiac v. Poland" hyperlink). "This ruling has set off a firestorm of controversy in staunchly Catholic Poland, where abortion is illegal under almost all circumstances." Americans for Informed Democracy, *The ECtHR, Poland, and Abortion*, Mar. 22, 2007, http://aidemocracy.typepad.com/interdependent/2007/03/the_ecthr_polan.html (last visited Mar. 24, 2007).

57. For example, the issue of homosexual sodomy pitted the federal government of Australia against the State of Tasmania. Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm (last visited Feb. 1, 2008). In *Toonen*, the United Nations Human Rights Committee held that laws criminalizing homosexual sodomy in Tasmania violated the rights of privacy and nondiscrimination secured by the International Covenant of Civil and Political Rights. The Australian Parliament incorporated the decision into national law by invoking the "international law override" clause in the Australian Constitution and prohibiting the prosecution of consensual homosexual conduct in private. Some nations use such an override to mediate the potential conflict between international delegations and federalism concerns. For discussion of the *Toonen* case and its impact, see Katharine Gelber, *Treaties and Intergovernmental Relations in Australia: Political Implications of the* Toonen *Case*, 45 AUSTL. J. POL. & HIST. 330 (1999); Laurence Helfer & Alice Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 62–77 (1996).

58. *See, e.g.*, Mark Warren, *Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations*, 13 WM. & MARY BILL RTS. J. 309, 311 (2004) ("In October 2003, the United States was reminded once again that its intractable position on capital punishment had become intolerable to the forty-five-nation Council of Europe. The United States is now at risk of losing its observer status in the highly influential organization because of its failure to take steps toward a moratorium on all executions." (footnotes omitted)); Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 487 (2002) ("There is substantial and growing international pressure on the United States to end or curtail its use of the death penalty. Most European nations have abolished the death penalty, and the European Union has become increasingly vocal in its criticism of the U.S. practice. For the last several years, the United Nations (UN) Commission on Human Rights has adopted resolutions calling upon nations to impose a moratorium on the death penalty. Many nations decline to extradite suspects to the United States if the suspects will face the death penalty. And *amicus curiae* filings by international organizations in U.S. death penalty cases are now becoming routine."); *see also* European Union, The EU's Human Rights and Democratisation Policy: Abolition of the Death Penalty, http://ec.europa.eu/comm/external_relations/human_rights/adp/index.htm (last visited Feb. 1, 2008) ("The European Union campaigns towards the universal abolition of the death penalty. This stance is rooted in the belief in the inherent dignity of all human beings and the inviolability of the human person, regardless of the crime committed.").

Finally, international delegations that undermine subnational state autonomy would seem to reduce local experimentation and the efficient delivery of local public goods by reducing the state regulatory control that promotes both values. One might object that international delegations often leave states free to experiment in all sorts of ways—that compliance typically requires a uniform state, but that the process of achieving it is free form. This observation, however, suggests only that some international delegations compromise local experimentation more than others, not that international delegations in general do not raise potentially serious concerns in this regard. There is less opportunity for experimentation by subnational states when an international body wills the end but not the means than there is when subnational states retain sufficient control to will both the end *and* the means.

One might also object that sometimes externalities (whether positive or negative) transcend the borders of nation states, and at other times so do economies of scale. This is of course true. For instance, some cross-border environmental problems, such as ozone depletion and global warming, need to be addressed collectively. And perhaps the internationalization of intellectual-property rights could be justified in part by economies of scale—for example, having one global patent application (and regime of monitoring and enforcement) rather than performing each of these functions country by country.[59] But when no interstate (let alone international) externality exists, the economic theory of public goods suggests that there are real informational costs associated with compromising the regulatory control of subnational states.[60]

In sum, transferring regulatory control to international bodies can undermine the regulatory control of subnational states. But regulatory control by subnational states is needed to advance the values typically associated with federalism. Therefore, international delegations that reduce the autonomy of subnational states compromise these values. This simple logic reflects the reality that a core function of a federal system, which is to diversify locally, conflicts with the very *telos* of many international delegations, which is to harmonize supranationally. To be sure, this point is tendered at a high level of abstraction: there are different kinds of federal systems and a rich variety of international delegations. But in general, the two do seem to clash at an elemental level.[61]

The foregoing analysis has taken care not to conflate the values of federalism with the opposition of subnational states to international

59. To be clear, there would also be substantial costs. For example, one way to engage in beneficial price discrimination with therapeutic drugs in poor countries is to disallow patents in those countries—that is, to allow generic drugs to flourish there, but not in developed countries.

