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## "What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism

Richard Briffault

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# “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism\*

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## I. INTRODUCTION

Contemporary legal discourse concerning federalism has shifted from the formal to the normative, that is, from a focus on the fifty states as unique entities in the American constitutional firm-

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\* The title of this Essay is inspired by a question raised repeatedly during the roundtable discussion of “Federalism’s Future,” during the second day of the Vanderbilt Law Review Symposium, on February 5, 1994.

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ment to a concern with the *values* of federalism. This normative turn has had some salutary effects. It has sharpened the debate over federalism, reminded us of the impact of the federal design on the substance of American governance, and underscored the interrelationship of government structure and individual rights. But the normative approach has also, paradoxically, moved the focus of federalism away from the states. Many of the arguments offered on behalf of federalism are not distinctively associated with the states, but, rather, could be advanced by the empowerment of other subnational units. Indeed, many of federalism's values are the same as those urged by the advocates of local governments when they make their case for the autonomy of local governments from the states. As a result, much of the "intellectual case for federalism"<sup>1</sup> often converges with the case for decentralization, or localism.

The current normative emphasis thinking about federalism may have been inevitable in light of the erosion of the conceptual underpinnings that supported the traditional view of the states as special, such as the notion of the states as "sovereign" and the belief that the United States was founded by a compact of the states. Moreover, the normative approach to federalism is surely a more attractive way of addressing federal-state conflicts than an antiquarian concern with the allocation of domestic responsibilities between federal and state governments in the eighteenth century or vaporous reflections concerning the essential features of "States *qua* States."<sup>2</sup>

But a discourse that focuses primarily on the "ism" in federalism rather than on the formal features of the federal structure generates new difficulties. First, many of the values of federalism-as-decentralization are opposed by compelling countervalues—widely accepted political norms that call for action at the national level rather than decentralization. Although federalism suggests that courts ought to enforce federalism-based restrictions on national actions, the existence of equally important countervalues that could be advanced by national action means that individual cases may entail intensely political judgments concerning these conflicting norms. A normative focus will thus provide an uncertain guide for the resolution of federalism disputes.

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1. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491 (1987).

2. See *National League of Cities v. Usery*, 426 U.S. 833, 847 (1976).

Second, normative federalism rests on an uncertain intellectual foundation. Even when values conventionally associated with federalism are unopposed by counternorms, it will often be debatable whether federalism actually promotes federalism's values. This compounds the difficulty inherent in an assertion that federalism's values justify the imposition of limitations on otherwise valid national actions.

Third, as already indicated, the values said to be advanced by federalism are not distinctively associated with the states. Many of these values—increasing opportunities for political participation, keeping government close to the people, intergovernmental competition, the representation of diverse interests—may be served better by local governments than by states. Although historically federalism has been exclusively concerned with the states, leaving local governments without constitutional status,<sup>3</sup> contemporary federalism discourse often sweeps local autonomy in its ambit, vindicating the states in terms more applicable to local governments, or, at times, justifying federalism as a restriction on national power because of the resulting benefits for local autonomy. This suggests that state and local governments are allies in a common cause against the national government. But states and localities are often bitterly at odds, and national government actions have at times advanced the position of local governments at the expense of the states.<sup>4</sup> Normative federalism could thus weaken the states rather than strengthen them if it provides a justification for federal interventions on behalf of local governments in state-local conflicts. More generally, by lumping states and localities together, the normative approach obscures the distinctive legal features of the states and the significance of the federal structure. In this way, federalism tends to become merely an emphatic way of speaking of decentralization—a rhetorical trope with special resonance in American history and law—without any particular application to the states.

This Essay attempts to refocus attention on the states and on the formal legal features of federalism. These are the features that distinguish the states from local governments and that give the states their unique place in the American constitutional order. The states

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3. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

4. See, for example, *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *City of Boston v. Anderson*, 439 U.S. 951 (1978). See also Roscoe C. Martin, *The Cities and the Federal System* 109-35 (Atherton, 1965) (discussing federal grants-in-aid directly to cities).

have fixed boundaries; their borders cannot be changed without their consent. They have territorial integrity; no state or other subnational government overlaps the boundary of any other state. The states serve as constituent elements in the structure of our national government. The states have inherent, autonomous law-making capacity: they can enact laws, regulate, and raise and spend money without having to secure authority from any other level of government.

These formal features give the states considerable administrative, political, economic, and cultural salience in our system, and reinforce the position of states as relatively distinctive "civil societies" within the United States.<sup>5</sup> As a result, the states are a focus of the interests and concerns of many Americans. Citizens often think in terms of states and make state affiliation a critical aspect of their political, economic, and cultural identity. States are one of a handful of focal points of political loyalties and concerns, and the distinctive role of the states shapes the political culture of American society. The formal legal features of the states thus have functional consequences. They enable the states to promote the values associated with federalism better than local governments even though local governments are generally seen as better embodiments of the values of federalism-as-decentralization. Local governments typically lack the political, legal, and fiscal capacities and cultural associations to be effective subnational focal points and counterweights to national power.

Finally, a focus on the formal features of the states has implications for whether and how courts ought to treat federalism as a constraint on national government actions. Courts should be less concerned with vindicating the uncertain values—the "ism"—of federalism than with the federal structure itself. The role of the courts is to protect the formal features of the federal structure—the states' fixed boundaries, territorial integrity, inherent law-making power, and status as basic units for the organization of the national government—rather than to engage in the open-ended and value-laden assessment of the conflicting political values said to be advanced or eroded by state or national action. The Constitution provides for and protects the formal aspects of the states' existence, not the values conventionally ascribed to federalism.

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5. See, for example, Daniel J. Elazar, *American Federalism: A View From the States* 14-25 (Crowell, 3d ed. 1984).

To be sure, even without the indeterminacy of federalism's values, a jurisprudence of federalism that is focused on the federal structure may not always be easy to apply. The impacts of certain national actions, such as conditional grants, preemption, and mandates, on the inherent law-making autonomy of the states are, rightfully, questions of considerable controversy. But the focus of concern ought to be on the likely consequences of national actions for the continued viability of the federal structure, rather than on the conflicting normative concerns associated with national as opposed to state decision making.

## II. THE PARTIAL CONVERGENCE OF FEDERALISM AND LOCALISM

### A. *The Traditional Contrast of Federal-State and State-Local Relations*

"Federal-state" and "state-local" have traditionally been considered to represent distinct, if not virtually antithetical, models of intergovernmental relations.<sup>6</sup> Even as contemporary courts and commentators have struggled over the meaning of federalism and the definition of legal standards for the resolution of federal-state conflicts in light of the expanded role of the post-New Deal federal government, the one constant reference point for exponents of federalism has been that the federal-state relationship is and ought to be quite different from the state-local relationship. Indeed, it often seems that the principal purpose of the use of the term "federalism" is to emphasize that the states are special in the "federal-state" setting in a way that local governments are not in the "state-local" setting. Judges, scholars, and public officials have seen in federalism a constitutional limitation on the federal government and a doctrine for the protection of the prerogatives of the states from federal incursion.<sup>7</sup> No comparable federal doctrine protects local governments from either the federal

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6. See *id.* at 202 (explaining "[t]here is a clear difference in constitutional law between the federal-state and the state-local relationship. The former is federal and the latter is defined as unitary").

7. See Morton Grodzins, *Centralization and Decentralization in the American Federal System*, in Robert A. Goldwin, ed., *A Nation of States: Essays on the American Federal System* 1, 4 (Rand McNally, 2d ed. 1963) ("*A Nation of States*") (noting "[t]hose concerned about the federal system are uniformly found expressing fear of the federal octopus").

government or the states. In this view, the "reduction" of federal-state relations to state-local relations would be the end of federalism.

The difference between federal-state and state-local intergovernmental models is the contrast between the horizontal and the vertical. In theory, the federal and state governments are on the same plane. The federal government is not superior to the states; rather, federal and state governments are "coordinate."<sup>8</sup> Each is supreme and independent within its sphere, with the Constitution marking the division of authority. The state-local relationship is exactly the opposite. State governments are, constitutionally, unitary systems. The state is hierarchically superior to its local governments, which "have been traditionally regarded as subordinate government instrumentalities created by the state to assist in the carrying out of state governmental functions."<sup>9</sup>

This horizontal-vertical contrast is often intertwined with concepts of compact and creation. The notion that the United States was created by a compact among the first thirteen states "has roots deep in the political subconsciousness of most Americans."<sup>10</sup> President Reagan was, no doubt, speaking for much of the nation when he stated in his first Inaugural Address that the "Federal Government did not create the States; the States created the Federal Government."<sup>11</sup> In this view, the states were independent sovereigns prior to the formation of the Union.<sup>12</sup> By entering into the federal compact, the states agreed to divest themselves of a portion of their powers and delegate them to their creation—the new federal government.<sup>13</sup> The states retained the authority not transferred by this limited delegation, and have continued to enjoy the "separate and

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8. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

9. *Reynolds v. Sims*, 377 U.S. 533, 574-75 (1964). Accord *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907) (stating, "[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them").

10. Walter Hartwell Bennett, *American Theories of Federalism* 211 (U. of Ala., 1964).

11. Ronald Reagan, Inaugural Address, *Public Papers of the Presidents of the United States, Ronald Reagan 1981* at 2 (Jan. 20, 1981). President Eisenhower expressed the same view of the federal-state relationship when he stated "the national government was itself not the parent, but the creature, of the States acting together." Dwight D. Eisenhower, Address to the 1957 Governors' Conference, *Public Papers of the Presidents of the United States, Dwight D. Eisenhower 1957* at 489 (June 24, 1957).

12. See James Jackson Kilpatrick, *The Case for "States' Rights,"* in *A Nation of States* 88, 92 (cited in note 7) (stating "[o]ur Union was formed by the States, acting as States").

13. See Richard A. Epstein, *The Federalist Papers: From Practical Politics to High Principle*, 16 Harv. J. L. & Pub. Pol. 13, 20 (1993) (noting that "the dominant sovereigns were [sic] the states, which . . . ceded some portion of their power to a distant central government").

independent existence"<sup>14</sup> which is a residue of their former sovereignty.<sup>15</sup> As the Supreme Court recently insisted, federalism is a "constitutional scheme of dual sovereigns."<sup>16</sup>

The theory of the state-local relationship is completely different. The states are not the product of a compact among the local governments situated within the states. Rather, a local government is considered to be a creature of a state. It exists only by an act of the state, and the state, as creator, has plenary power to alter, expand, consolidate, contract, or abolish any or all local units. The local government is a delegate of the state, possessing only those powers the state has chosen to confer upon it. Absent any specific limitation in the state's constitution, the state can amend, abridge, or retract any power it has delegated, much as it can impose new duties or take away old privileges. The local government is, in short, an agent of the state, exercising limited powers on behalf of the state at the local level.<sup>17</sup>

### *B. The Rise of Localist Federalism*

In recent years, some of the conceptual underpinnings that supported the traditional view of the states as special have been eroded. Among scholars, a historical account of the Constitution as a compact of the *people* of the United States has supplanted to a significant degree the common understanding that the United States was formed out of a compact of the states.<sup>18</sup> In this "national idea" of federalism,<sup>19</sup> although the people may have acted through their states in framing and ratifying the Constitution, the prime movers were the people, not the states.

From this perspective, the federal structure of the United States is a result not of the federating of previously sovereign states into a union, but rather of a decision by the founding generation,

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14. *National League of Cities*, 426 U.S. at 845.

15. See James L. Buckley, *Liberty and Constitutional Architecture*, 16 Harv. J. L. & Pub. Pol. 55, 56 (1993) (indicating that the Framers "reserved to the sovereign States all authority not delegated to the national government").

16. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

17. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 7-8 (1990) ("Localism Part I").

18. See Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 Am. Pol. Sci. Rev. 9, 12 (1977).

19. See generally Samuel H. Beer, *To Make A Nation: The Rediscovery of American Federalism* 1-25 (Harvard U., 1993).



pursuing national ends, that the best way to organize the new nation was with a federal structure that preserved the states as governments and assumed a considerable measure of state autonomy. In this view the states are not so much the creators of the union as its creatures.

