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Federalism as Empowerment

Deborah J. Merritt

FEDERALISM AS EMPOWERMENT

*Deborah J. Merritt**

In his Dunwody Distinguished Lecture in Law, Professor Erwin Chemerinsky identifies a notable attribute of federalism: it empowers "multiple levels of government to deal with social problems."[1] I will elaborate briefly on his empowerment principle by identifying compatible language in several Supreme Court opinions authored by Justice O'Connor, suggesting that empowerment underlies the other values traditionally ascribed to federalism, and arguing that Professor Chemerinsky's vision of empowerment supports the Supreme Court's recent decision in *New York v. United States*.[2] Empowerment is a facet of the autonomy model of federalism endorsed by the Court in *New York*[3] and propounded by several constitutional scholars.[4] Professor

* John Deaver Drinko/Baker & Hostetler Chair in Law, The Ohio State University. I thank James Brudney and Andrew Merritt for their helpful comments on an earlier draft of this commentary.

1. Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 1, 40 (1995).

2. 505 U.S. 144 (1992). Professor Chemerinsky ably contrasts the Supreme Court's frequent use of federalism as a limit on federal *judicial* power with its rare invocation of federalism as a limit on federal *legislative* power. *See* Chemerinsky, *supra* note 1, at pt. I. Lacking his versatility (and ability to teach both Constitutional Law and Federal Courts during the same semester), I will confine my comments to conflicts between state and federal exercises of legislative power.

3. *See* Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1572-73 (1994) (explaining how the Supreme Court in *New York v. United States* endorsed the autonomy model of federalism).

4. For a discussion of the autonomy model, contrasting it with two other models of

Chemerinsky enhances that autonomy model, however, by stressing the importance of federalism in preserving "the availability of alternative actors to solve important problems."[5]

I. THE ROOTS OF EMPOWERMENT

Professor Chemerinsky accurately observes that the Supreme Court frequently professes a commitment to federalism without articulating the values that commitment serves.[6] Members of the Court, however, have not entirely ignored the possibility of empowering multiple government units as an object of federalism. Intimations of the empowerment rationale occur as early as 1869, when the Court announced that

> the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[7]

Although the Court did not explicitly acknowledge the power of these governmental units to address different social problems, it was con-

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federalism, see *id.* (arguing that while the autonomy model "holds some promise for adjudicating the future bounds of state and federal power," the territorial and federal process models are "outdated or incompatible with political reality").

Other scholarly works developing the autonomy model, or registering at least partial support for that model, include Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207 (1994); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341; Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977). For two recent critiques of the autonomy model from different perspectives, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

5. Chemerinsky, *supra* note 1, at 40.

6. *Id.* at 3-4, 26.

7. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869); *see also* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869) (stating that the Constitution recognizes a "separate and independent existence" for both state and federal governments which " 'are, in fact, but different agents and trustees of the people, constituted with different powers and designated for different purposes' ") (quoting THE FEDERALIST No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961)).

cerned with maintaining multiple centers of power as an essential constitutional object.

Justice O'Connor offered a more complete exposition of the empowerment principle in her 1982 partial dissent in *FERC v. Mississippi*.[8] The statute challenged in *FERC* set the rulemaking agenda of state utility commissions by directing them to debate a dozen federally drawn regulations.[9] Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, repeatedly objected to this "conscription of state legislative power"[10] and interference with the states' "power to choose subjects for legislation."[11]

Justice O'Connor explained that the federal attempt to control state rulemaking violated principles of federalism because it "drain[ed] the inventive energy of state governmental bodies."[12] If state legislatures and administrative agencies must perform "congressionally mandated tasks," Justice O'Connor reasoned, then they "are less able to pursue local proposals."[13] Direct preemption of state law was preferable to federal orchestration of state rulemaking: preemption, "at least, would leave [the states] free to exercise their power in other areas."[14] Allowing the states to "devote their resources elsewhere" would be beneficial because "[t]his country does not lack for problems demanding legislative attention."[15]

Justice O'Connor thus identified congressional interference with state power to address social issues as a primary evil in *FERC* and noted that this interference reduced the combined ability of state and federal governments to cope with "problems demanding legislative attention."[16] Justice O'Connor also peppered her opinion with examples of progressive legislation pioneered by state governments.[17] These advances, she

8. 456 U.S. 742, 775 (1982) (O'Connor, J., dissenting in part).

