

Introduction: Some Reflections on the Federalism Debate

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INTRODUCTION

A just polity requires two main features: the proper distribution of governmental power within and among its political entities, and a pervasive public virtue. The two are closely related. In an election year when both features are being called into question in the U.S., this symposium could not be more timely.

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Not since the New Deal—perhaps not since the Civil War—have we so thoroughly scrutinized and debated the institutions and practices of “our federalism” (as the Supreme Court affectionately calls it).¹ Today, federalism is being reconstructed in all branches and at all levels of government through a variety of forms: statutes, administrative and judicial arrangements, court decisions, and new private sector responsibilities.²

Broadly speaking, federalism can devolve power in two directions; it can move public power *downward* to the states,³ and it can disperse power *outward* to private actors. This “privatization”⁴ is often excluded from the notion of federalism, yet there are sound analytic reasons to include it. Downward devolution and outward privatization are not sharply distinct categories. Instead, they overlap.⁵ Each is a potentially valuable instrument in federalism’s toolbox.

The federal government’s authority in peacetime probably crested during the energy crisis of the late 1970s. Even at its high water mark, however, the national state apparatus remained radically incomplete, deeply contested, and always vulnerable to retrenchment. Today, the public entertains serious doubts about whether the national government can solve complex social problems. The public believes, rightly or wrongly, that national solutions have already been

1. The Court used the phrase in *Younger v. Harris*, 401 U.S. 37, 44 (1970). Its provenance is traced in Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 GA. L. REV. 697 (1993).

2. Congress has already enacted some far-reaching reforms, including the unfunded mandates legislation. Even more fundamental changes may reach the President’s desk in the coming months. How they will leave his desk, of course, is another matter. When the voters render their initial verdict on these developments in November, the *vox populi* (or at least the *vox* that the politicians claim to hear) will probably demand a slower pace and narrower scope in these changes.

3. States, in turn, may transfer some of this authority downward to their localities. This possibility merits more public attention than it has so far received. For example, New York Governor George Pataki has proposed devolving to the state’s counties much of the authority over AFDC that he hopes the state will receive from Congress.

4. Privatization can take a number of different forms. These include de-regulation, market-based regulation, sale of governmental assets to private entities, cash or near-cash subsidies to consumers with which they purchase privately-provided goods and services, contracting-out public services to private providers, and others. See Ronald Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 451-52 (1988).

5. Privatization, after all, is only one of many possible ways to decentralize governmental power. When government decides to privatize, it is simply choosing to rely primarily on private incentives rather than bureaucratic ones. The public goals of a privatization policy—liberty, diversity, empowerment of sub-national communities, and pursuit of efficiency—are often the same ones that a policy of downward devolution is intended to achieve. Both public decentralization and privatization policies combine public and private initiatives, authorities, and resources. The precise mix of public and private participation is always a central policy design question.

For certain purposes, one might wish to distinguish the privatization of existing governmental authority from a social policy decision to allow activity that has not yet been “publicized” to remain in the private sector. How such “non-publicization” differs—conceptually, normatively, and empirically—from the privatization of existing governmental authority is an interesting question. In the increasingly liminal policy world in which public and private imperceptibly shade into one another, it is also a very important one, but I shall not address it here.

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tried and that they have largely failed.⁶ Although the public's confidence in state governments is only somewhat greater than its trust in Washington,⁷ we can be certain that the states, once having retrieved authority, will not readily relinquish it absent some grave, hard-to-foresee national emergency. The stakes in the current federalism debate, therefore, are high indeed.

Most of the symposium papers focus on specific legal and policy domains—environmental regulation, welfare policy, torts, and individual rights—as well as exploring some theoretical perspectives on federalism. The papers consider how, why, and with what consequences devolution is occurring in so many areas. This introduction will look across (and peer beneath) these particular domains, identifying some common themes and developments that the welter of detailed, policy-specific analysis might otherwise obscure.

My argument can be briefly stated. Many policy elites regard the current federal system, which entrenches broad state authority that competes with the national government for resources and legitimacy, as a case of arrested political development, a kind of pulmonary embolism in the body politic. To them, federalism is an anachronistic relic of an ancient and unjust constitutional order; it is the institutional vestige of a localism long since marginalized by the emergence of a modern and universalizing culture based on mass education, a vast suburbanized middle class, and a popular culture shaped by national media and technologies. In this view, federalism today lacks normative justification and impedes the full realization of a strong and effective national polity.

I believe that these policy elites—who include most liberal activists and many Washington-oriented analysts and prestigious academics⁸—are wrong.

6. For the view that this loss of public confidence is simply a temporary, cyclical phenomenon, see generally E.J. DIONNE, JR., *THEY ONLY LOOK DEAD: WHY PROGRESSIVES WILL DOMINATE THE NEXT POLITICAL ERA* (1995). I regard this as wishful thinking. Any concessions to states' rights now will be difficult to dislodge in the future.

7. According to a recent joint survey by the Washington Post, Harvard University, and the Kaiser Family Foundation, while in 1964 three in four Americans trusted the federal government all or most of the time, today only one in four does so. This change is part of a more general decline in Americans' trust—in one another and in our institutions. Richard Morin & Dan Balz, *Americans Losing Trust in Each Other and Institutions*, WASH. POST, Jan. 28, 1996, at A1. The respondents indicated a higher level of trust in state governments, a finding that apparently is consistent with other surveys. See Eric Schmitt, *Senate Approves Bill to Phase Out Farming Subsidies*, N.Y. TIMES, Feb. 8, 1996, at A1 ("Many public opinion surveys show that people have more trust in state government than in the Federal Government.") (quoting Professor Larry Sabato).

8. It is striking in this regard that public law scholars at elite law schools (often described, accurately and tellingly, as "national" institutions) show little interest in state law, politics, and culture. For example, administrative law courses at these schools and the leading casebooks focus almost entirely on federal agencies. The vast body of state administrative law goes largely unmentioned. On this point, see Peter H. Schuck, *Introduction*, in *FOUNDATIONS OF ADMINISTRATIVE LAW* 6 (Peter H. Schuck ed., 1994). Much the same is true with respect to constitutional law. Courses in local government law are largely concerned with the general principles that govern municipal organization, finance, and regulation. Apparently, only one law school program in the U.S. focuses on the law of a particular locality. Telephone Conversation with Prof. Ross Sandler, Director, Center on New York City Law, New York Law School, Feb. 23, 1996.