Certainly, notions of creation, compact, and sovereign status prior to 1787 can have little relevance for the thirty-seven states that joined the Union after the ratification of the Constitution. The federal government plainly created those states, not the other way around. Indeed, the "highly arbitrary and abstract boundaries" of many of these later states reflect not the contours of preexisting communities, let alone the external borders of once independent sovereigns, "but cartographers' and Congressmen's convenience."<sup>20</sup>

With respect to the original thirteen states, whatever the historical record indicates about their legal status at the time of the ratification of the Constitution and their role in the formation of the Union,<sup>21</sup> surely these states are not sovereigns today. Although the Supreme Court continues to refer to the "sovereign" states and the "dual" or "joint" sovereignty of state and nation, most scholars, even scholars committed to the value of federalism and to the judicial protection of the states from federal power, reject the idea that the states can be described as sovereign. As Andrzej Rapaczynski has noted, "sovereignty" in the strong sense means that the sovereign must have final political authority over a domain and the subjects within it. "Sovereignty" is sometimes used in a weaker sense when

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20. Russell Kirk, *The Prospects for Territorial Democracy in America*, in *A Nation of States* 42, 43 (cited in note 7). Accord Beer, 72 *Am. Pol. Sci. Rev.* at 16 (cited in note 18).

21. Some recent scholarship has suggested that although the colonies were legally separate and independent of each other, the colonies did not become entirely sovereign states when independence from Great Britain was declared, but rather they immediately became a part of a continental American political community. According to Peter Onuf, throughout the revolutionary period, "the identification of the American states with the common cause [against the British] and membership in [the Continental] Congress directly worked against notions of truly independent statehood." Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* 22 (U. of Pa., 1983). The states tended to act not as independent sovereigns, but as part of a community of states, with "mutual recognition" of membership in that community serving as "the ultimate legitimating source of statehood claims." *Id.* at 23. See also Beer, *To Make a Nation* at 200-06 (cited in note 19) (contending that the colonies declared their independence from Great Britain and gave themselves state constitutions only when authorized to do so by the Continental Congress). For a vigorous restatement of the traditional view of the "legally independent status of the states prior to the adoption of the Constitution," see Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 469 n.37 (1994) (noting that the Declaration of Independence referred to "free and independent States," the Articles of Confederation expressly recognized the "sovereignty" of the states, and the Treaty of Peace with Great Britain recognized the legal independence of individual states).

referring to the American states to mean that the states have an area of exclusive authority.<sup>22</sup> The states are plainly not sovereign in the stronger sense: "[T]he federal Constitution imposes a variety of limits on the states that are clearly incompatible with the absolute authority entailed by state sovereignty in this strong sense."<sup>23</sup> Moreover, the Constitution "conspicuously drops"<sup>24</sup> the provision in the Articles of Confederation that "each state retains its sovereignty, freedom and independence."<sup>25</sup> Further, given the capacity of the federal government to act under the Commerce Clause, the spending power, or the Fourteenth Amendment to preempt state authority,<sup>26</sup> there may not be any substantive area of policy-making authority reserved to the states exclusively. It is doubtful, therefore, that state sovereignty exists today even in the weaker sense. As the Supreme Court noted in *New York v. United States*, "Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States."<sup>27</sup>

With the decline of the historical and sovereignty arguments for state autonomy, it is, perhaps, not surprising that commentators and courts have turned to political values in their analyses of federalism. But given the sharpness of the traditional federal-state/state-local contrast, it is striking that much of the contemporary analysis of federalism blurs this difference, deemphasizes the formal legal distinctiveness of the federal-state relationship, and frames the analysis of the allocation of power between the federal and state governments in terms equally applicable to conflicts between states and local governments. The current federalism debate devotes little attention to the states' formal place in the federal constitutional order. Rather, scholars and, to a lesser extent, Supreme Court justices, have devoted their energies to making what Michael McConnell has called the "intellectual case for federalism"<sup>28</sup>—a case which consists largely of celebrating the virtues of political decentralization. Thus, federalism is discussed in terms of normative concerns, but federalism's values

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22. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 Sup. Ct. Rev. 341, 351.

23. *Id.* at 349.

24. McConnell, 54 U. Chi. L. Rev. at 1489 (cited in note 1).

25. Articles of Confederation, Art. II.

26. Rapaczynski, 1985 Sup. Ct. Rev. at 355-57 (cited in note 22).

27. 112 S. Ct. 2408, 2421 (1992).

28. McConnell, 54 U. Chi. L. Rev. at 1491 (cited in note 1).

are not distinctively associated with the states. As a result, the case for federalism tends to resemble the case for localism.

As expounded by Justice O'Connor in *Gregory v. Ashcroft*, the principal themes in the case for federalism-as-decentralization are that "the federalist system is a check on abuses of government power"; it "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society"; it "increases opportunity for citizen involvement in democratic processes"; it "allows for more innovation and experimentation in government"; and it "makes government more responsive by putting the States in competition for a mobile citizenry."<sup>29</sup> These values of federalism have also loomed large in the work of such scholars as Lewis B. Kaden, Michael McConnell, Deborah Jones Merritt, and Andrzej Rapaczynski.<sup>30</sup> These values are largely the same as those conventionally ascribed to local governments and to local autonomy in the state-local setting. Indeed, it would seem that the characteristics of the states and of federalism that promote these values are even more pronounced at the local level.<sup>31</sup>

What enables the states in the federal-state system to check tyranny, promote political participation, reflect diversity, advance innovation, and increase government responsiveness to a mobile citizenry? Underlying the claim that federalism will promote these political benefits better than a unitary state are assumptions concerning the small size of the states, relative to the nation, and the fact that the existence of the states creates multiple centers of political power within the federal system.<sup>32</sup>

Small size is at the heart of the argument that empowering the states promotes political participation.<sup>33</sup> The communitarian push for

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29. 501 U.S. at 458.

30. See, for example, Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 853-57 (1979); McConnell, 54 U. Chi. L. Rev. at 1491-1511 (cited in note 1); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988); Rapaczynski, 1985 Sup. Ct. Rev. at 380-414 (cited in note 22). See also Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 Sup. Ct. Rev. 81; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633 (1993). In her *Gregory* opinion, Justice O'Connor cites both McConnell and Merritt in setting forth her litany of federalism values. 501 U.S. at 458.

31. See Vincent Ostrom, *The Meaning of American Federalism: Constituting a Self-Governing Society* 7, 85 (ICS, 1991).

32. See Kirk, *Territorial Democracy*, in *A Nation of States* at 45 (cited in note 7) (noting the importance of multiplicity, the autonomy of "narrower communities," and "smaller communities").

33. See Merritt, 88 Colum. L. Rev. at 7 (cited in note 30).

decentralization generally asserts that participation will be greater in smaller units. All other things being equal, it will be easier for people to exchange information and ideas, understand more about the issues at stake, and deliberate with each other in smaller units than in larger ones. It is often assumed that people in a smaller unit are likely to have common interests and to share values and norms and that, as a result, they may be more willing than people in a larger unit to put aside individual self-interest and engage in public-spirited decision making. As Michael McConnell explains, "the natural sentiment of benevolence, which lies at the heart of public spiritedness, is weaker as the distance grows between the individual and the objects of benevolence."<sup>34</sup>

Small size of the political unit, the sense of community, and political participation are intertwined and mutually reinforcing. Smaller units are said to have a greater sense of community, which facilitates participatory decision making. Participation strengthens the sense of community which, in turn, promotes greater participation. Similarly, the individual is more likely to be heard, to influence, and to make a difference in a smaller unit than in a larger one. The resulting enhanced sense of "citizen effectiveness"<sup>35</sup> presumably will lead to more participation, which, by reinforcing the sense of effectiveness, will maintain and increase participation.

The multiplicity of governments also contributes to the argument that federalism promotes participation. Federalism assures that there are two governments with general authority operating in every part of the country. With two governments, there are more offices to run for and more candidates to campaign for, contribute to, and vote for than would be the case if there were only one government, thus multiplying the opportunities for citizen participation.

The other virtues of federalism are rooted primarily in the multiplicity of governments characteristic of the federal-state system. Federalism as multiple governments means that there are multiple power centers in the polity. Considered "vertically,"<sup>36</sup> the federal and state governments "will act as mutual restraints," checking each

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34. McConnell, 54 U. Chi. L. Rev. at 1510 (cited in note 1).

35. Robert A. Dahl and Edward R. Tufte, *Size and Democracy* 41 (Stanford U., 1973).

36. A true federalist, of course, would deny that the federal-state relationship is a vertical one at all. See Daniel J. Elazar, *Exploring Federalism* 34-38 (U. of Ala., 1987) (stressing that true federalism is *noncentralization*, not *decentralization*, since decentralization implies a federal-state hierarchy whereas in federalism there is no hierarchy).

other's abuses.<sup>37</sup> Considered "horizontally," or in terms of the relationships among state governments, the multiplicity of states and the constitutionally guaranteed right of citizens to relocate from one state to another, to trade goods and services, and to shift capital across state borders results in a vigorous competition among the states for mobile business investment and taxpayers. Such interstate competition constrains state taxation, spending, and administrative expenses. Intergovernmental competition may hold down the cost and increase the accountability to the public of those government services provided at the state level. The multiplicity of states gives citizens an internal "exit" option in addition to enhancing the opportunities for voice. Both increase the public's ability to constrain government.<sup>38</sup>

The multiplicity of governments can increase sensitivity "to the diverse needs of a heterogenous society," as Justice O'Connor suggested,<sup>39</sup> if some interests that are a minority at the national level constitute a majority within the jurisdiction of a state. Federalism facilitates the representation of geographically concentrated minorities by permitting those minorities to dominate in some state governments and by providing them with a territorial base to obtain seats in the national legislature. By the same token, by permitting some important political issues to be resolved at the state, rather than the national, level, federalism enables different resolutions of the same issues in different states around the country.<sup>40</sup> To the extent that the relevant differences of opinion concerning an issue are territorially concentrated, state-level decision making can reduce the number of people who are on the losing side of the issue and, thus, hold down the costs to individuals of government decisions that go against them.<sup>41</sup> Moreover, losers at the state level may be able to obtain some relief by migrating to other states where their position has prevailed or where

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37. *Gregory*, 501 U.S. at 459.

38. See John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in Daphne A. Kenyon and John Kincaid, eds., *Competition Among States and Local Governments: Efficiency and Equity in American Federalism* 87-114 (Urban Institute, 1991).

39. *Gregory*, 501 U.S. at 458.

40. "If nothing but a national policy were made, then the minority that makes a different policy in a province or state would not be able to make that policy. Federalism permits, indeed guarantees, that there will be some subjects on which policy is made locally. Hence it guarantees also the possibility that such policy may differ from national policy. And if it does, then a minority benefits." William H. Riker, *Federalism*, in Fred I. Greenstein and Nelson W. Polsby, eds., 5 *The Handbook of Political Science* 93, 153-54 (Addison Wesley, 1975).

41. Robert Bish refers to these as "political externality costs." Robert L. Bish, *The Public Economy of Metropolitan Areas* 35-37 (Markham, 1971).

they might be members of the state's governing majority. By contrast, the exit remedy at the federal level would mean emigration from the nation.

Finally, Michael McConnell would also root the claim that federalism "allows for more innovation and experimentation" in the small size and large numbers of states. As he explains, "[e]lementary statistical theory holds that a greater number of independent observations will produce more instances of deviation from the mean. If innovation is desirable, it follows that decentralization is desirable."<sup>42</sup>

These virtues of federalism—participation, diversity, intergovernmental competition, political responsiveness, and innovation—are, of course, among the very values regularly associated with local autonomy.<sup>43</sup> The case for federalism, thus, tends to approach the case for localism. Moreover, to the extent that the values federalism is said to advance are the product of the small size and multiplicity of governments, these same features are the hallmark of state-local relations and local governments as well. Indeed, local governments are, as a rule, dramatically smaller than the states in both population and area, while the number of local governments vastly outstrips the number of states. If grass-roots participation, intergovernmental competition, political responsiveness, subnational diversity, and innovation are promoted by the relatively small number of relatively large states, then these values ought to be far more effectively advanced by the empowerment of the far larger number of much smaller local governments.

Many of the scholarly advocates of federalism appear to acknowledge that the normative values to be advanced through the empowerment of the states would also be served, and perhaps better served, by local governments.<sup>44</sup> As they recognize, to the extent that

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42. McConnell, 54 U. Chi. L. Rev. at 1498 (cited in note 1).

43. See, for example, Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1067-73 (1980) (noting the importance of local autonomy in promoting participation); Carol M. Rese, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837 (1983) (combining exit and voice arguments on behalf of local land-use regulation); Michael E. Libonati, *Reconstructing Local Government*, 19 Urb. Law. 645, 651 (1987) (discussing the impact of "communalist thinking" on local autonomy); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473 (1991). For a general critique of the normative case for local autonomy, what I have called "localism," see Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 392-435 (1990) ("*Localism Part II*").