9. *Id.* at 776 (O'Connor, J., dissenting in part).

10. *Id.* at 784 (O'Connor, J., dissenting in part).

11. *Id.* at 785 (O'Connor, J., dissenting in part). Justice Powell noted "the appeal—and indeed wisdom—of Justice O'Connor's evocation of the principles of federalism," but concluded that the Court's precedents rebuffed the facial attack on the substantive portions of the challenged statute. *Id.* at 775 (Powell, J., dissenting in part). Justice Powell, therefore, limited his partial dissent to portions of the federal act prescribing procedural rules for state administrative agencies considering the federal standards. *Id.* (Powell, J., dissenting in part).

12. *Id.* at 787 (O'Connor, J., dissenting in part).

13. *Id.* (O'Connor, J., dissenting in part).

14. *Id.* (O'Connor, J., dissenting in part).

15. *Id.* (O'Connor, J., dissenting in part).

16. *Id.* (O'Connor, J., dissenting in part).

17. Justice O'Connor's examples included Wyoming's 19th century enfranchisement of women, Wisconsin's invention of unemployment insurance, Massachusetts' initiation of minimum wage laws, and Florida's aggressive action against oil spills. *Id.* at 788-89 & n.26

implied, might not have occurred if the Constitution forced state governments to serve as "field offices of the national bureaucracy" or "think tanks to which Congress may assign problems for extended study."[18] Throughout her *FERC* dissent, Justice O'Connor demonstrated her interest in maintaining separate centers of state and federal power so that both sovereigns could pursue necessary governmental objectives.

The same recognition of empowerment as a goal of federalism emerges in Justice O'Connor's majority opinion in *New York v. United States*.[19] *New York* struck down a portion of a federal statute that commanded state governments either to take title to low-level radioactive waste produced in their states or to regulate those wastes as Congress dictated.[20] Justice O'Connor noted that this direct command to the states was more intrusive than conditional preemption, which allows states to choose whether to adopt a federal program,[21] because the latter technique allows states "to devote [their] attention and resources to problems other than those deemed important by Congress."[22] Justice O'Connor thus recognized that a significant goal of federalism is maintaining the ability of different government levels to address varying social problems.[23]

(O'Connor, J., dissenting in part).

18. *Id.* at 777 (O'Connor, J., dissenting in part).

19. 505 U.S. at 149-88. Justice O'Connor's opinion for the Court in Gregory v. Ashcroft, 501 U.S. 452 (1991), also contains a passing reference to government empowerment. In cataloguing some of the benefits of federalism, Justice O'Connor noted that federalism "makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458. The concept of different sovereigns competing to offer popular social services is linked to Professor Chemerinsky's idea of empowering different levels of government so that citizens may rely upon multiple sovereigns to address their needs.

20. *New York v. United States*, 505 U.S. at 174-77.

21. *See generally* Merritt, *supra* note 3, at 1577 (explaining that under conditional preemption, "Congress allows the states to choose whether to participate in a regulatory scheme. If the states choose nonparticipation, Congress promises to assume the regulatory burden. . . ."). Justice O'Connor referred to such an arrangement as " 'a program of cooperative federalism.' " *New York v. United States*, 505 U.S. at 167 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268 (1981)).

22. *New York v. United States*, 505 U.S. at 168.

23. *See also id.* at 174 (upholding one portion of the challenged statute because its conditional preemption allowed a state unwilling to follow Congress's lead to "devote its attention and its resources to issues its citizens deem more worthy"). Justice O'Connor's opinion for the Court in *New York* focused more heavily on government accountability than on empowerment as a reason for enforcing the Constitution's federalism provisions, *see id.* at 168-69, perhaps because the accountability rationale appeared to suit the political struggle over locating low-level radioactive waste disposal sites. Because of the Court's own emphasis, Professor Chemerinsky and other commentators understandably have focused on the accountability rationale in *New York*. *See* Chemerinsky, *supra* note 1, at 18-19. The empowerment rationale, however, also contributed to the Court's decision in *New York*.