The “genius” (as it was formerly called) of federalism was once an article of national faith confidently proclaimed by politicians and professors across the land, but beginning in the 1930s several events cast dark shadows over this traditional piety. The Depression severely tested it, the South’s massive resistance to *Brown v. Board of Education* savagely mocked it, and the Great Society and Nixon eras interred it under a mountain of nationalizing policy initiatives. Federalism had nourished some of America’s most repellent and repressive political regimes, most notably in the deep South: lynchings tolerated if not abetted by state officials, governors barring black children from entering public schools, Bull Connor’s dogs attacking civil rights demonstrators in Alabama, widespread poverty and disease in the Mississippi Delta, corrupt and insular Bourbon courthouse machines. These harsh images of federalism are fixed in our minds like insects caught in amber.⁹

But whatever injustices federalism worked in the past, it is a very different system today. Neither the federal government nor the states are even remotely what they were during the civil rights era, when many of our strongest impressions of the federal system were first formed.¹⁰ Federalism now serves both as an instrument of the modern administrative state and as a rather flexible institutional accommodation to the extraordinary diversity of American society and to the challenges that this diversity poses for national unity. This diversity-accommodating aspect of federalism receives too little attention from commentators. Although inter-state differences help to explain federalism’s remarkable durability, we still lack a determinative theory—constitutional considerations aside—for deciding which of those differences the federal government should tolerate or encourage and which of them it should limit or override altogether. We are left in the fluid and highly compromised realm of normal politics where, for at least the next few years, the system is likely to accord greater deference to inter-state differences and less weight to the value of national uniformity.

9. Wade Henderson, director of the Washington office of the NAACP, recently stated: “Many African-Americans remember that ‘states’ rights’ were code words for the states’ denial of basic civil rights. We are concerned that this history not return in the context of welfare reform.” Robert Pear, *Governors’ Plans on Welfare Attacked*, N.Y. TIMES, Feb. 14, 1996, at A12. Hostility to federalism, moreover, is not confined to liberals and blacks—and certainly not to Americans. Nationalizing elites in most countries fear that federalism and the social diversity that it protects and reinforces are state-fragmenting conditions that only the centralization of power can cure. Even the leaders of a country like Canada, with its strong federalist tradition, fear that its national unity is now in jeopardy. *E.g.*, Charles Truehart, *It’s Official, Canada Adrift on Quebec*, WASH. POST, Mar. 2, 1996, at A15. For other examples of nation-states grappling with the challenge of diversity, see generally DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* (1985). Some of Horowitz’s examples, such as Nigeria, have since opted for more authoritarian solutions.

10. On changes in the states, see generally CARL VAN HORN, *THE STATE OF THE STATES* (3d ed., 1996); LARRY SABATO, *GOODBYE TO GOOD-TIME CHARLIE: THE AMERICAN GOVERNOR TRANSFORMED, 1950-1975* (2d ed., 1983). On changes in the federal government, see generally *THE NEW POLITICS OF PUBLIC POLICY* (Marc K. Landy & Martin A. Levin eds., 1995).

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American federalism, like our politics and society more generally, has evolved in a generally progressive direction during the last thirty to forty years.¹¹ In noting this generally reformist tendency, of course, I do not mean to praise it in all of its particulars. We surely would have had to invent a robust federal system if our Constitution and subsequent political development had not bequeathed one to us, but we just as surely would have designed it very differently. The present configuration of state jurisdictions has little to recommend it besides historical pedigree; our political map was drawn with blood and iron, not by experts in public administration. The existing allocation of responsibilities among the different levels of government is irrational in many respects.¹²

Still, history, pragmatic compromise, and our remarkable social diversity have their just claims on our political structures and practices. If federalism is far from being an ideal system, it nevertheless remains a great source of social strength and political cohesion that help to bind a congeries of disparate peoples to the nation by accommodating their passionately parochial interests. It is also a system that more severely divided societies would do well to emulate, albeit in their own fashions.

My paper develops this argument by exploring five themes or developments that bear on contemporary federalism: (1) the *pervasiveness of devolution* in the U.S.; (2) devolution's *global character*; (3) the growing *social diversity* that is devolution's driving force; (4) the complex relationship between *technological change* and devolution; and (5) the *cognitive demands* on government created by the federal system. The analysis is neither systematic nor rigorous; I employ neither overarching theory nor refined analytical framework. My purpose here is not to prove hypotheses but to frame and provoke the discussion that will follow at this symposium.

I. THE PERVASIVENESS OF DEVOLUTION

The pressure to devolve power from the center to the periphery is a nearly universal phenomenon in contemporary society. It is by no means confined to the political sphere; indeed, it is proceeding far more rapidly and irreversibly in the economic and social realms. Although status quo interests almost always resist devolution and often succeed in delaying or defeating it, the pressures to devolve power in complex social systems are relentless. This is true whether those pressures are driven by efficiency goals, concerns about protecting liberty, or communitarian ideals. In a democracy, the devolutionary impulse

11. I support this claim in the concluding section of Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963 (1996) (book review).

12. For an extended argument on this point, see generally PAUL E. PETERSON, *THE PRICE OF FEDERALISM* (1995).

inevitably extracts important concessions from the center. Even in the most totalitarian regime, this impulse manages to find informal, symbolic, and clandestine outlets for rebellion and diversity.¹³

A. *Devolution by the Federal Government*

Under one banner or another, the assertion of states' rights has been a central political motif in the U.S. throughout our long, spasmodic process of national consolidation. At the same time, a citizenry perennially suspicious of private concentrations of economic power demanded national political institutions capable of controlling it.¹⁴ Mass education, mass media, and mass mobility disseminated more cosmopolitan values and created something like a common national culture. Recurrent wars and international and economic crises spawned large, professional bureaucratic establishments.

These developments all strengthened the hand of those forces calling for a more active central state. Nevertheless, they also generated a strong backlash against the new cosmopolitanism. Powerful counter-cultural movements, which appealed to the deep populist strains long endemic in American life, firmly rejected the new cosmopolitanism—and its reified political apparatus in Washington—in favor of more parochial, differentiated cultures and politics. As I discuss below, demographic and technological changes have accelerated this cultural fragmentation, increasing the demand for a federal structure capable of fully representing this diversity. All branches and levels of government have responded to this demand in diverse public policy domains.