60. *See, e.g.*, COOTER, *supra* note 14, at 107 ("Assign power over public goods to the smallest unit of government that internalizes the effects of its exercise.").

61. *Cf.* Friedman, *supra* note 45, at 1447 ("This process of harmonization [associated with globalization] will have an important impact on American federalism. In part, non-uniformity is inherent in the idea of American federalism—the notion that fifty different states and numerous local governments can go their own way in developing regulatory frameworks."); *id.* at 1460 ("There are forces at work bringing the world closer together, but those very same forces demand greater uniformity and coordination of regulation. The result is a narrowing of the state regulatory sphere.").

delegations.[62] This is because little of normative consequence turns on whether state officials oppose international delegations. In other words, it is important to distinguish the values of federalism from the views of state officials.

In other settings, state officials are sometimes eager to cede regulatory authority to the federal government. Daryl Levinson, for example, has observed that "state officials who are primarily interested in maximizing political support will have no reliable interest in decreasing federal power (or, the equivalent, in increasing state power)."[63] Similarly, Steven Calabresi notes that "it is sometimes in the interest of state and local officials for *them* to pass the buck on the hardest problems of government by deferring to the folks in Washington, D.C."[64] From the standpoint of normative federalism, therefore, the views of state officials are beside the point. The relevant benchmark, rather, is the impact of the proposed action on the values of federalism.

In the context of international delegations, the views of state officials tend to be a good proxy for the preservation of federalism values to the extent that the officials want to preserve their own autonomy rather than cede power to the federal government, to an international body, or to another nation. But regardless of whether this is the case regarding particular delegations, the relevant normative question is not what state officials prefer, but how the delegations affect the values of federalism. This impact is negative when the delegations reduce the control of subnational states.

IV

THE CONTRAST WITH ANTICOMMANDEERING DOCTRINE

One way to illustrate the impact of international delegations on the values of federalism is to contrast international delegations that reduce subnational state control with federal laws that commandeer—that is, federal laws that require state officials to enact, to administer, or to enforce a federal regulatory program. The U.S. Supreme Court has prohibited any form of commandeering in order to safeguard the federalism value of accountability, even though the Court's doctrine leaves the states with less regulatory control in certain situations. Accordingly, reasonable minds differ regarding the net impact of commandeering on the values of federalism.[65] By contrast, international

62. *See* Swaine, *supra* note 4, at 1613 (referencing "the headaches that state governments posed for reaching, and abiding by, international agreements" (footnote omitted)); *see also* MICHELLE SAGER, ONE VOICE OR MANY? FEDERALISM AND INTERNATIONAL TRADE (2002) (providing an account of the conflicts between the federal government and the states over NAFTA).

63. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 941 (2005) ("[T]here is no logical relationship between the policy interests of state citizens and the amount of regulation flowing from the federal government or left to the states. Federal regulation and spending obviously can, and often does, benefit state-level constituencies.") (footnotes omitted).

64. Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 797 (1995) ("[Federalism] is not always of value to state and local officials.").

65. For a fuller discussion than is provided in the following pages, see generally Siegel, *supra* note 6.

delegations that reduce subnational state autonomy compromise *both* political accountability and state regulatory control.