44. See Jean Yarbrough, *Madison and Modern Federalism*, in Robert A. Goldwin and William A. Schambra, eds., *How Federal is the Constitution?* 84, 104 (American Enterprise Institute, 1987) (explaining that "[a]lthough modern federalism does bring the government

federalism is about the promotion of the political virtues associated with decentralization, federalism's arguments on behalf of the states apply *a fortiori* to local governments.

Some commentators do not distinguish the states from local governments in their analysis of federalism.<sup>45</sup> Instead, they bracket local governments with the states and would have federalism protect local governments as well as states from federal interference. Thus, Deborah Jones Merritt notes that a "major advantage of federalism lies in the ability of state and local governments to draw citizens into the political process"<sup>46</sup> and that "state and local governments check federal authority by regulating areas that the federal government chooses to ignore."<sup>47</sup> She would apply principles of federalism to review congressional actions that "meddle with local governmental processes"<sup>48</sup> as well as with the processes of the states. Similarly, Michael McConnell treats the intellectual case for federalism as an "argument for substantial state and local autonomy," for the "devolution of governing authority to state, city, and community levels."<sup>49</sup>

A second approach of normative federalists has been to recognize the distinct status of local governments, but to urge that the empowerment of the states will indirectly benefit both local governments and the federalism values that they—more than the states—can advance. As Andrzej Rapaczynski notes, "if there is some genuine room for instrumental participation in American political life, it can realistically exist only on the local level."<sup>50</sup> Federalism can advance participation at the local level, he suggests, because "practically all the local political bodies that may be suitable for the development of participatory politics function under the umbrellas of state government."<sup>51</sup>

Yet federalism and localism are not inevitable allies, and states and local governments frequently come into conflict. A federal-

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'closer' to the people . . . it does not provide the citizens with an active and continuing opportunity to participate in public affairs. Direct democracy is no more possible at the state level than it is at the national level. The one place where direct democracy is possible in the extended republic is in the localities").

45. Kaden, 79 Colum. L. Rev. at 852 n.35 (cited in note 30).

46. Merritt, 88 Colum. L. Rev. at 7 (cited in note 30).

47. *Id.* at 6.

48. *Id.* at 49.

49. McConnell, 54 U. Chi. L. Rev. at 1511 (cited in note 1).

50. Rapaczynski, 1985 S. Ct. Rev. at 402 (cited in note 22).

51. *Id.*

ism that strengthens the autonomy of the states with respect to the national government will not necessarily increase the autonomy of local governments with respect to their states, and a federalism that promotes local autonomy could weaken the position of the states. In a recent article endorsing the Supreme Court's *New York v. United States* decision, H. Jefferson Powell captured the tension inherent in turning federalism into a device for the protection of values associated with local government. Powell saw in *New York* the praiseworthy beginning of the development of federalism doctrines that provide "legal techniques by which a space for local agendas, local deliberation, and local decision making can be created and preserved," but he acknowledged that the use of the "traditional terminology" of federalism is "not without its problems."<sup>52</sup> As he dryly observed: "[M]any of the 'states' that are the historical and primary referents of federalism talk are part of the problem of remote and nonparticipatory government."<sup>53</sup> As he noted, "[a] great deal of creative thought and action remains necessary if the language of federalism is to be used effectively to pursue democratic ends."<sup>54</sup> Put another way, the use of federalism to pursue "democratic" ends, defined as local autonomy, can come into conflict with the use of federalism to defend the states.

In other words, if federalism is associated primarily with a set of values, such as the pursuit of democratic ends, that are linked to decentralization, then federalism is not particularly about the states at all. Indeed, the ultimate irony could be that normative federalism will provide a weapon for national attacks on state autonomy in the name of local democracy, rather than constitute a shield for the states' defense against federal intrusions.

### III. DILEMMAS OF LOCALIST FEDERALISM

#### A. *The Limits of Federalism's Values*

The normative turn in contemporary federalism discourse may have been prompted by the erosion of the traditional arguments, grounded in creation and sovereignty, for treating the states as special. With the loss of their historic pedigree as progenitors of the

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52. Powell, 79 Va. L. Rev. at 688 (cited in note 30).

53. Id. at 688 n.262.

54. Id.



Union, and lacking the claim to sovereign status, perhaps the best the states can hope for is to attach themselves to the political value of decentralization. This might not be so bad for the states. Instead of being "reduced" to the status of administrative subdivisions, the states could be "raised" to the level of grass-roots democracies. Moreover, a normative discourse based on the functional benefits of decentralization might benefit the states by enabling decision makers and analysts to get beyond the vague assertions made in the past about the essential features of the states and instead provide reasons for limiting national power and vesting certain responsibilities in the states.<sup>55</sup>

Indeed, as the invocation of localism suggests, subordinate units can do quite well in the political scheme of things without a claim to being founders of the hierarchically superior unit, without a claim to sovereignty, and without a claim to constitutional protection against upper-level governments. Many local governments enjoy substantial autonomy with respect to many matters.<sup>56</sup> They wield extensive regulatory power over issues of vital concern to local communities, provide many of the principal services associated with domestic government, and enjoy considerable policy-making discretion with respect to the services and regulatory matters within their jurisdiction. Although local power is, at its source, a delegation from a state, that delegation is often quite broad and is rarely revoked. In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision.<sup>57</sup> Indeed, despite their formal status as political subdivisions of the state, most general purpose local governments—counties and municipalities—are primarily accountable to their local electorates. In practice, they function as representatives of local constituencies and not as field offices for state bureaucracies. Moreover, local governments' service-provision and policy-making discretion gives local people some real decisions to make when they participate in local politics. Local autonomy assures a range of diverse local responses to public issues that take into account differences in local circumstances and preferences, much as the existence of tens of thousands of local governments gives "mobile citizens" choices concerning the mix of

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55. See Susan Rose-Ackerman, *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* 159-73 (Free, 1992).

56. See generally Briffault, *Localism Part I* (cited in note 17).

57. See, for example, *id.* at 39-58 (reviewing local control over land use regulation).

taxes, services, and regulation when they select the locality in which they will live.

Despite the absence of formal federal constitutional protection or a claim to the more exalted status that federalism is said to provide the states, localities enjoy considerable power. The political rallying cry of "home rule" or "local control" has frequently been potent enough to block challenges to local autonomy based on claims of equality, individual rights, or the external effects of local action.<sup>58</sup> Thus, federalism as localism need not mean the end of state autonomy. Indeed, it is possible that in wrapping the states in the mantle of grass-roots, participatory democracy—by treating the decision making of the thirty million people of California or the seventeen million people of New York as a kind of extended town meeting—federalism as localism will ultimately strengthen the political position of the states.

Nonetheless, localist federalism could prove to be an uncertain protection for the states due its very normativity. Many of the values said to be associated with federalism regularly come into conflict with other values that would be advanced by greater national power and undermined by decentralization. It will often be unclear which value ought to be advanced when the norms and counternorms collide and the costs and benefits of each are weighed and compared. Moreover, even assuming that there is a consensus that federalism's values are the values that ought to be promoted, it will often be debatable whether federalism actually promotes federalism's values. The actual effect of federalism in advancing participation and innovation or providing protection against government tyranny is arguable. The intellectual case for federalism may provide no greater protection for the states than history or the idea of sovereignty.

### 1. Values and Countervalues

The clash of values and countervalues is sharpest when federalism is conceptualized in terms of its capacity to enhance government accountability to the diverse preferences of different territorially defined groups. For those issues that are resolved at the state level rather than the national level, there can be fifty different resolutions rather than one, with these fifty different resolutions reflective of the concerns of fifty different state constituencies. The value of state

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58. See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 Conn. L. Rev. 773, 774-76 (1992).

diversity, however, will frequently clash with the value of national uniformity. This has implications for both the economy and for our definitions of the rights of American citizens. In a mobile society and an increasingly integrated national economy, people, goods, services, and capital constantly are crossing state borders. Multiple and divergent state laws drive up the cost of doing business and the costs consumers pay for goods and services. Indeed, the existence of multiple law-making bodies may make it difficult for people and businesses to know what laws they are subject to and whether their conduct violates a particular state's rule.<sup>59</sup>

The values of diversity and uniformity also clash when the political and civil rights and liberties of individuals are at stake. Are basic questions such as the scope of freedom of speech, the nature of the government's interaction with religion, the procedural protections provided those accused of crimes, the right to vote in state and local elections, protections against public or private discrimination in employment or housing, and even the kinds of differentiations considered to be discrimination—age, disability, or sexual preference, for example—to be considered matters of state citizenship, subject to diverse determinations by different state communities, or matters of national citizenship, governed by a uniform national rule? During the last several decades, questions of civil rights and civil liberties have increasingly been resolved by national rules, apparently reflecting an increasing tendency to view Americans as belonging primarily to one national community. National standards now determine some of the basic structural rules for state citizenship, such as the right to vote in state and local elections and the organization of state and local political institutions. Thus, the value of federalism as diversity, and its assumption of the existence of diverse state communities, has often come into conflict with, and often given way to, the countervalue of an expansive definition of national citizenship, including national protection and support for the rights of members of the national community.

Similarly, implicit in the idea of federalism as democracy is that decentralization—the delegation of power to smaller units—makes it easier for people to participate in the public decisions that affect them. This assumes that all individuals affected by a state's action have a right to participate in those decisions. A state

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59. See Rose-Ackerman, *Rethinking the Progressive Agenda* at 172-73 (cited in note 55).

that permitted only some of its residents to participate in state politics or gave a greater weight to the participation of some over others would fail the standard of participatory democracy. Yet a state that includes within its borders only some of the people directly affected by the state's actions should be equally problematic from a participatory perspective. State actions regularly have external effects on residents of other states. Indeed, virtually by definition, an increase in decentralization increases the possibility of spillovers. For some policies and for some states the spillovers may be minimal. But in those areas where state borders cut through metropolitan areas or economic regions, the external consequences may be significant. The democratic virtues of state autonomy can, thus, come into conflict with the inefficiencies and undemocratic features of imposing costs on unrepresented persons inherent in a government structure that increases externalities.<sup>60</sup>

The value of intergovernmental competition for a mobile citizenry also has a corresponding set of countervalues which limits the force of competition as an argument for federalism. Competition may empower mobile individuals but it also constrains state autonomy. The capacity of capital, some businesses, and more mobile taxpayers to flee the state—without departing the nation—limits the programs that a state can adopt. The exit option makes it more difficult for states to engage in certain forms of regulation or to adopt redistributive policies.<sup>61</sup> As the Supreme Court noted in sustaining federal taxation of employment in order to fund an unemployment compensation program in the 1930s, the failure of most states to adopt such a program was "not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm, lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors." The states were "paralyzed by fear."<sup>62</sup>

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60. Compare Briffault, *Localism Part II* at 426-27 (cited in note 43) (discussing the consequences of the fragmentation of metropolitan areas for the ability of local governments to advance the political and economic goals associated with localism).

61. "A prisoner's dilemma operates: individual governments are unable to carry out large-scale redistributions of income because they fear that their high-income residents and businesses will relocate to lower-tax jurisdictions. Furthermore, the pattern of redistribution that does emerge is likely to have little to recommend it on social justice grounds, with wealthier states generally providing higher levels of benefits for 'their' poor." Rose-Ackerman, *Rethinking the Progressive Agenda* at 169 (cited in note 55).

62. *Steward Machine Co. v. Davis*, 301 U.S. 548, 588 (1937).

Thus, intergovernmental competition may limit the capacity of states to pursue their own political agendas, particularly when the states would promote equality or aid the needy within state borders. As was the case with the funding of unemployment insurance, national action may be necessary for the enactment of programs that the states would adopt but for the prisoner's dilemmas that result from interstate competition. A strong national government, with powers to displace conflicting state policies or to induce the states to cooperate in the national government's programs, may be essential for redistributive social policies and many forms of economic and social regulation.<sup>63</sup>

## 2. Does Federalism Actually Promote Federalism's Values?

Even when the values associated with federalism are unchallenged by rivals, the role of federalism in promoting the values attributed to it—prevention of tyranny, representing minorities, and providing additional opportunities for participation and innovation—remains debatable.