The practice of outward devolution by the federal government to the private sector has been even more important than downward devolution to the states.¹⁵ Since the late 1970s, Congress has privatized numerous activities and entities that were once federally regulated or owned. The most significant examples are the transportation industry, whose air and surface modes are now largely free of federal regulation, and the telecommunications industry, which was substantially deregulated in January 1996. The sale of Conrail, the growing use of market-based incentives in regulation under the Clean Air Act and other laws, and the auctioning of certain federally-regulated communication

13. The literature on the day-to-day experiences of those living, working, and governing in communist states is rich with examples of such low-visibility outlets. Two classics in this genre are MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (Michael H. Heim trans., 1984), and ALEKSANDER SOLZHENITSYN, *ONE DAY IN THE LIFE OF IVAN DENISOVICH* (Gillon Aitken trans., 1970).

14. See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982).

15. Privatization is a global phenomenon. See generally Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995).

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spectra are additional instances. As noted immediately below, privatization of at least portions of public pension systems may also be on the policy horizon.

B. *Devolution by Congress*

Congress, of course, is leading this decentralizing project. The President has now signed a far-reaching reform of the AFDC program that will give the states much greater policymaking authority over eligibility criteria, benefit levels, and other programmatic elements, as well as enlarged administrative responsibilities.¹⁶ Congress is also more receptive to proposals to distribute benefits through vouchers or similar near-cash techniques. This receptivity even extends to programs like Medicare and Social Security pensions in which the states have played little or no policy or fiscal role. Some of these proposals, which are likely to receive growing support, would effect devolution through privatization.¹⁷ In other policy areas such as manpower training, education, and transportation, Congress has moved toward block grants and looser restrictions on other levels of government. Finally, Congress enacted legislation in 1995 to eliminate future unfunded federal mandates to state and local governments.

C. *Devolution by the Executive Branch*

The executive branch has initiated downward devolution of its own. During the 1980s and 1990s, agencies have used their administrative authority to delegate more policy responsibility to their state and local counterparts. The Reagan and Bush Administrations, although often stymied in their “new federalism” initiatives by Democratic congresses, did manage to consolidate some categorical programs, to reduce regulatory restrictions in certain areas, and otherwise to enlarge state discretion. Despite criticism from the left, the Clinton Administration has continued such efforts, which include a permissive use of the waiver authority under section 1115 of the Social Security Act to allow states to experiment with changes in AFDC, Medicaid, and child welfare policies.¹⁸

16. See Robert Pear, *Senate Passes Welfare Measure, Sending it for Clinton's Signature*, N.Y. TIMES, Aug. 2, 1996, at A1. The extent to which they will also receive or raise the funds necessary to discharge these new welfare program responsibilities, of course, is a more doubtful matter. The Food Stamp program, at least for the near term, will retain its current structure of uniform national standards and funding, albeit at lower benefit levels. The federal-state shared responsibility for Medicaid has not been significantly changed in the law.

17. See, e.g., Robert Pear, *Plan to Put Part of Social Security into Stock Funds*, N.Y. TIMES, Feb. 17, 1996, at A1.

18. See generally U.S. General Accounting Office, GAO/HEHS-96-44, MEDICAID SECTION 1115 WAIVERS: FLEXIBLE APPROACH TO APPROVING DEMONSTRATIONS COULD INCREASE FEDERAL COSTS (1995) (summarizing waiver projects). On the other side, the right has criticized the administration for resisting certain state innovations, including some of Wisconsin's more radical reforms. See Robert Pear, *Clinton Wavers After Backing Welfare Plan*, N.Y. TIMES, June 14, 1996, at A1.

D. *Devolution by the Federal Courts*

Even the federal courts have become downward devolutionists. Judicial deference to local preferences has taken several different forms. Procedurally, they have encouraged the federal judicial districts to experiment with local rules in order to promote more efficient modes of civil discovery and case management.¹⁹ Doctrinally, they have reaffirmed the continuing centrality of state law even in nationwide mass tort litigation,²⁰ Fifth Amendment Takings Clause jurisprudence,²¹ constitutional torts,²² and much federal product safety regulation.²³ The Supreme Court has also recently limited federal power to exercise authority even in areas in which Congress has asserted a national interest.²⁴

E. *Devolution by the States*

The states, too, have increasingly embraced both downward and outward devolution. Changes in public education, perhaps the most politically explosive area of state-provided services, are especially revealing of the dynamics of contemporary federalism. As in the past, New York City may be the leading edge of reform. The city is moving to decentralize regulatory authority in personnel and other educational policy areas to the individual school level, thus by-passing, and perhaps eliminating altogether, the large-district community boards.²⁵ The state, however, can only effectuate this radical devolution of power by first re-centralizing it.

The devolution of education policymaking takes other forms as well. A number of states have created so-called "charter schools," which may be operated by independent public or private entities. Such schools, which may receive public funds, operate with great autonomy, free of local school board controls.²⁶ Wisconsin and some other states have authorized pilot programs,

19. See, e.g., Title I of the Judicial Improvements Act of 1990, 104 Stat. 5089, 5089-98.

20. See generally LINDA S. MULLENIX, *MASS TORT LITIGATION* (1995) (ch. 3).

21. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (suggesting that state nuisance law has traditionally guided determinations of when state governments may effect regulatory takings without compensation).

22. See *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 201-02 (1989).

23. See *Medtronic, Inc. v. Lohr*, 116 S. Ct. ___, 64 U.S.L.W. 4625 (1996).

24. See, e.g., *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1119 (1996); *United States v. Lopez*, 115 S. Ct. 1624, 1632-33 (1995) (striking down, on Commerce Clause grounds, statute making possession of firearms near schools federal crime). Some other decisions have used narrowing statutory interpretations to accomplish this limitation. See, e.g., *New York v. United States*, 505 U.S. 144, 169-70 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 464-67 (1991). For a recent review of these and other of the Court's federalism decisions, see Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995).

25. Joseph Berger, *Board of Education: A Thing of the Past?*, N.Y. TIMES, Feb. 18, 1996, at A39.

26. Peter Applebome, *Start of Charter School Shows Flaws in Concept*, N.Y. TIMES, Mar. 6, 1996, at B9 (reporting that as of December 1995, twenty states had authorized charter schools).

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soon to be expanded (but also under court challenge), that enable children to use state-funded vouchers to pay private school tuition.