The Tenth Amendment experienced something of a federalism revival during the 1990s, when the Rehnquist Court breathed new life into the amendment's seemingly truistic language.[66] First, in *New York v. United States*, the Court held that Congress could not order state legislatures either to regulate low-level radioactive waste in accordance with federal instructions or to take title to the waste.[67] Then, in *Printz v. United States*, the Court decided that Congress could not order state executive officials to help conduct background checks on would-be handgun purchasers on an interim basis.[68] In both cases, the Court supported its conclusion by stressing the importance of political accountability. In *New York*, for example, Justice O'Connor wrote for the Court that

> where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[69]

The Court's focus on accountability caused it to impose a ban on commandeering whose categorical nature is extraordinary in U.S. constitutional law.[70]

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66. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The text of the amendment makes explicit what is implicit in both the enumeration of powers allocated to Congress in Article I, § 8 and the historic distinction between a national government of limited powers and state governments of plenary powers. *See, e.g.*, New York v. United States, 505 U.S. 144, 156–57 (1992) ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.").

67. New York v. United States, 505 U.S. 144 (holding that the "take title" provision of the Low Level Radioactive Waste Policy Amendments Act of 1985 constitutes unconstitutional compulsion and commandeering of the governmental capacity of state governments).

68. Printz v. United States, 521 U.S. 898 (1997) (relying on a Tenth Amendment anticommandeering rationale in holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act).

69. New York v. United States, 505 U.S. at 168–69 (citation omitted). *See* BRADLEY & GOLDSMITH, *supra* note 3, at 400 (discussing the Court's accountability concerns).

70. For example, it is blackletter law that the Constitution allows racial classifications if the governmental interest is sufficiently weighty. For a recent instance in which the Court reiterated that racial classifications trigger strict scrutiny, as opposed to a categorical bar, see Johnson v. California, 543 U.S. 499, 505 (2005).

The Court prohibits commandeering in all circumstances even though this form of federal regulation implicates a tradeoff between political accountability and state regulatory control.[71] Specifically, *New York* and *Printz* advance federalism values to some extent by addressing the accountability problems that commandeering can cause and by requiring the federal government to internalize more of the costs of federal regulation before engaging in regulation. At the same time, however, anticommandeering doctrine undermines federalism values when the (clearly constitutional) alternative of preemption is reasonably available and the commandeering ban thus places states in danger of losing regulatory control in a greater number of future instances.[72] Direct federal regulation limits state regulatory power to a greater extent than does commandeering as a general matter, and state regulatory control is needed to advance the values believed to be associated with a federal system. If direct federal regulation removes states from the regulatory scene, it is difficult to advance political participation, to encourage political responsiveness and accountability through interjurisdictional and intrajurisdictional competition, to express the distinctive value commitments of statewide majorities, to create laboratories of experimentation, and to efficiently deliver local public goods.[73]

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71. *See generally* Siegel, *supra* note 6.

72. Preemption is the constitutional principle derived from the Supremacy Clause, U.S. CONST. art. VI, providing that if a conflict exists between valid federal law and state or local laws, federal law controls and the state or local laws are invalidated on the ground that federal law is supreme. *See, e.g.*, Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (internal quotation marks omitted); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) (Federal law trumps state laws that "interfere with, or are contrary to the laws of Congress," because "[i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.").

73. In response, one could invoke Rubin and Feeley's distinction between federalism as a constitutional requirement and the managerial concept of decentralization. *See* Rubin & Feeley, *supra* note 36, at 910 ("Decentralization is a managerial concept; it refers to the delegation of centralized authority to subordinate units of either a geographic or a functional character."). Even in a world without judicially enforced federalism, they argue, Congress and federal agencies could design experiments and try different approaches to problems in different regions of the nation. *Id.* at 923–26. Similarly, the federal government could legislate in such a way as to allow for regional participation, competition, expressions of value, and delivery of local public goods. (Tyranny prevention is another matter because the central authority decides how much decentralization takes place in a world without federalism.)

Professors Rubin and Feeley make some powerful political points and raise an intriguing theoretical possibility. But experience seems to show (it is difficult to establish empirically) that regional experimentation and encouragement of participation, competition, diversity, and local efficiency are not what tend to happen when Congress regulates. *See, e.g.*, Swaine, *supra* note 4, at 1582 ("[I]t seems doubtful that the national government has the right incentives to decentralize when it should." (footnote omitted)); *see also id.* at 1581–83 (discussing the literature); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2217 (1998) ("Rubin and Feeley's analysis fails to appreciate the degree to which decentralization in the United States is a function of, and bound up with, federalism—that is, the existence of the states as quasi-sovereign governmental entities deriving their power not from delegations by a national government but from elections by the people of each state."). This is not to say, however, that Congress could not choose to do some significant decentralizing. Indeed, decentralization is a concept that is analytically connected to a national perspective.