These references to the role of federalism in nurturing different levels of government, each with the power to respond to citizen demands, support Professor Chemerinsky's suggestion that federalism is valuable because it empowers multiple units of government. By linking Professor Chemerinsky's insight with these judicial precursors, it may be possible to build a stronger jurisprudence of "empowerment" as a rationale for federalism.[24]

II. EMPOWERMENT AND THE OTHER VALUES OF FEDERALISM

Empowerment of multiple sovereigns has intrinsic value because, as Professor Chemerinsky observes, it creates "alternative actors to solve important problems."[25] I have stressed this value in my own writing,[26] adding that "[w]ith two levels of government, the political pendulum is less likely to swing too far towards either conservative or liberal ideas."[27] An example of this tempering effect occurred during the Reagan administration, when cities and states created teenage employment programs to fill a void left by the President's veto of an unem-

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24. The empowerment principle also has roots in Justice Brennan's repeated suggestions that state courts should enforce constitutional rights abandoned by the federal courts. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *The Revival of State Constitutions*]. *See generally* Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENTARY 227 (1990) (describing Brennan's philosophy of federalism as an outgrowth of his concern for individual rights). Justice Brennan perceived that empowering two judicial systems could create extra safeguards for individual rights, as state courts could build upon minimum standards guaranteed by the federal courts. *See* Brennan, *The Revival of State Constitutions*, *supra*, at 548.

25. Chemerinsky, *supra* note 1, at 40. In this section, I discuss advantages conferred by both state and local governments. As Professor Richard Briffault has pointed out, constitutional principles of federalism protect only states, not local governments. Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1347-48 (1994). Writers on federalism have not adequately explored the place of local governments in our federal system. I continue to discuss some advantages conferred by local governments because any constitutional protection for state governments may help foster autonomous local governments as well. As Professor Briffault observes, however, states do not necessarily encourage autonomy at the city and county level. Briffault, *supra*, at 1336-37. These relationships deserve considerably more investigation.

Professor Briffault also offers an excellent discussion of how states further some of the values traditionally linked to federalism, while local governments advance others. *Id.* at 1348-49. States, for example, may be better at checking the federal government through active congressional lobbying, while local governments may be better at drawing citizens into governmental processes. *Id.*

26. *See* Merritt, *supra* note 4, at 6 (providing several examples of state initiated regulation in the absence of action by the federal government).

27. *Id.* at 7.

ployment bill.[28] Similarly, several states compelled fast-food chains to disclose their ingredients after the Food and Drug Administration refused to compel that disclosure.[29] More recently, states grew tired of waiting for federal reform of welfare benefits and pioneered their own efforts—sometimes with more humane and promising prospects than the recent congressional reforms achieved.[30]

In addition to its creation of "alternative actors," empowerment is linked to the other justifications for federalism that Professor Chemerinsky catalogues. Indeed, as I explain briefly below, empowerment breathes new life into these rationales.

A. *Checking Tyranny*

The Supreme Court frequently has identified the states' role in checking federal power as a significant value of federalism.[31] As Professor Chemerinsky points out, however, the Court rarely explains how the states exercise this check.[32] Certainly the states no longer restrain federal action by exerting exclusive control over vast legislative domains. Despite the Court's recent decision in *United States v. Lopez*,[33] the federal government has plowed furrows in every field of modern life.

Autonomous state governments, however, still check the federal government in at least three ways. First, the states temper the direction of federal law by supplementing federal legislation and regulating areas that Congress has not preempted. For example, following federal deregulation of business in the 1980s, states strengthened their fair trade and consumer protection laws.[34] Similarly, states increased criminal prosecution of workplace safety violations as federal enforcement of OSHA slackened.[35] Despite the broad scope of federal legislation,

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28. *Id.* at 6 & n.25.