An increasingly common and far-reaching form of state-level privatization is for states to devolve extensive powers of self-government to common-interest housing developments governed by homeowner associations.²⁷ In an instance of sub-state level devolution, New York City has delegated to privately-run "business improvement districts" a broad range of authority to provide important municipal services to businesses and residents and to impose tax-like user fees for those services.²⁸

F. *Devolution Within the Private Sector*

Decentralization by for-profit enterprises is of special interest because the way in which private firms internally organize their resources often prefigures change, *mutatis mutandis*, in the slower-moving public sector. Since 1980, the most notable trend in industrial organization has been the practice by large integrated enterprises of replacing highly-centralized management structures with looser, more decentralized ones organized around market-driven, multi-skill, flexible production and localized profit centers. Within the firm, authority structures and resource allocations are increasingly determined by the dictates of time- and cost-efficient information flows and market incentives, rather than by formal corporate ownership patterns.²⁹ The recent organizational transformations of AT&T, IBM, and many other industrial giants represent desperate efforts to meet the challenges posed by more nimble, market-responsive competitors. Their strategies include many elements of downward and outward devolution: breakup into smaller units; delegation of initiative and policymaking to lower-level, more market-sensitive employees; tactical out-sourcing; and elimination of middle management layers.

II. THE GLOBAL CHARACTER OF DEVOLUTION

There is much talk today about the demise of the nation-state.³⁰ Many commentators claim (and ardently hope) that traditional notions of national

27. See generally EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994); Robert C. Ellickson, *Cities and Homeowner Associations*, 130 U. PA. L. REV. 1519 (1982).

28. On business improvement districts, see Thomas Lueck, *Owners Challenging Business District*, N.Y. TIMES, Nov. 29, 1995, at B1. The voting rules for the governance of such districts are under challenge. See *Kessler v. Grand Central Partnership*, 95 Civ. 10029 (SAS) (filed S.D.N.Y. Nov. 28, 1995).

29. See, e.g., ARNALDO BAGNOSCO & CHARLES F. SABEL, *SMALL AND MEDIUM-SIZED ENTERPRISES* (1995); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* (1984).

30. See generally KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (1995); Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards A People-Centered Transnational Legal Order?*, 9 AM. U.J. INT'L. L. & POL'Y 1 (1993).

sovereignty are being rendered increasingly artificial by the growing integration of the world economy, the rise of transnational legal regimes, the spillover effects of environmental pollution, the irrelevance of national borders to massive immigration flows, and the need for international cooperation to control the dangerous conduct of rogue states. Proponents of this view cite the creation during the post-World War II era of numerous supra-national entities to coordinate international trade regimes, collective security arrangements, environmental accords, and political cooperation. They point to the European Union, which integrates all of these purposes into a multi-state structure that even provides for a supranational "European citizenship."

In fact, however, the nation-state is not only flourishing but proliferating, and it is devolution, the essence of federalism, that is reinvigorating it. One kind of global devolution—indeed one of the greatest devolutions in world history—has occurred in the wake of the sudden dissolution of the Soviet empire. Like the breakup of the Ottoman, Austro-Hungarian, British, and French empires earlier in this century, this event has spawned a profusion of new (or long-suppressed) entities extending in a broad arc from the Baltic and Central and Eastern Europe through Central Asia.

These entities, which claim a nation-state status that is often precarious or even fictive, in turn face devolutionary pressures from their own ethnic and religious minorities. The emergent states of the former Yugoslavia, the Chechnyan uprising against Russia, and insurgencies in a number of African states provide vivid examples of this phenomenon. The forces of devolution also stalk more well-entrenched prey, roiling long-established nation-states like Canada and Mexico; even strong states like the U.K., Spain, and Belgium are vulnerable to the militant demands of separatist movements. In order to survive, such nation-states must either suppress their minorities, which is difficult for democratic regimes (or even authoritarian ones) to do, or adopt a form of federalism or more modest power-sharing arrangement. The American states' demand for devolution, therefore, is part of a global *zeitgeist*. The powerful centrifugal forces exerted by diversity are propelling this change.

A second type of global devolution is actually the result of aborted or incomplete supranational projects. The most important example, of course, is the European Union after the (at least temporary) failure of Maastricht. Its gradual expansion—from the customs union created by the Treaty of Rome to common market to regional residency and work zone to the guarantee of voting rights in local (and EU) elections—proceeded without major interruption until the early 1990s and culminated in the Maastricht accords. Unmistakable danger signals, however, had already appeared. When the Dublin and Schengen agreements sought to fashion a common immigration, refugee, and border control policy, a number of EU members refused to accede.

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The European currency and common monetary policies envisioned by Maastricht are proving elusive. Some of the most powerful EU states have serious reservations about both timing and feasibility, and even Germany is faltering. They foresee the loss of autonomy, political risks, and short-term economic dislocations that a common monetary policy will entail. They also fear enhancing the more general authority of the central EU bureaucracy.

Just as "Washington" has become a readily serviceable, all-purpose political epithet deployed by those who are dissatisfied with national policies and demand the devolution of power to the states, so "Brussels" is now a rhetorical metaphor for meddlesome bureaucratic empire-building, corrosive cosmopolitanism, and insidious challenges to national sovereignty. Devolution—the effort to retrieve powers now exercised by Brussels, and the refusal to grant new ones—is among the most significant political currents in Europe today. Across the Atlantic, complaints about NAFTA—more strident during the presidential campaign—are echoing this devolutionary credo, but with an American accent.

III. DIVERSITY AND DEVOLUTION

The Founders, as Samuel Beer reminds us, contrived a constitutional system of federalism in the hope of advancing three fundamental civic virtues: liberty, community, and utility.³¹ But they did not write on a clean slate. They designed their federal system for a society that was geographically far-flung and, especially by the standards of the day, remarkably heterogeneous in demographic, religious, linguistic, cultural, and political terms. The dynamics and distribution of settlement during the colonial period had assured that the emerging civil society, once united in a national polity, would exhibit an unprecedented diversity.³² The states, and the federal system that both reflected and reinforced the states' political identities and social cultures, are the institutional expressions of this diversity.

The characteristic of America that has most struck its more acutely perceptive visitors across the centuries is the polyglot, eclectic, improvisational character of its civil society. This diversity, which is greater today than ever before, has many sources and dimensions but it ultimately rests on demographic foundations. Demographic heterogeneity entails cultural differentiation, which in turn spawns many other, more meaningful differences. The heterogeneities of ethnicity, language, and national origins that are such striking features of contemporary American society are a direct consequence of recent immigration patterns and a pluralistic political culture that toler-

31. See generally SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993).

32. See generally BERNARD BAILYN, *THE PEOPLING OF BRITISH NORTH AMERICA* (1986).

ates—and in some ways encourages—the maintenance (in some forms) of these differences.