The federalism consequences of lost regulatory control at the state level are borne out by the European experience. The general view of member states of the European Union on the subject of commandeering is the opposite of the U.S. Supreme Court's position:[74] member states tend to prefer directives to regulations. Directives "command a Member State to regulate in a particular area and thus require further Member State legislative action to become fully effective within that state," whereas regulations "have immediate legal force for individuals within a Member State."[75] The European judgment is that directives leave member states with more regulatory power.[76] In a relatively rare instance of comparative analysis on the U.S. Supreme Court, Justice Breyer flagged this perceived virtue of commandeering across the Atlantic:

> At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. . . . They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well.[77]

The Court, however, declined Justice Breyer's invitation to look abroad, deeming "such comparative analysis inappropriate to the task of interpreting a constitution."[78]

Contrast now instances of commandeering with international delegations of regulatory power that would otherwise be exercised by the subnational states. Such delegations do not merely compromise political accountability.[79] They also compromise state regulatory control.[80] In other words, there is no tradeoff at the

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74. *See, e.g.*, Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 800–01 (2004) (arguing that the Tenth Amendment decisions "stand in striking contrast to the analogous doctrines of the European Court of Justice," and exploring some of the "reasons for welcoming 'commandeering' in the European Union but not in the United States").

75. Halberstam, *supra* note 9, at 214–15 ("In the European Union, by contrast [to the United States], the subject of concern is not Union action that 'commandeers' Member State legislative or administrative bodies, but EU legislative activity that has direct effect in the legal systems of the Member States. Member States tend not to welcome Community regulations, which have immediate legal force for individuals within a Member State, and instead prefer that the Community pass directives, which command a Member State to regulate in a particular area and thus require further Member State legislative action to become fully effective within that State. So, too, 'commandeering' is a basic feature of German federalism . . . .") (footnote omitted); *see also* COOTER, *supra* note 14, at 236 (discussing the difference between directives and regulations in the law of the European Union).

76. Technically, both directives and regulations qualify as forms of "commandeering" under *Printz* because most regulations in the European Union must be enforced by member-state institutions. *See, e.g.*, Halberstam, *supra* note 9, at 213. Note, moreover, that even if one were to dispute Professor Halberstam's empirical judgment about member-state preferences, the key conceptual point would remain that both directives and regulations are legal in the European Union.

77. Printz v. United States, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

78. *Id.* at 921, n.11.

79. *See supra* notes 51–54 and accompanying text.

80. *See* BRADLEY & GOLDSMITH, *supra* note 3, at 408 (querying whether international delegations "simply move power even further away from U.S. states and localities").

theoretical level, just an unambiguous compromise of all of the federalism values whose vindication depends upon subnational state autonomy. This set of values includes not just tyranny prevention (because an international body is unlikely to perform the function of diffusing power as well as fifty states can).[81] This set also seems to include every other value of federalism.

V

CLARIFICATIONS

The discussion in Part II proceeded with an "arguendo" tone for a reason. This inquiry has assumed, rather than defended, the proposition that the values typically associated with federalism are values worthy of vindication. It has further assumed, rather than established, that a federal system in fact advances these values. In other words, this article has taken federalism values on the terms often accepted and has argued within these terms. Accordingly, those who reject either of the above assumptions will have good reason to reject this inquiry's conclusions. That said, these assumptions are reasonable: commentators who care most about the values typically associated with federalism do not tend to conclude as a general matter that these values are better promoted without a federal system than with it.

Further clarifications are in order. This article has not offered a comprehensive cost-benefit analysis of international delegations. It has examined instead only a subset of the potential costs—those related to federalism values—and has done so at a relatively high level of abstraction.[82] In other words, it has not investigated other kinds of costs possibly associated with international delegations,[83] nor engaged the potentially substantial benefits generated by such delegations.[84] This article therefore does not offer any general conclusions about the wisdom of delegations of authority to

81. *See supra* notes 39–40 and accompanying text.