Perhaps the strongest argument for federalism is that it is, in Madison's phrase, part of the "double security"—along with the separation of powers within the national government—for liberty.<sup>64</sup> Thus, federalism is said to provide "protection against abusive government."<sup>65</sup> Moreover, as Akhil Amar has urged, the role of federalism as a check on the national government may distinguish federalism from decentralization since, although most of the other values of federalism can be obtained by decentralization in which the local units are legally subordinate to the central government, the local units have to be legally autonomous in order to be able to protect the people against central government tyranny.<sup>66</sup>

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63. See, for example, Paul E. Peterson, Barry G. Rabe, and Kenneth K. Wong, *When Federalism Works* 232 (Brookings Institution, 1986) (explaining that "it is only the federal government that has the national constituencies and independence from economic competition with neighboring jurisdictions necessary to facilitate significant redistribution. And because state and local governments are increasingly exposed to external economic forces, it is even more difficult to include redistributive policies in their missions than it was in the 1930s when the need for federal action first became fully apparent").

64. Federalist No. 51 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 320, 323-24 (Mentor, 1961).

65. Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. Chi. L. Rev. 483, 498 (1991).

66. See *id.* at 498-99.

Unfortunately, no necessary linkage of federalism and freedom has ever been demonstrated. There have been federal states, like the former Soviet Union, the former Czechoslovakia, and the former Yugoslavia, which were characterized more by tyranny than by liberty.<sup>67</sup> Conversely, it would be difficult to argue that some nonfederal nations—Great Britain or France to name two—are significantly less free than the United States.<sup>68</sup> The argument that federalism is necessary to secure freedom is, perhaps, a confusion of federalism with constitutionalism, that is, government that is subject to fundamental constraints. Federalism may serve to restrict government tyranny in polities which generally impose constitutional constraints—whether of a written or of an unwritten form—on their governments. But in that case, it is the constitutionalism, not federalism, that is doing the work of protecting freedom. Nations may be constitutionally federal but politically tyrannical, much as nations committed to constitutionalism are more likely to be free even if they lack a federal structure.<sup>69</sup> The critical variable is constitutionalism, including the acceptance of limits on government power and protection of the legitimacy of political opposition, not federalism.<sup>70</sup>

Within the United States, the role of federalism—in the sense of federalism as a protection of the states from the national govern-

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67. Writing in 1987, Daniel Elazar listed nineteen nations that were, "by their constitutions," federal polities. These included the three socialist states noted in text, as well as other countries, such as Argentina, Brazil, Nigeria, Pakistan, and the United Arab Emirates, whose modern political histories have been marked by substantial periods of unfreedom. Elazar, *Exploring Federalism* at 42-44 (cited in note 36).

68. Franz Neumann and William Riker both contend that there is a more robust connection between party competition and freedom than there is between federalism and freedom. While federalism may support party competition by enabling a party that has lost a national election to secure itself in opposition if it has a base in a subnational state, the examples of the Soviet Union and Mexico indicate that a one-party regime can sustain itself for decades despite the federal structure of a polity, much as Britain and France have long had successful two-party or multi-party systems without federalism. According to Neumann, "[t]hose who assert that the federal state through the diffusion of *constitutional* powers actually diffuses *political* power often overlook the fact that the real cause for the existence of liberty is the pluralist structure of society and the multi-party (or two-party) system. Federalism is not identical with social pluralism; and neither the two-party nor the multi-party system is the product of the federal state or the condition for its functioning." Franz L. Neumann, *Federalism and Freedom: A Critique*, in Arthur W. MacMahon, ed., *Federalism, Mature and Emergent* 44, 47 (Doubleday, 1955). Riker, with his characteristic bluntness, dismisses the association of federalism and freedom as an "ideological fallacy." William H. Riker, *Federalism: Origin, Operation, Significance*, in Aaron Wildavsky, ed., *American Federalism in Perspective* 51, 54 (Little, Brown, 1967).

69. See Preston King, *Federalism and Federation* 67-68 (Croon Helm, 1982).

70. See Riker, *Federalism: Origin, Operation, Significance*, in Wildavsky, ed., *American Federalism in Perspective* at 54 (cited in note 68) (noting that "the crucial feature of freedom is not a particular constitutional form, but rather a system of more than one party").

ment rather than federalism as a check on the autonomy of the states—in promoting freedom has certainly not been established. Professor Amar suggests that federalism gives the states three different mechanisms for defending liberty by checking the federal government: legal, military, and political.<sup>71</sup> The states can provide the people with legal remedies, to be vindicated by suits in state courts, against federal violation of constitutional rights. The states as well as the nation possess instruments of coercive force, so that state militias—“small but expandable popular ‘shadow’ armies organized by state governments”<sup>72</sup>—could deter, and if need be, resist national tyranny.<sup>73</sup> Finally, state governments may organize political resistance to unconstitutional federal conduct.

Yet, these checks have not been important in practice, certainly not in this century. There has been no significant use of state legal remedies against the federal government to vindicate federal constitutional rights. As Samuel Beer points out, the “military version of how the federal design would operate is hardly more than an historical curiosity today.”<sup>74</sup> Nor has state political resistance played much of a role in checking oppressive tendencies in the national government. Neither the Red Scare of 1919 nor the McCarthyism of the 1950s, to name two examples, elicited a libertarian response from the states; rather, the states joined with the national government in clamping down on dissent.<sup>75</sup>

To be sure, the states provide a political (and patronage) haven for the parties out of national power, and, as Professor Amar has observed, “states furnish opponents of national policy with an oppor-

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71. See, for example, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1492-1519 (1987); Amar, 58 U. Chi. L. Rev. at 497-505 (cited in note 65).

72. Amar, 96 Yale L. J. at 1493.

73. Professor Amar suggests that the existence of the state militias may have played a role in the first national transfer of power, from the Federalists to the Republicans in 1801. The Federalists did not resist the transfer “no doubt in part because of honor among leading Federalists, but perhaps also because of the latent military check of federalism.” Amar, 58 U. Chi. L. Rev. at 503. However, the most comprehensive recent history of the early years of the American Republic makes no reference to any role of state militias in its discussion of the peaceful transfer of power following the elections of 1800. See Stanley M. Elkins and Eric L. McKittrick, *The Age of Federalism* 726-54 (Oxford U., 1993).

74. Beer, 72 Am. Pol. Sci. Rev. at 14 (cited in note 18).

75. Compare Neumann, *Federalism and Freedom*, in MacMahon, ed., *Federalism, Mature and Emergent* at 48 (cited in note 68) (discussing the criminal syndicalism legislation of the post World War I period and noting “[t]here seemed to be a race among the various states for the most drastic legislation, and vested interests, their influence enhanced by the makeup of the state legislatures, pushed through the bills. . . . On the whole, one may perhaps say that the federal system may have speeded up inroads into the civil liberties rather than have protected them”).

tunity to secure actual hands-on experience running a government," thereby enhancing their ability to constitute an effective opposition.<sup>76</sup> But even in centralized systems, opposition leaders holding only portfolios in a "shadow cabinet" rather than offices in regional governments have been able to mount effective campaigns to replace the party in power. Neither the accidents of American history nor the record of federal and unitary states elsewhere supports the argument that there is a causal connection that runs from federalism to freedom. (If there is any connection, it probably runs the other way.)<sup>77</sup>

Similarly, with respect to the purported connection between federalism and the representation of minorities, federalism is not the same as pluralism. State autonomy will benefit primarily those minorities that are geographically concentrated within the borders of some states. For those minorities scattered across a number of states and, especially, for those minorities that have no connection to territory at all, federalism may provide little benefit. At the time of the formation of the union, interests and positions on political concerns may have had some correspondence with state boundaries and state communities, but many of the divisions in today's politics—divisions over questions of race, ethnicity, class, or gender, for example—do not map on territory. State borders drawn one or two centuries ago are unlikely to capture differences concerning current or future issues. Instead, on many important contemporary issues national minorities will also be state minorities, and it is not at all clear that federalism will enhance the representation of minorities within states. Indeed, as pointed out in Federalist Number 10 and emphasized by political scientists and constitutional scholars ever since, majority factions may be particularly tyrannical in smaller units. Federalism conceived as the protection of local autonomy does nothing to secure the rights of minorities within localities.<sup>78</sup> The argument is not that federalism is harmful to the representation of some minorities but, instead, that because of federalism's reliance on territory and on the historically determined boundaries of the states, federalism may not benefit those

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76. Amar, 58 U. Chi. L. Rev. at 504 (cited in note 65).

77. See K.C. Wheare, *Federal Government* 48 (Oxford U., 1951).

78. See King, *Federalism and Federation* at 54 (cited in note 69) (noting "local, territorial autonomy may easily prejudice the rights of other groups or interests (especially where these form less than a majority) within the local community in question. . . . To protect local, territorial rights may easily conflict with the protection of the rights of minorities resident in the locality").



who are minorities on the issues of importance in contemporary politics.

Finally, it is not at all clear that federalism promotes participatory democracy or government innovation. For much of this century, the states were generally considered to be the least representative, the least accessible, and the least accountable of our three levels of government.<sup>79</sup> By contrast, grass-roots participation in local government has occurred without the protections of federalism despite the formally subordinate status of local governments in state-local relations. Similarly, while proponents of federalism often cite specific programs that were first developed in state "laboratories," it is uncertain whether there is anything in the structure of federalism that promotes innovation.<sup>80</sup>

States have become more representative and participatory in recent decades, but that is a result, at least in part, of reapportionment mandated by federal courts, federal civil rights and voting rights laws, federal requirements of local participation as conditions attached to federal grants, and fiscal assistance that stimulated the states to take on new social responsibilities, as well as state-initiated and state-level measures. As a result of the reformation of state government in the 1960s and 1970s, the states were in position to become centers for the development of progressive and "new Democratic" alternatives to Republican and conservative national policies during the Reagan-Bush era. But certainly much of the democratic character of contemporary state governments is due not simply to state autonomy, but also to the imposition of national norms of representative government on the states.<sup>81</sup>

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79. See Alice M. Rivlin, *Reviving the American Dream: The Economy, the States and the Federal Government* 92-94 (Brookings Institution, 1992).

80. Indeed, Susan Rose-Ackerman has argued that the intergovernmental competition characteristic of federalism actually operates to discourage state politicians from undertaking risky innovations. See generally Susan Rose-Ackerman, *Risk Taking and Reelection, Does Federalism Promote Innovation?*, 9 J. Leg. Stud. 593 (1980). As Andrzej Rapaczynski noted, "insofar as there is something to the laboratory-of-experiment argument, a unitary government could avail itself of the same advantages by a partial delegation of authority to its local branches, so that there may be nothing in the laboratory rationale that is peculiarly related to the federal structure of American government." Rapaczynski, 1985 Sup. Ct. Rev. at 409 (cited in note 22). Indeed, as Akhil Amar points out, "if experimentation is our chief desideratum, a purely pyramidal government structure may well be preferable, enabling central planners to shape and reshape government boundaries and policies for more carefully controlled experiments." Amar, 58 U. Chi. L. Rev. at 498 (cited in note 65).

81. To be sure, some aspects of the representative character of state government have nothing to do with federal mandates and are entirely the result of state-level activity. State provisions for direct democracy, such as the initiative and referendum, lack any federal ana-

In short, federalism may not be necessary to promote the values it is said to advance. Federalism may actually interfere with the attainment of those values, and even when federalism does promote federalism's values, it may come into conflict with other equally weighty values that would be advanced by national power. This is not to make the "intellectual case" against federalism as much as to suggest that such an intellectual case can be made. Normative federalism—localist federalism—relies on a set of political arguments, quasi-empirical assumptions, and intuitive hunches that may be countered by conflicting arguments, assumptions, and hunches. Federalism as decentralization gives forceful support for state autonomy, but in light of the many countervailing arguments available to proponents of national power, it is not clear that it establishes a constitutional rule for limiting the federal government. In any given dispute, the normative case for federalism will require some consideration of whether a value advanced by federalism is at stake; whether federalism actually advances that value; whether, or how much, the national government's action threatens that value; whether there is an appropriate national concern supporting the national government's action; and how the balance between the harm to state-based values and the gain for national-based values ought to be struck. Striking that balance may require the assessment of empirical data concerning, for example, the extent to which state actions have external effects, as well as intensely political value judgments. It is not clear how able or willing the federal courts will be to engage in this difficult analysis.

Of course, whatever the impact of normative federalism in the courts, arguments from political values can be quite effective in the political realm. Since the demise of the *Lochner* era, our reliance on the private, not public, provision of most goods and services is largely attributable to a political preference for free market decision making over state socialism and social democracy, not a constitutional limitation on the scope of government. So, too, state and local governments, bolstered by the widespread political support for the values of decentralization and state and local decision making, continue to play major roles in the provision of public goods and services and domestic regulation regardless of the uncertain scope of constitutional protec-

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logue. State-based direct democracy played a vital role in setting the political agenda for the 1980s as a consequence of California's Proposition 13 and other state voter-initiated tax and expenditure limitations, much as the more recent voter-initiated legislative term limitation movement may affect the political structure of the 1990s and thereafter.

tion of federalism today. Like localism in the state-local context, federalism as decentralization may promote greater respect for sub-national decision making among national political leaders. Nevertheless, the harder question remains whether normative federalism can, or ought, to be enforced in courts when the national government, acting within the area of its authority, takes steps adverse to the values associated with federalism.