The post-1965 migration flow to the U.S. has little in common with the pre-1965 flows that created the still-dominant population stock. One example will suffice to make the point: in 1965, there were barely one million Asian-Americans; by 1990 the total had increased more than sevenfold, to 7.3 million—or almost 3% of the U.S. population. The Asian-American grouping, moreover, consists of numerous subgroups—Chinese, Filipino, Japanese, Indian, Korean, Vietnamese, Cambodian, Laotian, and others—with different languages, cultures, socioeconomic profiles, and experiences in the U.S.³³ Much the same is true for some of the other ethnic groupings now constituted by the U.S. Census.³⁴

The U.S. is also the most religiously diverse nation in the world. It is not simply that the world's religious traditions, great and small, are all well represented here. It is also that each of the main religious groupings—Christian, Jewish, Islamic, Hindu, and Buddhist—contains confessional sub-groups that are bewildering in their variety. They differ from one another liturgically, doctrinally, organizationally, demographically, and in their geographic distributions. This religious diversity also is a function of immigration patterns. Immigrants who brought with them quite different cultural, linguistic, and confessional traditions found it desirable to establish churches here that were parochial in those senses. Thus, Catholic immigrants from France, Bavaria, Italy, Puerto Rico, and South America preferred to worship with co-religionists from the old country.

The fierce dissenting ethos of American Protestantism, refined through almost four centuries of struggle and fragmentation, is a powerful and independent cause of religious diversity that has precipitated a vast number of Protestant denominations and sects. Even the non-Protestant religions in the U.S. have been profoundly influenced by these fractionating pressures. American Judaism, for example, has split into at least four streams, most of which have no real counterparts among Jews in other countries. Such centrifugal tendencies are by no means confined to liberal, congregational groups. They extend as well to the more hierarchical Catholic and Orthodox churches and the rapidly growing evangelical sects. In most cases, the churches' worshipers, liturgies, and other practices in the U.S. are far more

33. See, e.g., Felicity Barringer, *Immigration Brings New Diversity to Asian Population in the U.S.*, N.Y. TIMES, June 12, 1991, at A1. See generally YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* (1992). As a result of immigration's demographic effects, the U.S. population is also younger than other leading industrial nations—another diversity-enhancing attribute.

34. I say "constituted by the U.S. Census" in recognition of the utter artificiality of some of these groupings.

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heterogeneous than they are anywhere else in the world. This religious diversification, moreover, continues. For every church amalgamating with others today, many more are born afresh or separate from parent congregations.

This American diversity also possesses a strong regional aspect. States (and the regions in which they cluster) differ in many important ways, not just superficial ones like accents, dress, and sports team allegiances. It is this regional heterogeneity that our political institutions in general, and the system of federalism in particular, were meant to respect and preserve. The states are distinct from one another with respect to most of the variables that affect and thus differentiate their political behavior: wealth, public services, cultural institutions, age, distribution and urbanization of the population, economic development, climate, ethnic and religious patterns, partisan division, political structure, style and culture, and the like. The pronounced residential concentration of new, culturally diverse immigrants in a small number of metropolitan areas magnifies this regional distinctiveness.³⁵ Many local communities in the more internally diverse states exhibit a similar distinctiveness.

Diversity among the states might seem artificial given the fact that their existing boundaries were established for a number of historical reasons that had precious little to do with the kinds of economic and other factors that a rational, omnipotent institutional designer seeking to craft a just and efficient federal system would emphasize today. But these state-forging circumstances, however historically contingent, left their indelible marks on the populations of the different states. By now, each state possesses a distinctive social character and political culture.³⁶

These local distinctions turn out to be remarkably durable. Two examples drawn from the politically-salient area of health policy—one relating to professional standards, the other to individual behavior—will illustrate the point. Medical education, specialty certification, technology, product marketing, research, and (increasingly) legal standards of care are highly national in character. Even so, local diversities dominate. When providers have more than one option for treating a medical condition, the treatment they use and the prices they charge vary enormously from region to region. Moreover, these regional differences persist even after one controls for differences in

35. The top six states of intended residence for immigrants in 1993 accounted for over 70% of immigrants admitted that year. This pattern of concentration has continued since 1971. 1993 STATISTICAL Y.B. IMMIGR. NATURALIZATION SERV. 21-22. New immigrants also are beginning to settle in significant numbers even in ethnically homogeneous "heartland" communities. See Steven A. Holmes, *In Iowa Town, Strains of Diversity*, N.Y. TIMES, Feb. 17, 1996, at 6.

36. This diversity is perhaps most apparent during the presidential primary season, when political and media commentators have occasion to call special attention to it.

medical resources, insurance, and other such factors. Persistent region-specific professional cultures overwhelm the strong pressures for national uniformity.³⁷

Sharp inter-state differences in health status and individual behaviors also persist. In his book *Who Shall Live?*, economist Victor Fuchs notes that the contiguous states of Nevada and Utah states enjoy roughly the same levels of income, schooling, urbanization, climate, and resources devoted to medical care, and are alike in many other respects as well, yet “their levels of health differ enormously. The inhabitants of Utah are among the healthiest individuals in the United States, while the residents of Nevada are at the opposite end of the spectrum.”³⁸ Fuchs attributes these disparate health outcomes to life style differences—not only tobacco and alcohol consumption but also marital status and geographical stability linked to religious beliefs and practices.³⁹

Such persistent differences constitute the distinctive engine and problematic of federalism. Different states’ inhabitants exhibit famously divergent public attitudes and policy preferences on a wide variety of policy issues. This is true whether the policy domain is one over which the states enjoy broad discretion with respect to funding levels and programmatic content (such as AFDC, Medicaid, and public education),⁴⁰ one in which the states’ role is highly constrained by federal prerogatives (such as the treatment of immigrants),⁴¹ or one in which the federal government expressly seeks to reduce or eliminate state-to-state and locality-to-locality inequalities (such as compensatory education and food stamps).

The political acceptability of these inequalities in states’ spending and program characteristics, which reflect variations in their tax bases and in their citizens’ values, is of course a core issue in the federalism debate. Those who advocate greater uniformity hope to override these differences in pursuit of the nationalist, egalitarian ideals that have dominated modern American political discourse but that have never been fully accepted or institutionalized.

37. Gina Kolata, *Sharp Regional Incongruities Found in Medical Costs and Treatments*, N.Y. TIMES, Jan. 30, 1996, at C3.

38. VICTOR R. FUCHS, WHO SHALL LIVE?: HEALTH, ECONOMICS, AND SOCIAL CHOICE 52 (1974).

39. *Id.* at 52-54.