82. This inquiry should not be read as denying the obvious—namely, that international delegations vary widely along several dimensions in terms of their impact on the regulatory autonomy of subnational states. Bradley and Kelley render the cost question more context-sensitive and tractable by fashioning a framework for assessing variations in the extent to which particular international delegations compromise the regulatory autonomy of nations. *See generally* Bradley & Kelley, *supra* note 1. Their four-factor typology—issue area, type of authority, legal effect, and autonomy of the international body—is also useful in tracing out the impact of international delegations on the values of federalism (when the authority delegated would otherwise be exercised by the subnational states). For example, the impact is greater when the issue area is a traditional (though no longer exclusive) subject of state regulation, such as education, criminal law enforcement, family law, taxation, or alcohol, than when the issue concerns, say, interstate or international commerce or matters of national security. *Cf., e.g.*, Friedman, *supra* note 45, at 1460–61 ("Many of the regulatory areas subject to internationalization . . . increasingly touch upon the central role of the states, protecting the health and safety and welfare of their citizens."). Moreover, legislative delegations compromise subnational state autonomy to a greater extent than do information-gathering and reporting functions. In addition, international delegations with low legal effect obviously compromise federalism values to a lesser extent than do delegations with high legal effect. Finally, a less (as opposed to more) autonomous international body would likely be more compatible with the values of federalism.

83. For a discussion, see generally Bradley & Kelley, *supra* note 1.

84. *See supra* notes 10–12 and accompanying text.

international bodies or other nations. Moreover, it has not discussed the constitutionality of international delegations because, among other reasons, the associated costs and benefits do not provide the sole criteria of constitutional judgment.

These points are important. As the Supreme Court has learned from painful experience,[85] the Constitution does not disable government from addressing serious social problems in a reasonably efficacious way. The Court often insists on limits, but rarely does it impose categorical bars. Suggestions to the contrary tend to presuppose an unduly stringent conception of the law–politics distinction,[86] and they may be animated as much by political opposition as by "neutral" constitutional analysis. In a world in which international delegations are pervasive and growing in number, reflecting a broad bipartisan consensus regarding their utility, it would be extraordinary to construe the Constitution as requiring the end of, say, participation by the United States in NAFTA, the WTO, or the UN Security Counsel.[87]

In determining the wisdom or constitutionality of particular international delegations, however, it is important to avoid confusing a benefit for a cost or a cost for a benefit.[88] The foregoing analysis suggests that the values typically associated with federalism constitute costs, not benefits, of international delegations that reduce the regulatory control of subnational states.

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85. *See*, *e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1387 (2001) ("The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate. There will be attacks on judges and, ultimately, on the institution of judicial review. Even in the face of established precedent, law itself will come to be seen as nothing but politics.") (referencing Lochner v. New York, 198 U.S. 45 (1905)).

86. I cannot adequately defend these claims here. For discussions, see generally Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. (forthcoming 2008); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. (forthcoming 2008).

87. The availability of a veto reduces the impact of what would otherwise be a relatively extraordinary delegation of legislative and executive authority to the Security Council. The ability to exercise a veto, however, ameliorates concerns about the autonomy costs of international delegations to a lesser extent than might at first appear. Nations may want to avoid tempting other countries to wield their vetoes, and the force of a veto may be constrained by the default condition. *See* Swaine, *supra* note 4, at 1538–40 (discussing these matters).

88. The federalism costs and benefits of international delegations are relevant not only, or even primarily, to judicial assessments of their constitutionality. Given the present pervasiveness of international delegations and the tradition of judicial deference to Congress and the President in the realm of international affairs, *see, e.g.*, Friedman, *supra* note 45, at 1466–71, it may be unrealistic to expect even a relatively federalist Supreme Court to intervene in this arena. Regardless of whether the Court continues to stay its hand, the various costs and benefits should be of abiding concern to the political branches themselves. After all, it is not clear on what other basis they ought to act or decline to act. *Cf., e.g.*, Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1331, 1333 (2006) (doubting that the Court will resolve the nationalist–new federalist debate over the scope of the treaty power and encouraging the interpretive community "to actively engage in a normative dialogue over how the executive should carry the federalism banner and the larger implications of its doing so for U.S. foreign affairs").

