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Symposium Introduction: A Conversation On Federalism and the States: The Balancing Act of Devolution

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INTRODUCTION

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“Federalism rules,” as the eight-year old daughter of one of the co-authors might put it. But our dual system of governance, in which states and the federal government share responsibilities, also poses significant challenges. As Justice O’Connor noted in a 1992 Supreme Court decision, *New York v. United States*,¹ “discerning the proper division of authority between the Federal Government and the States” is “perhaps our oldest question of constitutional law.”²

Within the context of this constitutional debate, the pendulum of power has shifted considerably over the years. In the environmental arena, for example, during the 1970s Congress enacted an alphabet soup of statutes intended to federalize environmental law.³ More recently, the pendulum has swung decisively back toward the states. In 1999, for instance, then-President Clinton directed federal agencies to “grant the States the maximum administrative discretion possible” in implementing federal programs.⁴

This recent trend will assuredly continue under the current Administration. Ten of the twenty-nine people advising President Bush on the EPA, including EPA-head Christie Whitman, are

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¹ 505 U.S. 144 (1992).

² *Id.* at 149.

³ See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW SCIENCE, AND POLICY (3d ed. 2000).

⁴ Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999). See generally David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1 (2000).

current or former state officials. Likewise, many other federal appointments reflect the Administration's solicitude for the states. President Bush's choice to head the U.S. Department of Health and Human Services, which administers welfare programs, is former Wisconsin Governor Tommy Thompson, a strong proponent of state autonomy. Attorney General John Ashcroft, charged with enforcement of the nation's federal civil rights laws, is also a former governor. Further, the Administration's state-sensitive approach is reinforced by recent Supreme Court decisions such as *Kimel v. Florida Board of Regents*,⁵ and *Alabama v. Garrett*,⁶ both of which uphold state immunity from federal suits by private individuals and underscore the role of states as independent sovereigns.

The current trend toward devolution of power from the federal government to the states cuts a wide swath across areas of governmental authority. Scholars, however, typically focused on individual areas of expertise, have sometimes failed to appreciate the breadth of this trend. This conversation, involving individuals from three distinct areas of law and policy, is an attempt to address the issues raised by devolution—and the concomitant concepts of federalism—in a more comprehensive way.

Four questions frame the conversation. First, we want to explore the national interests at stake. As a threshold matter, even when states exercise power, we need to understand the particular national interests affected. Devolution of responsibility to the states does not mean that national interests in an issue have evaporated. There are national interests at issue in efforts to protect the environment, eliminate poverty, and ensure civil rights, and states have a continuing responsibility to take those national interests into account in developing regulatory approaches.

Second, we want to examine the extent to which national interests are being effectively protected through the federal-state approach to governance in the areas of environmental policy, welfare policy, and civil rights law. Are there effective mechanisms to ensure an ongoing dialogue between federal and state governments? Are measures in place and in use that are adequate to gauge the performance of states in achieving these objectives?

Third, we need to ask what works—which policies and strategies have been effective in achieving the proper balance and in solving thorny problems on the national agenda. One of the beauties of our

⁵ 528 U.S. 62 (2000).

⁶ No. 99-1240 (U.S. Feb. 21, 2001).

federal system is the opportunity for states to serve as “laboratories of democracy.”⁷ To realize the full potential of this structure, successes must be publicized so that they can be emulated, and perhaps even improved upon.

Fourth, it is critical to identify ways in which federal-state divisions of responsibility are *not* working to achieve national objectives. For example, consistent evidence of states’ failure to adequately address the issue of violence against women prompted Congress to enact federal legislation, the Violence Against Women Act,⁸ to assist the states. As part of this inquiry, it obviously is important to determine the obstacles to success and how best to overcome them. And, it is necessary with failures, as with successes, to spread the word so that others can learn from mistakes that are made.

Our final point involves the context for this conversation. A broad-based inquiry into federalism and its application in different fields of practice is of potential value and importance at any time. We believe, however, that this is a particularly important time to consider these questions because the pace of devolution has accelerated considerably in recent years and it is likely to quicken even more in the near term.⁹ As a result, it seems especially worthwhile to facilitate such a dialogue at this juncture. If “national interests” exist, it will be increasingly important to understand the implications of achieving them in the face of increasing state authority. Similarly, it will be important to understand the nature of “best practices” that have promoted successful achievement of national interests in a devolved world. And it will be important to identify features of devolution that are likely to undermine achievement of national interests, so that the rush to devolution does not lead to abandonment of such interests.

As devolution continues across government sectors—from civil rights to environmental protection to welfare reform—it remains essential to ascertain the appropriate balance between federal and

⁷ *New York State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See generally David L. Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347 (1994).

⁸ Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902-55 (1994).

⁹ See John J. Dilulio, Jr. & Richard P. Nathan, *Introduction*, in *MEDICAID AND DEVOLUTION, A VIEW FROM THE STATES 1* (Frank J. Thompson & John J. Dilulio, Jr., eds., 1998) (referring to the 1990s as a “decade of devolution”).

state authority, i.e., the balance that best protects the interests of individuals in their capacities as both state and national citizens. The “conversation about federalism” that follows is an effort to advance the debate about how best to strike this balance.