29. *Id.*

30. *See, e.g., The Role of States in Welfare Reform: Hearing Before the Subcommittee on Human Resources of the House Committee on Ways and Means*, 103d Cong., 2d Sess. (1994) (testimony of Jane Campbell on Behalf of the National Conference of State Legislatures); *see also* Margo D. Butts, *Urban Welfare Reform: A Community-Based Perspective*, 22 FORD. URB. L.J. 897 (1995) (stressing importance of community-based organizations in welfare reform).

31. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1638-39 (Kennedy, J., concurring); *New York v. United States*, 505 U.S. at 181; *Gregory*, 501 U.S. at 458-59.

32. Chemerinsky, *supra* note 1, at 3.

33. 115 S. Ct. 1624 (1995).

34. *See* John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 930 (1995).

35. Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORD. L. REV. 469,

states retain significant power to regulate private behavior interstitially and thus to moderate the course of federal law.

Second, state and local governments are vigorous lobbyists and litigants. States continuously press Congress to enact, modify, or repeal legislation,[36] and state lobbyists are equally vigilant before federal administrative agencies.[37] When states lose these legislative or administrative battles, they do not hesitate to resort to lawsuits against the federal government.[38] Because state and local governments are relatively well organized, well financed, and politically sophisticated, they are able to shape the direction of federal programs and check the course of congressional debate.[39]

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495 (1993).

36. *See, e.g.*, Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1552-53 (1994); Merritt, *supra* note 4, at 6; Harry N. Scheiber, *State Law and "Industrial Policy" in American Development, 1790-1987*, 75 CAL. L. REV. 415, 438-39 (1987).

37. For a recent example, see The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2182, 2184, 2185 (1995) (reporting comments on rules implementing the Family and Medical Leave Act; along with other government units and associations, participants included the Association of Washington Cities, the California Department of Fair Employment and Housing, the State of Nevada personnel department, the State of Louisiana's Office of Legislative Auditor, the Government Finance Officers Association, the State of Kansas Department of Administration, and the State of New York Metropolitan Transportation Authority).

38. During the 1980s, for example, some states and cities defended affirmative action programs challenged by the federal government. *See* Merritt, *supra* note 4, at 5. States also have cooperated with social security beneficiaries to sue the federal government for benefits denied the physically and mentally impaired. *Id.* at 5-6. More recently, several states have sued the federal government to force more stringent enforcement of the country's immigration laws. *See, e.g.*, Tony Perry, *State's Immigration Suit Dismissed*, L.A. TIMES, Feb. 14, 1995, at A3 (reporting that in dismissing California's lawsuit, the court found "no legal precedent for a state suing the federal government for failing to enforce immigration laws"); Ross Ramsey, *Judge Throws Out Immigration Lawsuit*, HOUS. CHRON., Aug. 10, 1995, at A21 (reporting that in addition to the lawsuits brought by Texas, California, and Florida, all of which have been dismissed, New York, New Jersey, and Arizona also have filed suits).

39. Some scholars point to the fact that state governments are able to influence the direction of federal programs as evidence that the political process adequately protects all state interests in the federal/state balance. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Supreme Court accepted this claim in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-54 (1985). As I argue below, however, completely abandoning judicial enforcement of federalism principles is misguided. The courts retain an important role in policing some techniques of congressional regulation that pose serious threats to state autonomy or "empowerment." *See infra* text accompanying notes 66-77; *see also* Merritt, *supra* note 4; Deborah J. Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994).

Third, state and local governments serve as wellsprings of political power. Political parties that lack federal clout maintain their constituencies in the states. When the time is ripe, those state organizations provide a platform for challenging the dominant national party.[40] State and local politics also provide spawning grounds for the coalescence of new interest groups. After organizing locally, these groups may acquire sufficient power to sway national decisions.[41] In these ways, the ferment of state and local politics may check the growth of monolithic political power at the national level.