40. See data in PETERSON, *supra* note 12, at 44.

41. Nathan Glazer, for example, recently has shown that Massachusetts is far more attentive to the interests of immigrants, both legal and illegal, than is Texas. Nathan Glazer, *Governmental and Nongovernmental Roles in the Absorption of Immigrants in the United States*, in PATHS TO INCLUSION: THE INTEGRATION OF MIGRANTS IN THE UNITED STATES AND GERMANY (P. Schuck et al. eds., forthcoming 1997). Texas, in turn, is viewed in another comparison as being more solicitous than California. Scott McCartney and Karen Blumenthal, *Texas Strives to Avoid California's Mistakes, and It Is Prospering*, WALL ST. J., Sept. 13, 1995, at A1; see also PETER SKERRY, MEXICAN AMERICANS: THE AMBIVALENT MINORITY (1993) (arguing that Mexican immigrants and Mexican-Americans have made more progress in San Antonio, Texas, where they have faced greater racial discrimination, than in Los Angeles, California, where they have faced less).

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Devolutionists, in contrast, regard inter-state differences as benign, even desirable; they wish to accord them full, or at least fuller, expression.

But however this debate is resolved, the normative question will remain. Some differences among states reflect citizens' deeply-held values or important local interests that they want their policymakers to affirm and preserve, while others are more expendable. Which inter-state differences are so normatively compelling that the federal government must countenance their continuation rather than suppress them in the interest of national uniformity?

To this central question, the Constitution provides only a partial answer. It bars the federal government from overriding inter-state differences that are protected by the Bill of Rights, that do not affect interstate commerce, or that other structural limitations on national power immunize. For the rest, however, the Constitution leaves the question to be resolved in the pulling and hauling of normal politics. Even in this realm, to be sure, a quasi-constitutional background norm holds that the federal government should tolerate inter-state differences unless there is a compelling reason to override them.⁴² Still, this is no more than a default rule, a rebuttable presumption. The fundamental normative question remains: Which conditions will suffice to rebut this presumption of state diversity?

This question is especially difficult because in principle, and sometimes in fact, *each* level of government—federal, state, and local—is capable of protecting diversity values. The ability and willingness of a particular level to do so depend primarily on the nature of the conflict that the diverse interests implicate and on the political and legal cultures which prevail at that level. Small racial and religious minorities, for example, can often receive greater legal protection at the federal level than at the state level.⁴³ A concern for diversity, therefore, does not always justify devolution. Indeed, as the case of civil rights enforcement famously demonstrates, such a concern may justify entrusting the primary authority and responsibility to the center.

Still, there should be at least one easy answer to the question of which state differences the federal government should be able to suppress: it should reduce those differences which, if permitted to be the subject of inter-state competition, will engender a so-called “race to the bottom.” This answer might seem to be an easy one because such a race, by its very nature, would undermine *both* local and national values. For reasons that I discuss below, however, neither the race-to-the-bottom theory nor criteria such as allocative or

42. Traditionally, this norm was quite widely accepted. Between 1960 and the early 1990s, however, it weakened considerably. In the current Congress, it has again become robust.

43. The heightened constitutional protection accorded to “discrete and insular minorities” under the *Carolene Products* standard is an example. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Likewise, state constitutional rights are premised on the notion that individuals can often expect greater protection at the state than at the local level.

governmental "efficiency" can resolve the suppression-by-difference question. After all, the federalism debate directly implicates competing conceptions of nationhood, and the efficiency criterion begs most of the important issues.

IV. TECHNOLOGICAL CHANGE

If the diversity of American life leaves us uncertain about how we should treat inter-state differences, technology—by facilitating the expression of those differences—is deepening this normative indeterminacy. In this way technology is raising the stakes in a federal system designed, among other purposes, to give diversity political and institutional form.

Technology's precise effects on diversity are complex and changing, hence still poorly understood. In part, this is because technology triggers multiple and competing effects on diversity that we can scarcely glimpse today, much less evaluate. Although some of these changes might work to homogenize our culture and make centralized authority more palatable to the public, technology also enhances social diversity. Civil libertarian fears notwithstanding, past predictions of technology-based authoritarian control in the U.S. have proved as exaggerated as they are common. New technologies promise to enlarge individual choice, redefine social relationships, and transform markets in ways that will encourage individuals and groups to express existing diversities and to cultivate new ones. Although these changes will not necessarily produce a more desirable society—more choices do not always yield better ones—a responsive federalism must strive to reflect and integrate the resulting diversities.

Many of the most important social effects of technology are quite unexpected, even to their creators. Three examples—air conditioning, television, and computers—will illustrate the point.

Air conditioning transformed American politics and society by making many areas of the country attractive to individuals and businesses that otherwise would not have located there.⁴⁴ It encouraged a vast population shift in the U.S. in which millions of Americans, many of them retirees and young adults from northern and midwestern states, moved to states that had been thinly populated and had tended to practice a traditionalist courthouse politics. The migrants brought with them different values, traditions, and policy preferences that imposed new demands on state governments. This migration, by diversifying and enlarging the population of those states, helped to transform their politics in various ways. Many of these states were forced to modernize their political structures, and they developed a more competitive,

44. This fact, so obvious once one takes note of it, was pointed out to me by Professor Nelson Polsby.

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issue-oriented politics. These political changes in the Sunbelt states exerted reform pressures on other states, which must compete for population and tax base. These changes, in turn, altered congressional and presidential politics and thus the terms of the federalism debate.

The transformative social effects of television are so widely acknowledged as to be a cliché. For my purposes, however, what is most interesting about TV is that, despite widespread fears (or hopes) that it would standardize popular culture and encourage a uniformity of speech and outlook, it has not done so. This is not to deny the obvious fact that millions of American viewers of network TV watch the same sports events and entertainment shows, hear the same speech patterns, laugh at the same jokes, receive the same news reports, and observe the same celebrities. Nor do I mean to deny the equally obvious fact that much TV programming is as banal and coarse as we, its viewers, often are.