*B. Localist Federalism and the Status of Local Governments*

Some legal academic commentators have dispensed with the longstanding sharp differentiation in the constitutional status of states and local governments and assimilated the latter to the former, while others have treated the traditional distinction as not much more than an annoying inconvenience to be overcome by "creative thought and action."<sup>82</sup> The blurring of the lines between states and local governments has also found its way into Supreme Court opinions. The Court has been more attentive to the formal differences between states and local government than the scholarly advocates of federalism, much as the Court has continued to employ the rhetoric of state sovereignty, to stress the jural uniqueness of the states, and to reiterate the traditional view that local governments are no more than political subdivisions of their states. Nevertheless, in a number of cases, the Court has confirmed the importance of local governments as autonomous decision makers, and has treated local governments as political units that will advance political participation, community self-determination, and government responsiveness to diverse local values and concerns—just like the states. The Court has emphasized the relatively autonomous, locally responsive cast of many local governments in considering the rights and obligations of localities under the Constitution and federal statutes, much as it has shaped constitutional law to respect local autonomy in certain areas of prime local concern.

In a number of the leading federalism cases, the Justices who support strong federalism protections sought to extend to local governments the constitutional shield against the national government they would accord the states. As their captions reveal, two of the leading modern Supreme Court federalism decisions—*National*

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82. Powell, 79 Va. L. Rev. at 688 n.262 (cited in note 30).

*League of Cities v. Usery*<sup>83</sup> and *Garcia v. San Antonio Metropolitan Transit Authority*<sup>84</sup>—concerned the impact of federal legislation on local governments. Local governments were the principal beneficiaries of the *National League of Cities*' rule that Congress lacks authority to displace state and local freedom to structure integral operations in areas of traditional government functions. To be sure, Justice Rehnquist's opinion in *National League of Cities* emphasized the uniqueness of the states and noted that local governments were protected by federalism only because of their jural status as "subordinate arms of a state government."<sup>85</sup> But many of the examples he presented of the deleterious consequences of the extension of the Fair Labor Standards Act to states and localities concerned traditionally local matters and local decision making.<sup>86</sup> Similarly, in his *Garcia* dissent, Justice Powell emphasized that the mass transit system operated by the San Antonio Metropolitan Transit Authority was "a classic example of the type of service traditionally provided by local government. It is *local* by definition."<sup>87</sup> The services affected by the federal mandate in *National League of Cities* and *Garcia* were "activities that epitomize the concerns of local, democratic self-government."<sup>88</sup> In providing the democratic and participatory case for federalism with a historical pedigree, Justice Powell urged that "[t]he Framers recognized that the most effective democracy occurs at the local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them."<sup>89</sup>

The Court's evocation of the importance of autonomous local self-government to democracy in the United States was crucial to the extension of the one person, one vote doctrine to local governments in *Avery v. Midland County*.<sup>90</sup> In *Avery*, the Supreme Court considered and rejected the argument that since local governments are juridi-

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83. 426 U.S. 833 (1976).

84. 469 U.S. 528 (1985).

85. *National League of Cities*, 426 U.S. at 855-56 n.20. Justice White made the same point in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991).

86. See, for example, *National League of Cities*, 426 U.S. at 846-47 (discussing the impact of federally mandated costs on the provision of police and fire protection by the Nashville-Davidson County, Tennessee, metropolitan government and Cape Girardeau, Missouri, and on the affirmative action program of Inglewood, California).

87. *Garcia*, 469 U.S. at 578 (Powell, J., dissenting) (emphasis in original).

88. *Id.* at 575.

89. *Id.* at 575 n.18.

90. 390 U.S. 474 (1968).

cially mere administrative arms of the state, and not autonomous political decision makers, they ought not be subject to the one person, one vote requirement. Although the Constitution does not require the states to have local governments, to make them locally elective or locally accountable, or to grant them lawmaking autonomy, the Court found that the states, in fact, "characteristically provide for representative government—for decision making at the local level by representatives elected by the people."<sup>91</sup> In practice, local governments "universally" exist, enjoy considerable "policy and decision-making" autonomy, and operate as representative institutions.<sup>92</sup> Thus, a state—even one with a properly apportioned legislature—could not provide for the election of its county governments in a manner that promotes rural interests at the expense of urban voters. In this conflict between state autonomy and local democracy, the interest in local democracy prevailed.

In a handful of other cases, the Court followed *Avery's* approach of emphasizing the separateness of a locality from its "parent" state in order to promote local autonomy, and to weaken a state's control over one of its localities. For example, in *Washington v. Seattle School District No. 1*,<sup>93</sup> the Court permitted the school district to assert the Fourteenth Amendment to invalidate a state measure that would have banned a local program of busing for school integration.<sup>94</sup> In *Lawrence County v. Lead-Deadwood School District No. 40-1*,<sup>95</sup> the Court permitted a South Dakota county to assert the Supremacy Clause to preempt a state law that would have limited the county's discretion to use federal funds. *Lawrence* is particularly instructive. Turning on its head the assumptions that state and local interests are congruent and that by assimilating local governments to their states, localist federalism can protect both states and local governments, *Lawrence* involved a state-local conflict concerning the conditions attached to a federal grant to localities. Federal law would have made the funds available for "any governmental purpose." The state argued that, as the county's creator and legal superior, it had

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91. *Id.* at 481.

92. *Id.*

93. 458 U.S. 457 (1982).

94. The state's ban on the local adoption of busing was not treated as a mere "internal" redistribution of decision-making authority—an agency's shifting of power over a matter from a field office to headquarters—consistent with the model of local governments as agents of the state, but rather it was viewed as an unusual interference with local school boards' status as "separate entities for purposes of constitutional adjudication." *Id.* at 482.

95. 469 U.S. 256 (1985).

the sole authority to determine the purposes for which the funds could be spent. The Court, however, read "any governmental purpose" to refer to the products of *local* decision making. The Court found that Congress had intended to promote local self-determination, not state control over local spending. Thus, Congress and the Supreme Court together vindicated local "freedom and flexibility to spend the federal money as they saw fit,"<sup>96</sup> thereby displacing the state's traditional control over local fiscal practices.<sup>97</sup>

More commonly, the Court has recognized an interest in local autonomy in settings in which the state and some of the localities were on the same side of the dispute. In *Milliken v. Bradley*,<sup>98</sup> for example, the Court stressed the legal disjuncture of a state from its localities in order to reject inter-district busing as a remedy for unconstitutional segregation in the Detroit school system. The lower court relied on the provision in the Michigan Constitution that public education is a state responsibility and Michigan law's treatment of local school districts as creatures and agents of the state in finding that the state had a duty to include suburban school districts in the remedial busing program. The Supreme Court, however, turned from the state's theoretical supremacy over its local governments and its formal legal responsibility for local public services to the value of local autonomy: "No single tradition in public education is more deeply rooted than local control over the operations of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of educational process."<sup>99</sup> Despite the state's uncontested authority to redistribute power and restructure the school system, the state and its school districts stood on independent legal footings. The state was not responsible for the actions of the Detroit board, and the suburban school districts were "separate and autonomous" from both the state and Detroit.<sup>100</sup> The value of local control deserved respect and operated as a brake on the lower court's remedial authority to combine local school districts, notwithstanding the nominal status of the districts as mere arms of the state.

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96. *Id.* at 263.

97. See also *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979) (holding that a school district had standing under the Supremacy Clause to sue the state of Texas over conditions of participation in federal school breakfast program, but finding for the state on the merits).

98. 418 U.S. 717 (1974).

99. *Id.* at 741-42.

100. *Id.* at 744.

The value of local control played a significant role in another leading education case—*San Antonio Independent School District v. Rodriguez*.<sup>101</sup> In *Rodriguez*, the Court rejected the claim that significant inter-district disparities in spending on education, resulting from a state's reliance on the local property tax to fund public schools in a state marked by sharp inter-local differences in taxable wealth, violated the Equal Protection Clause. The Court indicated that these spending differences were justified because they served the interest in local control of the schools.<sup>102</sup> Local control was considered both an operative fact and a normative strength of the public school system. Reliance on local resources secured local control of the schools since prodding the states to provide more money for local schools in order to promote inter-district equality would increase the state's control of a school district's "purse strings," and thereby erode local school autonomy.<sup>103</sup> Thus, local autonomy provided a good justification for not increasing the state's role despite the resulting educational inequities.<sup>104</sup>

On occasion, even when focused on the subordinate legal status of localities—their lack of the "sovereignty" the states are said to possess—the Court has managed to support local decision making and underscore the separateness of localities from their states. *Community Communications Co. v. City of Boulder*<sup>105</sup> held that the exemption from federal antitrust laws provided to the states under *Parker v. Brown*<sup>106</sup> does not automatically extend to local governments, and that a state's grant of broad home rule powers to its municipalities is not by itself sufficient to immunize those municipalities from federal antitrust liability.<sup>107</sup> *Community Communications* thus exposed local governments to liabilities from which the states are

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101. 411 U.S. 1 (1973).

102. *Id.* at 51-53 (stating, "[t]he people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies").

103. *Id.* at 51-53 & n.109.

104. In addition to education, a concern for local autonomy has played an important role in shaping the application of the Equal Protection Clause to local land use regulation. See generally Briffault, *Localism Part I* at 101-09 (cited in note 17). See also Carol F. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 B.U. L. Rev. 1, 57-68 (1982).

105. 455 U.S. 40 (1982).

106. 317 U.S. 341 (1943).

107. *Community Communications*, 455 U.S. at 52-56.

shielded. That was, in part, a result of the Court's determination that local governments are relatively autonomous with respect to their states. Indeed, the gist of *Community Communications* is that local governments are not simply administrative subdivisions or extensions of their states but are, instead, independent entities and, thus, do not necessarily benefit from an immunity provided only to states.

Subsequently, the Court took some of the sting out of *Community Communications* by making it much easier for the states to extend the state action exemption to localities than to private parties. Thus, whereas private parties can claim *Parker's* state action exemption only for anti-competitive activities that are both the result of a "clearly articulated and affirmatively expressed . . . state policy" and "actively supervised by the State itself,"<sup>108</sup> local governments can obtain an exemption from liability without the need to prove that their actions are subject to active state supervision.<sup>109</sup> The state policy said to authorize local anti-competitive regulation does not have to make any explicit reference to the displacement of competition or even to economic regulation.<sup>110</sup> A state's general authorization of local zoning "for the purpose of promoting health, safety, morals or the general welfare of the community" has been deemed a sufficient authorization for local anti-competitive behavior so that local actions taken pursuant to the zoning power are exempt from antitrust scrutiny.<sup>111</sup>

Moreover, in an intriguing instance of localist federalism, the Court recently explicitly relied on *Parker's* "national commitment to federalism," by holding in *City of Columbia v. Omni Outdoor Advertising, Inc.*,<sup>112</sup> that a municipality would not lose its antitrust exemption even when the municipality or its political leadership is an alleged "conspirator" with private actors in restraint of trade.<sup>113</sup> Local governments do not automatically benefit from *Parker's* federalism-based immunity, but the rules for obtaining *Parker* immunity are to

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108. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

109. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985).

110. *Id.* at 42-45. See also *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). Much of the potentially anti-local thrust of *Community Communications* was substantially ameliorated by the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (Supp. 1994), which eliminated money damages in antitrust suits against local governments. The Act does permit localities to be sued for injunctive relief.

111. *Omni Outdoor Advertising*, 499 U.S. at 372-73.

112. 499 U.S. 365.