All three of these control mechanisms require healthy state governments that are "empowered" to address real social issues. Without the power to legislate, interest groups would not form in the states, political parties would be unable to build state constituencies, and states could not alter the contours of federal programs by regulating interstitially.[42] Professor Chemerinsky's identification of empowerment as a prime value of federalism thus illuminates the Court's traditional view of states exercising a political check on federal power.

B. *Responsiveness*

The Supreme Court also has praised state governments as more responsive than Congress to the needs of local citizens.[43] This value of federalism includes two related, but different, benefits.[44] First, the Court has suggested that states are smaller, more homogenous units than our nation, allowing state governments to pursue programs that are better tailored to the distinctive preferences of their citizens.[45] Second, the relative accessibility of state and local government encourages citizens to participate in the governmental process, teaching the lessons of self rule.[46]

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40. *See* Arthur W. Macmahon, *The Problems of Federalism: A Survey*, *in* FEDERALISM: MATURE AND EMERGENT 3, 11 (Arthur W. Macmahon ed., 1955) ("[F]ederalism lessens the risk of a monopoly of political power by providing a number of independent points where the party that is nationally in the minority at the time can maintain itself while it formulates and partly demonstrates its policies and capabilities and develops new leadership.").

41. *See* Akhil R. Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 504 (1991); Rapaczynski, *supra* note 4, at 387-88.

42. *See* Powell, *supra* note 4, at 686 (" 'Without [the power to develop, consider, adopt, and implement policies that regulate and structure private-sector activities], local government could hardly affect any private activity,' and (we might add) can be of little interest except as a sort of debating society for those with free time.") (quoting GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 68 (1985)).

43. *See Gregory*, 501 U.S. at 458.

44. *See id.*

45. *See id.*

46. *See id.*; *FERC*, 456 U.S. at 789-90 (O'Connor, J., dissenting).

Professor Chemerinsky raises valid questions about both of these rationales. Is the state of California really more homogenous than the nation as a whole?[47] And does the city of Los Angeles offer its citizens a cozy experience in self government?[48] These are important points to consider before extolling the values of a federal system.

Once again, though, the principle of empowerment demonstrates the federalism value of responsiveness. As a practical matter, and despite the bewildering heterogeneity marking the population of every state, state governments have created diverse political climates. For example, some states stress environmental protection, while others proclaim the "right to profit."[49] The governor of California has denounced affirmative action, while the governor of Ohio applauds it.[50] These differences indicate that majority interests shift from state to state, and that local politicians respond to those differences.

Equally important, these variations in legal culture—undergirded by a strong system of uniform national law—respond to the needs of a diverse population better than a fully centralized system would. Our federal system resolves certain issues on the national level while leaving others for state and local action. Minority interests in each state may lose to the local majority on the latter issues, but they always have the option of seeking a better life elsewhere.[51] Federalism, in other words, responds to voter preferences both by allowing states to tailor laws to the preferences of the local majority and by creating some choice of legal systems for all citizens.[52]

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47. Chemerinsky, *supra* note 1, at 29.

48. *Id.*

49. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1223 (1995) (noting that many state governments are active in formulating environmental policy); Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 621 (1978) (noting that Louisiana advertised itself as the "Right-to-Profit State").

50. Robert Shogan, *Affirmative Action Stirs Unforeseen Division in GOP*, L.A. TIMES, Aug. 20, 1995, at A1, A17. *See generally* Kaden, *supra* note 4, at 854 (discussing other "differences in the political choices" made from state to state).

51. *See, e.g.*, Dailey, *supra* note 4, at 1877-80 (stressing the importance of state law in providing choices for individuals seeking different laws governing family relations); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1503 (1987) (book review) (noting "the migration of homosexuals to cities like San Francisco, where they received official toleration, and the migration of individuals from Massachusetts to New Hampshire to escape high rates of taxation"); *cf. Gregory*, 501 U.S. at 458 (federalism "makes government more responsive by putting the States in competition for a mobile citizenry").