Still, the diversity-enhancing power of this medium is at least as impressive as its propensity toward uniformity. The notorious decline of the Big 3 networks in favor of a bewildering variety of cable channels, upstart networks, foreign language offerings, public TV, and multimedia applications of the TV screen has spawned extraordinarily heterogeneous programming for viewers. Even after discounting the hype that often pervades discussion of our telecommunications future, it seems clear that our electronic destiny is diversity, not uniformity.⁴⁵

The personal computer, along with the automobile, may prove to be the most diversity-enhancing technology of all.⁴⁶ Already, the rapid proliferation of chat groups, home pages, World Wide Web databases, and multimedia linkages have vastly increased the ability of users to indulge their most arcane and specialized interests (and fantasies), from aardvarks to Zoroastrianism. Moreover, the broad diffusion of electronic mail over the Internet and Web is enabling individuals to conduct conversations with one another at a low and steadily declining cost. These developments, which are certain to spread in the years ahead, will inevitably increase individuals' choices about their (literal)

45. Communications technology is expanding diversity in other ways. Through highly specialized advertising and targeted media, product manufacturers and service providers can now identify and create market niches based on ethnic, regional, gender, and other specialized appeals, and then hopefully move into broader cross-over markets. Tortilla products, for example, began with a narrow following in some southwestern states. By 1994, sales exceeded \$2.4 billion annually; the fastest-growing market was the Midwest. Linda Wong, Executive Director and General Counsel of Rebuilding Los Angeles, Remarks at Immigration and World Cities conference, Columbia University (Feb. 10, 1996).

46. At least for those who can afford to gain access to it. The cost of a PC has steadily declined even as its power and capabilities have increased. A much-discussed, frequently-predicted shake-out in the manufacturing sector of the industry may reduce competition somewhat and slow the pace of these pro-consumer changes, but they will probably continue nonetheless. If so, cost is unlikely to prevent any but the most destitute of American families from affording a bottom-of-the-line PC. Utilization, of course, is a separate question.

connections to others and about what they wish to read, see, hear, feel, and learn. These expanded domains of choice will in turn generate an even more fundamental change in *consciousness*—in our conviction, surely exaggerated but nonetheless deeply felt, that our identities are both controllable and readily transformable.

Such technologies, with the social shifts that they portend, may fundamentally alter the terms of the federalism debate—albeit in complex ways. The same computer-based technologies that will enlarge individual choice can also enable policymakers to gather, retrieve, integrate, manipulate, and analyze immense quantities of data at relatively low cost. In the past, arguments for central planning, industrial policy, and other national interventions in the economy have been premised on our growing power to exploit such technologies to rationalize public policies. With such data-processing and analytical power, the argument goes, more effective national regulation should be possible even in the face of growing social diversity. I believe that this argument is false, but this is beside the point, which is that computer technologies are transforming the crucial variables that any federal system must reflect.

One of these variables is the effect of physical location on the choices and prospects of an individual or firm. For example, the ability to communicate with others quickly and cheaply on a computer screen enables one to enjoy many of the economic and cultural advantages of New York City while living in South Dakota and enjoying its lower tax rates. More choices of this kind, and the lower cost of gratifying them regardless of location, will greatly complicate the Tiebout effect, in which individuals distribute themselves among communities according to their differing preferences concerning the mix of taxes and services offered by those communities.⁴⁷

In this way (and in others), technology could exacerbate the existing competition among jurisdictions, encouraging them to adopt beggar-thy-neighbor policies. This would tend to accelerate the much-discussed “race to the bottom.” By freeing consumers and employers to locate anywhere at lower opportunity costs, technology increases the pressure on high-amenity, high-tax states like New York to reduce their regulatory and fiscal burdens in order to retain their more mobile population, employment, and tax bases. On the other hand, such an exodus would leave New York unable to provide those amenities to remote consumers as well as to resident ones.⁴⁸ Here, as elsewhere, a Prisoners’ Dilemma dynamic drives behavior. The would-be free-riders could

47. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

48. According to a recent report by the Regional Plan Association, in New York City—indeed, in the New York metropolitan region as a whole—this scenario is already unfolding. Kirk Johnson, *Report Sees Major Decline for New York Region*, N.Y. TIMES, Feb. 14, 1996, at A1.

defeat their own purposes, making themselves and others in the community worse off than if they could agree on a cooperative strategy. The resulting equilibrium might easily be sub-optimal. The conventional solution to this problem is for the national government to adopt tax and subsidy policies that can defuse the competition among states and localities. Most federalism theorists emphasize this justification for an active national policy role in a federal system,⁴⁹ and some national policies do indeed function to keep inter-state rivalries within tolerable limits.

But federalism, I maintain, is far more than a judicious policy response to the risk of races to the bottom. First, it is not at all obvious that such races would occur unless Washington supplied corrective policies. In fact, theoretical models of the race-to-the-bottom dynamic predict a variety of possible outcomes under a number of plausible scenarios, while the empirical data are inconclusive as to actual outcomes.⁵⁰ Beyond this indeterminacy, the risk of such a race is more normatively ambiguous and complicated than many advocates for national regulation suggest. These advocates emphasize the game-theoretic Prisoner's Dilemma, yet they often overlook another economic phenomenon that can produce a compensating advantage: The same competitive dynamic that might cause states to race to the bottom can also constrain the states' perverse incentives to adopt sub-optimal spending and regulatory policies, incentives that both public choice theory and political experience suggest are powerful indeed.

Efforts to impose national uniformity, moreover, entail their own disadvantages. Uniformity mandated at the "wrong" level, or administered incompetently even at the "right" one, may well be worse than heterogeneous outcomes among the states. Washington's efforts to regulate inter-state competition suffer from a variety of recurrent flaws. Its policy instruments are crude, perhaps too crude for the necessary fine-tuning. Grants to states and localities, for example, tend to distort those jurisdictions' own taxing and spending policies.⁵¹ Careful administration may reduce these distortions (e.g., a maintenance of effort requirement) but this may simply create new distortions in the process (e.g., locking the state into an outdated and undesirable pattern of expenditure).

Moreover, the optimal balance between federal and state preferences, initiative, and accountability is elusive. Even where federal categorical grants

49. See, e.g., Jerry L. Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in THE REAGAN REGULATORY STRATEGY 111, 117-18 (George C. Eads & Michael Fit eds., 1984). See generally PETERSON, *supra* note 12; Bednar & Eskridge, *supra* note 24.

50. Professor Klevorick's literature review makes this plain. Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, in YALE LAW & POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 177, 179-81 (1996).

51. Under certain conditions, such grants might even be unconstitutional. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995).

to states might be justified as targeted mechanisms to internalize state-created externalities, they tend to be policy-intrusive and administratively cumbersome. At the same time, federal officials resist broader functional grants that surrender policy control and funding to state officials, who may have different political and policy priorities and whose expenditures may be more closely disciplined by their taxpayers-voters. Washington often responds more sluggishly than states to the changing social conditions, market forces, and local imperatives that should inform public policy. In areas as diverse as workfare in AFDC, managed care in Medicaid, charter schools in public education, and more efficient forms of public utility regulation, the states and localities are usually the first to devise new programmatic innovations, and those innovations are often progressive.⁵² Finally, Congress, no less than the states, possesses strong incentives to use national policymaking authority to "cheat" on the federalist bargain.⁵³ Devolution of national authority to the states can help to limit such cheating, just as it can help to control the states' incentives to over-spend and over-regulate.