113. *Id.* at 374-75.



be liberally interpreted to protect local governments. The effect of normative federalism in muddling the legal status of local governments, of simultaneously insisting on the federal-state/state-local difference, and yet bringing local governments within the umbrella of localist federalism, is apparent.<sup>114</sup>

This is not to overstate the extent to which local governments have been assimilated to the states or the extent to which local autonomy as a value has been raised to the level of federalism. The Supreme Court continues to distinguish between states and localities in a number of doctrinal settings. The jurisprudence of the Eleventh Amendment and the scope of Section 1983, for example, are shaped by the continuing distinction between the states as "sovereigns" and localities as mere administrative units.<sup>115</sup> So, too, the federalism protections the Constitution affords localities are most often based on their status as political subdivisions of their states rather than on their independent value in promoting decentralization. In many cases there was no conflict between federalism and local autonomy, so that protection of local control also enhanced the autonomy of the states.<sup>116</sup> Yet the tenor of many of these opinions often belies their formal doctrine. Listening to the music as well as the words, we can hear the Court expound the virtues of local autonomy and the benefits of grass-roots participation in government decision making. The values of decentralization to the local level are used to justify decisions that restrain the reach of constitutional norms and congressional power. Moreover, local governments have been distinguished from their states in a sufficient number and variety of doctrinal settings that the "arms of the state" metaphor cannot be fully persuasive in explaining why local governments are protected in the name of federalism from the encroachments of federal authority. Rather, it would seem that the normative values of local, as well as state, autonomy have been subsumed into the definition of federalism.

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114. See generally *Wisconsin Public Intervenor*, 501 U.S. 597 (finding that local regulation would benefit from the same interpretive canons that limit the scope of the preemptive effect of federal statutes on state laws in a case in which the federal statute at issue expressly saved state regulation from federal preemption but made no reference to local ordinances).

115. Only states are immune from suit under the Eleventh Amendment, and local governments are not treated as arms of the state for Eleventh Amendment purposes. See *Lincoln County v. Luning*, 133 U.S. 529 (1890). Similarly, local governments are "persons" suable under 42 U.S.C. § 1983, but states are not. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

116. See *Rodriguez*, 411 U.S. 1. Rejection of the local control argument in the school finance cases would have imposed an enormous political and financial burden on the states to address inter-local wealth and spending differences.

At times, this can result in a paradox: the use of the values of federalism to undermine a traditional tenet of federalism—the states' power to determine the structure and powers of their local governments. In *Avery*, the Court's commitment to democratic local self-government led it to hold that the one person, one vote doctrine applies to the states, thereby subjecting state rules governing the design of local elective institutions to close judicial scrutiny and constraining state authority to develop institutions that reflect state policy but that deviate from the federal norm of equal population representation.<sup>117</sup> In *Lawrence*, the Court sustained congressional power to enhance local fiscal autonomy, and, thus, local capacity to provide effective local self-government, by finding that Congress could displace state limitations on local spending practices. More generally, even when there is no conflict between federalism and localism, the invocation of federalism to protect local actions, and the use of arguments about political participation, decentralization, and democratic self-government to justify federalism decisions makes it difficult to distinguish federalism from localism, and to determine what, if anything, makes the states unique.

#### IV. BACK TO THE STATES AND TO THE FEDERAL STRUCTURE

##### A. *Formal Differences Between States and Local Governments*

There are several important formal legal distinctions between the states and local governments. The federal Constitution secures the continuing existence of the states within their existing boundaries. It makes the states the basic component units for the structure of the federal government and for the amendment of the federal Constitution. It also rests on the assumption that the states have inherent autonomous governmental power; that is, it assumes and, through the Tenth Amendment, assures that the states may, in general, legislate, regulate, and raise and spend revenue without having to look to the federal government or the federal Constitution for authority.

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117. See generally Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. Chi. L. Rev. 339 (1993).

Local governments for the most part lack these protections and powers. The federal Constitution makes no provision for local governments at all. Although some state constitutions provide protections and powers to their local governments analogous to the provisions of the federal Constitution dealing with the states, no state extends all of these protections to all localities. Indeed, the federal Constitution, as currently interpreted, prevents the states from making local governments basic components in the design of state governments, and few states provide any local role in the state constitutional amendment process.

The assurance of the continued independent existence of the states grows out of the guarantees of a republican form of government and protection against invasion and domestic violence.<sup>118</sup> The commitment that no state shall be deprived of its equal suffrage in the Senate secures each state individually, much as the Guarantee Clause secures their existence collectively. Moreover, the Constitution protects the territorial integrity of the states. No new state may be "formed or erected within the Jurisdiction of any other State," nor may a state be formed "by the Junction of two or more States, or Parts of States" without the consent of the affected states.<sup>119</sup> The states, defined in terms of their existing territory, are permanent components of the American governmental system—"indestructible"<sup>120</sup> and irreducible constituents of the United States.

The Constitution provides no comparable guarantees to local governments.<sup>121</sup> The states can abolish or diminish the territorial scope of their localities without federal constitutional constraint. The general rule of state law is that the state legislature has plenary authority over municipal existence and territorial scope, and can dissolve local governments or detach local territory at will.<sup>122</sup> Although state constitutional provisions for home rule, when available, may assure a measure of autonomy for local governments, they generally do not guarantee the existence of local governments or the security of local borders. State laws providing for the detachment of municipal territory have been sustained in the face of objections that

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118. U.S. Const., Art. IV, § 4.

119. U.S. Const., Art. IV, § 3.

120. *Texas v. White*, 74 U.S. 700, 725 (1869).

121. See *Hunter*, 207 U.S. at 178-79.

122. See, for example, Chester J. Antieau, 1 *Municipal Corporation Law* §§ 1B.01, 1C.09 (Matthew Bender, 1991); C. Dallas Sands and Michael E. Libonati, *Local Government Law* §§ 8.28, 8.31 (Callaghan, 1993).

they violate home rule or state constitutional prohibitions against special laws.<sup>123</sup>

As a result, although state boundaries are remarkably stable, with only one state carved out of another in the last two centuries,<sup>124</sup> boundary change is a widespread phenomenon at the local level, with local governments losing territory and occasionally being dissolved.<sup>125</sup> Although losses in municipal territory and outright disincorporations are commonly the results of actions initiated by local residents pursuant to general state enabling legislation rather than actions taken by state legislatures or administrative agencies against particular localities, state actions to diminish or abolish local governments are certainly not unknown—as both the residents of Brooklyn, who lost their independent city as a result of the action of the New York state government last century, and, New York City, currently threatened by the state with the detachment of Staten Island, have reason to know.<sup>126</sup> In short, the states are fixed elements in the intergovernmental system, whereas the existence and territorial scope of local governments are subject to the vagaries of state-initiated or state-authorized change.

The constitutional protection of the territorial integrity of the states has an additional dimension, the significance of which may be understood only in light of its absence at the local level. The assurance that no state may be "formed or erected within the Jurisdiction of any other State"<sup>127</sup> means that every bit of territory within a state is within that state only and in no other state. There are no overlapping state borders. Each citizen is the citizen of one

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123. See, for example, Sands and Libonati, *Local Government Law* at 2; Eugene McQuillin, 2 *The Law of Municipal Corporations* § 7.26 (Callaghan, 3d ed. 1988). See also Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *Minn. L. Rev.* 643, 694 n.199 (1964) (explaining that detachment is beyond the scope of home rule).

124. West Virginia was created out of Virginia in 1863 during the Civil War. A Unionist Virginia "legislature" provided the constitutionally requisite consent. See James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 297-304 (Oxford U., 1988). In the late eighteenth century, Vermont was created out of territory along the New York-New Hampshire border that had been claimed by both states but had been organized by New York. Vermont declared its independence in 1777, but was unable to obtain recognition by the other states or by Congress as a separate state until it was admitted to the Union in 1791. See Onuf, *The Origins of the Federal Republic* at 127-45 (cited in note 21).

125. See Joel C. Miller, *Municipal Annexation and Boundary Change*, in *Municipal Year Book 1988* at 59-67 (International City Management Association, 1988).

126. See generally Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 *Colum. L. Rev.* 775, 780-90 (1992).

127. U.S. Const., Art. IV, § 3.

state and one state only. That state, in turn, is the only state with the full powers of a state government with respect to that citizen. Local government, by contrast, is marked by large numbers of overlapping jurisdictions. Most citizens reside simultaneously in at least two localities—a county and a municipality—and in most places multiple special districts and school districts have governmental authority over territory that also falls within counties and cities.

The difference in the existence of a protection against overlapping governments is, in practice, a far greater distinction between states and localities than the presence or absence of a guarantee of independent existence. The fates of Brooklyn and Staten Island notwithstanding, states rarely directly abolish existing local governments or force the detachment of territory. Most local governments have relatively stable existences. The states, however, frequently generate new local units, especially special districts, and give them jurisdiction overlapping or coextensive with existing local governments. Local authority is fragmented, with many different governments having different powers with respect to local residents but, usually, with no one government having general power over all local matters. As a result, it may be harder for residents to know which particular local government is responsible for a particular local matter, and it may be more difficult for local governments to respond to citizen concerns and take effective action. In most places, no one local government will be the sole government responsible for local matters or the distinctive focus of residents' attention with respect to local concerns.<sup>128</sup>

The federal government is structurally constituted out of the states. The states are the units for the election of the officials of the federal government. Members of the House of Representatives are elected from districts drawn within states. House districts may not cross state lines.<sup>129</sup> Senators are elected from the states at-large.<sup>130</sup> The President is elected by an Electoral College composed of electors selected by the states.<sup>131</sup> Electoral College "districts" may not cross state lines; indeed, typically, electors are elected from the states at-

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128. See Daniel R. Mandelker, Dawn Clark Netsch, Peter W. Salsich, Jr. and Judith Welch Wegner, *State and Local Government in a Federal System* 30 (Bobbs-Merrill, 3d ed. 1989).

129. U.S. Const., Art. I, § 2.

130. U.S. Const., Art. I, § 3; U.S. Const., Amend. XVII.

131. U.S. Const., Art. II, § 1, cl. 2-3.

large.<sup>132</sup> Should the Electoral College fail to elect a majority winner, the President is selected from the top three finishers by the House of Representatives, with the members voting in state delegations and each state having one vote.<sup>133</sup> Although no federal elected official has been elected by the government of a state since the ratification of the Seventeenth Amendment all federal elected officials are elected from state-based constituencies.

By contrast, since *Gray v. Sanders*<sup>134</sup> and *Reynolds v. Sims*,<sup>135</sup> the Supreme Court has interpreted the Constitution to forbid the use of local governments as basic structural units for the composition of the state legislature or the election of state-wide officials if that would result in any significant deviation from the equal treatment of voters in a state-wide electorate.<sup>136</sup> The Court rejected the so-called federal analogy—the claim that state senates could be designed on a one county, one vote rule, and state lower houses with a minimum of one representative per county and with the remaining seats distributed among counties according to population—as appropriate for the structure of state legislatures.<sup>137</sup> As a result, local governments may not be the building blocks of state legislatures, and cities or counties may not be used as units of representation or election to state governments if there are significant population disparities among those local governments—which there almost always are.<sup>138</sup>

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132. Victor Williams and Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 Marq. L. Rev. 201, 206-07 & n.33 (1994).

133. U.S. Const., Amend. XII. Although the Constitution does not address the structure of the lower federal judiciary, the longstanding practice has been to appoint federal district judges to districts drawn within states, with no district consisting of more than one state. The territorial jurisdictions of the circuit courts of appeals are based on blocks of states, with no state divided into more than one circuit court.

134. 372 U.S. 368 (1963).

135. 377 U.S. 533 (1964).

136. Nor can local boundary lines be a factor in the election of members of the House of Representatives if that results in more than a trivial deviation from one person, one vote. See, for example, *White v. Weiser*, 412 U.S. 783, 790-91 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526, 533-34 (1969).

137. *Reynolds*, 377 U.S. at 571-73.

138. See *New York City Bd. of Estimate v. Morris*, 489 U.S. 688 (1989) (invalidating one borough/one vote rule on New York City's Board of Estimate). In theory, the principle of equal population representation could be reconciled with the election of state representatives from local units through the use of weighted voting or multi-member districts. One person, one vote does not mandate election districts of equal population but can be satisfied with districts of different population as long as representation is proportionate to population. In practice, however, it has proved difficult to create weighted voting systems that assure equal population representation. See *Jackson v. Nassau County Bd. of Supervisors*, 818 F. Supp. 509 (E.D.N.Y. 1993). Moreover, weighted voting and multi-member districts may raise the prospect of sub-

The federal constitutional amendment process turns on the participation of the states. The Constitution permits the states to initiate the amendment process. More importantly, no amendment can be valid unless ratified by three-fourths of the states, with the states acting either through their legislatures or by conventions.<sup>139</sup> By contrast, in all but two states, localities have no role in the state constitutional amendment process. No state gives a locality the power to initiate constitutional change, and no state requires the consent of any local government in the ratification of proposed state constitutional amendments. In virtually all states, the ratification of state constitutional amendments requires the approval of the state-wide electorate, with just two states requiring, in addition, the approval of voters within some particular local subdivisions.<sup>140</sup>

Finally, under the federal Constitution, the states have inherent law-making autonomy. The states can legislate without having to demonstrate any authorization from the federal Constitution or the federal government. Implicit in the Tenth Amendment's reservation of powers to the state is that the states had those powers in the first place and did not derive them from a federal grant. If there is anything to the rhetoric of "state sovereignty," this is it.