52. As Professors Edward Rubin and Malcolm Feeley have pointed out, these two aspects of responsiveness correspond to the notions of voice and exit: "Individuals will seek organizations that are responsive to their needs, or voice; if their present organization fails to respond, they can exercise their exit option to locate a more responsive one." Edward L. Rubin

Professor Chemerinsky's focus on empowerment also reminds us of the different ways in which state and local governments draw citizens into the governing process. It is true that voters participate in state and local elections at appallingly low rates; in this sense, state politics fosters less participation than national elections. Nevertheless, those citizens who vote in a school board election may feel that they understand the issues better, enjoy a clearer choice among candidates, and have a greater likelihood of affecting the election's outcome than they do when casting a vote for one of two or three Presidential candidates. Simple counts of electoral participation fail to assess the quality of the voter's experience.[53]

State and local governments also offer thousands of political offices that would not exist in a centralized government. In that sense, federalism vastly multiplies opportunities for political participation. These governments, moreover, have proven particularly adept at drawing women, minorities, and other political outsiders into government positions. Even today, women's voices are much stronger in state legislatures than in Congress. In 1993, women accounted for one-fifth of all state legislators, but less than one-tenth of U.S. Representatives and one-twentieth of U.S. Senators.[54] Similarly, African-Americans have been much more successful in winning state and local offices than national ones.[55] Empowering state governments appears to empower political outsiders as well, giving them local opportunities to gain entrance to politics. This may be one of the most significant contributions of a federal system.

C. *Experimentation*

Almost every discussion of federalism invokes Justice Brandeis's famous description of the states as "laborator[ies]" that "try novel social

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& Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 917 (1994). Federalism, of course, cannot create an unrestrained political marketplace. National laws remove many options from state control, and significant relocation costs prevent citizens from migrating in response to every disagreement with state law. The additional responsiveness contributed by federalism, however, remains an advantage of the system.

53. Even if state and local governments currently fall short of the ideal of political participation, those units also may hold more hope of reviving civic republicanism. *See, e.g.*, S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 687-88, 765-66 (1991) (cautioning against the continuation of a trend favoring federal preemption of state and local law).

54. Laura Mecoy, *State Offers Highest Hopes for Year of the Woman, Part II*, SACRAMENTO BEE, July 9, 1993, at A1.

55. *See* Merritt, *supra* note 4, at 8.

and economic experiments without risk to the rest of the country."[56] Some commentators have interpreted Justice Brandeis's exhortation literally, as suggesting that federalism will promote controlled, social science experiments.[57] As Professors Edward Rubin and Malcolm Feeley have pointed out, a centralized government is more likely than autonomous states to pursue controlled experiments of this nature.[58]

Despite his pseudo-scientific language, it is doubtful that Justice Brandeis expected states to engage in controlled social experiments. Instead, experimentation in a federal system is akin to natural selection.[59] States adopt novel programs either to satisfy local interests or in a conscious attempt to attract new residents.[60] If the programs satisfy their constituents, the programs flourish and may spread to other states. If the programs disappoint voters, they disappear. This type of experimentation lies behind much of the legislation filling both state and federal codes.[61]

Experimentation of this nature is firmly linked to Chemerinsky's view of federalism as empowerment. Authorizing multiple government units to address social problems increases the opportunities for experimental programs to emerge. Even the boldest national department of social policy research could not generate the hundreds of legislative

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56. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

57. *See, e.g.*, Rubin & Feeley, *supra* note 52, at 923-26.

58. *Id.* at 924-26; *but see* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980) (arguing from theoretical model that neither a centralized government, autonomous states, nor a federal system provide strong incentives for experimentation on the state or local level).