I wish to be clear that in pointing to these deficiencies of national authority in a federal system, I do not mean to deny that such authority can sometimes be justified as a way to constrain socially destructive races to the bottom. My point, rather, is that, one cannot reach a sound overall judgment about how best to allocate policymaking and fiscal responsibilities between the two levels of government until one analyzes many important, empirically-based factors that militate in favor of devolution to the states.

V. THE COGNITIVE DEMANDS OF DEVOLUTION

Broadly speaking, we may distinguish between two ways in which a federal policymaking institution can decentralize national power. The most common way might be called "default decentralization." Here, the federal policymaker simply allows the power to make and implement decisions that might constitutionally be made at the national level to remain instead where it already is—with a lower level of government or with private actors. The other way might be called "affirmative decentralization," in which the federal policy-maker actively delegates—downward or outward—power that she is presently exercising.

Most of the debate about federalism concerns the appropriateness, scope, and terms of affirmative decentralization. In order to affirmatively decentralize

52. See, e.g., Douglas J. Besharov, *The Hope of a New Approach*, WASH. POST, Dec. 3, 1995, at C1 (describing states' recent welfare reforms). Although some state reforms are designed primarily to save money, it is hard to explain these changes simply on the basis of that rationale. The states often provide more benefits at greater cost than federal law requires.

53. See Bednar & Eskridge, *supra* note 24, at 1467-81.

power in a coherent fashion, that power must first be centralized, rationalized (i.e., organized for delegation with certain ends in view), and then delegated. Ordinarily, the first and third steps will not be particularly problematic; after all, the power in question is usually centralized to a considerable degree already, and the delegation, once arranged politically, can then be ordered into effect.⁵⁴ It is the intermediate step—rationalization of the power to be delegated—that is the most difficult. To rationalize a power before delegating it, the federal policymaker must gain a deep, nuanced, fully contextual understanding of the policy problem to which the power is to be addressed. Only then can the terms of the delegation be carefully and functionally tailored.

One dimension of this rationalization process is easily overlooked. I refer to its cognitive-sympathetic aspect, by which I mean the ability of the power-delegating institution to project itself—through an act of imaginative identification—into the institutional mind of the lower-level delegate who must ultimately exercise that power.

Consider, for example, the area of AFDC policy. In order to meet the cognitive-sympathetic needs of a rationalized delegation of policymaking authority, the federal decisionmaker—Congress, welfare bureaucracy, or court—must be able to comprehend the decisionmaking context of local officials who administer the program at the “retail” level. The former must understand the nature of the latter’s resource constraints, political culture, operating routines, and ways of thinking about their tasks—all of which are often radically different from their own. Federal policymakers must imagine the intricate microcosmic interactions between front-line local agency caseworkers and their clients, take into account the informal norms that those interactions generate, and shape the ensuing delegation accordingly.

This perspectival chasm is exceedingly difficult to bridge, even under the best of circumstances. The problem is not simply that federal delegators are remote from the local delegates in both time and space; it is also that the two groups inhabit quite different institutional, motivational, and hence valuational worlds.⁵⁵ If we wish to improve federalism’s performance, we must somehow

54. Subject, of course, to the usual implementation obstacles. These may be significant, although not so great as when the national government seeks to centralize power that was previously decentralized. See, e.g., MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* (1990) (discussing federalization of state programs for support of aged, blind, and disabled into SSD).

55. One thinks of Robert Cover’s famous discussion of different *nomoi*—worlds “of right and wrong, of lawful and unlawful, of valid and void.” Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983). For my purposes, however, the more useful typologies are Robert Merton’s distinction between cosmopolitans and parochials, James Q. Wilson’s contrast of the investigatory worlds of FBI and DEA agents, and Michael Lipsky’s contrast between “street-level bureaucrats” and their superiors at agency headquarters. See generally MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY* (1980); ROBERT MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* (3d ed. 1968); JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* (1978). On the liability implications of these differences in perspective, see PETER H. SCHUCK, *SUING GOVERNMENT: CIVIL REMEDIES FOR*

ameliorate this problem. Whether federal agencies are permitted to retain or enlarge their existing authority or are required to devolve it downward or outward, they must learn to infuse lower-level values and perspectives into their policy decisions or into their rationalization of the power to be delegated, as the case may be.⁵⁶ A number of fairly standard techniques can advance this cognitive-sympathetic project. Examples include more extensive federal consultations with local officials, greater regionalization of federal administration, incorporation of local norms into federal policy decisions, intergovernmental personnel exchanges and training that expose policymakers to conditions and constraints in the field (and vice-versa), liberal use of waiver authorities to encourage local policy variations and experiments, and systematic evaluation and dissemination of their results.

CONCLUSION

As American federalism enters its third century, it exhibits a remarkable durability and vitality. It flourishes not only because of the political inertia of established institutional structures and vested interests (although they certainly play their part), but because Americans remain deeply divided over public policy issues of all kinds.⁵⁷ We need political institutions that reflect these divisions; we also need institutions that suppress and soften them. It may seem ironic to urge that policy elites should respect the extraordinary diversity of American society in the name of national unity, but any contradiction is only superficial. A sound federalism must both mirror our differences and mute them, and the precise balance that it strikes between these two national imperatives must constantly change as our values and interests change. Today devolution is firmly in the saddle. For the foreseeable future, American federalism will surely accord to inter-state differences greater programmatic scope and political legitimacy than they have enjoyed since the New Deal. Just as surely, however, any new equilibrium will be fiercely contested and inevitably transitory. We may safely schedule another symposium on federalism five years hence.

OFFICIAL WRONGS (1983), especially chs. 6 and 7.

56. There is a corresponding need for local officials to learn to view themselves as part of the national policy system, which must sometimes transcend even the most deeply-rooted parochial differences. A more radical, institutional approach to altering the balance of national and local interests and values would restructure representation in the U.S. Senate to include multi-state, regional, or even national constituencies. See Peter H. Schuck, *Industrial Policy's Obstacles*, N.Y. TIMES, Sept. 7, 1983, at A23.

57. The durability of these divisions over time, as revealed in public opinion surveys, is remarkable. See generally BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, *THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICA'S POLICY PREFERENCES* (1992).