VI

CONCLUSION

In law as in life, sometimes the conventional wisdom is in fact wise and the intuitive argument is fundamentally sound.[89] One example is the relationship between international delegations that reduce the regulatory autonomy of subnational states and the values of federalism.[90] Enhancing the power of international bodies or other nations at the expense of the autonomy of subnational states compromises the values that federalism is generally thought to secure.[91] This is not to suggest that international delegations are unconstitutional or cost-benefit inefficient, either in general or in their particulars. This analysis has not come close to making the necessary case, and

89. During my transition from clerking to teaching, I was struck by the radically different ways in which judges and academics tend to regard new and creative legal arguments. For example, suggesting with enthusiasm in a petition for certiorari that the main question presented is "novel" constitutes a good way to defeat one's own claim to constitutional attention—and inexperienced advocates before the Supreme Court sometimes do just that. In the legal academy, by contrast, the coin of the realm seems to be arguments that are novel, provocative, and counterintuitive. There may be good reasons for this divergence; different institutions often perform different core functions. But the magnitude of this difference in perspective is arresting, particularly if one believes that good scholarship can help judges and elected officials to make better decisions. That said, this is certainly not the only function of the academy, or even the most important one. In the area of constitutional scholarship, for example, meta-theoretical work is most prestigious, and it has proven deeply illuminating, even if many judges might disagree. For a crisp account of the transformation in "[t]he criteria and purposes of good legal scholarship" during the late 1970s and 1980s, see Post, *supra* note 51, at 10.

90. *See, e.g.*, Thomas M. Franck, *Can the United States Delegate Aspects of Sovereignty to International Regimes?*, *in* DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY 1, 3 (Thomas M. Franck ed., 2000) ("America's decentralized and divided constitutional scheme does not fit easily the exigencies of the growing system of supranational regimes."). *Cf.* Friedman, *supra* note 45, at 1472 ("Turning first to substantive regulatory authority, I cannot help but predict that globalization will be the cause of a quite substantial curtailment of state authority.").

91. Barbara Koremenos makes the fascinating empirical finding that international delegations are less common when the parties to an agreement are democracies. *See* Barbara Koremenos, *When, What, and Why do States Choose to Delegate?*, 71 LAW & CONTEMP. PROBS. 151 (Winter 2008). It would be illuminating to investigate empirically why this might be the case. One possibility is that democracies tend to worry more than nondemocracies about the democratic values that international delegations can compromise—for example, participation, accountability, and responsiveness. More generally, it would be useful to research the extent to which the existence of a federal system (or a certain kind of federal system) within a nation correlates with differences in the nature and extent of international delegations.

For instance, the federalism impact of a decision to delegate internationally depends in part on the issue area. *See supra* note 82 (providing examples). Certain matters, such as military alliances, have few implications for state policymaking. By studying the delegation provisions of international agreements, as Koremenos does, one might be able to develop coding rules for a variable that captures the extent to which the agreements implicate overarching national interests (so that the states do not have different preferences over policy), or instead concern issues regarding which the states want to differentiate their policies. It may be possible to code agreements (albeit roughly) for such things. A plausible assumption is that when the variance in subnational state preferences over time is small and their interests broadly coincide, the detrimental impact of an international delegation on the values of federalism is reduced. If the variance is high or state interests differ, then the effect can be substantial. If one understood the configuration of these interests, one could compare them to the provisions of international agreements to determine whether nations with federal systems are less willing to participate in agreements that regulate issues of high variance and conflicting interests among the subnational states.

to reiterate, that was not its purpose. But this much is apparent: when subnational states lose regulatory control, constitutional and cost-justified international delegations are constitutional and efficient despite—not because of—their impact on the values of federalism.