59. For an excellent development of this point, see McConnell, *supra* note 51, at 1498-500.

60. *See id.*

61. Once again, states must develop new programs within any constraints imposed by federal law. Perhaps due to the infinite variability of human conduct, however, states continue to innovate in a remarkable number of fields. It is also noteworthy how many federal schemes incorporate earlier state innovations. *See, e.g.*, *FERC*, 456 U.S. at 788-89 (O'Connor, J., dissenting in part) (noting state innovations already adopted at the federal level, such as minimum wage laws and the enfranchisement of women, as well as ongoing state innovations in such wide-ranging areas as automobile insurance, environmental protection, and utility regulation); Drummonds, *supra* note 35, at 496-97, 500, 502-03 (describing federal incorporation of state innovations in regulating sexual harassment, family leave, and disabilities discrimination); Dwyer, *supra* note 49, at 1222 n.189 ("Even in the 1960s, some state and local governments were leading, not following, the federal government toward greater environmental protection."); Kaden, *supra* note 4, at 854-55 (describing federal programs in a wide variety of fields, all of which originated in the states); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1172 (1995) (noting that "[s]ome of the most innovative environmental protection legislation has been the product of state initiatives").

proposals adopted by state, county, and city governments each year. Some of those initiatives may be silly and some may be awful, but some hold real promise for social progress. In all, this vast marketplace of political ideas—stocked by one national government, fifty state governments, and thousands of local authorities—offers an important resource for devising worthwhile social programs.

These values of federalism—empowerment, political control, responsiveness (through both diversity and political engagement), and experimentation—argue in favor of retaining a role for autonomous state governments in our maturing democracy. None of these arguments, though, suggest that we should return *all* power to the states. As Professor Chemerinsky stresses, federalism is a system in which *both* the national and state governments play important roles.[62] Indeed, the values of federalism depend on the continued existence of both levels of government. The states check the aggregation of monolithic power in the national government, while the national government checks oppression by local majorities in the states. State governments offer diverse living conditions, while the national government insures that citizens can move freely from state to state. State and local governments offer multiple opportunities for political participation, but the national government insures that participation remains open to all. And, at least in some fields, state innovation increases after the national government establishes minimum standards.[63] In all of these ways, federalism depends upon the empowerment of many governments, not just one.

III. EMPOWERMENT AND CONSTITUTIONAL DOCTRINE

Empowering multiple sovereigns, as federalism requires, is a difficult task. Professor Chemerinsky resolves this problem by suggesting that, because federalism strives to empower all levels of government, "federalism generally should not be the basis for invalidating federal laws."[64] Instead, "[a]ll levels of government should be available to deal with the complex and difficult social problems facing the United States as it enters the next millenia."[65] However, the empowerment principle does not support a simple rule favoring enforcement of federal law. The Constitution already assigns the federal government the trump card in any direct contest between state and federal law; under the Supremacy Clause, federal law must prevail. Using the empowerment principle to

62. Chemerinsky, *supra* note 1, at passim.

63. *See, e.g.*, Dwyer, *supra* note 49, at 1223-24 (describing how federal environmental legislation spurred a dramatic growth in state environmental regulation).

64. Chemerinsky, *supra* note 1, at 41.

65. *Id.*

urge further deference to Congress would allow the federal government to overpower, rather than empower, the states.

Instead, the empowerment principle prescribes modest limits on federal power similar to constraints urged by scholars who advocate the autonomy model of federalism.[66] As Professor Chemerinsky urges, Congress must have broad scope to decide which substantive problems to address nationally and which ones to relegate to the states.[67] Congress has more information and better fact-gathering resources than the courts to resolve these questions. A preference for national or local solutions in particular areas also may vary over time. During an earlier era, we left family law largely to the states, allowing both experimentation and diversity in those laws. With increased population mobility, and a crisis of poverty among single women and their children, we have chosen to impose some national measures regarding child support.[68] Except at the margins, the Constitution should grant the federal government the power to act when it deems necessary.[69]

In *New York v. United States*, however, the Supreme Court recognized that the *manner* in which Congress regulates can affect state power as much as the substance of the legislation.[70] Whenever Congress enacts legislation, it "disempowers" states from adopting contrary rules. That is the necessary price of the Supremacy Clause; we cannot empower two levels of government without offering some rule

66. *See supra* note 4.

67. Chemerinsky, *supra* note 1, at 38-39.

68. *See* Dailey, *supra* note 4, at 1885 (discussing the Child Support Enforcement Act and arguing that, although the states should retain primary control of family law, some federal legislation is necessary to reinforce state authority).