By contrast, local governments lack inherent law-making power. Local governments are generally viewed as creatures and delegates of a state, possessing only those powers the state has chosen to confer upon them. Absent any specific limitation in the state constitution, the state can amend, abridge, or retract any power it has delegated, much as it can impose new duties, take away old privileges, or alter the locality's boundaries. A local government can act only if it can demonstrate that the state has granted it the necessary authority. State courts frequently apply a rule of strict construction, known as Dillon's Rule, named after its author Judge

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merging the interests of minorities within the jurisdiction and thus may be challenged under the Voting Rights Act. For a general discussion of weighted voting and one person, one vote, see Briffault, 60 U. Chi. L. Rev. at 408-11 (cited in note 117).

139. U.S. Const., Art. V.

140. See *The Book of the States, 1992-93* at 20-26 (Council of State Governments, 1992) (indicating various mechanisms for proposing amendments to state constitutions and obtaining ratification).

In Louisiana, if five or fewer political subdivisions of the state are affected by a proposed constitutional amendment, ratification requires the approval of a majority of voters in the state as a whole and also in the affected subdivision(s). *Id.* In New Mexico, amendments concerning certain elective franchise and education matters require approval by three-quarters of the state-wide vote and two-thirds of those voting in each county. *Id.* It goes without saying that local governments have no role in the ratification of amendments to the federal Constitution.

Dillon, in interpreting the statutory powers of local government. Under Dillon's Rule, local governments may exercise only those powers "granted in *express words*," or "those *necessarily or fairly implied* in or *incident* to, the powers expressly granted," or "those *essential* to the declared objects and purpose of the [municipal] corporation—not simply convenient, but indispensable."<sup>141</sup> Thus, a locality needs a clear and express state delegation in order to be able to govern. When it is uncertain whether a locality possesses a particular power, Dillon's Rule tends to create the presumption that the locality lacks that power.

To be sure, this sharp differentiation between inherent state law-making authority and the absence of such inherent local law-making authority is often muted in practice. The federal Constitution imposes significant restrictions on the scope of state law-making authority. The Commerce Clause, the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and other provisions of the Constitution constrain the range of state decision making and remove many policy options, even entire substantive domains, from state legislative agendas. The combined effect of expansive contemporary interpretations of federal law-making power and the Supremacy Clause's preemption of state laws that conflict with congressional enactments further narrows the scope of state law-making autonomy. The Constitution does not protect the states from federal displacement even with respect to matters that historically were primarily fields of state competence, as recent Supreme Court decisions sustaining federal legislation in such traditional state fields as land use regulation,<sup>142</sup> public utility regulation,<sup>143</sup> and alcoholic beverage consumption<sup>144</sup> demonstrate.

By the same token, most states provide at least some of their local governments a measure of home rule.<sup>145</sup> Where it exists, home rule tends to undo Dillon's Rule by giving local governments the general authority to enact laws and make policy concerning local matters without having to demonstrate an explicit grant of authority for the

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141. Mandelker, et al., *State and Local Government* at 91 (cited in note 128) (emphasis in original).

142. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

143. *FERC v. Mississippi*, 456 U.S. 742 (1982).

144. *South Dakota v. Dole*, 483 U.S. 203 (1987).

145. Melvin B. Hill, Jr., *State Laws Governing Local Government Structure and Administration* 43 (U.S. Advisory Commission on Intergovernmental Relations, 1978) (pointing out home rule authority granted to cities in 41 states and to counties in 27 states).



specific local initiative in question. Although home rule rarely protects local initiatives from subsequent displacement by conflicting state laws, home rule does give localities power to initiate legislation in areas within their competence, and that power is comparable to the power enjoyed by the states relative to the national government. Many local governments enjoy considerable authority within their domains and have considerable power over matters of importance to their constituents.

Nonetheless, there is still a significant difference between states and local governments with respect to the power to take the legislative initiative. Not all states have amended their constitutions to provide for home rule, and even in those states which have so acted, home rule is often not extended to all localities. Moreover, in many states, home rule is limited to "municipal affairs" or "local" matters.<sup>146</sup> The definition of "municipal" or "local" is often contested, and many commentators have asserted that state courts have taken a "constricted view" of what constitutes "municipal" or "local."<sup>147</sup> The presence of a "state concern" mixed in with an otherwise "municipal affair" may result in a judicial denial of local power to legislate.

The gist of the difference between state and local law-making authority is that every local law is potentially subject to two challenges, whereas state laws are subject to only one. A local government must prove both that it has the power to adopt the measure in the first place, and that its measure has not been prohibited or preempted by a higher level of government. State legislation is subject only to the second challenge—prohibition or preclusion by the national government. The first challenge—source of authority to legislate in the first place—never arises. This is a source of enormous strength for the states, much as its absence is the legal Achilles' heel for local governments.

This state-local difference is most clearly seen in two areas: fiscal affairs, and the determination of civil rights, duties, and relationships. Fiscal autonomy is a crucial aspect of government authority. As people demand more and more public goods and services, an effective and responsive government has to be able to raise the funds necessary to meet those demands. The inherent law-making power of

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146. Mandelker, et al., *State and Local Government* at 113-15 (cited in note 128).

147. See, for example, Michael E. Lihonati, *Reconstructing Local Government*, 19 *Urb. Law.* 645, 646 (1987); Gordon L. Clark, *Judges and the Cities: Interpreting Local Autonomy* 113 (U. of Chicago, 1985).

the states includes the power to raise money. Although the Constitution prohibits certain specific forms of state taxation<sup>148</sup> and imposes other more general rules, such as nondiscrimination against interstate commerce, the states have enormous autonomy with respect to taxation and borrowing. They may innovate new forms of revenue-raising and new types of debt instruments, they may raise tax rates, and they may increase their debts in order to raise the money they desire to pay for the programs they prefer. To be sure, state resources will often be inadequate, and interstate competition constrains state fiscal autonomy, but these limitations are political and economic, not legal. By contrast, local fiscal powers are limited legally. Local fiscal authority "must be derived from the state, and a grant of it will be strictly construed, with doubts resolved against the existence of any particular aspect of the power."<sup>149</sup> States limit local taxing and borrowing and often impose onerous procedures. Most importantly, localities generally are not free to innovate or initiate new forms of taxation and borrowing without state authorization or permission. Fiscal powers are rarely seen as a part of home rule. In the fiscal arena, local governments are dependent on state grants and subject to state constraints.<sup>150</sup>

Similarly, even under the most generous definitions of home rule, local governments lack power to enact "private or civil law governing civil relationships" and to define and punish serious crimes.<sup>151</sup> As a result, local governments are largely excluded from legislating with respect to the core areas of law and society—contract, tort, property, the administration of justice, criminal law, family relationships. In the state-local setting, these fundamental questions—the traditional mandatory curriculum of the first year of law school with some of the basic upper year courses thrown in—are committed to the states.<sup>152</sup>

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148. See U.S. Const., Art. I, § 10.

149. Osborne M. Reynolds, Jr., *Handbook of Local Government Law* 289 (West, 1982).

150. One analyst has noted the "growing dominance of state government within the state and local sector" and has attributed it, in part, to the greater ability of the states "to look after themselves with discretionary changes in sales and income tax rates," while local governments "had to rely on the property tax." Rey W. Bahl, Jr., *Changing Federalism: Trends and Interstate Variations*, in Thomas R. Swartz and John E. Peck, eds., *The Changing Face of Fiscal Federalism* 56, 62-64 (M.E. Sharpe, 1990).

151. Mandelker, et al., *State and Local Government* at 133 (cited in note 128) (quoting the National Municipal League Alternative Model).

152. See id. at 141-42. See generally Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671 (1973).

Indeed, even when examined through the prism of the federal-state relationship, the power to set the rules that govern fundamental aspects of economic and social relations is left largely to the states. Although the Constitution does not commit any of these areas to the states exclusively, and, under current Commerce Clause doctrines, Congress could enter into any of these areas whenever it wants, in practice, law making in this area is to a considerable degree state law making without direction from Congress. From both the federal-state and state-local perspectives, therefore, the dominance of the states in the determination of the primary legal rules of life is testimony to the significance of the inherent law-making authority of the states.

*B. Functional Implications of the Formal Differences*

The differences in the formal features of states and local governments have functional implications. Permanent existence, fixed boundaries, territorial integrity, and inherent law-making and revenue-raising authority tend to make the states more effective political actors than local governments, which are subject to abolition and territorial modification, have fragmented and overlapping jurisdictions, and lack inherent legislative or fiscal autonomy. The states are better positioned to function as political centers. They are more capable of responding to citizen demands and of taking effective action. The permanence of the states, the greater clarity of their borders, their enhanced capacity for political action, and their resulting greater involvement in law, policy, and governance make it more likely that people will see the states as focal points for political action. Together, these factors increase the likelihood that people will focus on their state as one of their important political and cultural identifiers. In addition to such factors as race, ethnicity, gender, and occupation, people will identify themselves in terms of their state. In short, permanence, integrity, and law-making power contribute to political capability which reinforces the political and cultural salience of the states.

These formal factors also assure the political salience of the states in the national political process. With presidents, senators, and members of the House of Representatives elected in a process that emphasizes state lines and state-based territorial interests, those interests inevitably become a factor in national political decisions,

much as a voter's "state perspective affects his choices and decisions" in elections for these national offices.<sup>153</sup> Federal and state legislative districts, however, frequently cross local lines, and legislators often represent fragments of multiple localities. As a result, they are less likely to focus in their deliberations on the interests of particular localities. Local interests will, of course, be heard, but they are not guaranteed the same kind of automatic political attention that comes from the election of representatives from the states and the constant identification of legislators as representatives from their states during the course of legislative activity.

Due to the states' permanence, clearly marked jurisdiction, inherent authority, and structural role in the organization of the national government, people are more likely to organize their thoughts about the political world in terms of the states. This, in turn, may lead people to think about some of the broader aspects of American society—economic, social, and cultural questions—in terms of the states. Indeed, although it is often assumed that the creation of different states was intended to reflect pre-existing differences in the population,<sup>154</sup> it appears that the formal features of the states in our constitutional order are themselves a source of some of the distinguishing social and cultural features that are associated with different states, and not the other way around.

As Russell Kirk has stated, most of the states "were mere parallelograms of prairie and desert and forest" when first organized as states, but over time the "institution and practice" of self-government in independent, non-overlapping, autonomous states, and the reinforcement of the state-based interests and identifications through the use of states in national elections have given different states "some distinct and peculiar character as peculiar territories, by fixing loyalties and forming an enduring structure of political administration."<sup>155</sup> According to Daniel Elazar, due to their "settled

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153. Beer, 72 *Am. Pol. Sci. Rev.* at 15 (cited in note 18).

154. This has given rise to the frequent criticism that the states do not reflect distinctive economic or social differences because state lines do not map on to such underlying differences. As Samuel Beer has observed, "[i]f the purpose of the states had been to provide a level of self-government functional to territorial diversity, then it would have been imperative, in this rapidly growing and developing society, that their boundaries be changed from time to time. On the contrary, however, our national policy has been to freeze the boundaries into a virtually unchangeable form." *Id.* at 16. State boundaries were not drawn to reflect underlying demographic or economic differences; rather, state boundaries have been the source of new territorial differences.

155. Kirk, *Territorial Democracy*, in Goldwin, ed., *A Nation of States* at 43 & n.2 (cited in note 7). See also William S. Livingston, *A Note on the Nature of Federalism*, in Wildavsky, ed.,

existence over generations"<sup>156</sup> and other formal factors, the states have, over time, taken on some of the features of distinctive civil societies. Elazar states that there are, to a greater or lesser degree, common cultural, social, and political patterns within individual states, as well as consistent deviations of particular states from national norms or patterns.<sup>157</sup> The political and legal structure has itself contributed to the differentiation of the states from each other and to the creation of commonalities within individual states. The formal features provide the durable institutional skeleton to which other political, cultural, and social values have become attached, much as coral settles on a reef or moss on a stone.