69. *See* Kramer, *supra* note 36, at 1500-01 (stating that "courts are poorly situated to make (or second guess) the difficult judgments about where power should be settled or when it can be shifted advantageously"). Congress possesses only the powers delegated to it, rather than a general police power. In theory, therefore, Congress may lack authority to assign some subjects to its control. The Supreme Court's expansive construction of the commerce and spending clauses, however, leaves Congress virtually unfettered discretion to decide whether matters should be handled at the state or federal level. Even the Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995), represents only a minor restraint on congressional power. In *Lopez*, the Court struck down Congress's attempt to regulate the possession of guns within 1000 feet of schools. *See id.* at 1626. The decision, however, stemmed from the Court's exasperation with both Congress's blatant disregard for any limits on its power and the Solicitor General's unrestrained arguments justifying the statute. *See* Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674, 686-89, 696-98 (1995). Congress may be able to regulate gun possession near schools with a slightly different statute. *Id.* at 696-98. After *Lopez*, Congress may have to take its delegated powers more seriously, but the decision is unlikely to impose significant limits on the subjects Congress assigns to federal control.

70. *New York v. United States*, 505 U.S. at 168.

for mediating differences between them and we recognize the need for national control in many areas.

Despite displacing contrary state laws, however, most congressional regulations leave states with significant power. Direct preemption of state law allows states "to devote [their] attention and resources to problems other than those deemed important by Congress" and even "to supplement [the federal] program to the extent state law is not preempted."[71] Conditional preemption and spending programs similarly allow the states to choose whether to pursue federal ends or follow an alternate course. Even when states perceive that refusing federal funds is not a realistic option, their formal power to reject federal programs may enhance their voices in both pre-passage lobbying and program administration.[72] These traditional techniques of federal regulation, in other words, are consistent with Professor Chemerinsky's vision of empowering multiple government levels.

On the other hand, Congress's recent ploy of issuing direct commands to the states exacts an additional price from the purse of state power. In addition to denying the states authority to regulate a substantive area, a federal law that "harness[es] state power for national purposes" will absorb the energy of state legislators and prevent them from applying their creativity to other problems.[73] For this reason, the Supreme Court held in *New York* that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[74]

Professor Chemerinsky's empowerment principle lends important support to this result. A single federal command to the states might not significantly diminish state power, but the cumulative effect of many commands would reduce the states to "regional offices [or] administrative agencies of the Federal Government."[75] This prospect of fifty regional offices, each dependent upon the federal government for direction, is far different from the vigorous picture Professor

71. *Id.*

72. *See* Kramer, *supra* note 36, at 1542-44 (asserting that the states are assured a voice in the lawmaking and administrative processes because the "federal government needs the states as much as the reverse"); *see also* Dwyer, *supra* note 49, at 1216-19 (stating that Congress and federal administrative officials must consider state interests under the Clean Air Act in order to win state cooperation in implementing the Act).

73. *FERC*, 456 U.S. at 777 (O'Connor, J., dissenting in part); *see also New York v. United States*, 505 U.S. at 168, 174 ("A State whose citizens do not wish it to attain the Act's milestones may devote its attention and its resources to issues its citizens deem more worthy. . . .").

74. *New York v. United States*, 505 U.S. at 188.

75. *Id.*

Chemerinsky paints of "empowering multiple levels of government to deal with social problems."[76] In politics, as in management theory, empowerment requires some measure of autonomy to produce results.[77]

IV. CONCLUSION

The last five years have witnessed a remarkable resurgence of judicial, legislative, and scholarly attention to federalism. Professor Chemerinsky reminds us that we cannot intelligently continue the current debate over the future of federalism without careful exploration of the values of our federal system. By raising that question, and proposing empowerment as a significant benefit of multiple sovereigns, Professor Chemerinsky adds an essential perspective to the ongoing dialogue.

76. Chemerinsky, *supra* note 1, at 40.

77. *See* THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE 200-34 (1982); Merritt, *supra* note 3, at 1575 & n.49; Powell, *supra* note 4, at 686-87.