Thus, the formal features of the federal plan have made the states "a part of the complex of sociological and psychological values that constitutes the pattern of diversities" in the United States.<sup>158</sup> That complex of values which gives the states a certain importance in the popular consciousness also reinforces their political position. As William Riker has pointed out, "federalism is maintained by the existence of dual citizen loyalties to the two levels of government."<sup>159</sup> A system of multiple levels of government will last only if citizens are willing to look to all the governments in the system when they make their demands for government action. The capacity of the states to take effective political action and the economic, social, and cultural associations that have become attached to the states build loyalty to the states as such forums for political action. Although the tendency to think and act in terms of states may change with increasing national economic integration, the modern tendency to define rights nationally, the high levels of interstate mobility, the emergence of new non-state-based interests, and the formal features of the states tend to assure that they will continue to play a role in people's thinking about political matters and will endure as a framework for governance.

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*American Federalism in Perspective* 33, 46 (cited in note 68) (noting that at the time of admission, the non-original states "may not have been sufficiently diversified to justify" treatment as distinct communities, but "they rapidly acquired . . . consciousness of individuality").

156. Elazar, *American Federalism* at 11 (cited in note 5).

157. *Id.* at 14-25.

158. Livingston, *A Note on the Nature of Federalism*, in Wildavsky, ed., *American Federalism in Perspective* at 46 (cited in note 155).

159. Riker, *Federalism: Origin, Operation, Significance*, in Wildavsky, ed., *American Federalism in Perspective* at 58.

The federal-state/state-local differences should not be overstated. Many local governments have settled borders and a long-standing existence and are endowed with the fiscal resources and law-making authority that enable them to wield considerable power over a wide array of locally important matters. These local governments are politically salient to their residents so that citizens will turn to them for government action. Interests tied to these localities may loom large in the political deliberations of officials in higher levels of government. Localities will often be sharply differentiated from each other in political, economic, social, and cultural terms, and distinctive localities can engender loyalties among their residents. Historic towns, big cities with distinctive social and cultural traditions, governments that consolidate city, county, and special district functions, and communities with ample tax bases can be sources of citizen identification or politically salient communities. In addition, local concerns can loom large in state capitals. Local governments and local interests are often far more powerful than their limited legal status would suggest. There is a "cultural bias toward local self-government"<sup>160</sup> in addition to the disposition to identify with state citizenship.

Nevertheless, due in part to the formal legal features that the states possess and localities lack, the states generally have a greater capacity for governance than do localities, much as the use of state lines to structure the national government makes it more likely that distinctive state interests will be attended to and respected in the national government. Action at the state level is likely to be more effective than action at the local level. These factors increase the propensity of citizens to see the states as a governmental alternative—indeed, the principal governmental alternative—to federal action.

To be sure, the actual practice of government and not the formal distribution of power is critical in assessing the nature of a polity. The former Soviet Union had a federal constitution but was not federal in practice; political power in many states was significantly decentralized despite the absence of formal legal protections for local autonomy. Still, formal structural differences can have an effect in shaping political developments. To the extent that formal legal rules affect the distribution of power, the federal

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160. Elazar, *Exploring Federalism* at 189 (cited in note 36).

Constitution gives the states and state-based interests, concerns, and identities a distinctive place in American law and politics. There is no comparable provision for local governments and local interests either in the governance of the nation or in the governance of most states.

The differences between states and local governments suggest a subtle tension within the values advanced by the exponents of normative federalism. The intellectual case for federalism tends to amalgamate the values of decentralization and of the creation of powerful alternatives to the national government, much as it tends to lump together states and local governments. But the diffusion of power down to the grass roots is not quite the same thing as the creation of multiple centers of power.<sup>161</sup> The differences in the basic characteristics of local governments and states mean that each is particularly suited to a different value.

Grass-roots democracy is possible, if at all, only at the local level. Local governments are, for the most part, much smaller than the states, and there are many more of them. They are much better positioned to provide citizens with opportunities for political participation, to reflect diversity, to increase the likelihood of innovation and experimentation, and to engage in the kind of competition that constrains governmental behavior. Local autonomy would disperse power far more widely than would a system of strong states and weak localities. Yet, the same features that connect localities more closely to the grass-roots—their small size and large numbers—make them less powerful politically and consequently less capable of resisting pressures from higher levels of government.

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161. In making this point and seeing the difference between the diffusion of power and the creation of alternative centers of power, I was influenced significantly by Akhil Amar's distinction between decentralization and federalism. See Amar, 58 U. Chi. L. Rev. at 498 (cited in note 65). However, I see Professor Amar's normative point in more positive terms. In Professor Amar's view, the purpose of federalism is the checking function, that is, having the federal and state governments "guard against each other's excesses and thereby protect the liberty of ordinary citizens." *Id.* I agree with Professor Amar that "[t]he best argument for federalism . . . is neither experimentation, nor diversity, nor residential self-selection," which can be accomplished by decentralization without federalism, "but protection against abusive government." *Id.* However, as I suggested earlier, although this is the "best argument" for federalism I am not sure it is a persuasive one given the lack of any necessary connection between freedom and federalism. See text accompanying notes 64-77. Indeed, as much of my criticism of normative federalism suggests, I doubt whether federalism is helpfully discussed in terms of "arguments." Federalism, or, more accurately, the federal structure, just is. It does not need an argument. The structure exists and defines our government. The federal structure achieves a measure of decentralization, and in some circumstances it can have the effect of limiting the national government. But what it does by definition, and what is not fully caught in the conventional definition of decentralization as the dispersal of power to the grass roots, is create alternative centers of power.

By contrast, although the states are, for the most part, too large to provide real participatory democracy, they are more capable than local governments of being viable power centers. Their formal features give them greater legal, political, and fiscal resources for effective action. Their constitutional protections and inherent powers are reinforced by the greater resources and greater ability to mobilize public attention that comes from their relatively larger size and fewer numbers. Only the states can begin to address most of the problems that would otherwise be the subjects of national action. To the extent, then, that federalism is about the creation of realistic alternatives to the concentration of power in the national government, the states are better suited to that function than are localities.

Federalism and localism are, thus, different. Their different features reflect the fact that they are about different institutions and perform different functions. They can come into conflict, such as when national efforts to advance local interests and visions of local self-government result in the displacement of conflicting state policies. But even when there is no conflict, the current propensity to see federalism through a normative lens obscures the real differences between states and local governments; the distinctive characteristics of the federal-state structure; and the legal features and associated political, social, and cultural factors that enable the states to be centers of power in the American political system.

#### V. TOWARD A FEDERALISM WITHOUT THE "ISM"

Implicit in the normative approach to federalism is the argument that courts ought to take federalism's values, including those associated with decentralization, into account when they adjudicate federal-state disputes. Normative concerns—the impact on local political participation or the loss of the potential for interstate variations—might, thus, be a basis for enforcing federalism-based restrictions on national actions. However, as many of the values of federalism have comparable countervalues that could be advanced in defense of national legislation, this approach could lead the courts into intensely political judgments of the conflicting norms in particular cases.

An analysis based on normative concerns could, in some cases, require extensive empirical fact-finding and review, as courts determine whether a particular federal action adversely affects one of the



norms of federalism. For example, the norms of federalism include the protection of interstate diversity and state-level control over state-based matters. If a federal action would impose a uniform national rule or shift control over a subject to the national government, courts might have to consider conflicting data concerning the extent to which the consequences of state regulation are borne within a state or, instead, the extent to which they generate the external effects that might be necessary to justify such federal action. Courts might engage in extensive review of political factors, such as the extent to which the prisoner's dilemma operates in a particular field, thereby constraining nominal state autonomy and justifying federal displacement of the results of autonomous state decision making. Far more difficult would be cases in which the norms of federalism conflict with the norms of national action, as when the value of subnational participatory democracy clashes with the value of redistribution or when the value of interstate diversity conflicts with the value of national unity. These are essentially political decisions. If the courts were to take the normative turn, and consider federal-state disputes in terms of the values said to be associated with federalism, they would be repeating, and perhaps undoing, the very sort of empirical analysis and political decision making that ought to have occurred in the political arena.

Given the likely indeterminacy of the conflicting empirical data supporting or opposing federal interventions, as well as the complete absence of constitutional direction concerning the resolution of diversity versus uniformity or state participatory decision making versus national redistribution values, a consequence of normative federalism is its potential for the simple substitution of judicial preferences with respect to the weighing and balancing of these pragmatic and normative concerns for the determinations of elected officials. It is not clear, even in the theory of normative federalism, what justifies the displacement of political decision makers by judicial decision makers with respect to these largely political questions.

If, however, one looks to the federal structure and the formal legal protections and powers of the states within the federal-state system as the central constitutional issue in federalism, then, the focus of judicial attention would be not on the values of federalism, but on whether federal action threatens the formal protections and powers of the states. In a sense, this would result in a constitutional law of federalism without the "ism." Courts would step in to protect the formal features of the federal structure rather than weigh the

implications of national actions for the values said to be advanced by that structure—the values that compose the norm of *federalism*.

Those values would not, of course, be cast entirely adrift. The formal features of the federal structure—the guarantee of state existence, the nonoverlapping boundaries, the use of states as the basic constitutive units in the national government, and the inherent law-making power of the states—in combination with other factors in our politics and culture which make the states politically salient to the American people, would be the primary guarantor of those values. This is not to make the dubious argument that the representation of the states in Congress assures that the interests of state governments are taken into account by the national legislature. Certainly, since the ratification of the Seventeenth Amendment, state governments are not at all represented in Congress, and the use of states as units of representation does nothing to assure that members of Congress represent the interests of state governments. Rather, the argument is that the design of the constitutional system—including the protection of the states as exclusive, autonomous decision makers within guaranteed borders, as well as the use of state lines in the election of national officials—creates a political environment in which people, both officeholders and ordinary citizens, are taught to think in terms of states and in which state affiliation becomes one of the important political interests that people have. This assures that the states will be a factor in the political calculus, and that the states will remain political centers that provide important alternatives to the national government for public decision making. How big a factor states and state interests are in any decision, and whether government decisions are taken at the state or national level, are properly decisions for the political process, so long as the federal-state framework and the consequent institutional incentives to think in terms of states are preserved.

In a federalism focused on the federal structure rather than on federalism's values, judicial action would be appropriate when national actions threaten that structure. Although this will avoid the complex empirical and value-laden determinations inherent in normative federalism, even this standard will not always be easy to apply. To be sure, on the recent record of federalism cases there does not appear to be much of a problem of federal legislation threatening formal state existence, state territorial integrity, the participation of the states in the constitutional amendment process, or the representation of the states in Congress. It has, however, been argued that

some contemporary modes of federal legislation threaten the inherent law-making autonomy of the states.<sup>162</sup>

Federal laws that would "commandeer" the legislative authority of the states,<sup>163</sup> and federal efforts to manipulate conditional preemption or conditional grants to conscript the states into implementing federal programs, have been assailed as inconsistent with state autonomy. To some extent, these criticisms are hyperbolic: Federal carrots and sticks that induce or even compel the states to engage in legislative or regulatory activity as part of a national program do not deny the states' inherent autonomy with respect to subjects unaffected by the federal program any more than does outright preemption, and yet the latter is seen as less subversive of state autonomy.<sup>164</sup> Still, such federal commands and manipulations are problematic. By crowding state agendas with federal programs, and pressuring the states to commit their personnel, treasure, and authority to federal concerns, these measures can limit the capacity of the states to pursue their own state-initiated programs.<sup>165</sup> Moreover, by treating the states as if they were arms of the national government, such programs may threaten to diminish the status of the states in the eyes of the people, and, thus, in the long run, undermine the capacity of the states to be independent decision makers and alternatives to centralized national political action.

This is not the place to resolve the important and vexing question of whether federal regulatory commands, or carrots and sticks intended to manipulate the states into carrying out national ends, are indeed inconsistent with the inherent law-making authority of the states. But, when considered by the courts, the question must be answered by examining the impact of national action on the capacity of the states to be independent lawmakers and alternative power centers within the federal framework, rather than by a more open-ended and value-laden assessment of the conflicting political values said to be advanced or impaired by state or national action. As a matter of law, the core of federalism is the formal legal position of the states in the federal structure, and not the values conventionally associated with federalism. In federal-state cases in general, the proper focus of judicial attention ought to be on whether federal action

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162. See Candice Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 *Hastings Const. L. Q.* 489, 555-73 (1994).

163. *New York v. United States*, 112 S. Ct. 2408, 2420 (1992).

164. *Id.* at 2424.

165. See Hoke, 21 *Hastings Const. L. Q.* at 549 (cited in note 162).

is inconsistent with the formal federal structure rather than on the values of federalism.

